Texas Asbestos Claims and Market Share Liability: New Remedy for an Old Tort.

John B. Mileno Jr.

COMMENTS

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I. INTRODUCTION

There are approximately three thousand plaintiffs currently engaged in litigation regarding asbestos related diseases in the Eastern District of Texas alone.[1] The majority will not be able to recover damages for inju-

1. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1354 (E.D. Tex. 1981). The number is due mainly to the number of petrochemical plants and shipyards in this region. *Id.* at 1354.

ries caused by the failure of asbestos manufacturers to adequately warn of the dangerousness of their product because they are unable to identify which specific manufacturer's asbestos particle invaded their lungs.[2] Although an individual injured by a product may seek recovery from the manufacturer under various theories,[3] a theory often relied on by plaintiffs in asbestos litigation is strict products liability.[4] The purpose of this comment is to familiarize the reader with asbestos litigation in Texas and the use of "market share" liability.[5] While the author does not purport to have treated all aspects of the asbestos problem, an attempt has been made to address the more troublesome issues and propose a remedy to facilitate the disposal of asbestos plaintiffs' claims.

II. Strict Products Liability in Texas

The Texas Supreme Court first recognized a cause of action for prod-

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2. *See id.* at 1354. Generally, the plaintiff must identify the defendant as the manufacturer or seller of the product that injured him. Failure to do so has proven fatal to the plaintiff's suit. *See* Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); 1 R. Hursh & H. Bailey, American Law Of Products Liability § 1:41 (2d ed. 1974). The inability to identify a particular manufacturer or seller has arisen with other products. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (plaintiff unable to identify manufacturer of DES); Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 358 (E.D.N.Y. 1972) (in many instances manufacturer of cap unknown); Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133 (plaintiff cannot identify manufacturer), *cert. denied*, 449 U.S. 912 (1980).

3. *See* 1 R. Hursh & H. Bailey, American Law Of Products Liability §§ 1:3-:5 (2d ed. 1974). In many jurisdictions, an injured plaintiff may sue in negligence, for breach of warranty, or strict products liability. *Id.* § 1:5.

4. *See* Restatement (Second) of Torts § 402A (1965). Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

5. Market share liability has been proposed for use in those cases in which the plaintiff is unable to identify the manufacturer. Once the plaintiff proves exposure to the product and damages, the burden of proving causation shifts to the defendants. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46, *cert. denied*, 449 U.S. 912 (1980). *But see id.* at 938-43, 163 Cal. Rptr. at 146-51 (Richardson, J., dissenting) (arguing against soundness of majority's market share remedy).

ucts liability based on implied warranty over forty years ago.[6] The court held that neither privity of contract nor proof of negligence were necessary for the plaintiff to recover.[7] Twenty-five years later, in *McKisson v. Sales Affiliates, Inc.*,[8] the court adopted section 402A of the Restatement (Second) of Torts.[9] For section 402A to apply, the defendant must be a seller of goods.[10] Additionally, the plaintiff must prove, regardless of negligence, that the defendant's product was unreasonably dangerous to the user or consumer.[11] Thus, the focus of a strict liability action is not the acts or omissions of the manufacturer, but the product itself.[12] Furthermore, the plaintiff must be a user or consumer[13] and must prove a defect in either manufacturing, marketing or design.[14]

Marketing products which are viewed as unavoidably unsafe because there is both utility and risk in their use may give rise to liability when the manufacturer fails to adequately warn the consumer or user of the

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6. *See* Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 610, 164 S.W.2d 828, 829 (1942). The Texas Supreme Court held the defendant meat packer liable, regardless of negligence, for the plaintiff's injuries resulting from ingestion of contaminated sausage. *Id.* at 612, 164 S.W.2d at 829. The basis of liability was "an implied warranty imposed by operation of law as a matter of public policy." *Id.* at 612, 164 S.W.2d at 829.

7. *See id.* at 617, 620, 164 S.W.2d at 832, 834. Privity applies only when the suit is based upon breach of contract. Liability for the sale of contaminated food is imposed by operation of law. *Id.* at 617, 164 S.W.2d at 831-32.

8. 416 S.W.2d 787 (Tex. 1967).

9. *See id.* at 789. The court was of the opinion that the rule in *Decker*, essentially section 402A of the Restatement, logically applied to defective products. *Id.* at 789.

10. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965). Section 402A "applies to any person engaged in the business of selling products." *Id.* A "seller" includes distributors, retailers, and manufacturers. *See, e.g.*, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 790 (Tex. 1967) (section 402A embraces distributors); Griggs Canning Co. v. Josey, 139 Tex. 623, 634, 164 S.W.2d 835, 840 (1942) (retailers classified as sellers); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942) (manufacturers classified as sellers). Goods are "any product[s] sold in the condition, or substantially the same condition, in which [they are] expected to reach the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A comment d (1965).

11. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967) (section 402A imposed regardless of negligence). The Restatement defines unreasonably dangerous as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

12. *See* Gonzales v. Catapillar Tractor Co., 571 S.W.2d 867, 871 (Tex. 1978).

13. The consumer need not have purchased the item. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment *l* (1965). He may be a family member, guest, employee, or donee. *Id.* A "user" is one who passively enjoys the product. *Id.*

14. *See* Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). The three defects recognized by section 402A are those of manufacturing, marketing, and design. *See generally* Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 25-32 (1979).

dangerous nature of the product.[15] The duty of the manufacturer to warn arises when there exists reasonably foreseeable risks in the use of the product.[16] One of the basic requirements a plaintiff must fulfill in a strict liability action is the identification of the manufacturer as the seller of the product that caused his injury.[17] The inability to meet this requirement has prompted many plaintiffs to develop novel theories of apportioning liability.

III. Existing Theories of Recovery

A. *The Alternative Liability Theory*

Generally, in a products liability action, the plaintiff is able to identify a specific product manufactured by the defendant.[18] There have been cases, however, in which the plaintiff has not been able to identify a par-

15. *See* Restatement (Second) Of Torts § 402A comment k (1965). When accompanied by proper directions and warning, an unavoidably unsafe product is not unreasonably dangerous and the manufacturer is not liable for any "unfortunate consequences." *Id.* Usually such products are drugs, chemicals or machinery. *See, e.g.*, Martinez v. Dixie Carriers, Inc., 529 F.2d 457, 465 (5th Cir. 1976) (lack of adequate warning rendered Hytrol-D defective or unreasonably dangerous); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1274 (5th Cir. 1974) (failure to provide warning presented defect in polio vaccine), *cert. denied*, 419 U.S. 1096 (1974); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973) (failure to give adequate warnings rendered asbestos unreasonably dangerous), *cert. denied*, 419 U.S. 869 (1974); *see also* Crocker v. Winthrop Laboratories, Inc., 514 S.W.2d 429, 432-33 (Tex. 1974) (drug cannot be made perfectly safe, but reasonably safe if accompanied by warning); Bituminous Casualty Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868, 873 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (manufacturer of product with high risk of human harm legally obligated to provide warning); Muncy v. Magnolia Chem. Co., 437 S.W.2d 15, 17 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.) (insecticide involved danger to user therefore manufacturer must warn).

