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## California Expands Tort Liability Under the Novel "Market Share" Theory: *Sindell v. Abbott Laboratories*

*The California Supreme Court, in the novel and unprecedented case of Sindell v. Abbott Laboratories, eliminated the plaintiff's burden of identification of a negligent party, and thus the causation requirement, in a multiple party tort action. In the course of this decision, the court adopted the "market share" theory of liability which dictated in Sindell that nonidentifiable defendant-manufacturers of the generic drug DES would be liable for the damages in proportion to their share of business in the market. The author thoroughly examines various theories of recovery, such as "alternative liability," "concert of action" and "enterprise liability," which the court employed in their formulation of the "market share" theory. While in agreement with this decision, the author analyzes the majority and dissenting opinions and notes the benefits and shortcomings of this most controversial development in California tort law.*

### I. INTRODUCTION

Until recently, the vast majority of women who had developed cancer due to their mother's ingestion of the drug diethylstilbestrol (DES)<sup>1</sup> during pregnancy were unable to recover damages because of their inability to identify the responsible manufacturer. However, the California Supreme Court, in *Sindell v. Abbott Laboratories*,<sup>2</sup> has pioneered a new theory of recovery which permits a DES daughter<sup>3</sup> to recover damages without naming a specific manufacturer-defendant. This four to three decision<sup>4</sup> will likely have far-reaching consequences in the field of

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1. Although diethylstilbestrol is the most common trade name associated with the term DES, this generic drug, along with several closely-related congeners, was manufactured and sold under approximately 60 different trade names between 1947 and 1971. OLIVAS, FACT SHEET ON DES DAUGHTERS 8 (1978) (unpublished manuscript).

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

3. The drug DES manifests its injury-producing qualities not in the mothers who ingest it, but in their offspring. See notes 10-16 *infra* and accompanying text. Since the majority of cases thus far have involved the female offspring of these mothers, the potential plaintiffs have been popularly termed "DES daughters." However, the term, as used in this casenote refers to all of the offspring of DES users, whether male or female.

4. Justice Mosk wrote the majority opinion, with Chief Justice Bird and Associate Justices Newman and White concurring. The dissent was authored by Justice Richardson, joined by Justice Clark and Justice Manuel.

products liability by in effect removing causation in certain situations as a required element of proof.

Before discussing the significance of *Sindell* with regard to the expansion of manufacturer's liability, the special nature of DES cases will be noted. Next, both the history and the court's treatment of each theory of applicable established tort law will also be discussed, in addition to a review of the market share theory,<sup>5</sup> adopted by the *Sindell* court. Finally, both the advantages and drawbacks of the market share theory, and its potential impact on future cases in the field of products liability will be analyzed.

## II. THE FACTS

### A. DES

DES, a synthetic compound of the female hormone estrogen, was approved on an experimental basis<sup>6</sup> in 1947 as a miscarriage preventative. DES was manufactured, promoted, and marketed from 1947 to 1971 by hundreds of drug companies,<sup>7</sup> including the respondents in *Sindell*.<sup>8</sup> In 1971, as a result of statistical data showing a significant correlation between the use of DES and the subsequent development of cancer in the daughters of mothers who took the drug during pregnancy,<sup>9</sup> the FDA banned the use of

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5. This new theory of liability advanced by the *Sindell* court will be defined and discussed in notes 107-25 *infra* and accompanying text.

6. Although the FDA authorized the marketing of DES as a miscarriage preventative, it required that the drug contain a warning label to describe its experimental nature. Instead, the defendants marketed DES on an unlimited and wide-open basis as a miscarriage preventative without warning as the experimental nature of the drug. Appellant's Additional Brief at 9, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) [hereinafter cited as *Sindell*, Appellant's Brief].

7. The exact number of companies that actually manufactured DES for use during pregnancy is uncertain. In *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979), the defendants produced affidavits showing that more than 300 companies were offering DES for sale during the relevant time period. However, this number includes distributors and packagers who did not actually manufacture DES. An FDA computer printout shows 94 companies for which the FDA approved a New Drug Application (NDA) for DES use for the prevention of miscarriages. However, this printout does not include those companies which started to market DES after it was no longer classified as a new drug, nor does it include information on manufacturers of drugs manufactured simultaneously with DES, or drugs having the same purpose and effect as DES. Thus, it may be estimated that the number of actual manufacturers is between 94 and 300. Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964 n.3 (1978) [hereinafter cited as *Fordham Comment*].

8. The named defendants were Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, the Up-John Company, and Rexall Drug Company.

9. In 1971, Dr. Arthur Herbst and colleagues at Massachusetts General Hospital reported eight cases of primary clear cell adenocarcinoma of the vagina in women 15-22 years of age. It was determined that seven out of eight of the mothers of these patients had taken DES during the first five months of pregnancy. The

the drug for the purpose of preventing miscarriages,<sup>10</sup> because of its danger<sup>11</sup> and ineffectiveness.<sup>12</sup>

eight had taken dinestrol and estrone, drugs similar to DES. This was the first documented link between cancer and DES usage. Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina*, 284 N. ENG. J. MED. 878 (1971). Subsequent studies by other authorities have confirmed this finding. See Nordquist, Fidler, Woodruff & Lewis, *Clear Cell Adenocarcinoma of the Cervix and Vagina*, 37 CANCER 858 (1976).

More recent studies have associated DES exposure to a variety of other abnormalities. See, e.g., Bibbo, Gill, Friedoon, Blough, Fang, Rosenfield, Schumacher, Sleeper, Sonck and Wied, *Follow-up Study of Male and Female Offspring of DES-Exposed Mothers*, 49 J. AM. C. OBSTET. & GYNEC. 1 (1977) [hereinafter cited as Bibbo] (general genital abnormalities and low sperm density in DES-exposed males); Fowler and Edelman, *In Utero Exposure to DES*, 51 AM. J. OBSTET. & GYNEC. 459 (1978) (higher risk of DES-exposed females developing squamous neoplasia); Barnes, Colton, Gundersen, Noller, Telly, Strama, Townsend, Halib and O'Brien, *Fertility and Outcome of Pregnancy in Women Exposed in Utero to Diethylstilbestrol*, 302 N. ENG. J. MED. 609 (1980) [hereinafter cited as Barnes] (increased risk of infertility and unfavorable outcome of pregnancy associated with DES exposure).

10. The prevention of miscarriages is just one of the marketing uses of DES. It is still used in the treatment of women for menopausal disturbances, senile vaginitis, and the relief of breast engorgement during lactation suppression. Men are treated with DES for cancer of the prostate. DES is still prescribed by some physicians as a post-coital contraceptive, commonly known as the "morning-after" pill. And, until banned as an animal feed in 1979, DES was used to increase weight gain in livestock. 22 ENVIRONMENT 35 (1980). For a complete list of the most recent uses of DES, see PHYSICIANS' DESK REFERENCE 1033 (34th ed. 1980) [hereinafter cited as P.D.R.].

11. The FDA took the following steps in regard to the dangers of DES:

1. All manufacturers of DES or closely related congeners (dianestrol, hexestrol, benzeestrol, promethestrol) 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 the 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 occurrence 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 AD., DEP'T OF HEALTH, EDUC. & WEL., DRUG BULL., DIETHYLSTILBESTROL CONTRAINDICATED IN PREGNANCY (Nov., 1971). For the most recent contraindications for DES, see P.D.R., *supra* note 10, at 1032-33.

12. DES was first purported to help maintain high risk pregnancies in the 1940's, as the result of two poorly conducted and relatively uncontrolled studies reported in obstetrical literature, 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, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTET. & GYNEC. 821 (1948) [here-

Presently, several hundred young women whose mothers ingested DES during pregnancy are suffering from a DES-induced cancer<sup>13</sup> known as clear cell adenocarcinoma. Heretofore a relatively rare form of cancer<sup>14</sup> "it is believed to strike after a minimum latent period of 10 to 12 years"<sup>15</sup> and generally appears in the vagina, cervix and uterus. The vast majority of DES daughters who have not developed cancer are suffering from other abnormalities, the most prevalent being adenosis.<sup>16</sup>

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inafter cited as Smith]. These early studies were soon discredited by subsequent studies that showed no beneficial effects in the use of DES by women threatened by miscarriage. See, e.g., Goldzieher and Benigno, *The Treatment of Threatened and Recurrent Abortion: A Critical Review*, 75 AM. J. OBSTET. & GYNEC. 1207 (1958); Davis and Fug, *Steroids In the Treatment of Early Pregnancy Complications*, 142 J.A.M.A. 778 (1950); Dieckmann, Davis, Kynkiewicz and Pottinger, *Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Values?*, 66 AM. J. OBSTET. & GYNEC. 1062 (1953). Despite these studies, DES continued to be manufactured and prescribed for the prevention of miscarriages until 1971. See notes 9-11 *supra* and accompanying text.

