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Manufacturers' Liability Based on a Market Share Theory: Sindell v. Abbott Laboratories

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MANUFACTURERS' LIABILITY BASED ON A MARKET SHARE THEORY: *SINDELL v. ABBOTT LABORATORIES*

I. INTRODUCTION

When California addressed the issue of strict products liability in 1963,[1] it was an established principle of products liability that except in rare cases, the plaintiff had to identify the defendant-manufacturer of the product which caused his injuries to assert a cause of action.[2] This rule was followed in California as recently as 1978, when the court of appeals in *McCreery v. Eli Lilly & Co.*[3] affirmed the California Superior Court's grant of a summary judgment to a defendant-manufacturer because the plaintiff could not identify the defendant as the specific manufacturer of the drug which caused her injuries.

In March 1980, however, the California Supreme Court radically departed from this requirement in *Sindell v. Abbott Laboratories*.[4] The court held that a valid cause of action was stated against five drug manufacturers even though the particular manufacturer of the product which caused injury could not be identified. In *Sindell*, the court pronounced a new theory upon which non-identifiable manufacturer liability could be predicated. Under the court's new market share theory,

1. Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman*, the plaintiff sustained injuries when a piece of wood flew out of the lathe he was working with and hit him in the head. The defendant manufacturer argued that the plaintiff's suit was barred because the plaintiff failed to give reasonable notice of a breach of warranty. The court held that, regardless of the validity of the plaintiff's warranty action "[a] manufacturer [could be] strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. The effect of *Greenman* was to mitigate the plaintiff's burden of proof in products liability actions. Strict products liability was subsequently widely adopted by state and federal courts and incorporated into the *Restatement (Second) of Torts § 402A*. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 4:4 (1974).

2. It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant is in some way responsible. Thus, for example, if recovery is sought from a manufacturer, it must be shown that he actually was the manufacturer of the product which caused the injury . . . .

1 R. HURSH & H. BAILEY, *supra* note 1, § 1:41 at 125. *Accord*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 at 671-72 (4th ed. 1971).

3. 89 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978).

4. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (appeal pending).

plaintiffs injured by fungible products could bring suit against several manufacturers, who together, produced a substantial portion of that product. Each defendant would then be liable for the portion of the judgment corresponding to their share of the market.[5]

This note will examine the effect and the practicality of the market share liability theory proposed by the court. The various policies underlying traditional products liability law and the market share solution to the identity problem are also examined. Finally, the court's decision will be analyzed and available alternatives to the market share theory will be suggested.

II. STATEMENT OF THE CASE

A. *Facts*

The plaintiff, Judith Sindell, brought suit on her own behalf and others similarly situated, against eleven drug companies and others for injuries allegedly resulting from the ingestion of diethylstilbestrol (DES)[6] by their mothers while the plaintiffs were in utero. The defendants were manufacturers who promoted, marketed, and distributed DES between 1941 and 1971. In 1947, the Food and Drug Administration (FDA) authorized the marketing of DES as a miscarriage preventative on an experimental basis and required that it carry a warning label to that effect.[7] The drug was subsequently administered to the plaintiffs' mothers. The drug was later found to be a possible cause of adenocarcinoma, a rare uterine cancer, and adenosis, a precancerous vaginal and cervical growth. These conditions appeared in daughters

5. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

6. Diethylstilbestrol (DES) is a man-made estrogen approved by the FDA in 1947 which was administered to pregnant mothers to prevent miscarriage. For information on the studies that supported this use, *see* Karnaky, *The Use of Stilbestrol for the Treatment of Threatened and Habitual Abortion and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942), and Smith, *Diethystilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTET. & GYNEC. 821 (1948). *But see* Davis & Fugo, *Steroids in the Treatment of Early Pregnancy Complications*, 142 J.A.M.A. 778 (1950); Dieckmann, Davis, Rynkiewicz & Pottinger, *Does the Administration of Diethylistilbestrol During Pregnancy Have Therapeutic Value*?, 66 AM. J. OBSTET. & GYNEC. 1062 (1953); Robinson & Shettles, *The Use of Diethylstilbestrol in Threatened Abortion*, 63 AM. J. OBSTET. & GYNEC. 1330 (1952).

7. The FDA was not joined as a defendant even though it authorized the drug for use as a miscarriage preventative. This is probably because of the exemption accorded injuries resulting from discretionary agency function under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976). The original approval of the joint clinical file submitted by twelve companies to support their request for new drug applications has been proposed as a basis for concert action. *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 976 (1978) [hereinafter cited as *Enterprise Liability*].

who were exposed to DES while in utero.[8] In 1971, the FDA ordered the defendants to cease marketing and promoting DES as a miscarriage preventive. The FDA also ordered the defendants to warn physicians and the public of the potential danger to unborn children if the drug was used during pregnancy.[9]

The plaintiffs predicated their cause of action on various theories of negligence, concert action, alternative liability, and strict products liability.[10] The defendants demurred on the ground that the plaintiffs could not identify the manufacturer responsible for the product which caused their injuries. The trial court sustained the demurrer based on the plaintiffs' admission that they were unable to make the identification. Consequently, the case was dismissed.[11]

The California Supreme Court reversed the lower court ruling on the appeal involving only five of the original eleven named defendants.[12] The court held that a valid cause of action was stated by proving

8. The exact increase in the incidence of adenocarcinoma is uncertain. Prior to the DES outbreak, however, there were very few reported cases. *See generally* Unfelder, *The Stilbestrol - Adenosis - Carcinoma Syndrome*, 38 CANCER 426 (1976). The frequency of incidents of adenosis has prompted the FDA to require the following warning on forms of DES and related drugs still on the market: "Vaginal adenosis has been reported in 30% to 90% of postpubertal girls and young women whose mothers received diethylstilbestrol or a closely related congener during pregnancy. . . . The significance of this finding with respect to potential development of vaginal adenocarcinoma is unknown. Periodic examination of such patients is recommended." 40 FED. REG. 32,773 (1975).

9. Responding to the dangers of DES, in 1971 the FDA took these three steps:

> 1. All manufacturers of DES or closely related congeners . . . are being notified that appropriate changes will be required in the labeling for such drugs. This change will consist in the listing of pregnancy as a contraindication to the use of diethylstilbestrol and other above-mentioned compounds.
>
> 2. All other estrogens will be required to have the following WARNING in their labeling: "A statistically significant association has been reported between maternal ingestion during pregnancy of diethylstilbestrol and the occurrance of vaginal carcinoma developing years later in the offspring. Whether such an association is applicable to all estrogens is not known at this time. In any event, estrogens are not indicated for use during pregnancy."
>
> 3. Epidemiological studies are being initiated to determine the true incidence of this disease in young women . . . and the probability of a cause and effect relationship.

U.S. FOOD AND DRUG ADMINISTRATION & U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, DRUG BULL., DIETHYLSTILBESTROL CONTRADINDCATED IN PREGNANCY (Nov. 1971).

10. The plaintiffs also brought causes of action based on violation of express and implied warranties, false and fraudulent representation, mislabeling drugs in violation of federal law, conspiracy, and lack of consent. The court did not address these issues, and limited its discussion to the theories of alternative liability, concert action, and industry-wide liability. *See* notes 15-96 *infra* and accompanying text.

11. Sindell v. Abbott Lab., 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978), *vacated* 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (appeal pending).

12. The remaining defendants were Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, the Upjohn Company, and Rexall Drug Company. Sindell v. Abbott Lab., 26 Cal. 3d at 596 n.4, 607 P.2d at 927 n.4, 163 Cal. Rptr. at 135 n.4.

that the defendants produced a substantial percentage of DES. The manufacturers were liable for a portion of the judgment equal to their share of the market for that drug unless they could prove that they could not have made the product which caused the plaintiffs' injuries.[13]

B. *Issue Presented to the California Supreme Court*

The issue, as stated by the court, was whether "a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, [may] hold liable for her injuries a maker of a drug produced from an identical formula?"[14]

III. NON-IDENTIFIABLE MANUFACTURER LIABILITY PRIOR TO *SINDELL V. ABBOTT LABORATORIES*

Strict products liability evolved as a device designed to aid the consumer-plaintiff in surmounting obstacles of proof imposed by negligence recovery theories when dealing with injuries caused by a defective product.[15] Strict products liability was justified on the grounds that rapid technological progress had placed distance and complex technology between the consumer and the manufacturer. The consumer was perceived as inadequately prepared to protect himself from defective and injurious products. Conversely, the manufacturer was in better position to prevent defective products from entering the marketplace. Therefore, imposing liability on manufacturers for injuries caused by defective products was deemed an incentive to product safety. The manufacturer could also afford to bear the burden of the loss compared to the injured consumer. The effect of the cost would be minimal because the manufacturer could pass it on to all his consumers as a cost of doing business or he could insure against it.[16]

Increased complexities in the marketplace spawned another prob-

13. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

14. *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

15. *See generally* W. PROSSER, *supra* note 2, §§ 96 & 97 at 641-58 (development of products liability from the privity requirement through strict products liability); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Prosser, *Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Wilson, *Products Liability*, 43 CALIF. L. REV. 614 (1955).

16. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 435, (1944) (Traynor, J., concurring), in which it was said: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 462, 150 P.2d at 441. *Accord*, Daly v. General Motors Corp., 20 Cal. 3d 725, 736, 575 P.2d 1162,

lem. Technological improvements and more efficient production practices allowed manufacturers to create and market fungible goods; products which, though made by different manufacturers, could be interchanged with one another. As a result, the injured consumer might not be able to identify the particular manufacturer of the product which caused his injuries. As the number of such cases increased, the problem became more apparent. New theories emerged in an attempt to accord the consumer some remedy when the manufacturer whose product caused injury was not identifiable. Theories such as enterprise liability[17] and non-legal systems such as latent technological injury compensation were proposed.[18] In addition, several established multiple tortfeasor theories such as alternative liability, concert action, and industry-wide liability were used to attack the problem. These theories represent exceptions to the prevailing rule that the plaintiff must iden-

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1168, 144 Cal. Rptr. at 380, 386 (1978); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, —, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

The *Restatement (Second) of Torts* extends strict liability to the wholesaler and the retailer as long as they are engaged in the business of selling the type of product involved in the particular claim. RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965). Courts have generally held that liability may be imposed on the wholesaler regardless of whether the ultimate consumer purchased the product directly from the wholesaler or through the retailer. Some courts, however, refuse to impose liability on the wholesaler or retailer when they did not participate in the manufacturing process and when the wholesaler or retailer sold the product with a latent defect in the same condition as it had been when it left the manufacturer. 1 R. HURSH & H. BAILEY, *supra* note 1, § 4:28. In addition, courts have shown some reluctance to impose liability on the retailer of a product which has been packaged or sealed before it reaches the retailer. *Id.* § 4:29.

The possibility of holding a drug retailer liable for injuries caused by DES was addressed in Bichler v. Willing, 58 A.D.2d 331, 397 N.Y.S.2d 57 (1977). The court stated that pharmacists could not be held strictly liable if they gave proper warning of dangerous ingredients or side effects. Because the side effects of DES were unknown, even to the manufacturers, the pharmacist could not be held liable. Unlike the manufacturer, the pharmacist did not have a duty to test the product for side effects. *Id.* at —, 397 N.Y.S.2d at 59.

The reported class action suits involving DES manufacturers have not included reatilers and wholesalers as defendants. Limitations on the liability of these parties may be one reason. Tactical considerations such as the solvency of the retailer or wholesaler and the effort to avoid circutious litigation may also be influential. Future application of the market share theory will probably not involve these parties because the problems inherent in the theory would make application to these groups impractical. With thousands of wholesaler and retailers it would be even more difficult to determine what share of the market each party was responsible for. In addition, the amount of time and money that would be needed to join a sufficient portion of these groups would be prohibitive. Even if the market share theory could be limited geographically with respect to wholesalers and retailers, the inability of these groups to pay the large damage awards imposed and the minimal effect that imposing liability on these parties would have on the total industry would make such lawsuits unprofitable. Therefore, it is understandable that the wholesalers and retailers have not been joined in *Sindell*-type suits.

17. *Enterprise Liability*, *supra* note 7, at 995-1000.

18. Note, *Industry-Wide Liability*, 13 SUFFOLK L. REV. 980, 1015-22 (1979) [hereinafter cited as *Industry-Wide Liability*]. *Cf.* O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976) (suggesting no-fault insurance for medical malpractice and products liability).

tify the manufacturer whose product caused the injuries in question.[19]

A. *Alternative Liability*

Where two or more tortfeasors are negligent toward the plaintiff and it is not known which defendant caused the harm, all tortfeasors will be held jointly and severally liable under the theory of alternative liability. This theory was introduced in *Summers v. Tice* in which a plaintiff was injured when two of the hunters he was with negligently fired their guns.[20] The court held that once the plaintiff proved that the defendants were negligent and that the negligence caused the plaintiff's injury, the burden of proof as to causation shifted to the defendants. It then became incumbent upon the defendants to absolve themselves of liability.[21] Under *Summers*, each defendant was liable for the whole amount of the damages with apportionment to be decided among them.[22] Alternative liability was developed to avoid the unfairness of allowing the defendants to escape liability because the plaintiff was not able to prove which defendant caused his injury when it was certain that one person was responsible.[23] It was especially justified in situations in which the defendants were more capable of producing evidence as to the cause of the injury than the plaintiff.[24]

As the *Restatement (Second) of Torts* notes, this rule is usually applied when all possible defendants have been joined.[25] In a products

19. *E.g.*, Garcia v. Joseph Vince Co., 84 Cal. App. 2d 868, 873-75, 148 Cal. Rptr. 843, 848-50 (1978); 1 R. HURSH & H. BAILEY, *supra* note 1, § 1:41.

This requirement is a major obstacle in DES cases because of the passage of time, and because the formulae used by the manufacturers to produce DES were identical. The effect was to preclude the plaintiffs and the defendants from producing evidence on the identification issue. Consequently, all but two DES cases were dismissed. *See* Bichler v. Eli Lilly and Co., No. 15600-1974 (Sup. Ct. N.Y. 1979), *aff'd*, (A.D. 1st Dept. N.Y. Feb. 24, 1981). *But see*, Gray v. U.S., 455 F. Supp. 337 (S.D. Tex. 1978); McCreery v. Eli Lilly and Co., 87 Cal. App. 3d 733, 150 Cal. Rptr. 730 (1978).

20. 33 Cal. 2d 80, 199 P.2d 1 (1948).

21. *Id.* at —, 199 P.2d at 4. The *Summers* court justified this shift by citing Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1945), in which the court allowed the burden of proof on causation to shift to the defendants once the plaintiff provided enough evidence to infer negligence under the doctrine of res ipsa loquitur.

22. 33 Cal. 2d at —, 199 P.2d at 5.

23. *Id.* at —, 199 P.2d at 3.

24. *Id.* at —, 199 P.2d at 4.

25. RESTATEMENT (SECOND) OF TORTS § 433B, Comment h (1965). Subsection (3) to § 433(B) provides that:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

liability action involving a number of manufacturers it might not be possible to join all the defendants.[26] One case similar to *Sindell* in which the court used alternative liability to reverse the lower court's granting of the defendants' motion for summary judgment was *Abel v. Eli Lilly and Co*.[27] The plaintiffs in *Abel* were also daughters whose mothers used DES during pregnancy. The plaintiffs brought a products liability action against defendants who allegedly comprised a group of all the manufacturers of DES whose products were sold in Michigan during the relevant time period.[28] The court held that a cause of action was stated under several theories, including alternative liability.[29]

The defendants' main argument was that the plaintiffs could not identify the manufacturer of the product which caused their injuries.[30] The majority and the dissent both agreed that identification of the manufacturer was usually a requirement in a products liability case.[31] The majority, however, did not view the action as an issue of identification, but as a question of the apportionment of damages.[32] Therefore, once the plaintiff proved that the defendants had caused them to suffer a certain amount of damage, the burden of proof as to the apportionment of the damages shifted to the defendants.[33] The court, however,

26. Generally, in personam jurisdiction would not be a problem because most states have long-arm statutes. *See* Sutterfield, *In Personam Jurisdiction—How Long Is the "Long Arm" in Products Liability*?, 1980 INS. L. J. 447-60. It is possible, however, that some companies which produced DES in the 1950's and 1960's are no longer in existence and therefore cannot be joined.

27. 94 Mich. App. 59, 289 N.W.2d (1980).

28. *Id.* at 68, 289 N.W.2d at 23. "Defendants' motion was supported by affidavits which stated that more than 300 manufacturers were listed . . . as offering DES for sale at the relevant time." *Id.*

29. *Id.* at 71-72, 289 N.W.2d at 24. Plaintiffs alleged that all defendants acted wrongfully in producing and marketing a defective product, and that each plaintiff was injured by the product of one of the defendants. They also alleged that all defendants acted wrongfully, and one (but only one) of the defendants caused the harm to each individual plaintiff, therefore, they are alternatively liable. Plaintiffs also alleged that all defendants, acting in concert, caused the marketing of DES, and that this concerted activity was the cause of the plaintiff's injuries. All defendants, having acted together to cause all the harm, are therefore jointly and severally liable. *Id. See* note 43 *infra* and accompanying text.

30. *Id.* at 68, 289 N.W.2d at 23.

31. *Id.* at 70, 85, 289 N.W.2d at 24, 30-31. Both also agree that adopting a new theory of enterprise liability is not recommended. *Id.* at 77, 91, 289 N.W.2d at 27, 33.

32. "In the case before us . . . the problem is essentially one of apportionment of damages among proven wrongdoers." *Id.* at 76, 289 N.W.2d at 26. The court, however, never addressed the issue of identification. It appears that it accepted the plaintiffs' allegation that joining all manufacturers which sold DES in Michigan during the relevant time satisfied the *Summers* requirement that the plaintiff join all possible defendants. Summers v. Tice, 33 Cal. 2d 80, —, 199 P.2d 1, 3 (1948).