16. *See* Foster v. Ford Motor Co., 616 F.2d 1304, 1311 (5th Cir. 1980). One commentator has suggested the duty to warn arises with "foreseeably unreasonable risks." *See* Edgar, *Products Liability in Texas*, 11 Tex. Tech L. Rev. 23, 31 (1979).

17. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (fundamental principle that plaintiff must prove defendant manufactured injury causing product); McCreery v. Eli Lilly & Co., 150 Cal. Rptr. 730, 733 (Ct. App. 1978) (plaintiff has burden of proving defendant's product caused injury); Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 532 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (proof of causation necessary element of strict liability case).

18. *See, e.g.*, Crocker v. Winthrop Laboratories, Inc., 514 S.W.2d 429, 429 (Tex. 1974) (plaintiff able to identify manufacturer of talwin); Bituminous Casualty Co. v. Black & Decker Mfg. Co., 518 S.W.2d 868, 868 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (plaintiff joined specific manufacturer as defendant); Muncy v. Magnolia Chem. Co., 437 S.W.2d 15, 15 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.) (plaintiff joined manufacturer of defective product).

ticular defendant.[19] Illustrative is *Summers v. Tice*,[20] in which the California Supreme Court was confronted with an injured plaintiff who, through no fault of his own, could not identify the defendant responsible for his injury.[21] Rather than dismiss the plaintiff's cause of action, the court held that each joined defendant should bear the burden of proving his act did not cause the plaintiff's injury.[22] This theory of recovery has been referred to as "alternative liability,"[23] and is embodied in section 433B(3) of the Restatement (Second) of Torts.[24]

B. *The Concert of Action Theory*

The "concert of action" theory, set forth in section 876 of the Restatement is also available to plaintiffs when two or more manufacturers are joined in a products liability action.[25] Under this concept, one is liable if he does a tortious act in concert with another, or knowingly renders assistance or encouragement to one whose conduct constitutes a breach of

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19. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (plaintiff unable to identify manufacturer of DES); Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 358 (E.D.N.Y. 1972) (plaintiffs unable to identify manufacturer of blasting caps); Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133 (plaintiff unable to identify manufacturer of DES ingested by her mother), *cert. denied*, 449 U.S. 912 (1980).

20. 199 P.2d 1 (Cal. 1948).

21. *See id.* at 1-2.

22. *See id.* at 5.

23. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136, *cert. denied*, 449 U.S. 912 (1980).

24. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). Section 433B(3) provides:

> 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.

Id. The reason for subsection three is the injustice of allowing defendants to escape liability due to the plaintiff's inability to prove which defendant caused the harm. *See id.* comment f. Plaintiff must still prove that his injury resulted from the tortious acts of two or more defendants. *See id.* comment g.

25. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979). Section 876 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
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> (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
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> (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.

duty to a third person.[26] Additionally, one may be liable if the assistance or encouragement, viewed independently, constitutes a breach of duty.[27] There is no requirement of an express agreement; a mere tacit understanding is sufficient.[28] Even if the defendant could prove the product was not manufactured by him, plaintiff's showing of a tacit understanding would bring the defendant within the purview of section 876.[29] Identification is not an issue. The theory is not applied in cases in which the plaintiff cannot identify the manufacturer.[30] To do so might expose a single manufacturing defendant to liability for the defects permeating an entire industry.[31]

C. *The Enterprise Liability Theory*

A third theory, referred to as both enterprise liability and industry-wide liability,[32] was formulated in *Hall v. E.I. Du Pont De Nemours & Co.*[33] In *Hall*, the plaintiff sued to recover damages for injuries suffered by children who had detonated blasting caps.[34] The plaintiffs joined virtually the entire industry and the trade association, alleging there was a duty to warn of the dangerousness of blasting caps which had been breached by the entire industry.[35] The plaintiffs also claimed industry-wide cooperation among the defendants with regard to the design, manu-

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26. *See id.* comment a. Parties are in concert when they act in accordance with an agreement. *Id.* comment a. The giving of advice or encouragement to one who plans a tortious act renders the giver of such advice or encouragement liable to the injured party. *Id.* comment d. Furthermore, if one gives assistance to or personally participates in, a united effect, that is a breach of duty to a third person, he is liable. *See id.* comment e.

27. *See id.* comment e.

28. *See id.* comment a. The agreement need not be in words, it may be implied from the conduct. *Id.* comment a.

29. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 932-33, 163 Cal. Rptr. 132, 140-41, *cert. denied*, 449 U.S. 912 (1980).

30. *See id.* at 932, 163 Cal. Rptr. at 140. The plaintiff's allegations based on concert of action do not rest on the problem of identification, but a tacit agreement among the defendants. *Id.* at 932, 163 Cal. Rptr. at 140.

31. *See id.* at 933, 163 Cal. Rptr. at 141.

32. *See id.* at 933, 163 Cal. Rptr. at 141. "Enterprise liability" was the plaintiff's terminology for industry-wide liability. *Id.* at 933, 163 Cal. Rptr. at 141.

33. 345 F. Supp. 353 (E.D.N.Y. 1972).

34. *See id.* at 358. The decision is a consolidation of two similar suits. *See id.* at 358 (inability to identify manufacturer was issue in *Chance v. E.I. Du Pont De Nemours & Co.*).