13. It has been estimated that between .5 and 2 million women used the drug DES between the years 1947 and 1971. Bruck, *Defense Lawyers Fight Over Strategy As Massive DES Battle Heats Up*, AM. LAW, Feb. 1979, at 16 [hereinafter cited as Bruck]. A survey of 12 hospitals between 1959 and 1965 showed that between 1.8 % to 2.67 % of all pregnant women hospitalized were given DES. Records of two pharmaceutical surveys show that there may have been up to 50,000 females a year, between 1960 and 1970, that were exposed to DES in utero. Heinonen, *Diethylstilbestrol in Pregnancy*, 31 CANCER 573 (1973) [hereinafter cited as Heinonen]. The total number of cancer victims among DES daughters has been estimated to be between 1.4 and four in 1,000. Bruck, *supra*, at 16. However, recent medical studies estimate the risk as being between 0.14 and 1.4 per 1,000 DES-exposed females, with the peak age-incidence being age 19. Herbst, *DES-Associated Clear Cell Adenocarcinoma of the Vagina and Cervix*, 34 OBSTET. & GYNEC. SURVEY 844 (1979).

14. Prior to the link between DES and cancer, there had only been three reported cases ever of clear-cell adenocarcinoma of the vagina; clear-cell adenocarcinoma of the cervix was also very rare. Ulfelder, *The Stilbestrol-Adenosis-Carcinoma Syndrome*, 38 CANCER 426, 428 (1976).

15. *Sindell*, Appellant's Brief, *supra* note 6, at 9.

16. The *Sindell* court defined adenosis as "precancerous vaginal and cervical growths which may spread to other parts of the body . . . treatment [of which is] in cauterization, surgery or cyrosurgery." 26 Cal. 3d at 594, 607 P.2d at 925, 163 Cal. Rptr. at 133.

Proof that DES is a cause of adenosis in females is well-documented. See Forberg, *Cervicovaginal Epithelium—Its Origin and Development*, 115 AM. J. OBSTET. & GYNEC. 322 (1973). However, one authority has stated that adenosis can arise *de novo* in any female. Sandberg, *The Incidence and Distribution of Occult Vaginal Adenosis*, 101 AM. J. OBSTET. & GYNEC. 322 (1968), and Dr. Herbst of Massachusetts General Hospital has shown that adenosis has occurred in a controlled population not exposed to DES. Herbst, Poskanzer, Robboy, Friedlander and Scully, *Prenatal Exposure to Stilbestrol*, 292 N. ENG. J. MED. 334 (1975) [hereinafter cited as Herbst]. Thus, it appears that adenosis may have multiple origins.

For other potential abnormalities that have been found in DES daughters, see Sandberg, *Benign Cervical and Vaginal Changes Associated with Exposure to Stilbestrol in Utero*, 125 AM. J. OBSTET. & GYNEC. 777 (1976); Bibbo, note 9 *supra*.

### B. *The Facts in Sindell*

The appellant,<sup>17</sup> Judith Sindell, filed suit<sup>18</sup> against several drug companies<sup>19</sup> for personal injuries sustained as a result of prenatal exposure to DES. Sindell sued on her own behalf and as representative of a class of other women in California similarly situated.<sup>20</sup>

The *Sindell* case is just one of many actions that has been brought in recent years by DES daughters,<sup>21</sup> most of whom have

17. *Sindell* is actually a companion case with *Rogers v. Rexall Drug Co.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). Although the cases were consolidated on appeal, the court's decision refers to Ms. Sindell, and only discusses the allegations in her complaint. This casenote will likewise refer to only Ms. Sindell.

18. The plaintiff's original complaint alleged 10 causes of action, each of which are claimed to have arisen from the defendants acting individually and in concert in the manufacture and marketing of DES. The causes of action are as follows: negligence, strict liability in tort, lack of informed consent, breach of express warranty, breach of implied warranty, fraud, violation of federal law, joint enterprise, conspiracy, and certain limited class relief actions.

19. The plaintiff's original complaint named ten defendants, five of which, Boyle Drug Co., Merck, Sharp & Dohme Orthopedics Co., Inc., Miles Laboratories, Ortho Pharmaceutical Corp., and Parke Davis & Co., were dismissed for various reasons before appeal, leaving five remaining defendants. See note 6 *supra*.

20. The plaintiff class consisted of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers to which they were exposed." 26 Cal. 3d at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 132 n.1. Defendants were also sued as representatives of a class of drug manufacturers which sold DES after 1941. *Id.*

The complaints of both Sindell and Rogers, which were substantially the same, alleged that the prerequisites for maintaining these class actions were met. Thus, the appellate court refrained from discussing the potentially complicated class action issues in its opinion. *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1 n.1, 149 Cal. Rptr. 138, 141 n.1 (1978). For a discussion of the potential legal problems involved with class action certification, see note 31 *infra*.

21. Most of these suits are still pending. Of those that have been decided, the majority have resulted in judgments for the defendants because of the inability of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers. 26 Cal. 3d at 597, 607 P.2d at 927-28, 163 Cal. Rptr. at 135-36. See *Rheingold v. E.R. Squibb & Sons, Inc.*, No. 74 Civil 3420 (CHT) (S.D.N.Y. Oct. 14, 1975); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *Fields v. Eli Lilly & Co.*, No. C122248 (Cal. Super. Ct. Dec. 1977); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978); *Tigue v. E.R. Squibb & Sons, Inc.*, No. 3838 (76 N.Y. Sup. Ct., filed March 1976).

*Diamond v. E.R. Quibb & Sons, Inc.*, 366 So. 2d 1221 (Fla. App. 1979), held that the suit, brought 20 years after the plaintiff's mother took the DES, was barred by the Florida statute of limitations, which prohibits actions more than 12 years after the delivery of a product to the original purchaser, regardless of when the defect was discovered.

In *Lyons v. Premo Pharm. Laboratories, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (1979), the plaintiff, whose daughter died from clear cell adenocarcinoma of the cervix due to her mother's exposure to DES, settled with the specific manufac-

already developed clear cell adenocarcinoma. Sindell, as a result of DES exposure, developed a malignant bladder tumor which was surgically removed.<sup>22</sup> She also continues to suffer from adenoses, which requires that she be frequently monitored by biopsy or colposcopy to insure early warning of further malignancy.<sup>23</sup>

Among Sindell's allegations were that each defendant knew, or should have known, that DES was carcinogenic at the time of its manufacture and sale, and that the defendants acted in concert in the manufacture and promotion of DES for the prevention of miscarriage without adequate testing or warning, and without monitoring or reporting its effects.<sup>24</sup> Sindell further alleged that each defendant undertook a program to market DES on a "wide-open basis" for the prevention of miscarriage, notwithstanding the fact that it was only conditionally approved by the FDA<sup>25</sup> and that each defendant continued to market DES after learning of its carcinogenic properties. However, in her complaint, and subsequently throughout her trial and appeals, Sindell was unable to name a specific manufacturer responsible for her injuries.

The trial court sustained the defendant's demurrer to the complaint and dismissed the action, primarily because of Sindell's inability to name the responsible manufacturer.<sup>26</sup> On appeal, the court of appeal reversed the trial court,<sup>27</sup> finding a cause of action

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turer, and continued his case against eleven other drug companies, alleging the joint actions of the companies were the causes of his daughter's death. The court held that "alternative liability" and "enterprise liability" were not applicable where the plaintiff had knowledge of the particular brand of DES ingested.

*Barros v. E.R. Squibb & Sons, Inc.*, No. 75-1226 (E.D. Pa. Jan. 27, 1978) was one of the first DES cases to go to trial and resulted in a verdict for the defendant. Although the plaintiff's mother identified Squibb as the manufacturer of the DES she ingested, the jury concluded that the identification was not sufficiently proven. However, in *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979), the Michigan Court of Appeals, after the lower courts granted summary judgment for defendants, No. 74-030-070 NP (Mich. Cir. Ct. May 16, 1977) held that the plaintiffs had a cause of action under the concert of action theory. This decision is presently on appeal to the Supreme Court of Michigan.

There have been two recent jury verdicts for DES plaintiffs. In *Needham v. White Laboratories*, No. 76 C1101 (N.D. Mich. Aug. 24, 1979), the plaintiff was able to produce records showing the responsible manufacturer and received a jury verdict of \$ 800,000.00 In *Bichler v. Eli Lilly & Co.*, Index 15600/74, (Sup. Ct. N.Y. 1979), a New York jury found for the plaintiff despite her inability to identify a specific manufacturer, awarding her \$500,000.00.

22. 26 Cal. 3d at 594-95, 607 P.2d at 976, 163 Cal. Rptr. at 134.

23. *Id.*

24. *Sindell*, Appellant's Brief, *supra* note 6, at 8-10.

25. *Id.*

26. *Sindell v. Boyle Drug Co.*, No. C169127 (Cal. Super. Ct. 1977); *Rogers v. Abbott Laboratories*, No. 61220 (Cal. Super. Ct. 1977).

27. *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978); *Rogers v. Rexall Drug Co.*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978).

under both the alternative liability<sup>28</sup> and concert of action<sup>29</sup> theories. The defendant's subsequent appeal resulted in the California Supreme Court decision which is the subject of this casenote.

### C. *The Issue Presented*

Although many legal issues are involved in DES cases in general, the *Sindell* court restricted its discussion to the following issue: "May 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, hold liable for her injuries a maker of a drug produced from an identical formula?"<sup>30</sup> The California Supreme Court believed public policy required an extension of traditional products liability doctrine to provide for an adequate remedy in such situations. In order to accomplish this extension, the court adopted a novel theory of liability in tort law.