33. To establish the alternative liability of the defendants, the plaintiff would have to "establish by the preponderance of the evidence that each defendant breached its duty of care in produc-

did not address the fact that though the defendants, through affidavits, were able to show that of more than 300 companies manufacturing DES at the relevant time, the plaintiffs had joined only those who had sold DES in Michigan.[34]

The court's holding could produce unfair results for both prospective defendants and prospective plaintiffs. On one hand, with fewer than the total number of possible defendants present, manufacturers whose product may not have caused the injury may be held liable.[35] Conversely, if it is assumed that all the plaintiffs' mothers ingested the DES while in Michigan, the plaintiffs could argue that joinder of all manufacturers selling DES within the state at the time minimizes the chance that a manufacturer outside the defendants group would have supplied the drug.[36] The defendant's predicament becomes more apparent, though, if the plaintiffs are not able to satisfy their burden of proof as to some of the defendants.[37] In that event, the risk of an innocent manufacturer being held liable is greater. From the plaintiffs' perspective though, all DES manufacturers were tortfeasors because they all marketed a defective product. The question remains one of causation and there are strong policy considerations which would dictate that as between a manufacturer who may have caused the injury, and a completely innocent plaintiff, the manufacturer should bear the loss.[38]

Regarding causation, the plaintiffs bear what the court recognized as an extreme heavy burden of proof. The plaintiffs must prove that one or more of the defendants manufactured the DES ingested by the mothers involved.[39] If the plaintiffs fail to prove that it was more probable than not that any one particular defendant manufactured the injury causing DES, they would lose as to that defendant. The plaintiffs would lose as to all defendants, if they could not sustain this burden

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ing the product, that the harm to each plaintiff was the result of ingestion of DES by her mother, and that one or more of the named defendants manufactured DES so ingested." 94 Mich. App. at 76-77, 289 N.W.2d at 26-27.

34. *Id.* at 68, 289 N.W.2d at 23.

35. *Enterprise Liability*, *supra* note 7, at 991.

36. The author points out in *Enterprise Liability* that one of the main characteristics of the alternative liability theory was the joinder of every party possibly responsible for the plaintiff's injuries. This created a presumption of causation that varied the standard of proof. Therefore, even though the possibility that one particular defendant was responsible was fifty percent or less, it was counterbalanced by the certainty that one of the defendants did in fact cause the injury. To join less than all possible defendants would destroy this balance. *Id.* at 986, 991.

37. *See* note 33 *supra*.

38. Summers v. Tice, 33 Cal. 2d 80, —, 199 P.2d 1, 3 (1948); *Enterprise Liability*, *supra* note 7, at 991.

39. 94 Mich. App. at 76-77, 289 N.W.2d at 26-27. *See* note 33 *supra*.

toward any of them. It is very possible that the plaintiffs would be denied a remedy.[40]

As evidenced, alternative liability as a possible solution to the identification issue in products liability cases involving multiple defendants is not without its problems. The inherent risk of unfairness to the defendants must be carefully balanced against the risk of leaving the plaintiffs without a remedy. There appears to be a general agreement that, without modification, alternative liability is inapplicable to cases such as *Sindell*.[41]

B. *Concert Action*

The theory of concert action has also been used to shift the burden of proof on the causation issue from the plaintiff to the defendant.[42] The plaintiff must show that the defendants acted pursuant to a common design, gave substantial encouragement or assistance to another's wrongful conduct, or, acted wrongfully themselves in giving aid to another's wrongful conduct.[43] In this regard, agreement may be tacit or express. The purpose behind the theory is to deter harmful group activity.[44]

The application of the theory to a products liability situation was examined in *Hall v. E.I. Du Pont De Nemours & Co.*,[45] under the con-

40. Market share would be a possible means of proving that it was more likely than not that the particular defendant manufactured the DES which injured the plaintiff. Since each plaintiff has to prove this as to each defendant, if the market share of each defendant was small, the plaintiffs would probably lose since potential liability is more difficult to prove. *Id.* at 76-77, 289 N.W.2d at 26-27.

41. *Enterprise Liability*, *supra* note 7, at 990-91; RESTATEMENT (SECOND) OF TORTS § 433B(3), Comment h, at 446 (1965).

42. The theory originated to handle cases of group assault. *E.g.*, Sir John Heydon's Case, 77 Eng. Rep. 1150 (1613) and cases cited in W. PROSSER, *supra* note 2, § 46 at 291 n.5. The modern application of the theory has generally been in cases involving car races which result in injury. *E.g.* Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968); Lemons v. Kelly, 293 Or. 354, 397 P.2d 784 (1964).

43. RESTATEMENT (SECOND) OF TORTS § 876 (1965), provides:

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

Id.

44. W. PROSSER, *supra* note 2, § 43 at 292.

45. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 371 (1972); Hanrahan v. Cochran, 12 A.D. 91, 42 N.Y.S. 1031 (1896); *Enterprise Liability*, *supra* note 7, at 979.

cept of joint control of risk.[46] The plaintiff could prove joint control by the following methods: (1) by showing that there existed an explicit agreement among the defendants with regard to warnings and other safety features; (2) by showing covert joint action through evidence of parallel behavior sufficient to support an inference of tacit agreement; and, (3) by showing that the defendants adhered to an industry-wide safety standard. The court labeled the first method classic concert of action. Noting that the theory was not limited to any particular mode of cooperation or negligence,[47] the court found that the plaintiff's allegations concerning the defendants' knowledge of the blasting caps risk, the feasibility of safety measures, and the cooperation among the defendants, stated a valid cause of action under this theory.[48] The critical factor would be proof that the knowledge of the risks and the safety measures used were shared by the members of the industry and used as a basis for joint decisions.[49]

Concert action was examined in relation to the DES situation in *Abel v. Eli Lilly and Co*.[50] The plaintiffs alleged that the defendants acted in concert to produce and market a defective product without

46. 345 F. Supp. at 371. Recognizing that joint control of risk could arise through business relations or joint enterprise, the court rejected the argument that some form of profit sharing was a requirement in order to impose liability. *Id.* at 372-73.

47. The court referred to Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), as illustrative of the application of the concert action theory in a strict liability case involving manufactured products. The court in *Vandermark* extended the cause of action to the retailer on the grounds that he was an integral part of the overall processing system. *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899. Extending liability to the retailer who may be in a position to exert some influence over the safety of the product would be an additional incentive to safety. Finally, the retailer may be the only party available to the plaintiff. To impose liability on him would not be unfair because it would avoid leaving the plaintiff without a remedy and the retailer could adjust the cost among the other members of the industry, and the consumers as a part of doing business. *Id.* at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900.

Dement v. Olin-Mathieson Chemical Corp., 282 F.2d 76 (5th Cir. 1960), involved a negligence action for injuries sustained while plaintiff was working with explosives containing three component parts. The court, applying the doctrine of res ipsa loquitur, imposed joint liability even though each defendant had exclusive control over only one component part. *Id.* at 82. The court justified its decision by emphasizing that all parts were in the control of the defendants at the stage in which care was needed, that the plaintiff should not be barred from recovery due to impossible procedural barriers, and, finally, that the possibility of cost spreading reduced unfairness to the defendants. *Id.* at 81-83.

48. 345 F. Supp. at 375.

49. The court noted the following factors as being relevant in this regard: 1) size and composition of the trade association's membership; 2) its announced and actual safety objectives; 3) its method of decision making in this area; 4) the manner in which accident information was collected; 5) the safety program and its implementation by the association and its members during the relevant time period. *Id.* at 376.

50. 94 Mich. App. at 72-73, 289 N.W.2d at 24-25. *See* note 29 *supra* and accompanying text.

adequate testing or warning.[51] This case, unlike *Hall*, did not involve a trade association. Nevertheless, the court found that these allegations stated a valid cause of action. Even if it was shown that one defendant did not act wrongfully toward the plaintiff, the rest may be held jointly and severally liable. Proof that one of the defendants was the manufacturer of the defective product would not absolve the others because the basis of the theory is that all defendants, by their cooperative acts, contributed to the harm suffered by the plaintiff.[52]

The main problem with the application of concert action to DES cases is the difficulty of proving cooperative action without evidence of an express agreement. Arguably, courts should infer the existence of a tacit agreement when there is evidence of intentionally synchronized behavior which is part of an overall industry plan which benefits the participants.[53] Such parallel behavior though, may be attributable to factors other than tacit agreement. The role of regulations, especially in the drug industry, may explain the cooperation among industry members. To impose liability based on compelled behavior would penalize the industry for complying with regulations designed to protect the public. This would hardly serve the safety incentive rationale underlying products liability law.[54]

As in alternative liability, the imposition of joint liability under concert action may lead to arbitrary selection of defendants and unfair standards of liability when all possible defendants are not joined.[55] This possibility can be mitigated a number of ways. First, the defendants may implead other manufacturers who they feel are responsible. Second, unlike alternative liability, concert action does not require the joinder of all possible defendants because each defendant has contributed to the harm and therefore is jointly and severally liable.[56] Finally, if the plaintiff joins those defendants who contributed to the major portion of the market, it is not only likely that one of them would be the party responsible for the injuries, but it is likely that as a group, those defendants greatly influenced the entire industry.[57] Therefore, imposi-

51. *Id.* at 72, 289 N.W.2d at 25.
52. *Id.*
53. *Enterprise Liability*, *supra* note 7, at 983.
54. *See* note 16 *supra* and accompanying text.
55. *Enterprise Liability*, *supra* note 7, at 984.
56. *See generally* Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 429-30 (1937).
57. *Enterprise Liability*, *supra* note 7, at 985.

tion of liability would encourage them to direct the industry towards insuring greater product safety.

Concert action is one possible way to approach the causation issue in DES and similar actions. The primary difficulty lies in proving the existence of a tacit agreement among the members of the industry. This task is complicated by the infusion of government regulations restricting industry activity.