35. *See id.* at 358. There was a possibility, however, that some of the caps were of Canadian manufacture. *Id.* at 379. The plaintiffs did not allege a failure to warn, but a failure to warn adequately. *Id.* at 359. They conceded that the industry, through the trade association, warned users and the general public of the dangers of blasting caps, but claimed that the industry had considered and wrongfully rejected the use of a warning label on blasting caps. *Id.* at 359.

facture, and marketing of blasting caps.[36] As in *Summers*, the plaintiffs were unable to identify a specific defendant.[37] The plaintiffs in *Hall*, therefore, joined the entire blasting cap industry.[38] The court determined that under the circumstances, the defendants should have the burden of proving causation, provided the plaintiffs show the caps had been manufactured by any one of the defendants.[39] The court reasoned that if statistics on blasting cap injuries were compiled by the trade association, the defendants would be better able to allocate risk control measures.[40] The court, however, concluded with a caveat, stating that the application of industry-wide liability should be limited to those industries made up of only a few manufacturers.[41]

IV. *Sindell v. Abbott Laboratories*: THE MARKET SHARE LIABILITY THEORY AND DES LITIGATION

In *Sindell v. Abbot Laboratories*,[42] the plaintiffs, in a class action suit, sought to recover from the defendant drug manufacturers for injuries they allegedly received due to their mothers' ingestion of diethylstilbestrol (DES), a purported anti-abortificant.[43] The plaintiffs were able to prove that the defendants manufactured DES between 1941 and 1971 and that it was prescribed to their mothers, when pregnant, to prevent miscarriage.[44] They further established that all the defendants manufactured the drug from the same basic formula, shared test data, and marketed and promoted DES as a safe, effective drug.[45] The plaintiffs sought recovery under theories of negligence, strict liability, and breach of express and implied warranties.[46]

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36. *See id.* at 359.

37. *See id.* at 379.

38. *See id.* at 358.

39. *See id.* at 379.

40. *See id.* at 378.

41. *See id.* at 378. The court stated that what would be fair and feasible for an industry of few producers might be unfair if applied to an industry of many producers. *Id.* at 378.

42. 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

43. *See id.* at 925, 163 Cal. Rptr. at 133. DES is a synthetic form of estrogen. *See* PHYSICIANS' DESK REFERENCE 1055 (35th ed. 1981).

44. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980). The Food and Drug Administration authorized DES for use in preventing miscarriage in 1947. *See generally* P. RHEINGOLD, DRUG LITIGATION 107 (3d ed. 1981).

45. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925-26, 163 Cal. Rptr. 132, 133-34, *cert. denied*, 449 U.S. 912 (1980).

46. *See id.* at 925-26, 163 Cal. Rptr. at 133-34. The plaintiffs alleged a separate cause of action for negligence in failure to test the drug. *Id.* at 926, 163 Cal. Rptr. at 134. Furthermore, the plaintiffs alleged causes of action based on false and fraudulent representations,

The California Supreme Court considered and rejected the three bases for trying the action urged by the plaintiffs.[47] The plaintiffs encountered a fundamental problem in that they could not prove a particular manufacturer's product was responsible for any one plaintiff's injury.[48] Several factors contributed to the problem of identification. For example, the latency period for the onset of symptoms revealing either adenosis[49] or adenocarcinoma[50] is, at a minimum, ten to twelve years from the date of exposure.[51] Moreover, most doctors prescribed DES generically, and pharmacists generally filled these prescriptions with whatever brand they had in stock at the time.[52] The plaintiff's theory of recovery based on alternative liability was rejected by the court because, unlike the circumstances in *Summers*, the defendants were in no better position to identify the tortfeasor than were the plaintiffs.[53] In *Summers*, the only two possi-

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misbranding, conspiracy, and "lack of consent." *Id.* at 926, 163 Cal. Rptr. at 134.

47. *See id.* at 928, 163 Cal. Rptr. at 136. The plaintiff's complaint suggested three theories under which the action could be tried—alternative liability, concert of action, and industry-wide liability. *Id.* at 928, 163 Cal. Rptr. at 136. The concert of action theory was rejected because the plaintiff's allegations did not state a cause of action. *Id.* at 932, 163 Cal. Rptr. at 140. The plaintiff's alleged a failure to test adequately, and other acts or omissions. *Id.* at 932, 163 Cal. Rptr. at 140. The theory of industry-wide liability met with disfavor because the court in *Hall* expressly stated that it should be used only when the industry involved was relatively small. *Id.* at 935, 163 Cal. Rptr. at 143; *see also* Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 378 (E.D.N.Y. 1972) (possibility of manifest unreasonableness if applied to decentralized industries).

48. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980).

49. *See id.* at 925, 163 Cal. Rptr at 133. Adenosis is a benign, pre-cancerous vaginal or cervical growth. *Id.* at 925, 163 Cal. Rptr. at 133. The condition must be checked twice a year by biopsy or calposcopy. *Id.* at 925, 163 Cal. Rptr. at 133; *see also* Celebre, *Management of Vaginal Adenosis at the Hospital of the University of Pennsylvania*, 16 J. OF REPRODUCTIVE MED. 293, 293 (1976) (article presents techniques employed in diagnosis and follow up); Herbst, *Problems in the Examination of the DES-Exposed Female*, 46 OBST. AND GYNEC. 353, 353-55 (1975) (discusses various presentations and problems of diagnosis).

50. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980). Adenocarcinoma is a "fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading." *Id.* at 925, 163 Cal. Rptr. at 133; *see also* Herbst, *Adenocarcinoma of the Vagina*, 284 NEW ENGLAND J. OF MED. 878, 878-81 (1974) (discusses diagnosis and treatment of vaginal adenocarcinoma). *See generally* Roth & Hornback, *Clear Cell Adenocarcinoma of the Cervix in Young Women*, 232 J.A.M.A. 768 (1975) (discusses diagnosis and treatment of cervical adenocarcinoma).

51. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980).

52. *See id.* at 926, 163 Cal. Rptr. at 134.

53. *Compare* Sindell v. Abbott Laboratories, 607 P.2d 924, 930-31, 163 Cal. Rptr. 132, 138-39, *cert. denied*, 449 U.S. 912 (1980) (two hundred possible tortfeasors not all joined) *with* Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948) (both possible tortfeasors joined). The only viable defense would be non-manufacture of the drug during the period in question. *See*

ble tortfeasors were joined as defendants.[54] In *Sindell*, there were over two hundred manufacturers of DES and only ten were joined.[55] Thus, the court believed the possibility the guilty tortfeasor would escape liability was too great to allow recovery under that theory.[56] Faced with the spectre of innumerable remediless plaintiffs[57] the California Supreme Court formulated a new theory of recovery.[58] Although neither party could identify the manufacturer, the court concluded the loss was better borne by the defendants.[59] In order to prevail under this theory, the plaintiff must join a substantial share of the product's manufacturers.[60] If this can be done, shifting the burden of proving causation is reasonable because there is greater chance the actual tortfeasor has been joined.[61] The defendants who could not exculpate themselves would then be liable for a percentage of the judgment commensurate with their percentage of the market.[62]

Sindell v. Abbott Laboratories, 607 P.2d 924, 930, 163 Cal. Rptr. 132, 138, *cert. denied*, 449 U.S. 912 (1980). Though a manufacturer may not be in a better position to identify the tortfeasor, he may be able to exonerate himself. *Id.* at 930, 163 Cal. Rptr. at 138.

54. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 930-31, 163 Cal. Rptr. 132, 138-39, *cert. denied*, 449 U.S. 912 (1980).

55. *See id.* at 926, 163 Cal. Rptr. at 134. Of those ten, only five appealed. *Id.* at 926, 163 Cal. Rptr. at 134.

56. *See id.* at 931, 163 Cal. Rptr. at 139. The possibility that any of the five of a possible two hundred defendants supplied the drug was so remote, the court stated that to shift the burden to the defendants under the *Summers* rule would be unfair. *Id.* at 931, 163 Cal. Rptr. at 139. The policy reasons that support the *Summers* rule are lacking in *Sindell*. The *Summers* court determined that as between plaintiff and defendants, the latter were in a better position to know who the tortfeasor was. *See* Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948). In *Sindell*, however, the manufacturers were in no better position than the plaintiffs on the issue of identification. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 930, 163 Cal. Rptr. 132, 138, *cert. denied*, 449 U.S. 912 (1980).

57. *See id.* at 936, 163 Cal. Rptr. at 144. If the court was confined to *Summers* and *Hall*, or if it required the plaintiffs to identify the manufacturer, the plaintiffs would be barred from recovery. *Id.* at 936, 163 Cal. Rptr. at 144.

58. *See id.* at 936-37, 163 Cal. Rptr. at 144-45. The basis of the market-share theory is public policy. *Id.* at 936-37, 163 Cal. Rptr. at 144-45. The court looked to Justice Traynor's dissent in Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 443-44 (Cal. 1944) for guidance. Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 *cert. denied*, 449 U.S. 912 (1980); *see also* RESTATEMENT (SECOND) OF TORTS § 433B comment h (1965) (suggests possibility of modifying alternative liability rule to provide for unforeseen possibilities).

59. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 449 U.S. 912 (1980). The court restated the *Summers* rule that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury." *Id.* at 936, 163 Cal. Rptr. at 144.

60. *See id.* at 937, 163 Cal. Rptr. at 145.

61. *See id.* at 937, 163 Cal. Rptr. at 145.

62. *Id.* at 937, 163 Cal. Rptr. at 145. Thus, each defendant's liability will correspond to its percentage of the market. *Id.* at 937, 163 Cal. Rptr. at 145. The defendants may also

The court did, however, recognize the shortcomings of this new theory. The passage of time renders the accurate determination of market share nearly impossible due to the destruction of records and failed memories.[63] Thus, slight discrepancies between market share and actual liability are inevitable, leaving much of a jury's determination of the percentage of liability to speculation.[64]

A. *Strict Liability Under Borel v. Fibreboard Paper Products*

Clarence Borel had been an insulation worker at various locations in Texas and was exposed to heavy concentrations of asbestos dust over his thirty-three year career.[65] Of the eleven original defendants joined in the suit, four settled before trial,[66] and a fifth received an instructed verdict because the plaintiff was unable to prove exposure to his product.[67] The trial proceeded against the remaining six defendants,[68] resulting in a verdict for the plaintiff of over $70,000.[69] The complaint alleged negligence, gross negligence, breach of warranty, and strict liability in the "failure to take reasonable precautions or to exercise reasonable care to warn . . . of the danger."[70] The defendants obtained a jury finding that Borel was contributorily negligent.[71] Nevertheless, the jury found all the defendants lia-

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cross-claim and implead manufacturers who may have supplied the product in question, but were not joined as defendants. *Id.* at 937, 163 Cal. Rptr., at 145.

63. *See id.* at 937, 163 Cal. Rptr. at 145. An example of the problems a plaintiff may face in identifying a particular defendant is found in Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

64. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980). There is no basis in the opinion for the assertion that any discrepencies would be minor. *Id.* at 937, 163 Cal. Rptr. at 145; *see also* Summers v. Tice, 199 P.2d 1,5 (Cal. 1948) (jury must apportion damages).

65. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Borel testified that, in his work as an insulator, his clothes were continually covered in asbestos dust. *Id.* at 1082. Furthermore, he blew asbestos dust out of his nostrils "by handfuls" at the end of a day. *Id.* at 1082.

66. *See id.* at 1086 n. 17.

67. *See id.* at 1086 n. 17. Borel did not have a problem establishing the identity of the manufacturers of the asbestos to which he was exposed. *See id.* at 1102-03.

68. *See id.* at 1086.

69. *See id.* at 1086. The trial court reduced this amount by almost $21,000, the amount received from the four defendants who settled before the trial. *Id.* at 1086.

70. *See id.* at 1086. The complaint further alleged failure to warn as to proper wearing apparel and protective equipment, failure to test asbestos to determine the danger of use, and failure to remove the products from the market once it was known that they would cause asbestosis. *Id.* at 1086.

71. *See id.* at 1086. The jury found that all but two of the defendants were negligent, but that none were grossly negligent. *Id.* at 1086.

ble on the strict liability issue and returned a verdict for the plaintiff.[72]

The product defect alleged by Borel was marketing the product without a warning relating to the danger of inhaling asbestos fibers.[73] Applying Texas law, the Fifth Circuit Court of Appeals found that manufacturers are held to the knowledge and skill of experts and are expected to keep abreast of scientific discoveries.[74] Moreover, the danger of asbestos was known to the defendants thus there were foreseeable risks.[75] Since the risks were foreseeable, the defendants had a duty to warn which they breached.[76] Although Borel could not prove the extent of exposure or the precise product that caused his disease, he was able to prove that he had been exposed to the products of all the defendants.[77] The court concluded that the Texas Supreme Court's decision in *Landers v. East Texas Salt Water Disposal Co.*[78] did not bar the plaintiff's recovery merely because

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72. *See id.* at 1086. The fact that the general verdicts were inconsistent with one another is of no consequence. *See* Dunn v. United States, 284 U.S. 390, 393 (1932).

73. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Under Texas law, a product is defective if it is unreasonably dangerous to the user or consumer, and lacks an adequate warning. *See* Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801, 804 (Tex. 1978); Crocker v. Winthrop Laboratories, 514 S.W.2d 429, 433 (Tex. 1974). Section 402A of the Restatement (Second) of Torts provides that when a manufacturer has knowledge, or should have knowledge, of the presence of a danger in his product, he must provide an adequate warning. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965). Even if an "unavoidably unsafe product" is marketed because its utility outweighs its risks, the seller still has a duty to warn of those risks and failure to do so "renders the product unreasonably dangerous." Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

74. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Application of this standard enables the trier of fact to determine whether the manufacturer knew or should have known of the danger and whether he was negligent in failing to warn the ultimate user or consumer. *Id.* at 1089. Further, the manufacturer has a duty to inspect and test a product before marketing it so that, if it is unavoidably unsafe, it may be made available to the public with adequate warnings. *Id.* at 1089-90.

75. *See id.* at 1092-93. The court referred to its discussion of the history of asbestos and related diseases. *See id.* at 1083-85 nn. 1-16. Based on the evidence, the jury was entitled to find foreseeable risks existed. *Id.* at 1093.

76. *See id.* at 1093. "Here the defendants gave no warning at all." *Id.* at 1093.

77. *See id.* at 1094. Two defendants claimed they could not be liable because the plaintiff was not exposed to their products until the mid-1960's. The court referred to the medical evidence establishing a five to ten year latency period and held that even recent exposures could have aggravated Borel's condition. *Id.* at 1094.

78. 151 Tex. 251, 248 S.W.2d 731 (1952). Landers joined the East Texas Salt Water Disposal Company and Sun Oil Company seeking to recover damages for the pollution of a small lake maintained on his property. *Id.* at 252-53, 248 S.W.2d at 731-32. Plaintiff alleged that two separate pipelines, each owned by one defendant, ruptured on April 1, 1949 and the ensuing leakage drained into his lake and killed all the fish. *Id.* at 252-53, 248 S.W.2d at 731-32. The defendants' pleas in abatement, asserting misjoinder of parties, were granted,

he could not apportion liability.[79] The defendants, therefore, were held jointly and severally liable.[80]

B. The Similarity of DES and Asbestos Litigation

DES was not officially identified as a dangerous drug until 1971.[81] Its use as an anti-abortificant was criticized by some doctors from the time it was introduced for that purpose.[82] Not until the incidence of clear-cell adenocarcinoma, considered a rare cancer, began to rise in the late 1960's was a link established between the disease and *in utero* exposure to DES.[83] Asbestos, on the other hand, had been shown to be harmful as early as the mid-1930's.[84] It has been linked to the diseases of asbestosis and mesothelioma.[85] Like clear-cell adenocarcinoma in DES daughters, these diseases take from ten to twenty years to become manifest.[86] The asbestos fiber remains in the lung, so that a single exposure may result in

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and the trial court ordered a severance, requiring plaintiff to replead. *Id.* at 253, 248 S.W.2d at 732. The plaintiff refused to replead and his action for damages was, therefore, dismissed. *Id.* at 253, 248 S.W.2d at 732. The pleas in abatement were granted in light of Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Tex. Comm'n App. 1930, holding approved). Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 254, 248 S.W.2d 731, 733 (1952). The rule in *Robicheaux* provided "that an action at law for damages for torts cannot be maintained against several defendants jointly, when each acted independently of the others and there was no concert or unity of design between them." Sun Oil Co. v. Robicheaux, 23 S.W.2d 713, 715 (Tex. Comm'n. App. 1930, holding approved). Thus, the plaintiff had to prove the amount of damage caused by each defendant. *Id.* at 715. The Texas Supreme Court in *Landers* noted that *Robicheaux* was a commission of appeals decision and the supreme court did not adopt the opinion of the commission. *See* Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 254, 248 S.W.2d 731, 733 (1952). The court expressly overruled *Robicheaux*, stating when "the tortious acts of two or more wrongdoers join to produce an indivisible injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit." *Id.* at 256, 248 S.W.2d at 734.

79. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1095 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

80. *See id.* at 1095.

81. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980); U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, FDA DRUG BULLETIN: DIETHYLSTILBESTROL CONTRAINDICATED IN PREGNANCY, November 1971.

82. *See* A. Herbst & H. Bern, *Introduction and Background*, in DEVELOPMENTAL EFFECTS OF DIETHYLSTILBESTROL (DES) IN PREGNANCY 1 & n. 3 (1981).

83. *See* A. Herbst, *The Epidemiology of Vaginal and Cervical Clear Cell Adenocarcinoma*, in DEVELOPMENTAL EFFECTS OF DIETHYLSTILBESTROL (DES) IN PREGNANCY 63, 64-69 (1981).

84. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

85. *See id.* at 1083-84.

86. *See id.* at 1084.

either of the two diseases.[87] Due to the long latency period, there is, as with DES, a problem of identification of the tortfeasor.[88] This problem, however, usually exists for only one of two types of asbestos workers.[89] Generally, the plant worker is able to identify the manufacturer of the material to which he has been exposed.[90] It is the insulation worker, who may work in several plants and use several brands of asbestos insulation over a long period of time, that has a problem identifying the manufacturer.[91] Both DES and asbestos litigation are predicated on the same principle—the defendants knew or should have known that the product was dangerous.[92]

Borel is the fountainhead from which all asbestos litigation in Texas flows. The fact that there are many different plaintiffs, and only a few recurring defendants, has given rise to plaintiffs urging collateral estoppel on the issue of dangerousness of asbestos.[93] In effect, plaintiffs have argued that defendants who were a party in *Borel* are estopped from denying liability.[94] This argument has met with a favorable response in federal district courts, but has yet to be upheld on appeal.[95]

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87. *See id.* at 1083. Borel and his fellow employees thought the fibers dissolved in their lungs. *Id.* at 1082.

88. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981).

89. Telephone interview with Larry Cain, Esq., engaged in asbestos litigation in Sherman, Texas (Feb. 3, 1982).

90. *See, e.g.,* Migues v. Fibreboard Corp., 662 F.2d 1182, 1184-85 (5th Cir. 1981) (plaintiff able to establish exposure to defendant's product); Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155, 156-57 (8th Cir. 1975) (plaintiff injured by defendant's products); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973) (plaintiff established exposure to defendants' products), *cert. denied,* 419 U.S. 869 (1974).

91. Telephone interview with Larry Cain, Esq., engaged in asbestos litigation in Sherman, Texas (Feb. 3, 1982).

92. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1105 (5th Cir. 1973), *cert.denied,* 419 U.S. 869 (1974). *Compare* Migues v. Fibreboard Corp., 662 F.2d 1182, 1183-84 (5th Cir. 1981) (plaintiff claims asbestos unreasonably dangerous) *with* Sindell v. Abbott Laboratories, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134 (plaintiff alleged failure to warn in DES case), *cert. denied,* 449 U.S. 912 (1980).