Before discussing the *Sindell* court's analysis of this complex legal issue, a brief explanation of the various theories of liability which have permitted plaintiffs to recover despite the inability to name a specific defendant is necessary.

## III. CAUSATION

Although DES cases involve several legal problems, such as class action certification,<sup>31</sup> statute of limitations,<sup>32</sup> possible ab-

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28. For a complete definition and discussion of the alternative liability theory, see notes 43-55 *infra* and accompanying text.

29. For a complete definition and discussion of the concert of action theory, see notes 70-81 *infra* and accompanying text.

30. 26 Cal. 3d at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

31. Although several DES cases, like *Sindell*, are class actions, many have encountered difficulty with regard to their class action status. *E.g.*, *Rheingold v. E.R. Squibb & Sons, Inc.*, No. 74 Civil 3420 (CHT) (S.D.N.Y. Oct. 14, 1975); *Stack v. E.R. Squibb & Sons, Inc.*, No. GD 77-05944 (Pa. Ct. C.P. June 30, 1977). The major problem encountered in DES class actions is the requirement for common questions of law and fact among class members. See, *FED. R. CIV. P. 23*. Because of the individual questions of fact vary so greatly in products liability actions, class actions generally are not certified in these cases. Recently, however, some courts have certified class actions for the determination of property damage in products liability cases. See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); *Anthony v. General Motors Corp.*, 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (1973); *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332, 194 Cal. Rptr. 599 (1972); *Landesman v. General Motors Corp.*, 42 Ill. App. 3d 363, 356 N.E. 2d 105 (1976). *Contra*, *Edelman v. Lee Optical Co.*, 24 Ill. App. 3d 216, 320 N.E. 2d 517 (1974); *Gilmore v. General Motors Corp.*, 35 Ohio Misc. 36, 300 N.E. 2d 259 (1973). In the



above cases that permitted class actions, the amount of damages was identical to each member of the class.

Despite the general reluctance by most courts to certify class standing in personal injury and products liability cases, the *Sindell* court passed over the issue completely in its finding for the plaintiff. See note 20 *supra*. In *Payton v. Abbott Laboratories*, 83 F.R.D. 382 (D. Mass. 1979), the district court granted the conditional certification of a plaintiff class consisting of all women who were prenatally exposed to DES in Massachusetts, were born in Massachusetts and domiciled there when they received notice of the action and who had not developed uterine or vaginal cancer. The court ruled that the plaintiff class was sufficient to meet the requirements of FED. R. CIV. P. 23. However, the court denied the plaintiffs' motion to certify the manufacturers as a defendant class. In light of the *Payton* decision, not only DES plaintiffs, but plaintiffs in all product liability cases, may have a better chance of maintaining class action suits.

32. The general rule in negligence actions is that the statute of limitations begins to run when the cause of action accrues, which is held to be the time of injury. BIRNBAUM, STATUTE OF LIMITATIONS AND PRODUCTS LIABILITY 1 (1979). Some courts have applied this strict time of injury approach even though the plaintiff might have been unaware of any injury. See *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, amended 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, cert. denied, 374 U.S. 808 (1963). The New York Court of Appeals has recently reaffirmed the strict accrual of injury approach in a strict liability case. *Thornton v. Roosevelt Hospital*, 417 N.Y.S.2d 920, 291 N.E.2d 1002 (N.Y. Ct. App. 1979) (injury held to have occurred upon injection of drug although the deleterious effects were nonexistent for almost twenty years). *But cf. McKee v. Johns-Manville Products Corp.*, 404 N.Y.S.2d 814 (Sup. Ct. Erie Co. 1978) (New York court held that time of diagnosis starts the running of the statute of limitations unless the defendant can show that the plaintiff should have discovered the nature of his disease earlier).

A more modern approach to the running of the statute of limitations in products liability cases is the "discovery rule" approach, which dictates that the statute begins running when the plaintiff discovers, or should have discovered, his injury. This was first used by the United States Supreme Court in *Urie v. Thompson*, 337 U.S. 163 (1949), and this is probably the majority rule today.

In drug and latent injury cases, the courts have decided in a variety of ways. Some jurisdictions have adopted the restrictive view, holding that the discovery rule does not apply. See *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (statute begins to run at the time the injury occurs, not when the plaintiff discovers the cause of the injury). Other courts have held that the statute of limitations begins to run when the facts giving rise to the cause of action are discovered or should have been discovered with the exercise of reasonable diligence. *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47 (Fla. Dist. Ct. App. 1978). Still other courts have framed the discovery rule in terms of a causal relationship. The cause of action accrues when the victim discovers or should have discovered the nature and cause of the disability or impairment. *Harig v. Johns-Manville Products Corp.*, 394 A.2d 299 (Md. Ct. App. 1978) (an asbestos case where the cause of action did not accrue until plaintiff ascertained the nature of the injury). The *Harig* rule was adopted by the California Court of Appeals in *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978). The degree of knowledge of causal relationship between the plaintiff's injury and the defendant's product necessary for an action to accrue has varied among jurisdictions. See, e.g., *Burd v. New Jersey Telephone Co.*, 76 N.J. 284, 386 A.2d 1310 (1978) (plaintiff was charged with constructive knowledge of a possible causal link between injury and exposure); *Raymond v. Eli Lilly & Co.*, 371 A.2d 170 (N.H. 1977) (statute of limitations did not begin to run until a complete physical and causal link had been forged); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976) (statute began to run when the injury itself was manifested, when the causal link between the injury and product was ascertained, and when the actionable claim between the injury and the de-

sence of a cause of action for fetal injury prior to viability,<sup>33</sup> and possible absence of a cause of action because the danger of the drug was unknown at the time of manufacture,<sup>34</sup> the *Sindell* court saw the identification of the manufacturer, or causation issue, as the major problem facing potential plaintiffs.<sup>35</sup>

Because of the significant time lapse between the intake of the DES, the manifestation of the injury, and the time period which elapses before DES is discovered to be the causative agent, most plaintiffs are unable to positively identify the specific manufac-

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defendant's negligence was shown); *Roman v. A.H. Robins Co., Inc.*, 518 F.2d 970 (5th Cir. 1975) (while applying Texas law, the court held that only some evidence of causal relationship is necessary for the statute of limitations to begin to run).

Many states have recently enacted so-called statutes of repose, which provide for an outside limitation period that runs from the time the product left the manufacturer's possession or control. These statutes have the effect of limiting a manufacturer's liability for those products that have been on the market for several years, or those products that have a long latent period before the injury is discovered, such as DES. *See, e.g.*, IND. CODE § 331-1-1.5 (1978); NEB. REV. STAT. § 25.224 (Supp. 1978); TENN. CODE ANN. § 23-3708 (1980); ARIZ. REV. STAT. ANN. § 12-551 (1978); UTAH CODE ANN. § 78-15-3(1) (1977). The effect of these statutes of repose was seen in *Diamond v. E.R. Squibb & Sons, Inc.*, 366 So. 2d 1221 (Fla. Dist. Ct. App. 1979), where the Florida statute, which provides that an action for products liability must be brought within 12 years after the date of delivery of the product to its original purchaser regardless of the date the defect was discovered, barred a DES daughter from recovery.

33. All jurisdictions in the United States allow a cause of action for fetal injury, however, the states are split as to whether or not to allow a cause of action for prenatal injury *prior to the viability* of the fetus. For a list of jurisdictions on both sides of the question, *see* 40 A.L.R.3d 1222, § 3(a)-(b) (1971 & Supp. 1980). DES was recommended for use by pregnant women from the beginning of their pregnancy through the end of their term. Smith, *supra* note 12, at 823-24. However, some women were treated on a short-term basis, usually within the first three months of pregnancy, when there was the greatest chance of miscarriage. *See* Heinonen, *supra* note 13, at 575. Thus, in those cases where the mother was only treated with DES during the first few months of pregnancy, in those jurisdictions that do not allow a cause of action for fetal injury prior to viability plaintiffs may not be allowed to recover.

34. The negligence standard in products liability is based on the requirement that liability for negligent behavior is imposed only when the risk is foreseeable. Thus, in order to maintain a cause of action in a DES case, it is necessary for the plaintiff to show that the risk was foreseeable to the manufacturer at the time of manufacture.

As early as 1947, a substantial body of medical literature showed a connection between the use of hormones and carcinogenic effects. *Fordham Comment*, *supra* note 7, at 971 n.25. By 1947, oral administration of DES to laboratory animals had been shown to produce cancer. *Bell v. Goddard*, 366 F.2d 177, 179 (7th Cir. 1966). Thus, defendants were on notice of the potentially carcinogenic properties of DES, as well as its ineffectiveness. *See* note 12 *supra*.

35. 26 Cal. 3d at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.

turer of the drug ingested by their mothers.<sup>36</sup>

The general rule in tort liability is that the plaintiff has the burden of proof on the issue of causation<sup>37</sup> with the responsibility of showing that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. This rule applies whether the injury occurred as the result of an accidental event<sup>38</sup> or from the use of a defective product.<sup>39</sup>

There are several exceptions to this general rule, two of which may be applicable to the *Sindell* situation. These two exceptions are "concert of action" and "alternative liability."<sup>40</sup> A third basis of liability, "industry-wide" or "enterprise liability,"<sup>41</sup> has also been considered in the resolution of DES cases.<sup>42</sup> All of these theories, under certain circumstances, may support a plaintiff's action even if the responsible defendant is not specifically named or identified, and all were considered as possible solutions by the *Sindell* court. Thus, each of these theories will be discussed in detail before the adopted "market share" approach is analyzed.