C. *Industry-Wide Liability*

A third theory, industry-wide liability, has been proposed as a method for dealing with the problem in multiple defendant lawsuits by eliminating the identification requirement. This theory was clearly pronounced in *Hall v. E.I. Du Pont De Nemours & Co*.[58]

In *Hall* the plaintiffs were children who were injured when blasting caps exploded. The incidents took place over a four year period and involved twelve separate accidents in ten different states. The plaintiffs were unable to identify the manufacturer because the explosions destroyed any identifying marks on the blasting caps. The defendants, six blasting cap companies and their trade association, constituted the entire blasting cap industry in the United States.[59]

In deciding whether the defendants' parallel safety practices could provide a basis for joint liability, the court noted that joint liability was concerned with three problems. The first was the need to deter hazardous group activity. The second was the task of imposing foreseeable losses to those parties in the best position to guard against them. The third problem concerned allocating the burden of proof so as to avoid

58. 345 F. Supp. 353 (E.D.N.Y. 1972).

59. *Hall* is consolidation of two cases, Hall v. E.I. Du Pont De Nemours & Co., 312 F. Supp. 358 (E.D.N.Y. 1970), and Chance v. E.I. Du Pont De Nemours & Co., No. 70-C-1107 (E.D.N.Y. 1972) which were both decided as to the tort issues of product liability in Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). Chance, however, moved for a severance of his case on the grounds of improper joinder of parties and also moved for a transfer of jurisdictions. Decision on the question was reserved pending an evidentiary hearing on which law should govern the substantive issues in the case. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. at 380-81; Chance v. E.I. Du Pont De Nemours & Co., 57 F.R.D. 165, 171 (E.D.N.Y. 1972). Ultimately it was decided that law to be applied was not that of New York but that of the respective jurisdictions in which the accidents occurred. Accordingly, the claim of Chance was subsequently transferred. Chance v. E.I. Du Pont De Nemours & Co., 371 F. Supp. 439, 445-48 (E.D.N.Y. 1974).

It should be noted that in *Hall*, the manufacturer who actually produced the damaging blasting cap was known. In *Chance*, the manufacturer was unknown. The discussion of the *Hall* case pertains to that case which consolidated the parties, *i.e.*, 345 F. Supp. 353. The theories discussed refer to the allegations and arguments with respect to the court's disposition of the product liability issues raised in Chance's claim.

denying the injured plaintiff a remedy merely because proof of causation was either within the defendants' control, or totally unavailable.[60]

To deal with these problems, the court proposed a theory of industry-wide liability based primarily on concert action. Under this theory, the plaintiffs can shift the burden of proof on causation to the defendants if they can show: (1) that all the manufacturers of a product adhered to an insufficient uniform safety standard; (2) that they cooperated in the design and manufacture of the product; (3) that the product was defective and caused plaintiff's injury; (4) and that one of the defendants manufactured the product in question.[61] The plaintiffs' ability to shift the burden of proof would not be affected by the fact that the blasting caps may have come from outside the United States.[62]

This theory incorporated the concert action principle, recognizing that although the actual harm to the plaintiff was caused in fact by one defendant, it was the conduct of the group as a whole, in devising insufficient safety standards, that caused the harm.[63] Since the defendants were responsible for the inadequate safety practices, holding the group jointly and severally liable was perceived to be the most practical remedy and placed the burden of what the court deemed the inevitable costs of business on those in the best position to take precautions against further injuries.[64]

To benefit from the shift of evidentiary burdens, the plaintiff had to initially prove that the defendants had breached a duty of care toward them and that there was a causal connection between the group created risk and their injuries. The plaintiffs' burden was satisfied if they proved that it was more probable than not that the injury causing caps were the product of one of the named defendants. Though the shift of evidentiary burdens was a product of alternative rather than concert liability, the court found that the justification of avoiding an

60. 345 F. Supp. at 371.

61. *Id.* at 380. The court justified the shift using the rationale behind the RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965):

> [T]he injustice of permitting proved wrongdoers, who among them have inflicted an injury upon an entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm was made it difficult or impossible to prove which of them has caused the injury. *Id.*

62. 345 F. Supp. at 379. Shifting the burden of proof effectively established liability unless the defendants proved that they did not manufacture the blasting caps in question. This was an insurmountable burden because all identifying marks were destroyed when the caps exploded.

63. *Id.* at 374.

64. *Id.* at 377-78.

unjust result served both theories.[65]

This theory has been criticized for the court's apparent failure to recognize the problem created by allowing cause-in-fact to be gauged on a standard of probability.[66] Arguably though, the court implicitly recognized this problem by placing the emphasis on the group's activities rather than the activity of each individual member. Under the concert action theory, the fact that one defendant's conduct can be proved to be the cause-in-fact of the plaintiff's injuries does not relieve the others of liability.[67] In *Hall*, the harm was not caused by the failure of the individual members to place adequate warnings on their blasting caps, or by the failure to make the caps more difficult to detonate, but by the manufacturers mutual agreement as to the relevant safety standards.[68] The court in *Hall* was careful to distinguish its holding, which is predicated on industry safety standard agreements reached in a small concentrated industry, from the case of similar agreements reached in larger decentralized industries.[69] In the latter instance, proving that the entire industry agreed and adhered to uniform safety standards would be much more difficult. Accordingly, the basis on which liabilty would rest would be insufficient.

D. *Enterprise Liability*

The theory of enterprise liability was proposed to deal with the particular problems of a DES suit. The plaintiff must prove that the defendants all manufactured a generically similar defective product and that the product's defect caused the plaintiff's injury. The plaintiff

65. *Id.* at 379 (citing RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965) and Wigmore, *Joint Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923)).

66. *Enterprise Liability*, *supra* note 7, at 998. Cause-in-fact is the necessary occurrance without which the plaintiff would not have suffered an injury. The question involved is whether the conduct of the defendant caused the plaintiff's harm. W. PROSSER, *supra* note 2, § 41 at 237. If the particular manufacturer is not known, the relationship between a defendant's conduct and the plaintiff's injury cannot be determined.

67. 345 F. Supp. at 372, 378.

68. *Id.* at 375-76.

69. The court noted:

> To establish that the explosives industry should be held jointly liable on [industry-wide] liability grounds, plaintiffs . . . will have to demonstrate defendants' *joint awareness* of the risks at issue . . . and their *joint capacity* to reduce or affect those risks. By noting these requirements we wish to emphasize their special applicability to industries composed of a small number of units. What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers.

Id. at 378. (emphasis added)

must also prove that there was an insufficient, industry-wide safety standard as to the manufacture of this product and there must be clear and convincing evidence that one of the defendant's products caused the plaintiff's injuries. In addition, the plaintiff must show that the defendants owed a duty to a class of which the plaintiff is a member. Finally, the plaintiff's inability to identify the manufacturer can not be due to his fault. Once these elements are established, the burden of proof shifts to the defendants. To avoid liability it is incumbent on the defendants to prove that they could not have manufactured the product which caused the plaintiff's injuries.[70]

The enterprise liability theory combines principles of alternative and concert liability. It is similar to alternative liability in that it requires the product of one defendant to be the cause-in-fact of the plaintiff's injuries. Accordingly, a defendant who adhered to the insufficient industry-wide safety standard may escape liability if it can prove that its product did not cause the injuries.[71] Furthermore, both theories cure the plaintiff's inability to identify the manufacturer by shifting the burden of proof on causation to the defendants.[72] Enterprise liability differs from alternative liability in that all possible defendants do not have to be joined in order for causation to be established.[73] The plaintiff need only show by clear and convincing evidence, that one of the manufacturers, all of whom are tortfeasors, manufactured the product which caused his injury. The clear and convincing standard can be met by joining manufacturers whose combined production equals seventy-five percent to eighty percent of the total market.[74] Though alternative liability places responsibility for the total amount of damages on each defendant,[75] under enterprise liability the defendants would be liable

70. *Enterprise Liability*, *supra* note 7, at 995.

71. *Id.* at 996. The ability of the defendants to exonerate themselves has been criticized as a hollow concession, particularly in DES cases where the lack of proof is due to time rather than the defendants' negligence. The defendants would not have any more information than would the plaintiffs. Therefore it would be unlikely that they could prove that they did not manufacture the injury-causing product. *Industry-Wide Liability*, *supra* note 18, at 1000-01. Furthermore, enterprise liability, like industry-wide liability, retains the insufficient safety standard as a basis for liability for those defendants who cannot prove causation. *Enterprise Liability*, *supra* note 7, at 997.

72. *Enterprise Liablity*, *supra* note 7, at 996. *See* RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965).

73. *See* note 25 *supra* and accompanying text.

74. *Enterprise Liability*, *supra* note 7, at 996. The author notes that this requirement dilutes the *Summers* rule but justifies it by pointing out that under enterprise liability, the plaintiff must prove the added element of an industry-wide safety standard ahered to by the defendants. *Id.* at 997.