93. *See, e.g.,* Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 542 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1360 (E.D. Tex. 1981); Flatt v. Johns-Manville, 488 F. Supp. 836, 839 (E.D. Tex. 1980) (plaintiff invoked offensive collateral estoppel).

94. *See, e.g.,* Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 542 (D. Minn. 1982) (plaintiff relied on *Borel* in invoking collateral estoppel); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1360 (E.D. Tex. 1981) (*Borel* is basis for granting collateral estoppel); Flatt v. Johns-Manville, 488 F. Supp. 836, 839 (E.D. Tex. 1980) (plaintiffs invoke *Borel* for imposition of collateral estoppel).

95. *See* Migues v. Fibreboard Corp., 662 F.2d 1182, 1185 (5th Cir. 1981).

C. *Borel Misinterpreted*

In *Migues v. Fibreboard Corp.*,[96] the widow of a deceased insulation worker joined fourteen defendants in a wrongful death action.[97] The question to be determined in *Migues* was whether *Borel* could be read as holding asbestos products were unreasonably dangerous as a matter of law.[98] The effect of such a holding would be the preclusion of the defendants, who had been joined in *Borel*, from relitigating the issue of dangerousness of asbestos.[99] The court declined to address the issue since the appellant was not a party to *Borel*.[100] Instead, attention was focused on the stare decisis affect of *Borel* on non-*Borel* defendants given by the district court.[101] In rejecting this theory of preclusion, the court of appeals held the only determination made in *Borel* was that the jury's findings were consistent with the evidence presented.[102] The court held Judge Parker misinterpreted *Borel* when he stated that the decision held asbestos was unreasonably dangerous as a matter of law.[103]

D. *Anticipating the Adoption of Market Share Apportionment in Texas*

Hardy v. Johns-Manville Sales Corp.[104] is presently the only case suggesting the use of market share information in Texas.[105] As in *Migues*, one of the issues raised by the defendants was the question of collateral estoppel.[106] The *Hardy* court upheld its earlier decision that collateral estoppel was correctly applied.[107] The pertinent aspects of *Hardy* are those

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96. 662 F.2d 1182 (5th Cir. 1981).

97. *See id.* at 1183. Of the fourteen defendants, thirteen settled with plaintiff before trial for $400,000. The remaining defendant went to trial on the merits. The jury awarded a three million dollar verdict for the plaintiff that was reduced by the judge to one and one-half million dollars. *Id.* at 1183.

98. *See id.* at 1183.

99. *See id.* at 1185.

100. *See id.* at 1185.

101. *See id.* at 1185. The trial court's interpretation of *Borel*, that all asbestos products are unreasonably dangerous as a matter of law, was necessary for invoking stare decisis. *Id.* at 1186. Since the defendants had never been found to have sold or manufactured asbestos, the plaintiffs were required to prove that they had. *Id.* at 1186.

102. *See id.* at 1189.

103. *See id.* at 1187. The court stated that "upon reviewing *Borel*, we must conclude that there is no such decisis to stare." *Id.* at 1187.

104. 509 F. Supp. 1353 (E.D. Tex. 1981).

105. *See id.* at 1356.

106. *See id.* at 1360.

107. *See id.* at 1360-61. The court further stated that Texas recognized the "identity of interest" rule, thus collateral estoppel could be invoked against non-*Borel* defendants. *Id.* at 1361. The plaintiffs in *Hardy* have filed an interlocutory appeal with the Fifth Circuit Court

which relate to market share apportionment of liability.[108] The court determined that it was necessary to explain its view of the application of market share apportionment in Texas.[109] The court recognized that *Erie Railroad Co. v. Tompkins*[110] required federal courts to apply state substantive law to the cause before them; however, there has been no multiple defendant asbestos case in Texas state courts.[111] The court refused to wait for the Texas Supreme Court to rule on market share because it was unknown when, if ever, such a case would reach the court.[112] Therefore, in the absence of a decision from a Texas court, the federal court was compelled to prognosticate as to how Texas' courts would rule were they faced with the issue.[113]

V. THE INDICIA FOR APPLYING *Sindell* in Texas

A. *Concurrent Liability*

The *Hardy* court noted there were two factors which, when considered together, indicate the probability of Texas adopting a market share concept.[114] The first factor is the application of concurrent liability in Texas.[115] Concurrent liability permits concurrent tortfeasors to be held jointly and severally liable for a plaintiff's injuries.[116] The court's rationale was that *Sindell* is based on *Summers*, in that the plaintiff in both

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of Appeals. *See* Migues v. Fibreboard Corp., 662 F.2d 1182, 1187 n. 10 (5th Cir. 1981).

108. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981). The court granted two motions urged by defendant Forty-Eight Insulations. Forty-Eight filed a motion for leave to file a cross-action based on market share, and motion for a leave to conduct discovery. *Id.* at 1355. The court recognized that Forty-Eight sought the benefit of market share for apportionment only, and not liability. *Id.* at 1356. Leave to conduct discovery should only be granted if it results in admissible, probative evidence. In this case, Judge Parker believed it would probably result in judicial economy. *Id.* at 1356.

109. *See id.* at 1356. "[T]he question is too serious to be disposed of in a one-page order." *Id.* at 1356. One defendant, however, claimed any discussion on market share would violate the case or controversy rule and, in effect, be an advisory opinion. The court pointed out, however, that defendant Johns-Manville was interested in the court's view. *Id.* at 1356.

110. 304 U.S. 64 (1938).

111. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1356 (E.D. Tex. 1981).

112. *See id.* at 1356. The *Erie* doctrine presents an ironic problem. On the one hand, a federal court is required to apply state law. On the other hand, as Judge Parker noted, these are "true diversity cases" and, therefore, there may never be an asbestos case filed in Texas courts. *See id.* at 1356.

113. *See id.* at 1356-57.

114. *See id.* at 1359.

115. *See id.* at 1359.