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36. *Fordham Comment, supra* note 7, at 972. This inability of DES plaintiffs to positively identify the responsible manufacturer has resulted in summary judgment at the pleading stage for several other DES defendants. *See* note 21 *supra*.

37. PROSSER, *LAW OF TORTS* 241 (4th ed. 1971) [hereinafter cited as PROSSER]. However, there are certain exceptions to this general rule. *See* notes 40-41 *infra* and accompanying text.

38. 26 Cal. 3d at 597-98, 607 P.2d at 928, 163 Cal. Rptr. at 136. *See, e.g., Shunk v. Bosworth*, 334 F.2d 309 (6th Cir. 1964) (res ipsa loquitur is not applicable where a hunter is injured by one of two fellow hunter's shotgun pellets and where there is no evidence of negligence).

39. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136. *See, e.g., Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 29-30 (D. Minn. 1973) (no action for negligence against two suppliers to the manufacturer of a defective tractor because no records were available to prove that they were the negligent suppliers).

40. The other exceptions to this general rule are:

vicarious liability; common duty; concurrent causation of a single, indivisible result, which neither would have caused alone; concurrent causation of a single, indivisible result, which either alone would have caused; successive injuries; damage of the same kind, which is difficult to apportion; and acts innocent in themselves which together cause damage.

Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429-42 (1937).

41. The term "enterprise liability" originated in *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F.Supp. 353, 376-78 (E.D.N.Y. 1972), and is sometimes used broadly to mean that inquiries caused by an enterprise should be borne by it. Klamme, *Enterprise Theory of Torts*, 47 COLO. L. REV. 153, 158 (1976). The term has been loosely used in DES cases to refer to any of the theories expounded in *Hall* which create joint and several liability when a plaintiff cannot justifiably identify a specific manufacturer of the injury-producing drug. Birnbaum, *Plaintiffs in DES Suits Seek to Blame All Producers of Drugs*, Nat'l L.J., Oct. 30, 1978, at 24, col. 1. The theory of "enterprise liability" as the term is used in this casenote is more precisely defined and discussed at notes 92-102 *infra* and accompanying text.

The *Sindell* court designated the "enterprise liability" theory by "the more accurate term of 'industry-wide' liability." 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

42. *See* note 21 *supra*, and *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138, 143 n.5 (1978).

## A. *Alternative Liability*

### 1. History

The unanimous decision of *Summers v. Tice*<sup>43</sup> best exemplifies the theory that has been termed "double fault and alternative liability."<sup>44</sup> This theory states that, where all defendants behave tortiously, but the plaintiff is unable to identify the specific defendant that causes his or her injury, the burden of proof is shifted to each defendant to show that he is not the responsible party.<sup>45</sup> Where the defendants are unable to meet this burden, joint and several liability results.<sup>46</sup>

In *Summers*, the plaintiff was injured when two hunters simultaneously and negligently fired their guns in the plaintiff's direction. The plaintiff could not ascertain which of the defendants actually caused the injury, but the court nevertheless held that both defendants were jointly and severally liable. The *Summers* court refused to apply the concert of action theory,<sup>47</sup> by stating that to do so would be "straining that concept."<sup>48</sup> The court developed instead the concept of alternative liability, based on the following policy consideration: if the plaintiff is forced to identify the responsible defendant, there is the possibility that the wrong defendant will be identified, conceivably leaving the injured plaintiff without a remedy.<sup>49</sup> Because of this inequitable result, the burden of proof should shift to the defendants, "each to absolve himself if he can."<sup>50</sup>

This rule of alternative liability developed by the *Summers* court has been adopted by the *Second Restatement of Torts*. The Restatement notes that the policy underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of

43. 33 Cal. 2d 80, 199 P.2d 1 (1948).

44. PROSSER, *supra* note 37, at 243.

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

46. *Id.*

47. 33 Cal. 2d at 34, 199 P.2d at 3. For a discussion of the concert of action theory, see notes 70-81 *infra* and accompanying text.

48. 33 Cal. 2d at 85, 199 P.2d at 3.

49. *Id.* at 86-87, 199 P.2d at 4-5.

50. *Id.*

them has caused the harm.”<sup>51</sup>

In formulating the alternative liability theory, the *Summers* court relied upon the celebrated case of *Ybarra v. Spangard*.<sup>52</sup> In *Ybarra*, the plaintiff sustained an injury while unconscious during the course of surgery. The court decided that it would be an unfair burden to require the plaintiff to identify the person or persons who caused his injury, because his inability to identify the specific causative factor was a direct result of actions of the defendants.<sup>53</sup> Therefore, the court, by applying the doctrine of *res ipsa loquitur*<sup>54</sup> found that an inference of negligence had arisen that required the defendants to explain their conduct.<sup>55</sup>

## 2. Appellant's Reliance on Alternative Liability

In *Sindell*, the appellant placed primary reliance on the *Summers* and *Ybarra* decisions to show joint or alternative liability on the part of the defendants. For example, the appellant maintained that the *Ybarra* decision went one step further than that required of the court in a DES case.

In *Ybarra* the court may have actually shifted the burden of proof to an entirely innocent non-negligent party. Here we are merely asking the court to follow the doctrine elaborated in *Summers* and shift the burden of proof to a group of defendants, each and every one of which is a negligent cause of the plaintiff's inability to identify the specific wrongdoer causing injury.<sup>56</sup>

The appellant also attempted to compare the *Summers* fact situation to that of the DES-type of injury. For example, the appellant pointed to the fact that the fungible nature of the shotgun pellets in *Summers* was what made the identification of the responsible defendant virtually impossible.<sup>57</sup> This was analogized to the situation in *Sindell*, where the fungible nature of the generic drug DES made it difficult to prove without records which respondent caused the harm to the appellant.<sup>58</sup>

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51. RESTATEMENT (SECOND) OF TORTS, § 433B(3)(f) (1965) (Illustration 9 is patterned after the *Summers* case).

52. 25 Cal. 2d 486, 154 P.2d 687 (1944).

53. *Id.*

54. *Res Ipsa Loquitur* has three necessary elements: “(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.” PROSSER, *supra* note 37, at 214 (quoting 4 WIGMORE, EVIDENCE 2509 (1st ed. 1905)).

55. 26 Cal. 3d at 599, 607 P.2d at 929, 163 Cal. Rptr. at 137.

56. *Sindell*, Appellant's Brief, *supra* note 6, at 19.

57. *Id.* at 13.

58. The *Sindell* “[d]efendants maintain that the plaintiff is in a better position . . . to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated . . . the brand or strength of the dosage, [or] the appearance of the medication.” 26

In *Summers*, the conduct which created the impossibility of identification was the simultaneous discharge of the two defendants' shotguns. However, in *Sindell*, the appellant argued that the drug companies, by manufacturing the same drug under a variety of trade names, created a situation in which it was unlikely that any identification could be made. The appellant also contended that the tortious character of the respondent's conduct in failing to warn of, or discover, the dangers of DES was the major reason why all parties failed to keep better records.<sup>59</sup> Thus, the appellant maintained that the DES injury was an even more compelling situation in which to find liability than that found in *Summers*.

In developing this theory, the plaintiff relied on *Haft v. Lone Palm Hotel*.<sup>60</sup> In *Haft*, multiple defendants were held liable for the drowning of a young boy and his father in the hotel swimming pool despite the absence of proof of causation. The defendants were held to have been liable for negligence in failing to provide a lifeguard as required by law. Even though there were no witnesses to the accident, the *Haft* court held that the absence of evidence of causation was a direct and foreseeable result of the defendant's negligence, and on this basis, shifted the burden of proof to the defendants.<sup>61</sup> Similarly, the appellant in *Sindell* argued that her inability to identify the responsible manufacturer was a direct and foreseeable result of the defendant's negligence in their failure to warn consumers of the dangers of DES.<sup>62</sup>

### 3. *Sindell* Analysis of Alternative Liability

The *Sindell* court, in response to the respondent's allegation that the appellant was in a superior position to identify the responsible manufacturer, stated that neither *Sindell* nor the drug manufacturers were in a better position to bear the burden of

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Cal. 3d at 601 n.3, 607 P.2d at 930 n.13, 163 Cal. Rptr. at 138 n.13. In some DES cases, the plaintiff has been able to produce such records. For example, in *Needham v. White Laboratories*, No. 76 C1101 (N.D. Mich. Aug. 24, 1979), the plaintiffs' father was the pharmacist who had filled the DES prescription and thus was able to produce the necessary records. However, in most DES cases, this information is not so readily available due to the time span involved. For purposes of the appeal, the court assumed that the appellant could not, as alleged in her complaint, make an identification of the manufacturer for the DES taken by her mother. 26 Cal. 3d at 601 n.13, 607 P.2d at 930 n.13, 163 Cal. Rptr. at 138 n.13.

59. *Sindell*, Appellants Brief, *supra* note 6, at 17-18.

60. 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

61. 26 Cal. 3d at 601 n.14, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38.