75. *See* note 22 *supra* and accompanying text.

only for the amount equivalent to their market share.[76]

Enterprise liability incorporates the concert liability principles by requiring proof of an industry-wide safety standard and the manufacture of a generically similar defective product, both which must contribute to the plaintiff's injuries.[77] It differs from concert liability in that it does not require any type of express or implicit agreement. Parallel behavior is sufficient in and of itself.[78]

Under enterprise liability, traditional tort policies would be served by placing the loss on the tortfeasor rather than the injured plaintiff. More importantly, however, it aligns legal principles with changes in technology and society by placing the loss on the manufacturer who is best able to absorb and distribute the cost and take preventive measures.[79]

Although the enterprise liability theory attempts to base liability on two recognized theories of joint liability, it has been criticized as deviating too greatly from traditional tort principles and policies because it eliminates the identification requirement.[80] Although it was proposed to meet the needs of DES cases in particular,[81] enterprise liability would have application to other situations as well.[82] Ultimately, its potential effect on manufacturing in general would be significant. The effect of extended products liability has already been felt in increased premiums. Under the enterprise liability theory, increased potential for liability might place the cost of premiums outside the reach of small manufacturers.[83] While the increased liability may provide an

76. *Enterprise Liability*, *supra* note 7, at 1000.

77. *Id.* at 996.

78. *Id. Cf.* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 376 (1972) (the court stated that whether defendants shared knowledge of known risks and joint decisions based on this knowledge were critical facts to be proved).

79. *Enterprise Liability*, *supra* note 7, at 1000-02. The author points out that the insurance system, especially for drug companies, is undergoing change. Some companies have already become insurers. The imposition of enterprise liability may encourage this trend and result in a more economic and efficient system. *Id.* at 1003-04. Furthermore, rather than discouraging small industries, the theory supports them by focusing on the large manufacturers. *Id.* at 1005.

80. *Industry-Wide Liability*, *supra* note 18, at 998.

81. *Enterprise Liability*, *supra* note 7, at 994.

82. Areas in which enterprise liability would be applicable would be injuries caused by generic drugs other than DES, cigarette smoking, pesticides, air pollution, water pollution, food preservatives, and asbestos—any product which is discovered to have harmful effects over a long period of time. *Industry-Wide Liability*, *supra* note 18 at 1002 n.114. The theory has already been used in asbestos cases. Letter from Robert B. Steinberg (counsel for plaintiffs in *Hogard v. Johns-Manville Corp.*, No. C-137466 (L.A.S.C. 1980) (appeal pending)) to the author of the current article (June 26, 1980). As of that date, Mr. Steinberg reported that over 1,000 asbestos lawsuits had been filed in the Southern California area since 1975.

83. In a survey done for congressional hearings on the insurance problem, the fifty-four firms

incentive for greater product safety, it might also decrease it because no matter how safe one manufacturer tries to make its product, it may be found liable for another's error. In addition, research and marketing of new products may be inhibited, contrary to the societal interest in encouraging production of new, beneficial products. Finally, because the theory concentrates on large manufacturers, they may be encouraged to organize the industry and effectively shut down smaller manufacturers in violation of anti-trust laws.[84]

Policy considerations also militate against acceptance of enterprise liability. The reason behind the shift of the burden of proof on causation is to achieve a more equitable result.[85] But equity extends considerations to both the plaintiff and the defendant. The mere possibility that a particular defendant might be responsible should not be a fair basis for liability.[86] No doubt the possibility equally exists that the defendant's product was not responsible for the plaintiff's injury. The theory may also be unfair to plaintiffs who identify the manufacturer but must accept the consequences of a defendant's insolvency or unavailability. In this instance, the plaintiff who cannot identify the manufacturer but can pick solvent and available defendants is in a better position.[87]

The policy of loss spreading which supports this theory has been criticized as undermining the whole body of tort law.[88] Fault in some

responding reported that the average products liability premium increase between 1970-76 was 944.6% while average increase in sales was only 162.1%. The survey showed that 21.6% of the firms responding wanted products liability insurance but were unable to obtain it. *Product Liability Insurance: Hearings Before the Subcommittee on Capital, Investment, and Business Opportunities of the House Committee on Business*, 95th Cong., 1st Sess. 4, 15 (1977).

It was concluded that the problem was affordability, not availability. BRIEFING REPORT: INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, 44 INS. COUNSEL J. 437, 438 (1977). It was later noted, however, that unaffordability was tantamount to unavailability. H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 10 (1978). In both cases, the result appears to be that small firms were not able to bear the risks of operation.

84. *Industry-Wide Liability*, *supra* note 18, at 1003-05.

85. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 379 (1972); Summers v. Tice, 33 Cal. 2d 80, —, 199 P.2d 1, 3 (1948); Ybarra v. Spangard, 25 Cal. 2d 486, —, 154 P.2d 687, 691 (1944). RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965).

86. W. PROSSER, *supra* note 2, § 41 at 241.

87. *Industry-Wide Liability*, *supra* note 18, at 1009-10. Sindell v. Abbott Lab., 26 Cal. 3d 588, 618, 607 P.2d 924, 941, 163 Cal. Rptr. 132, 149 (1980) (Richardson, J., dissenting).

88. To allow loss spreading covertly to dominate the structure of tort law will only produce unsound results and bad general principles, it will only bring the law into disrepute as the courts say one thing and do yet another; it will only call into question the solid achievements of traditional tort law, as they are overshadowed by current excesses in judicial doctrine; and it will so overburden the tort system that it will destroy its effectiveness in situations in which it has worked well in the past.

Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 661 (1978).

form is still the basis of liability.[89] Enterprise liability, however, would, in effect, eliminate that basis and result in making manufacturers insurers. In addition, the deterrent aspects of products liability law would be defeated by holding a manufacturer liable for a defect that could not have been discovered at the time the product was marketed. Without fault as a basis, liability would be imposed based on injury alone.[90] The denial of compensation should not raise a presumption of injustice because the question is not only one of compensation but of legitimacy.[91]

E. *Latent Technological Injury Compensation*

The arguments against enterprise liability generally lead to the conclusion that the problem of non-identifiable manufacturers exceeds the court's ability to fashion a practical remedy.[92] Since any solution to this problem will have effects not only on the substantive legal issues, but on industrial and the economic, concerns it is an appropriate question for legislation.[93] One alternative proposed would be a system for

89. The role of fault in products liability, especially strict products liability, is currently in question. Though originally seen as eliminating fault, strict products liability has retained some of the fault concept in the unreasonably dangerous standard of *Restatement (Second) of Torts* § 402A. See W. PROSSER, *supra* note 2, § 75 at 494-96. The California Supreme Court rejected this standard as being too close to a negligence standard in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). However, in Daly v. General Motors Corp., 20 Cal. 3d 775, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), the California Supreme Court defined fault as including both negligence and strict liability. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 39. The court then held that comparative fault applied to strict products liability.

For an analysis of the conflict between fault-based and no-fault strict products liability in California, *see generally* Comment, *A California Perspective in Strict Products Liability*, 9 PAC. L.J. 755 (1978) [hereinafter cited as *California Perspective*].

Drugs are an anomaly in the law of strict products liability because while it is recognized that there is always some attendant risk, that risk is generally outweighed by the social benefit. RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965). The result is that, the negligence standard still applies to drugs in a strict products liability case. *Enterprise Liability*, *supra* note 7, at 967 n.18.

90. *See Industry-Wide Liability*, *supra* note 18, at 1013-15.

91. Epstein, *supra* note 88, at 645. *See* Abel v. Eli Lilly and Co., 94 Mich. App. 59, 91, 289 N.W.2d 20, 33 (1980) (Moore, J., dissenting).

92. *See generally Industry-Wide Liability*, *supra* note 18, at 1015 n.191.

93. On October 31, 1979, the Department of Commerce published the Model Uniform Product Liability Act. 44 FED. REG. 62,714. The purpose of the Act was to balance the interests of product users and sellers and to promote more certainty within the system. *Id.* at 62,716. The Act provided for a ten-year statute of repose which gave a product a ten-year useful life after delivery. *Id.* at 62,732. It also allowed a two-year statute of limitation which would run from the time the claimant discovered or should have discovered or could have discovered the harm and its cause. *Id.* The drug industry is exempted from these limitations under section 110(B)(2)(d). *See id.* One commentator noted that the effect of this exemption would be to expose drug firms to greater liability than they have under common law or most state statutes. Buchanan, *Product Liability Defenses Under the Model Uniform Product Liability Act and State Legislation*, 15 FORUM 813, 817

"latent technological injury compensation." This system would be a governmental branch which would get the necessary operational funds through a tax on manufacturers' gross sales. The fund would be available to both plaintiffs who could identify the manufacturer and those who could not. Under this system, the statute of limitations would start to run from the date of purchase. Once the statute has run, tort litigation would no longer be an option. The plaintiff would have to apply to an administrative agency to get relief. Recovery would be based on the plaintiff's ability to show that he was injured, that the injury could be traced to a type of product, and that the injury could not have been discovered prior to the running of the statute. The plaintiff could recover damages for bodily injury and lost earnings according to a fixed scale. Pain and suffering would not be compensable. The government agency though would be allowed to seek indemnity from the manufacturer on the basis of fault.[94]

This alternative would more readily satisfy the current societal concern for compensating victims without doing violence to traditional tort law. It also provides a solution to a problem which will occur with increasing frequency as increased technology leads to injuries which require, and, deserve compensation. In addition, the goal of loss spreading is served, especially since the loss is spread among those whose activity generated the harm.[95]

This solution though, requires legislative action which is often tedious and compromising. Also required is the creation of an administrative agency. With the prevailing public opinion and political climate against government expansion, this may not be easily accomplished. Furthermore, the system requires a tax on the gross sales of manufac-

(1980). The Act though, does not adequately address the problem of non-identification of the manufacturer.