116. *See id.* at 1359.

cases was unable to positively identify the tortfeasor.[117] Moreover, since Texas recognized concurrent liability in the *Landers* decision in which the Texas Supreme Court held that a plaintiff could proceed to judgment even if he were unable to apportion damages between the defendants,[118] Judge Parker concluded that *Landers* and *Summers* are equivalent.[119] Texas, therefore, would modify *Landers* in the same manner California modified *Summers* to reach the *Sindell* result of market share liability.[120] The district court concluded that, like *Summers*, the *Landers* rule was too broad to be applied in an unchanged form.[121] To avoid the possibility of the responsible DES manufacturer escaping liability, the California Supreme Court, in *Sindell*, required the plaintiff to join "the manufacturers of a substantial share of the DES" market.[122] The *Hardy* court's reasoning implies that the Texas Supreme Court would impose a similar requirement.

The argument that Texas would modify *Landers* to reach the same result, however, is tenuous at best. The only rational given by the *Hardy* court to support this proposition is the recognition of *Landers* as the law of Texas by the Fifth Circuit Court of Appeals in *Borel*.[123] From this premise, the court takes a prodigous leap in logic, and states, "*Landers* and

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117. *See id.* at 1359. *Compare* Sindell v. Abbott Laboratories, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134 (plaintiff unable to identify manufacturer of DES ingested by mother), *cert. denied*, 449 U.S. 912 (1980) *with* Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948) (plaintiff unable to identify which defendant guilty of negligence).

118. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Tex. 1981).

119. *See id.* at 1359.

120. The *Sindell* court modified the *Summers* rule by requiring the plaintiff to join a "substantial share" of the market. The purpose of the modification was to insure that one innocent defendant was not held liable for the plaintiff's injuries. Texas has a similar rule stated in the *Landers* decision; that is, when the plaintiff cannot identify the tortfeasor in a group of possible tortfeasors, the defendants must exculpate themselves to avoid liability. *See* Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 258, 248 S.W.2d 731, 735 (1952). The *Hardy* court determined that if the Texas Supreme Court were confronted with facts similar to those in *Sindell*, it would also modify *Landers* by requiring the plaintiff to join the vast majority of the manufacturers so as to decrease the chance that the guilty defendant would escape liability. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Tex. 1981).

121. *Compare* Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948) (plaintiff joined every possible tortfeasor) *with* Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 252-53, 248 S.W.2d 731, 731-32 (1952) (plaintiff joined both tortfeasors).

122. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 449 U.S. 912 (1980).

123. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Tex. 1981); *see also* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1095 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

Summers are for the court's purposes precedential equivalents."[124] Without further explanation, the court's reasoning leaves too much to conjecture. Specifically, the court never states what its purposes were. The court ended its discussion on this issue by stating, "[t]herefore, it is not unwarranted to assume . . . Texas . . . would reach a *Sindell* result."[125] Such a conclusion, however, rests on mere supposition rather than sound legal precedent.[126]

B. *Comparative Causative Fault*

The second factor identified in *Hardy* was a movement in Texas to adopt comparative causative fault as an element of contribution in strict liability cases.[127] There is some debate as to whether the Texas Legislature or Supreme Court will act first on this issue.[128] Nevertheless, the court concluded that enterprise liability is "the only true means of comparative fault for asbestos-related cases . . . " and, therefore, *Sindell* would find support in the Texas Supreme Court.[129]

VI. Market Share Liability: Some Unanswered Problems

When one considers the three thousand plaintiffs in East Texas, the urgent need to provide to those plaintiffs a remedy and at the same time streamline the litigation process becomes readily apparent.[130] The Supreme Court of California sought to provide the plaintiffs in *Sindell*, and other plaintiffs similarly situated, a mechanism which would facilitate recovery for injuries they have suffered.[131] While this is a noble and necessary goal, the opinion suffers from some rather obvious infirmities.

The most significant omission from the *Sindell* majority opinion is a definition of the phrase "substantial percentage."[132] The court noted that the plaintiff's class had joined approximately ninety percent of the DES market, yet refused to decide whether that was a sufficient minimum percentage.[133] Assuming the market share liability approach is valid, there is

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124. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Tex. 1981).

125. *Id.* at 1359.

126. *See id.* at 1357, 1359.

127. *See id.* at 1359.

128. *See id.* at 1359 n. 16.

129. *See id.* at 1359.

130. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981).

131. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 449 U.S. 912 (1980).

132. *See id.* at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).

133. *See id.* at 937, 163 Cal. Rptr. at 145.

still no determination as to whether the plaintiff or defendant is responsible for proving the particular market share, nor is there a standard as to what formula should be used.[134] The plaintiff in a market share action should be required to join, if possible, all of the manufacturers of the product in question. In the case of DES or asbestos, the plaintiff may be unable to determine the identity or existence of all the manufacturers.[135] In such a situation, joining seventy-five to eighty percent of the product's manufacturers should suffice to give the plaintiff standing.[136] With this percentage, the chances that the guilty tortfeasor would escape liability are small. An additional factor is the ability of joined defendants in Texas to implead other defendants of which the plaintiff may be unaware.[137] The plaintiff should prove, by clear and convincing evidence, that he has joined the requisite number of defendants before being allowed to proceed with the litigation.

The *Sindell* court failed to reach the issue of what geographic area should be utilized in determining market share. Whether the *Sindell* court's observation that the plaintiffs had joined ninety percent of the market included markets without the state's boundaries is uncertain.[138] To illustrate, assume a manufacturer sells in only one area of the country, and that area recognizes market share liability.[139] If he is made a party to a products liability action, the effect of fixing liability in this fashion will result in far more than a mere "discrepancy between liability and market

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134. *See id.* at 937-38 & n. 29, 163 Cal. Rptr. at 145-46 & n. 29. One may presume that since the burden of proving causation has been shifted to the defendants, so will the burden of proving market share. *See id.* at 931, 163 Cal. Rptr. at 139. The defendants should bear the burden for the same reason the *Summers* rule shifts the burden of proof of causation; the defendant is usually in a better position to know. Even if they do not, they may be able to prove they did not manufacture the product. *See id.* at 930, 163 Cal. Rptr. at 138.

135. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 358 (E.D.N.Y. 1972); Sindell v. Abbott Laboratories, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980).

136. *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 996 (1978).

137. *See, e.g.*, Riley v. Industrial Fin. Serv. Co., 157 Tex. 306, 310, 302 S.W.2d 652, 655 (1957) (if less than all tortfeasors joined, those joined may bring in others); Fishel's Fine Furniture v. Rice Food Mkt., 474 S.W.2d 539, 541 (Tex. Civ.App.—Houston [14th Dist.] 1971, writ dism'd) (defendant may file cross-action against non-party); Fireman's Fund Ins. Co. v. McDaniel, 327 S.W.2d 358, 373 (Tex. Civ. App.—Beaumont 1959, no writ) (court has discretion regarding joinder of additional parties); *see also* TEX. R. CIV. P. 37 (rule on impleading).