62. *Sindell*, Appellant's Brief, *supra* note 6, at 17-18.

proof of identifying the responsible manufacturer.<sup>63</sup>

The respondents argued that the *Summers-Ybarra* burden of proof rule was predicated on the defendant's greater access to information, and since this was not the case in *Sindell*, alternative liability should not be applied. The court rejected this claim, noting that while "*Summers* states that defendants are 'ordinarily . . . in a far better position to offer evidence to determine which one caused the injury' than a plaintiff," this is not necessarily a prerequisite to the shifting of the burden of proof.<sup>64</sup> The court believed that the particular circumstances in *Sindell*, as in most DES cases, made it virtually impossible for either party to identify the specific wrongdoer.<sup>65</sup>

The court then distinguished the appellant's reliance on *Haft*. The court stated that the difficulty or impossibility of the identification of the specific responsible DES manufacturer was not, as argued by the appellant, the result of the respondent's alleged negligent act of failing to provide adequate warning. Rather, in the view of the court, it was a result of the long passage of time between the act, the ingesting and prenatal exposure to DES, and the resulting subsequent development of cancer.<sup>66</sup>

The *Summers* theory of alternative liability was rejected by the *Sindell* court for one major reason: the number of joined and unjoined defendants. In *Summers*, all parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. However, in *Sindell*, there were approximately 200 drug companies<sup>67</sup> that might have produced the injury-producing drug that injured the appellant; of these, only five were ultimately joined as defendants.

The court concluded that an application of the *Summers* rule to *Sindell* would not be fair to the respondents. The possibility of any of the respondents causing the injury to the appellant was too

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63. 26 Cal. 3d at 600-01, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38.

64. *Id.* at 600, 607 P.2d at 929, 163 Cal. Rptr. at 137 (citation omitted).

65. *Id.* The court accepted the plaintiff's assertion that she could not make an identification. See note 58 *supra* and accompanying text. The court also stated that the defendants could not trace the specific drug to determine the responsible manufacturer because the drug manufacturers never had direct contact with the patients who ingested their drug. Rather, the drug passed through a chain of possession from the manufacturer, to the wholesaler, to the retailer, to the physician, hospital or pharmacy and finally, to the patient. 26 Cal. 3d at 600-01, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38.

66. *Id.*

67. As was previously stated, the exact number of drug companies that manufactured DES is uncertain. See note 7 *supra*. However, the *Sindell* court used the number 200 in its discussion of the number of potential manufacturer-defendants in DES cases. 26 Cal. 3d at 602, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39. For the purpose of consistency, this note will use the *Sindell* court's assumption of the number of manufacturer-defendants.

remote to require each respondent to exonerate itself, especially with the substantial possibility that the actual offending manufacturer might escape liability altogether.<sup>68</sup> Thus, the court refused to apply the *Summers* theory of alternative liability.

## B. Concert of Action

### 1. History

Concert of action is another theory by which a plaintiff may obtain joint and several liability.<sup>69</sup> A typical illustration is that of an illegal drag race in which a bystander is injured by one of the participants.<sup>70</sup> Suppose *A*, *B*, and *C* enter into such a race, and *P* is injured by *A*'s car. Under the concert of action theory, *P* may sue *A*, *B*, *C* or any combination of the three.<sup>71</sup>

Prosser defined the concert of action rule as follows:

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.<sup>72</sup>

Thus, in the above example, all *P* need do is show that "each defendant he has joined helped plan and facilitate the race, that the participation of each was tortious, and that his injury resulted from the race."<sup>73</sup> It should be noted that the participants of the race may still be held under the concert of action theory even though they did not expressly agree to participate in it; "all that is required is that there be a tacit understanding. . . ."<sup>74</sup> It is also noteworthy that the definition of "joint tortfeasors" with relation to concerted action applies not only to those who act in concert to accomplish some common goal or plan and thereby cause injury, but also to "those who order, direct or permit others to do the act, and who give assistance or encouragement."<sup>75</sup> This theory of liability is accepted without dispute in California.<sup>76</sup>

68. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.

69. *Fordham Comment*, *supra* note 7, at 978.

70. *E.g.*, *Bierczyanski v. Rogers*, 239 A.2d 218 (Del. 1968); *Skroh v. Newby*, 237 So. 2d 548 (Fla. Dist. Ct. App. 1970); *Agovino v. Kunze*, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960). *See also* 36 A.T.L.A. L.J. 75 (1976).

71. *Fordham Comment*, *supra* note 7, at 979.

72. PROSSER, *supra* note 37, at 292 (citation omitted). *See also* Prosser, *supra* note 40, at 429-30.

73. *Fordham Comment*, *supra* note 7, at 979.

74. PROSSER, *supra* note 37, at 292 (citation omitted).

75. 4 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS 2329-30 (8th ed. 1974).

76. *See, e.g.*, *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72



*Orser v. George*,<sup>77</sup> relied on by the appellant in *Sindell*, explains the rationale for the use of the concert of action theory as a means to establish the element of causation. In *Orser*, three defendants were engaged in the tortious conduct of firing their guns in the direction of the decedent. Two of the three were alternately firing a pistol which was later determined to be the weapon that killed the decedent. The third defendant was shooting a rifle, which was not the fatal weapon. The trial court granted the third defendant summary judgment on the basis that he met the alternative liability burden of proof in showing that he was not the responsible defendant. The court of appeal reversed on the issue of whether the third defendant's tortious conduct in firing the rifle in the direction of the decedent had provided the other defendants with the "substantial 'assistance and encouragement' " necessary for concert of action liability.<sup>78</sup>

*Orser* effectively demonstrates the distinction and the added element involved in concert of action as opposed to alternative liability. If a defendant can be shown to have joined with others to facilitate an injurious result, it is irrelevant whether or not he can subsequently meet the burden of proof by showing that he was not personally responsible. Under the concert of action theory, the act of joining in or encouraging tortious conduct is in itself tortious.

The close relationship between concert of action and enterprise liability is shown in *Hall v. E. I. Du Pont De Nemours & Co., Inc.*<sup>79</sup> *Hall* involved injuries to thirteen children by dynamite blast caps. The evidence of individual manufacturers was destroyed by the explosions.<sup>80</sup> Alleging that the defendants knew that blasting caps were dangerous and agreed among themselves not to put warnings on the labels,<sup>81</sup> the plaintiffs sued the six major manufacturers of blasting caps and the industry's trade association. Although *Hall* was not decided on concert of action, the language used by the court forms a basis for the enterprise theory of liability. Accordingly, *Hall* will be discussed more fully below.<sup>82</sup>

## 2. *The Sindell Analysis of Concert of Action*

The court first addressed the appellant's charge that the respon-

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Cal. App. 3d 100, 113, 140 Cal. Rptr. 41 (1971); *Loeb v. Kimmerle*, 214 Cal. 143, 150, 9 P. 2d 199 (1932).

77. 252 Cal. App. 2d 660, *sub nom.* *Orser v. Vierra*, 60 Cal. Rptr. 708 (1967).

78. *Id.* at 668, 60 Cal. Rptr. at 714.

79. 345 F. Supp. 353 (E.D.N.Y. 1972).

80. *Id.* at 378.

81. *Id.* at 359.

82. See notes 87-89 *infra* and accompanying text.

dent's parallel or imitative conduct in their testing and promotion, methods was in itself tortious conduct. The court rejected this contention by pointing out that it is common for manufacturers to borrow testing and sales techniques from other manufacturers in the same industry. Thus, the court refused to set any precedent that might "render virtually any manufacturer liable for the defective products of an entire industry."<sup>83</sup> This was the major reason for the court's rejection of the concert of action theory, since, in the court's view, its application in this context would have expanded liability much further than had ever been intended.<sup>84</sup>

The court also distinguished the DES cases from prior concert of action cases cited by the appellant.<sup>85</sup> In particular, the court sought to distinguish *Orser*. The decision in *Orser* was based on the encouragement and assistance given by one of the alleged tortfeasors to the other. However, there was no allegation made by the appellant in *Sindell* that each respondent knew of the other's tortious conduct, or that they assisted and encouraged one another to inadequately test DES and to provide inadequate warnings in the same manner as in *Orser*.<sup>86</sup> Thus, the theory of concerted action was rejected.

### C. Enterprise Liability

#### 1. History

The concept of enterprise liability was first introduced in *Hall v. E. I. Du Pont de Nemours & Co., Inc.*<sup>87</sup> Though *Hall* and its companion cases were decided on other grounds,<sup>88</sup> the court sug-

83. 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

84. *Id.*

85. The appellant cited the following cases in support of her concert of action cause of action: *Loeb v. Kimmerle*, 215 Cal. 143, 9 P.2d 199 (1932) (defendants held jointly liable for assault); *Weinberg Co. v. Bixby*, 185 Cal. 87, 196 P. 25 (1921) (husband and wife held liable for wrongful diversion of flood waters); *Agovino v. Kunze*, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960) (participants in drag race all held liable); *Meyer v. Thomas*, 18 Cal. App. 2d 299, 63 P.2d 1176 (1936) (defendants liable for conversion of a note and deed of trust). These cases all involved a small number of ascertainable defendants whose concerted action resulted in a tort against a single plaintiff, usually over a short span of time. 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141. The court distinguished these cases from the more complicated fact situation found in *Sindell*. *Id.*

86. 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141.