94. *Industry-Wide Liability*, *supra* note 18, at 1019-21. The theory would apply to the DES situation as follows. Assume that there is a ten-year statute of limitations and that plaintiff's mother ingested the DES in 1955. Because the statute starts to run from the date of purchase, in this case, the date of ingestion, the plaintiff's cause of action in tort would expire in 1965. If the plaintiff discovered her injury prior to 1965, her remedy would be to sue the manufacturer in a regular tort action. She could not recover through the administrative agency because her injury was discoverable prior to the running of the statute. If her suit was successful, the plaintiff could recover actual and special damages, including pain and suffering. If the plaintiff's injury was not discovered until after 1965, she would have to apply to the administrative agency to get relief. Tort litigation would not be an option because the statute had expired. The plaintiff's recovery would be limited to actual damages and lost earnings. Pain and suffering would not be compensable.

95. *Id.* at 1020-21.

turers.[96] Unless the economic benefit to the manufacturers in terms of lower damage awards and legal fees is clearly demonstrable, manufacturers would no doubt lobby strongly against such a plan. Finally, the limitations on damages might make the plan unappealing to plaintiffs who, under tort law, might be able to recover not only actual and special damages, but punitive damages as well. Though the system is appealing in its simplicity and rationale, it would have to overcome major obstacles before it would be realized.

As evidenced, the problem posed by fungible products and the problem of a plaintiff's inability to identify the manufacturer has been considered from many angles. Traditional tort theories such as alternative liability, concert action, and industry-wide liability have limitations which render them inapplicable in this situation. New theories based on modifications of these traditional ones, appear to stretch legal principles beyond their limits in order to meet policy justifications. Other theories necessitate legislative action which, though possibly more appropriate, require recognition of the problem by the legislature and a well-reasoned, acceptable and workable solution. What solution will ultimately be adopted is an open issue. Recently though, the California Supreme Court decided to provide its own answer.

IV. DECISION IN *SINDELL V. ABBOTT LABORATORIES*

A. *Rejection of Prior Non-Identifiable Manufacturers Theories*

Before introducing its new theory, the *Sindell* court rejected the relevance of alternative liability, concert action, and industry-wide liability theories to the situation. Alternative liability was rejected first because all DES manufacturers were not joined as defendants, and, second, because the defendants were in no better position to prove causation the plaintiffs than were.[97] Concert action was not appropriate because the formula for DES is a scientific constant and therefore could not be a basis for a common plan. In addition, the defendants' reliance on each other's marketing and promotional techniques was a common practice in the industry. To apply concert action to this situation would be extending the doctrine beyond its limits.[98] Finally, in-

96. *Id.*

97. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139. *See* note 24 *supra* and accompanying text.

98. 26 Cal. 3d at 605-06, 607 P.2d at 923-33, 163 Cal. Rptr. at 140-41. *See* note 53 *supra* and accompanying text.

dustry-wide liability was rejected for several reasons. First, the blasting cap industry in *Hall* was much smaller than the drug industry. The *Hall* court itself noted that this theory, readily applicable to a small centralized industry, might be manifestly unreasonable when applied to a large decentralized industry.[99] Second, in *Hall*, some of the responsibility for the industry's safety standards was delegated to a trade association. Such allegations were not made in the present case.[100] Finally, the drug industry safety standards were set to a large degree by the FDA. Therefore, it would be unfair to hold a manufacturer liable for injuries resulting from a drug supplied by another manufacturer simply because it followed standards set by government regulation.[101] Thus, the *Hall* theory of liability was not applicable to the situation.

B. *Policy Considerations*

There were policy considerations, however, which justified finding a valid cause of action. To begin, modern industry has developed fungible goods which may injure consumers, but specific manufacturers may not be identifiable. Consequently, a modification of the traditional products liability action was required.[102] The court also noted that the *Restatement (Second) of Torts* recognized a modification of the *Summers* rule might be necessary because of the lapse of time and because of other complications resulting from the failure to join all possible defendants.[103] An additional policy argument advanced by the court was that the manufacturers were in the best position to absorb the

99. *See* note 69 *supra*.

100. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

101. *Id. See also* note 7 *supra*.

102. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court compared its reasoning to that used by Justice Traynor to support a products liability action different from traditional negligence. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467-68, 150 P.2d 436, 443-45 (1944) (Traynor, J., concurring).

103. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court was referring to RESTATEMENT (SECOND) OF TORTS § 433B, Comment h (1965), which states:

> The cases thus far decided in which the rule stated in subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. . . . It is possible that cases may arise in which some modificiation of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created.

Id.

cost of the injury.[104] Relatedly, it was asserted that manufacturers were better able to guard against the infusion if defective products into the market and that to impose liability would provide incentive for greater product safety.[105] The court finally noted that the most compelling reason for finding a cause of action was that the negligent defendant rather than the innocent plaintiff should bear the loss.[106] These goals could be accomplished under the new theory of market share liability.

C. *Market Share Liability*

The *Sindell* court found that although the rule of *Summers* was inapplicable as traditionally applied,[107] a modification of that theory would be appropriate. The plaintiff was required to allege the existence of a defect and an injury caused by that defect.[108] Causation though, was not measured by the number of defendant manufacturers joined in relation to the total number of manufacturers of that product. The court stated that the appropriate measurement of the possibility that any of the named defendants supplied the injury-causing product was "the percentage which the DES sold by each of them for the purpose of preventing miscarriage [bore] to the entire production of the drug sold by all for that purpose."[109] Therefore, once the plaintiff has shown that the defendants joined in the action were manufacturers who together produced a substantial portion[110] of the DES mothers may have taken, the burden of proof shifted to the defendants to prove that they did not manufacture the product which caused the injuries. The defendants also had the option of cross-complaining against other manufacturers

104. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. *See* note 16 *supra* and accompanying text. *But see* note 126 *infra* and accompanying text.

105. *Id.* The court emphasized that the consumer was particularly helpless to protect himself against serious injury when drugs were involved. *Accord*, Cronin v. J. B. E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153 (1972), 104 Cal. Rptr. 433, and Beech Aircraft Corp. v. Superior Court, 61 Cal. App. 3d 501, 132 Cal. Rptr. 541 (1976).

The dissent pointed out that the social benefits of drug production outweighed the medically recognizable risk in the use of drugs. Therefore, the additional risk should not be used to justify liability. 26 Cal. 3d at 619, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting). *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment k (1965).

106. The court pointed out that although the defendants were in no better position than the plaintiffs to prove causation, their conduct in marketing a drug with delayed effects significantly contributed to the lack of proof. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

107. *See* note 26 *supra* and accompanying text.

108. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, —, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

109. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Plaintiff alleged that Eli Lilly and Co. along with five or six other manufacturers produced ninety percent of the DES marketed.

110. The court stated that while 75% to 80% was recommended, it would require only an undefined "substantial share". *Id.* (citing *Enterprise Liability*, *supra* note 7, at 996.)

who may have supplied the product which caused the injury. Apportionment of damages was based on the share of the market for which each defendant was responsible.[111]

The court recognized that each defendant's share of the damages may differ somewhat from its actual share of the market since all manufacturers of the product might not be included and that determining the market share of each defendant might be difficult in itself.[112] This would not invalidate the theory according to the court. Similar problems were encountered and handled adequately with comparative fault.[113] In addition, difficulties in determining market share were problems of proof not pleading.[114] Rejecting the defendants' argument that it would be unfair to hold them liable for damages caused by another's product, the court pointed out that with market share liability, each defendant would only be liable for the amount equivalent to the damages caused by the DES it manufactured.[115]

111. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

112. The defendants argued that there were no production figures available to determine market share, that DES was produced for uses other than miscarriage prevention so that it would be difficult to ascertain exactly how much of the drug produced went toward that use, and that it would be difficult to establish a time frame and area for market share. These problems would be further complicated since it was likely that some of the drug companies that produced DES during the 1960's and 1970's were defunct. The problem in determining market share on an equitable basis is demonstrated by the following example. A court, using whatever data is available, might determine that a particular defendant produced 30% of the total market and is therefore liable for 30% of the plaintiff's damages. If actual figures and a definite time frame were available, along with the production figures of now-defunct companies, it could be ascertained that the defendant produced perhaps only 15% of the injury causing product market. Therefore, the amount of his liability would be twice the amount of damage proportionately attributable to his product. Conversely, a defendant found to have produced only 15% of the total market might have, in actuality, produced 30% of the drug supply to which the plaintiff's injuries are attributable. He would, then, be held liable for only one half of the injuries caused by his product. *Id.* at 613 n.29, 607 P.2d at 937 n.29, 163 Cal. Rptr. at 145 n.29.

113. *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145. One criticism of comparative negligence is the difficulty of apportioning damages among multiple tortfeasors. To provide an adequate percentage of fault for each tortfeasor was perhaps outside the capability of the jury. Comparative fault, regardless of its inaccuracy, was preferred over contributory negligence which completely barred the plaintiff's suit. *See generally* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503-07 (1953). The market share theory may suffer from the same problems due to the lack of adequate statistics. The jury may be overwhelmed by contradicting statistical evidence and in frustration arbitrarily decide percentages. This could result in more than a slight discrepancy between one defendant's market share and the amount of damages it pays. This defect can be remedied by trying the case before a judge or by the argument that to abandon market share would leave the plaintiff without a remedy.