138. *Cf.* Sindell v. Abbott Laboratories, 607 P.2d 924, 937-38 & n. 29, 163 Cal. Rptr. 132, 145-46 & n. 29 (geographic area recognized as unaddressed by defendants), *cert. denied*, 449 U.S. 912 (1980).

139. *Cf. d.* at 937, 163 Cal. Rptr. at 145 (causation measured by percentage of market), *cert. denied*, 449 U.S. 912 (1980).

share."[140] There is the additional problem of a manufacturer that markets his product nationwide, but has a substantially higher volume in one area of the country. If market share is recognized as a concept nationwide, and the scope of market share analysis is limited to state boundaries, then the fact that a particular state or region is very profitable for a manufacturer subjects him to increased potential liability.[141] A firm's choice of market strategy, therefore, may work to its detriment. Thus, without widely accepted, articulable standards for fixing liability based on market share, the market share approach will penalize firms that profit from placing their products in interstate commerce. To assure the most accurate result, the scope of market share analysis must be limited in both geographic area and time. If a defendant can show that he never sold in the area in question or that his product was never distributed in the area, then he has exculpated himself from liability. This is in keeping with the requirement of joining a substantial share in the first instance—to increase the chance that only those who manufactured the product that injured the plaintiff are held liable.[142]

The *Sindell* court also neglected to address the issue of limiting the scope of liability in relation to time. If the litigation involves a defective product with a long latency period, as does DES, the relevant market should be established at the time of initial exposure, and not when the cause of action accrues years later.[143] Thus the scope would be limited to the period during which plaintiff was exposed to the product. If a defendant can show that he was either not manufacturing the product at the time, or that it was not distributed in the area at the time, he should be dismissed from the action. The parameters defining the relevant market should include the geographic area in which the litigation takes place, and the period of time during which the plaintiff was exposed to the defendant's product. The relationship between time and place is extremely important in the accurate determination of liability. Only those who represent a substantial share of the product's manufacturers should be liable to the plaintiff. To exculpate himself, the defendant should show, by a preponderance of the evidence that he was not in the market at the time.

Furthermore, courts presented with asbestos cases should take judicial notice of the fact that asbestos is a competent producing cause of asbestosis and mesothelioma. Judicial notice coupled with market share liability

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140. *See id.* at 937, 163 Cal. Rptr. at 145.

141. *Cf. id.* at 937, 163 Cal. Rptr. at 145 (liability is function of market share), *cert. denied*, 449 U.S. 912 (1980).

142. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 931, 937, 163 Cal. Rptr. 132, 139, 145, *cert. denied*, 449 U.S. 912 (1980).

143. *See id.* at 937, 163 Cal. Rptr. at 145.

will enable claims to be settled more efficiently.[144] Under such a system, the plaintiff will have to prove by a preponderance of the evidence exposure to asbestos and the extent of damages.[145] The burden of proof would then shift to the defendants. To escape liability, defendants would have to show that they owed no duty to the plaintiffs, or if they did, it was not breached.[146] Furthermore, they could show that they did not market asbestos at the time, or in the particular geographic area.[147] Those defendants who could not exculpate themselves would have their liability determined by their share of the relevant market.[148]

Given the possibility of the discriminatory effect of regional market saturation, the theory of market share liability should be recognized on a national level. Of course, the application should be limited to that rare instance of a plaintiff who, if held to a requirement of identification of the defendant's product as a producing cause of his injury, would be barred from recovery. Further, when, as in the case of DES or asbestos, there was a fundamental failure on the part of the manufacturer to either ensure that his product was safe or warn the ultimate consumer or user of the dangerous aspects of the product market share is appropriate.[149] This is not to say that manufacturers should be liable for every conceivable injury, rather only those injuries that are more likely than not to result

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144. *See* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1083-85 & nn. 1-16 (5th Cir. 1973) (notes contain references to medical literature on dangers of asbestos), *cert. denied*, 419 U.S. 869 (1974). The vast weight of authority points to the conclusion that the dangers of asbestos are known and may be considered common knowledge. *See id.* at 1083-85 & nn. 1-16. Dr. Irving Selikoff of the Environmental Sciences Laboratory at Mt. Sinai School of Medicine in New York, recently stated "diagnosis of asbestos related diseases has reached a 'high degree of medical certainty,' " obviating the need for expert testimony in routine cases. 68 A.B.A.J. 397, 398 (April 1982). As such, a court may take judicial notice of an adjudicative fact. *See* Goodman v. Stalfort, Inc., 411 F. Supp. 889, 894 (D.N.J. 1976), *aff'd in part mem.*, 564 F.2d 89 (3d Cir. 1977); FED. R. EVID. 201. Rule 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute. It must be either generally known, or capable of accurate and ready determination by resort to an accurate source. *See* FED. R. EVID. 201(b). Further, when judicial notice of a fact is taken, the jury is instructed to accept the fact as conclusive. *See* FED. R. EVID. 201(g); *see also* Selikoff and Lee, ASBESTOS AND DISEASE 487-520 (1978) (bibliography of over eight hundred works dealing with asbestos exposure and disease).

145. *Cf.* Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 838 (E.D. Tex. 1980). The seven elements usually required would be reduced to the following three: (1) the defendants manufactured, marketed, sold, distributed or placed in the stream of commerce products containing asbestos; (2) plaintiff's exposure sufficient to produce disease; and (3) damages. *See id.* at 838.

146. *See* Sindell v. Abbott Laboratories, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980).

147. *See id.* at 937, 163 Cal. Rptr. at 145.

148. *See id.* at 937, 163 Cal. Rptr. at 145.

149. *See id.* at 936, 163 Cal. Rptr. at 144.

from exposure to their products.

VII. Conclusion

There must be a means to efficiently dispose of the multitude of pending asbestos claims without denying the plaintiff a remedy or the defendant due process. Requiring a plaintiff to identify a particular defendant is not an acceptable method of reducing the number of claims.[150] Market share liability is a far more fair and expeditious approach. The effect market share apportionment has on prospective defendants, however, cannot be wholly ignored. There must be a balancing of the two interests. Judicial economy should not be invoked to the detriment of the profit motive. Market share is not, nor should it be, applied as a short cut for the plaintiff. This extraordinary remedy should be invoked in only the most dire of circumstances.

150. *See id.* at 936, 163 Cal. Rptr. at 144.