87. 345 F. Supp. 353 (E.D.N.Y. 1972). See note 79 *supra* and accompanying text.

88. *Hall* was actually one of two companion cases, each of which involved several joined plaintiffs. *Chance v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353

gested an expansion of the concert of action theory to include corporate entities, and referred to this expansion as "enterprise liability." In *Hall*, the defendants had adhered to an industry-wide standard with regard to safety design, labelling and manufacture of the blasting caps. Thus, it appeared that the defendants jointly controlled the risk of injury. If shown by the plaintiffs that the caps were manufactured by one of the defendants, the burden of proof would shift to the defendants.<sup>89</sup>

This novel theory of liability was developed and refined by Naomi Sheiner, while a law student at Fordham University<sup>90</sup> for use within the context of DES actions. In *DES and a Proposed Theory of Enterprise Liability*, Sheiner proposed that enterprise liability "combines the better features of concert [of action] and alternative liability into one coherent theory."<sup>91</sup> The elements of the theory as outlined in the article are as follows:

- 1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendant's conduct.
- 2) A generically similar defective product was manufactured by all the defendants.
- 3) Plaintiff's injury was caused by this product defect.
- 4) The defendants owed a duty to the class of which plaintiff was a member.
- 5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
- 6) There existed an insufficient, industry-wide standard of safety as to the manufacture of this product.
- 7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.<sup>92</sup>

"Once [the] plaintiff proves these seven elements, the burden of proof as to causation shifts to [the] defendants, each of which can exonerate itself by showing . . . that its product could not have

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(E.D.N.Y. 1972). The *Hall* court held that the plaintiff's allegations of joint knowledge and action were sufficient to maintain a cause of action against the defendants. However, the various cases involved were subsequently severed and transferred to the federal district courts in the states where the accidents had occurred. None of the severed cases dealt with the issue of enterprise liability. In two of these cases, the statute of limitations had run. *Lehtonen v. E. I. Du Pont De Nemours & Co.*, 389 F. Supp. 633 (D. Mont. 1975) (motion to dismiss granted); *Davis v. E. I. Du Pont De Nemours & Co.*, 400 F. Supp. 1347 (W.D.N.C. 1974) (summary judgment granted). In the third case, the sixth circuit affirmed a jury verdict which rejected the plaintiff's negligence claim. The court also affirmed the lower court's directed verdict for the defendant on the strict liability claim on grounds unrelated to enterprise liability because the manufacturer was not identifiable. *Ball v. E.I. Du Pont De Nemours & Co.*, 519 F.2d 715 (6th Cir. 1975).

89. 345 F. Supp. at 374.

90. Ms. Sheiner is presently an associate at the law firm of Hughes, Hubbard and Reed in New York City.

91. *Fordham Comment*, *supra* note 7, at 995.

92. *Id.*

been the one which injured this particular plaintiff."<sup>93</sup>

Enterprise liability is similar to alternative liability in that it presumes that one of the defendants caused the plaintiff's injury, and because of the tortious acts of all defendants coupled with the plaintiff's inability to identify the one who caused the injury, the burden is shifted to the defendant to exculpate himself if he is able.<sup>94</sup> Like concert of action, the "plaintiff must prove an additional element in enterprise liability, . . . , one that is derived from the concerted activities of the defendants: [the presence of] an insufficient industrywide safety standard."<sup>95</sup> In addition to the Restatement's theory of concert of action and the *Summers* rule of alternative liability, Sheiner, in developing this proposed theory of liability, relied on both *Hall* and *Ybarra* for authority.<sup>96</sup>

The primary rationale that Sheiner advances for enterprise liability is the familiar policy generally found in strict liability cases: "That as between the innocent plaintiff and the tortfeasors, the tortfeasors should bear the cost of the injury."<sup>97</sup> Sheiner relies on the policy considerations of the doctrine of respondeat superior and strict liability, which involve a deliberate allocation of risk to those in the best position to take preventative measures and to absorb and distribute foreseeable costs to the public.<sup>98</sup> In particu-

93. *Id.*

94. *Id.* at 996.

95. *Id.* at 997.

96. *Id.* "*Hall's* major contribution is . . . that it . . . provided a rationale for a theory of industry-wide liability." *Id.* at 997. See notes 86-88 *supra* and accompanying text. "*Ybarra* is noteworthy because . . . the court seemed to justify its finding of causation on the grounds of alternative liability and concert [of action] . . . in a *res ipsa loquitur* context." *Id.* at 999. See also notes 52-55 *supra* and accompanying text.

97. *Fordham Comment, supra* note 7, at 1000. This, of course, is the familiar policy argument advanced by the court in *Summers* and *Ybarra*. See notes 43-55 *supra* and accompanying text.

This rule is summarized in *Holtz v. Holder*, 101 Ariz. 247, 251, 418 P.2d 584, 588 (1966) (en banc) as follows:

The 'single injury' rule is based on the proposition that it is more desirable, as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tortfeasors, one of whom may have to pay more than his just share, than it is to let two or more wrongdoers escape liability altogether, simply because the plaintiff cannot carry the impossible burden of proving the respective shares of causation or because the tortfeasors have not committed a joint tort.

*Id.*

98. *Fordham Comment, supra* note 7, at 1001-02. The doctrine of respondeat superior holds a master liable for the torts of his servant even though the master is not in privity with the injured third party and is innocent of any tortious behav-

lar, reliance is placed on the landmark decision of *Escola v. Coca Cola Bottling Co.*,<sup>99</sup> which developed the theory of strict liability in response to the scientific and industrial advances of the time. The Sheiner article suggests that it is now time to advance still another, more far-reaching form of liability.<sup>100</sup>

## 2. *Sindell* Analysis of Enterprise Liability

The *Sindell* court rejected the theory of enterprise liability, at least in form.<sup>101</sup> The court distinguished *Sindell* from *Hall* by pointing out that in the latter there were only six manufacturers which represented the blasting cap industry in the United States;<sup>102</sup> there are at least 200 manufacturers of DES, of which only five were named in *Sindell*. Moreover, in *Hall*, the defendants jointly controlled the risk of injury through a trade association; however, in *Sindell*, proof of control of risk would not be shown by such means.<sup>103</sup>

The court also advanced the policy reason that the drug industry, because of its close affiliation with the Food and Drug Administration, should not be held completely responsible for its industry-wide standards, since those standards are dictated by the government.<sup>104</sup> In its analysis, however, the court failed to consider the fact that although the FDA set the standards for the

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ior. See HARPER & JAMES, THE LAW OF TORTS § 26.1 (1956). The theory of strict liability holds that once causation is proven, the manufacturer is liable even though he has exercised all possible care and entered into no contractual relationship with the user of the product. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965). See also Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517 (1961); Ehrenzweig, *Negligence Without Fault* (1951), reprinted in 54 CAL. L. REV. 1422, 1472-74 (1966); Morris, *Hazardous Enterprised and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1175-79 (1952).

99. 24 Cal. 2d 453, 150 P.2d 436 (1944).

100. *Fordham Comment*, *supra* note 7, at 1002.

Technological advances now allow an entire industry to manufacture a complex fungible product, modern scientific research can link contact with this product to harmful effects after a significant lapse of time. Since these advances now make identification of the injury-producing product inaccessible to the consumer, the manufacturer's obligation to the consumer can only be met by some new form of liability.

*Id.*

101. The *Sindell* court preferred to develop its own basis for liability in DES cases rather than apply the enterprise theory because of the differing rationales. Enterprise liability imposes manufacturer liability solely because the manufacturer followed the standards of the industry. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court preferred to hold the *Sindell* defendants liable for the policy reasons outlined in notes 105-127 *infra* and accompanying text.

102. 26 Cal. 3d at 607, 607 P.2d at 934, 163 Cal. Rptr. at 142. The court does concede, however, that the caps could have been supplied by a cap manufacturer. *Id.*

103. *Id.* Apparently, enterprise liability, as interpreted by the *Sindell* court, requires tangible evidence of the defendant's participation in the unsafe industry-wide practices.

104. *Id.* at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 143.

manufacture and distribution of DES, the manufacturers of the drug failed to follow these standards.<sup>105</sup>

Thus, the court rejected, rather summarily, the third theory of liability offered by the appellant. However, as will be seen below, while the court rejected enterprise liability in form, the substance is strikingly similar to the theory of "market share" liability that the court developed *sua sponte*.

#### IV. MARKET SHARE LIABILITY

Although the court deemed the three theories of liability advanced by *Sindell* insufficient to warrant a cause of action, the court nevertheless held that the appellant should not be precluded from recovery.<sup>106</sup> The court stated that "the response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs."<sup>107</sup> Therefore, based on major policy considerations, the court established a new theory of causation applicable to a limited number of cases.

Primary authority for "market share" liability was Justice Traynor's landmark concurring opinion in *Escola v. Coca Cola Bottling Co.*,<sup>108</sup> which over thirty years ago recognized the then traditional standard of negligence as insufficient to govern the obligations owed by the manufacturer to the consumer.<sup>109</sup> As in *Escola*, the policy argument that the manufacturer is better able to bear the cost of an injury resulting from a defective product was also stressed by the *Sindell* court.<sup>110</sup> It was reasoned in *Sindell* that from a policy standpoint, holding a manufacturer liable for defects in their products and for the failure to warn of harmful effects, even in the absence of proof of causation, would provide an incentive for product safety, since the manufacturer would be in the best position to guard against such defects.<sup>111</sup>

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105. See note 6 *supra* and accompanying text.

106. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. This policy argument has been relied upon in other decisions as well. See note 98 *supra* and accompanying text.

111. 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Beech Aircraft Corp. v. Superior Court*, 61 Cal. 3d 501, 132 Cal. Rptr. 541 (1976). The court

Although the *Sindell* court rejected the theories of alternative liability, concert of action, and enterprise liability, it nevertheless borrowed heavily from each of these theories in its formulation of "market share" liability. In its rejection of alternative liability and concert of action, the court apparently preferred not to expand either of these established tort doctrines to the extent that would be necessary in the *Sindell* factual setting.<sup>112</sup> In contrast, enterprise liability, which is more of a proposed theory than an established doctrine,<sup>113</sup> was relied on very heavily by the court in the adopted "market share" theory.<sup>114</sup>

The major difference between the three theories of liability proposed by the appellant and the "market share" theory formulated by the court, is that "market share", rather than imposing joint and several liability, imposes only *several* liability on the defendants. Accordingly, no manufacturer may be held liable for 100 percent of the judgment. Instead, "each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiffs' injuries."<sup>115</sup> Although the court uses the term "market share" to literally mean "the proportion of the judgment represented by [that defendant's] share of that market,"<sup>116</sup> the court did not state exactly how a defendant's

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states that these policy considerations are particularly significant in cases involving medication, since the consumer is virtually helpless in protecting himself from serious, sometimes permanent or fatal injuries caused by defective drugs. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

112. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. Both the alternative liability theory and the concert of action theory have traditionally been applied in relatively uncomplicated tort actions between private individuals and where the specific tortfeasor could not be identified. *See, e.g.*, notes 43-50, 70, 85 *supra* and accompanying text. The *Sindell* factual setting, by contrast, deals with corporate defendants in a much more complicated situation, with added elements such as the great time lapse, number of potential defendants, and significant continuing injuries involved. Thus, the court preferred to advance a new theory of liability based on the rationales of alternative liability and concert of action.

113. *See* notes 90-101 *supra* and accompanying text.

114. Although the *Sindell* court purports to have rejected the enterprise theory of liability, its "market share" theory of liability is barely distinguishable. *See* notes 101-06 *supra* and accompanying text. In fact, the one distinguishing factor, the market share apportionment scheme, was suggested in the *Comment, supra* note 7, which stated that "much of the strength and justice of enterprise liability rests in the suggestion that damages be apportioned among defendants in proportion to their market shares." *Id.* at 999. However, this was merely a suggestion, with the author subsequently acknowledging that enterprise liability actually results in *joint and several* liability, with each defendant liable for the entire amount of the damages. *Id.*

115. 26 Cal. 3d at 612, 607 P.2d at 937, 168 Cal. Rptr. at 145.

116. *Id.* The court uses an illustration from the *Comment, supra* note 7, to explain the connection between percentage of market share and liability:

[I]f X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defend-

share of the market would be determined.<sup>117</sup>

The court recognized that some discrepancy between the "market share" apportioned to a defendant and the actual liability of that defendant is inevitable, primarily because of the passage of time involved.<sup>118</sup> However, the court likened this problem to the inability of a jury to precisely determine the relation between fault and liability under the doctrines of comparative fault<sup>119</sup> or partial indemnity.<sup>120</sup> In practice, it would seem that a defendant's portion of the market would be more easily defined, because of company records of sales and profits, than a particular defendant's comparative fault in, for example, a multiple-vehicle accident case, which would necessarily be a more subjective determination because of the lack of factual basis.

The other major problem with the "market share" theory, is that all the potential defendants may not be named. The *Sindell* court concluded, however, that this was not a major obstacle in this case, since the five named respondents represented approximately ninety percent of the entire market.<sup>121</sup> Thus, there was only a ten percent likelihood that the offending producer would

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ant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect, it is close enough so that defendants' objections on the ground of fairness lose their value.

26 Cal. 3d at 612 n.28, 607 P.2d at 937, 163 Cal. Rptr. at 145 (footnote omitted) (quoting *Comment, supra* note 7, at 994).

117. Although the court fails to outline a specific method in which a defendant's portion of the market may be determined, it is assumed that each defendant's market share will be determined according to the percentage of the market it held as evidenced by records of sales and profits. While many of the drug companies involved in DES suits maintain that it is virtually impossible to recreate the market and to determine market share, some of the less vulnerable defendants have ventured a guess. For example, counsel for Rexall has estimated that it held "under one-tenth of 1 percent of the market." Bruck, *supra* note 13, at 18. (quoting Ted Grashof, counsel for Rexall).

118. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147. For example, it may be difficult to determine a particular manufacturer's exact percentage of market share in a particular year and in a particular jurisdiction, when the relevant time period is 20 years in the past. An additional problem may be in identifying the particular purpose for which the defendant's drug was sold. See note 10 *supra*.

119. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147. See *Li v. Yellow Cab Co.*, Cal. 3d 809, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

120. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147. See *American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

121. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.



escape liability.<sup>122</sup> The court, therefore, gave the appellant the initial burden of joining a "substantial percentage" of the manufacturers in bringing an action based on "market share" liability. However, the court did not determine what constituted a "substantial percentage," except to state that in the instant case that the appellant met the burden.<sup>123</sup>

Though the court readily acknowledged the above potential procedural and equitable problems with the theory, it viewed these as relatively minor, considering the alternative of leaving the appellant without a remedy.<sup>124</sup> Thus, it appears that the *Sindell* court, without specifying it as such, facilitated a type of balancing test in its adoption of "market share" recovery; inconsistencies inherent in the determination of a "substantial percentage" or "market share" are outweighed by the necessity of providing innocent plaintiffs' with an avenue of recovery.

## V. THE DISSENT

A strong dissent, written by Justice Richardson, began by stating that the ramifications of the "market share" theory adopted by the court were virtually limitless, with the "elimination of the burden of proof as to the identification [of the manufacturer whose drug injured plaintiff imposing] . . . a liability that would exceed absolute liability."<sup>125</sup> Justice Richardson cited briefly the prevailing authority on tort law,<sup>126</sup> as well as other DES cases<sup>127</sup> in sup-

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122. *Id.* See note 117 *supra* and accompanying text.

123. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The *Comment, supra* note 7, at 996 suggested that 75 to 80 % of the market be the requirement for a substantial percentage. The court, however, preferred not to quantify the term "substantial percentage" to a specific number. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

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

125. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting opinion) (citing *Coggins, Industry-Wide Liability*, 13 SUFFOLK L. REV. 980, 998 (1979) (citation omitted)).

126. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting opinion).

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 was 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. . . .

*Id.* (citing 1 HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY, § 1:41 at 125 (2d ed. 1974)); accord, PROSSER, *supra* note 37, at 671-72; 2 DOOLEY, MODERN TORT LAW, § 32.03 at 243 (1977).

127. *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978). The dissent relied on these two earlier cases which held that absent identification of a specific liable manufacturer, DES plaintiffs could not maintain a cause of action.

port of this position.

The dissent painstakingly examined the majority's decision, showing, one by one, the problems inherent in the "market share" theory. First, although the court stated that the requirement of proof is satisfied by joinder of those defendants who have together manufactured a "substantial share" of the market,<sup>128</sup> it failed to establish a guideline or method of determining what constitutes a "substantial share."<sup>129</sup> Although the dissent believed that this should have been specifically determined by the court, the dissent did not appear to consider this a major deficiency in the decision compared to the other problems with "market share" recovery.<sup>130</sup>

More significantly, the dissent was concerned with the consequences of what it terms the "unprecedented extension of liability" advanced by the theory.<sup>131</sup> For example, a particular defendant, having a very small share of the relevant market, could "be held proportionately liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiff's injuries."<sup>132</sup> This would allow the plaintiff to "pick and choose their targets,"<sup>133</sup> with the defendants, who are held to be liable, named according to whatever method the plaintiff chooses, rather than by the possibility or likelihood of liability. While this may be a legitimate concern, it seems more likely that a potential plaintiff unable to identify a responsible defendant would name those companies most readily identified as DES manufacturers, with a corresponding large share of the market, rather than those minor companies who participated in an extremely small portion of the market.<sup>134</sup>

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128. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting opinion).

133. *Id.*

134. An example of this may be found in *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978). The plaintiff named Eli Lilly & Company as the defendant in the action, but discovery showed that plaintiff could not name the responsible manufacturer and had based her allegation on the 1970 *Physician's Desk Reference*, which listed Lilly as the only manufacturer of diethylstilbestrol. *Id.* at 80, 150 Cal. Rptr. at 732. It is generally acknowledged that Lilly has a "giant's share" of the market. Bruck, *supra* note 13, at 18. Although the plaintiff could not prove the responsible manufacturer, she named the one that was more likely to have produced the responsible drug, rather than name a company with

The dissent also pointed out the practical consideration of the disproportionate impact on those manufacturers who are amenable to suit in California, since it is possible that no other state will adopt the market share theory.<sup>135</sup> In this situation, those manufacturers brought to trial in California would be, in effect, jointly responsible for 100 percent of plaintiffs' injuries although those manufacturers " 'substantial' aggregate market share may be considerably less."<sup>136</sup>

Finally, the dissent criticized the theory as contrary to the social policy that encourages the development of new pharmaceutical drugs. Justice Richardson reasoned that the decision of liability based on market share would "inevitably inhibit, if not the research or development, at least the dissemination of new pharmaceutical drugs."<sup>137</sup> This, he stated, was totally inconsistent with the policy of traditional tort theory as advanced in the Restatement.<sup>138</sup> While Justice Richardson's view is shared by several authorities,<sup>139</sup> it has been controverted by others.<sup>140</sup> This conflict of opinion will be discussed more fully below.<sup>141</sup>

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only a small share of the market. *McCreery* does show, however, that the dissent is correct in stating that plaintiffs used varying methods in choosing which defendants to name in an action.