114. 26 Cal. 3d at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145. (citing *Enterprise Liability*, *supra* note 7, at 994, for an explanation of the correction between market share and liability).

115. 26 Cal. 3d at 612, 607 P.2d at 937, 16 Cal. Rptr. at 145.

V. ANALYSIS

Technological advances in industry have created societal problems. In addition to benefits, the development of new products carries commensurate risks. Discoverable or patent risks are usually dealt with by redesign or additional safety features. Products with known or suspected latent risks carry warning labels. Some latent risks, however, may only surface after a long period of time. In this situation, when the product is put into the marketplace, there is no way to warn the consumer of the hidden danger, or any reason to warrant re-design or to prevent the marketing of the product. Nevertheless, someone is injured. The allocation of responsibility for those injuries and how the injured parties are to be compensated are issues that need to be addressed.

The DES situation is a perfect example of the problem. The plaintiffs were injured by a drug taken by their mothers while the plaintiffs were in utero. Though the drug had passed scrutiny under the available testing standards and procedures required at the initial marketing point, it contained a defect which did not surface until twenty years later and in the next generation of offspring. Because of the passage of time, neither the plaintiffs nor the defendants could prove who manufactured the particular drug that caused the injuries. The California Supreme Court in *Sindell v. Abbott Laboratories*[116] decided that the courts were the appropriate body to determine the placement of responsibility and its allocation.[117] The court treated the problem as an adversarial one—the consumer against the manufacturer. In reality, because the problem is a societal one, the interests of society would best be served by a solution amenable to both parties, one which a legislature would appear more fit to tailor than a court.

There are certain factors which should dictate that legislative concern be focused on this problem. The first factor is that the solution to the problem will have a profound effect on the current economic struc-

116. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (4-3 decision) (appeal pending).

117. The dissent pointed out that the legislature was currently reviewing California products liability and was, in particular, considering legislation, (S. 1392 (1979-80) Reg. Sess. ch. 776 (1980)), which would provide funds for aiding persons exposed to DES. 26 Cal. 3d at 621, 607 P.2d at 943, 163 Cal. Rptr. at 151.

The majority rejected the applicability of the legislative measures to the case by stating that the issue was the amount of "damages for injuries which have been or will be suffered." Nor, as a principle do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California. *Id.* at 613 & n.30, 607 P.2d at 938 & n.30, 163 Cal. Rptr. at 146 & n.30.

ture.[118] The *Sindell* decision basically establishes a no-fault system of compensation. The manufacturers are not being held liable because they were negligent, either as individuals or in concert toward the plaintiffs.[119] Nor are they liable because the inability to prove identification was their fault,[120] or their particular product caused the plaintiff's injuries. These facts cannot be proven.[121] The manufacturers are held liable because they happen to manufacture the same product. The court rejects this as a basis for finding concert action liability,[122] but nevertheless uses it as a foundation for its market share theory. This, in effect, makes each manufacturer of a fungible product an insurer of not only injuries caused by the particular product it produced, but also those caused by similar products of other manufacturers.[123] As a result, insurance premiums for manufacturing are likely to increase or manufacturers will "capture" an insurance company to meet the demands of the increased scope of liability. Larger companies will probably be able to cope with these results. The smaller ones, however, might find the cost of premiums outside their reach.[124] This would leave them vulnerable to potentially devastating lawsuits.[125] In addition, since one

118. The effects of extended products liability are already being felt in the insurance area. *See* note 83 *supra*.

119. *See* notes 20 & 42 *supra* and accompanying text.

120. 26 Cal. 3d at 601, 607 P.2d at 930, 163 Cal. Rptr. at 138. To support their allegation that the lack of evidence was the defendants' fault the plaintiffs relied on Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). The court distinguished *Haft*, however, by noting that in *Haft* a direct causal relationship was found between the drowning of a father and son and the defendants' failure to provide lifeguards for their swimming pool. No direct and foreseeable relationship exists in the present case, however. The court stated that it would be mere speculation to find that had defendants provided a warning label, the plaintiff's mother would have recalled information concerning the drug she took and relayed it to her daughter. *Id.* at 601 n.14, 607 P.2d at 930 n.14, 163 Cal. Rptr. at 138 n.14.

121. *Id.* at 600, 607 P.2d at 929, 163 Cal. Rptr. at 137.

122. *See* note 98 *supra* and accompanying text.

123. *Industry-Wide Liability*, *supra* note 18, at 1011-12. This result is contrary to the position stated by the courts. *E.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

The *Sindell* court counters this argument by noting that each manufacturer will be liable only for injuries caused by their share of the market. But even the court recognized that the final determination would not be accurate. 26 Cal. 3d at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145. Logically, the market share standard would be most easily satisfied by suing the larger manufacturers. Thus, it is conceivable that they could be held liable for 100% of the injuries caused by the industry as a whole. Arguably this result is not unfair since they would probably have the greatest influence on the industry.

124. *See* note 83 *supra*. *See also* INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY: FINAL REPORT, *reprinted in* 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 585 app. (1978) [hereinafter cited as FINAL REPORT].

125. It could be argued that, in view of the cost of high risk ventures, the solution for small businesses would be to exercise extreme caution in the activities they choose to participate in.

of the theoretical foundations of *Sindell* is that the manufacturer can best distribute the loss among many, it is logical that this will result in higher prices to the consumer.[126] In a competitive market, the large manufacturers will be able to place prices at a more competitively advantageous level. Smaller manufacturers whose operational costs do not have the benefit of high volume, will not. As a result, the smaller manufacturer may be forced out of business.[127] Judicial imposition of liability, with attendantly high awards, may discourage the production of new products and affect marketing practices of the drug industry.[128] Finally, other areas as well as product safety might decrease instead of increase since no matter how safely a manufacturer produces a product it may still be held liable for unpreventable injuries or other manufacturers' careless manufacturing techniques.[129]

Another indication that a judicial solution such as market share

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This, however, reserves the profit opportunities associated with high risk products to large manufacturers and consequently may result in monopolistic markets.

126. The ability of the manufacturer to pass on cost of increased insurance premiums to the consumer depends on the type of product. The drug industry can easily pass on costs through price increases. Other manufacturers may not be able to pass on costs because a large portion of the increase in insurance costs is due to older products. In order to be competitive with newer companies who do not have much risks, they have to maintain price levels. FINAL REPORT, *supra* note 124, at 984-85.

Since it is ultimately the consumer to pays, a more realistic approach would be to take a portion of the sales price of each product and set it aside for compensation of product-caused injuries. *See Industry-Wide Liability*, *supra* note 18, at 1019-22 (proposing a system of latent technological injury compensation which would use funds procured through a tax on the manufacturers' gross sales).

127. The Task Force was unable to obtain verifable statistics on the number of small businesses which terminated either because of increased insurance premiums or unsatisified products liability judgments. It found, however, the circumstantial evidence suggested that this problem existed. FINAL REPORT, *supra* note 124, at 990-94.

128. Extended products liability may have an effect on the production of new products. The Task Force found, however, that further study was needed to determine the extent of the impact. One area where the impact was clearly shown was the drug industry. The Swine Flu program was almost barred because the pharmaceutical companies refused to provide the vaccine as a result of their inability to obtain adequate products liability insurance. Evaluation of this situation lead the Task Force to state: "To the extent that companies manufacturing pharmaceuticals and medical devices are unable to obtain affordable product liability coverage for their new products, . . . there may be an adverse impact upon medical research and upon the development and marketing of new products which may be socially beneficial." FINAL REPORT, *supra* note 124, at 988-89.

129. *Industry-Wide Liability*, *supra* note 18, at 1003-04. Conversely, imposing liability could encourage effective use of the drug industry's post-marketing system for adverse reactions and result in increased injury prevention. *Enterprise Liability*, *supra* note 7, at 1004-05. Arguably, any delay in the marketing of products attributable to extensive testing to avoid potential liability could result in a safer product. This argument has minimal validity, however, when the product, as in the case of DES or asbestos, has a defect that is not discoverable for ten years or more. Conventional scientific testing is ineffective with respect to such drugs. With drugs, the social benefits supporting expedient marketing practices may often outweigh whatever risk remains undefined after thorough testing.

liability is not as feasible as a legislative remedy is the degree of extrapolation the *Sindell* court had to engage in to justify its decision. The court found no prior legal basis for its new theory. Therefore, a policy justification was the only alternative. The court first noted that the advances in technology created the problem caused by fungible goods and that the court had a choice—to maintain the current doctrine and deny the plaintiff a remedy, or fashion a new remedy to meet the situation. Justice Traynor's famous concurring opinion in *Escola v. Coca Cola Bottling Co*. was cited as support.[130] The court noted that, while Justice Traynor was referring to duty, the court's present problem was causation and liability.[131] Though in some state of confusion, the principle of foreseeability still plays a role in California products liability law.[132] The adaptation the court was trying to justify was the complete elimination of foreseeability as a relevant factor. The drug had passed all available tests.[133] The defect surfaced a generation later. No manufacturer could have discerned that. Therefore, it can hardly be said that the injury was foreseeable.

The court also advanced the *Restatement (Second) of Torts* as support. Specifically, it pointed to section 433B, Comment h, which states that the rule in *Summers* may need modification if all defendants cannot be joined or due to the effect of lapse of time.[134] Although the comment declines to forecast the type of cases in which modification would

130. 24 Cal. 2d 453, 467-68, 152 P.2d 436, 443-44 (1944).

131. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

132. Manufacturers, or more specifically drug manufacturers, may be held liable under various theories of negligence, implied warranties, or strict liability. 50 CAL. JUR. 3d § 43 (1980). The California courts have eliminated the unreasonably dangerous standard of *Restatement (Second) of Torts* § 402A as the standard for strict liability on the grounds that it was too close to a negligence standard. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the court defined a design defect two ways. The first was based on the expectations of the consumer when the product was used in a reasonably foreseeable manner. The second involved balancing the benefits of the challenged design against the risk of danger inherent in the design. The latter standard was proposed to eliminate the role of fault in strict liability. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. Thus, the court sought to eliminate negligence principles, including forseeability, from strict products liability. However, the court appeared to retreat from this trend in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) when the court extended comparative fault to strict liability cases. *See generally California Perspective*, *supra* note 89, for a discussion of the California dichotomy. The conflict seems to be embodied in the respective opinions of Justices Mosk and Richardson. Justice Mosk's majority opinion in *Sindell* case and his dissent in *Daly* favor the trend toward no-fault compensation based strict liability. Justice Richardson in his majority opinion in *Daly* and his dissent in *Sindell* favors an unwillingness to depart totally from fault-based liability.

133. 26 Cal. 3d at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting). *Contra*, *Enterprise Liability*, *supra* note 7, at 963-71 (testing methods were insufficient).

134. *See* note 104 *supra*.

be necessary, it is conceivable that this situation was not one of them. In *Summers* all possible defendants were joined. It was entirely certain that one of the defendants was responsible. By joining less than the total number of defendants, the basis for liability under the *Summers* rule is weakened considerably. This weakness was recognized under the enterprise liability theory which also used the market share concept. Enterprise liability minimized the defect by requiring that the plaintiff also prove adherence to an insufficient industry-wide safety standard.[135]

The court's next and "most persuasive" reason for allowing the cause of action was that as between an innocent plaintiff and a negligent defendant, the tortfeasor should bear the loss.[136] Nevertheless, this is unpersuasive when it is remembered that the court found that neither the plaintiff nor the defendants were at fault for lack of proof as to identification.[137] The court tried to rationalize their decision by noting that the defendants contributed to the problem by marketing a drug with delayed effects.[138] This argument is untenable when it is considered that the defect was not discoverable under the contemporary testing methods. To use this justification as a basis of finding some fault is to require manufacturers to be clairvoyant.[139]

Realizing that these reasons were not sufficient, the court proceeded to broader policy arguments. The first justification advanced was the "deep pocket" theory—the defendants were best able to bear the loss and distribute it among society. Though this is probably true, as the dissent notes wealth should not be a basis for liability.[140] Fur-

135. *Enterprise Liability*, *supra* note 7, at 997.
136. 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
137. *See* note 20 *supra* and accompanying text.
138. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.
139. The dissent noted that over 99% of DES daughters never developed cancer. It went on to argue:

> If a drug has beneficial purposes for the majority of users but harmful side effects are later revealed for a small fraction of consumers, will the manufacturer be absolutely liable? If adverse consequences, wholly unknown to the most careful and meticulous of present scientists, surface in two or three generations, will similar liability be imposed? . . . [C]ommon sense and reality combine to warn that a "market share" theory goes too far. Legally, it expects too much.

Id. at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting).
140. Justice Richardson noted:

> This "deep pocket" theory of liability, . . . has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation that herein appears. But as a general rule, 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. . . . A system priding itself on "equal justice under law" does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant's

thermore, the loss spreading rationale has its own dangers.[141] The second justification for devising a new cause of action was that it would encourage product safety, deter placement of defective products in the marketplace, and, as a result, protect the helpless consumer. This rationale is based, however, if not on fault, then at least on the ground that the defects were discoverable and could be prevented.[142] If the consumer is helpless to protect himself from injuries caused by the delayed effects of a drug with a latent defect, then the manufacturer is also helpless in the sense that it cannot warn or take preventive measures against such a defect.

On these policy bases the court held that a plaintiff states a valid cause of action when the injury is caused by a fungible product and the plaintiff has joined defendants who have together contributed a substantial portion of the market for that product. Causation is to be measured by market share. But this crucial element is left undefined. The court noted that joining defendants who have a combined market share of seventy-five percent to eighty percent has been recommended, but expressly declines to designate any percentage parameters.[143] Since there is no basis for liability except the defendants' market share of a fungible product, the court's failure to define this element is a critical error. It is not merely a matter of proof as the majority suggests, but, as the dissent points out, a question of liability.[144] Moreover, the court uses this uncertain element to justify shifting the burden of proof from the plaintiff to the defendants on the issue of causation.[145] The court noted that any unfairness inherent in shifting the burden of proof is minimized by holding each defendant liable only for its share of the product. This logic is hard to accept. The court has recognized that the defendants are in no better position to disprove causation than the plaintiffs are of proving it.[146] A defendant who produced only thirty percent of the total product marketed should not be held liable merely

> wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law—one applicable to wealthy defendants, and another standard pertaining to defendants who are poor or who have modest means.

Id. at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting).

141. *See* note 88 *supra*.

142. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. *See generally California Perspective*, *supra* note 89, at 776-82.

143. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

144. *Id.* at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148.

145. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. This is not easily justified because the shift in *Summers* was based on the fact that it was certain that plaintiff's harm was caused by one of the joined defendants. *See* note 23 *supra* and accompanying text.

146. *Id.* at 600, 607 P.2d at 929, 163 Cal. Rptr. at 137.

because he cannot prove that he did not market the specific product that injured the plaintiff. Because most defendant's market share is relatively small, it is more likely than not that a given defendant did not market the product in question. To hold the defendant liable in such circumstances is manifestly inequitable.[147]

Finally, the uncertainty of the market share element is carried through to the apportionment of damages. Rather than making the defendants jointly and severally liable as in alternative liability,[148] the court apportioned the damages each defendant will be liable for on the basis of its market share. The court dismissed the problems caused by this element's vagueness by pointing out that difficulty in apportionment has been handled adequately in other situations.[149]

With liability based, not on fault, but on production of similar products, the end result of the court's decision is not a theory derived from established legal principles, but a theory of no-fault compensation founded on a basis of loss spreading and redistribution. As one commentator noted, if redistribution is the major goal, then there is no reason why the court should retain the principles of causation and defect. Redistribution would be frustrated to the extent that the defendant could use those elements to defeat the plaintiff's cause of action. "If the needs of the plaintiff are decisive, then the most appropriate response is a comprehensive system of first party insurance that compensates each person in accordance with the severity of their injury."[150]

It is possible that a uniform system of compensation is the solution to the problem. Courts resolve individual cases and cannot solve the problems inherent in setting up a major compensation system.[151] That responsibility belongs to a legislature which has the time and the resources to make a proper evaluation of the problem and the possible solutions. Unlike courts, which have been traditionally limited to dealing with a problem on a case-by-case basis, the legislature is empowered, through enactments, to make broader, more uniform changes.[152] Legislative decisions do not rest on the arguments of a limited number of parties concerning a particular fact situation. Considering the poten-

147. *Id.* at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).
148. *See* note 22 *supra* and accompanying text.
149. *See* note 114 *supra*.
150. Epstein, *supra* note 88, at 659.
151. *Id.* at 661. The criticism that the courts have become a secondary legislature has reached the United States Supreme Court. *E.g.*, R. BURGER, GOVERNMENT BY JUDICIARY (1977).
152. Some legislative steps taken have included statute of limitations and statutes of repose. *See* Buchanan, *supra* note 93, at 816-83.

tial breadth of the fungible products problem, such a decisional basis is too narrow. By shifting the problem to the legislature, consumer groups as well as manufacturers will have a role in the final plan. The legislature might react more slowly than courts in reaching its decision, and during the decisional process persons will probably suffer from injuries caused by fungible products. In the long run, however, a legislative decision will be more equitable and will reflect the needs of many interest groups. It will also avoid the undermining of judicial principles which have served well in other situations.[153]

VI. CONCLUSION

Advanced technology has created not only new products, but also new problems. One of these problems is the inability of a plaintiff injured by a fungible product containing a latent defect to identify the manufacturer of the product which caused his injury as required by traditional tort law. The problem is not only one of lack of identification, but also lack of fault because the manufacturer could not have discovered the defect under the current methods of testing. The court in *Sindell* attempted to solve the problem by judicially devising a basis of no-fault compensation. However, considering the scope of the problem and the role of the courts, the solution to the situation rests more appropriately with the legislature. This body, by providing a forum in which the concerns of all interested parties can be voiced, can devise an equitable and uniform solution without doing violence to valuable legal principles. Though it is recommended that the *Sindell* theory not be accepted as a viable cause of action, it is hoped that the legislatures will see it as a warning that the problem has reached maturity and requires immediate attention.

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153. Epstein, *supra* note 89, at 661.