135. 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting opinion). While no other state has specifically adopted the *Sindell* "market share" theory at the date of this writing, other states have held for the plaintiff in DES cases under the joint and several theories of liability. See note 2 *supra* and accompanying text.

136. 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting opinion).

137. *Id.* at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting opinion).

138. *Id.* The specific section that the dissent refers to is § 402 A, comment k, which states in relevant part:

It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS, § 402 A, comment k (1965).

139. See *Coggins, Industry-Wide Liability*, 13 SUFFOLK L. REV. 980 (1979); Birnbaum, *Market Share Liability Under California's Sindell DES Decision*, Nat'l L. J., May, 19, 1980, at 26 [hereinafter cited as Birnbaum].

140. See *Comment, supra* note 7; Lambert, *From the Editor's Scratch Pad*, 23 A.T.L.A. L. REV. 194 (1980) [hereinafter cited as Lambert]; Nordstrom, *Causation . . . Its Many Faces*, L.A. TRIAL L. 8A. ADVOCATE 1, No. 5 (May, 1980) [hereinafter cited as Nordstrom].

141. See notes 152-54 *infra* and accompanying text.

The dissent concluded by suggesting, in view of the sweeping possibilities of the market share theory as applied to other areas of business and commercial activity, that this extreme departure from traditional tort law should only be undertaken, if at all, by the legislature.<sup>142</sup>

## VI. IMPACT OF SINDELL

### A. Problems with "Market Share" Liability

Authorities in the field of products liability disagree as to the long-term impact of the *Sindell* ruling;<sup>143</sup> however, it is generally agreed that the decision, although limited, poses potential procedural problems.

The first apparent problem with the "market share" approach is that all potential defendants need not be named. Only a "substantial share" or percentage of the total possible defendants must be named.<sup>144</sup> This not only raises the practical problem of determining what a "substantial share" of the market is, but also leaves the possibility that the actual tortious manufacturer would not be named. In this situation, the "substantial share" of manufacturers, rather than the responsible tortfeasor, would pay for the plaintiff's injuries.

Although the *Sindell* court did not believe that this would be a major problem,<sup>145</sup> its failure to give a guideline for determining what is a "substantial share" of a market has created potential problems. The lack of foresight by the court in creating a novel

142. 26 Cal. 3d at 621, 607 P.2d at 943, 163 Cal. Rptr. at 151 (Richardson, J., dissenting opinion). The court addressed this suggestion of the dissent in a footnote stating that "as a principle, [we do not see] any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California." 26 Cal. 3d at 613 n.30, 607 P.2d at 938 n.30, 163 Cal. Rptr. at 146 n.30.

143. For example, Sheila Birnbaum, Professor of Law at New York University School of Law, states: "The shock waves of *Sindell* have already had an impact on other industries . . . indeed, [*Sindell*] is only 'the tip of the iceberg' in the continued expansion of product liability law." Birnbaum, *supra* note 139, at 27. However, Paul Rheingold, the New York City attorney that filed the first DES lawsuit in 1974, *Rheingold v. E.R. Squibb & Sons, Inc.*, No. 74 Civil 3420 (S.D.N.Y. Oct. 14, 1975), on behalf of his daughter, believes that *Sindell* may not have a very far-reaching impact with regard to other areas of products liability because few products liability cases involve serious questions of defendant identification. Podgers, 66 A.B.A.J. 827 (July, 1980) [hereinafter cited as Podgers].

144. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting opinion).

145. *Id.* at 612-23, 607 P.2d at 937, 163 Cal. Rptr. at 145.

theory of liability without following up on the practical application of the theory has, perhaps unnecessarily, exposed the decision to criticism. A related problem is the failure of the court to explain a method of determining the "market share" of a defendant.<sup>146</sup>

One potential procedural problem not discussed by either the majority or the dissent is whether a finding of "market share" liability may collaterally estop an entire industry from denying liability.<sup>147</sup> Collateral estoppel has recently been ruled a proper pleading vehicle in products liability cases.<sup>148</sup> However, these decisions do not address the possibility of collaterally estopping manufacturers of a generic product who have not personally had their day in court. In view of the *generic* quality of DES, as well as the limited scope of "market share" applicability,<sup>149</sup> it is doubtful that this issue presents a serious problem.

Apart from the aforementioned procedural problems in *Sindell*, there are equitable drawbacks inherent in the "market share" theory. One of the most serious of these appears to be the problem with the apportionment of damages. For example, in cases where the plaintiff cannot name the responsible defendant, such as was the situation in *Sindell*, "market share" liability will be evoked. However, in those cases where the plaintiff is able to name the responsible manufacturer that caused her injuries, it is assumed that the plaintiff will retain the burden of proof as to the single defendant, rather than naming several defendants and proceeding under a "market share" theory.<sup>150</sup> For example, in case 1, if the plaintiff is able to identify a specific responsible manufacturer, the plaintiff will retain the burden of proof, with the single

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146. See notes 117-19 *supra* and accompanying text.

147. Birnbaum, *supra* note 139, at 27.

148. See *Ezagui v. Dow Chemical Corp.*, 598 F.2d 727 (2d Cir. 1979); *Katz v. Eli Lilly & Co.*, 84 F.R.D. 387 (E.D.N.Y. 1979); Burke, *Judge Lets Lawyers in Federal Suit Depose Jurors on State Court Verdict*, Nat'l L. J., December 17, 1978 at 6. Bruek, *Plaintiff's Win Three Key Victories, Des Suits*, AM. LAW, Nov. 1979, at 10.

149. See notes 163-66 *infra* and accompanying text.

150. Defendant Abbott Laboratories, in its petition for rehearing to the Supreme Court of California, stated that this example had occurred in *Sindell*:

The two cases now before the Court provide a limited illustration of the fallacy of this assumption and the inequities that would result from its use. While the Court has assumed that the plaintiff *Sindell* has no identification evidence, the plaintiff *Rogers* alleges that *Eli Lilly & Company* made the alleged injury-causing product in her case. If both plaintiffs are correct and if they succeed in proving every other element of the tort, then *Lilly* would pay 100% of *Rogers*' damages, plus a market share portion of *Sindell*'s damages. It is patently obvious that *Lilly*'s total liability in the two cases will *not* reflect its share of the market, but far exceed it.

Petition of Abbott Laboratories For Rehearing at, 7-8, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (rehearing denied May 7, 1980).

defendant paying 100 percent of the judgment. However, in case 2, if the plaintiff is unable to name the responsible manufacturer, she will name several and proceed on the basis of "market share" liability. If one manufacturer is named in both case 1 and case 2, that manufacturer-defendant will be forced to pay 100 percent of one judgment and a market share percentage in another. Thus, this combined liability will force that one manufacturer-defendant to bear a much greater burden than its actual market share.

As pointed out by the dissent, the above example would particularly become a problem if jurisdictions other than California fail to adopt the "market share" theory as advanced by the *Sindell* court. In this situation, those manufacturers more amenable to suit in California would be held to a disproportionate share of damages.<sup>151</sup>

The final major problem with the "market share" theory is the concern that the pharmaceutical industry may be undermined by, in effect, making it the insurer of all defective drugs of uncertain origin.<sup>152</sup> Critics of the *Sindell* decision believe, as was stated in the dissent, that the theory will inhibit the dissemination of drugs, which is contrary to the public policy considerations advanced in the Restatement.<sup>153</sup> A close look at the wording of the Restatement cited by the dissent, however, will show that these policy considerations do not apply to the facts of the *Sindell* case.

The Restatement states that public policy justifies the use of new or experimental drugs, despite medically recognizable risks, and that the manufacturer of such a drug will not be held strictly liable for subsequent injuries caused by the drug. However, this applies to manufacturers who are held *strictly liable*, and only applies when the drug is *properly prepared and marketed, and proper warning given*.<sup>154</sup> In contrast, *Sindell* sued the various respondents for their *negligence* in failing to properly market, test, and warn of the inherent dangers in the use of DES.

Therefore, it appears that the *Sindell* court, rather than holding the drug industry liable for all injuries that occur as a result of a drug previously thought to be safe, has only suggested that those manufacturers who are shown to have been negligent in their marketing or testing of a drug should be held liable for the conse-

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151. 26 Cal. 3d at 617, 607 P.2d at 942, 163 Cal. Rptr. at 150.

152. *Id.* at 621, 607 P.2d at 942, 163 Cal. Rptr. at 150.

153. See note 138 *supra* and accompanying text.

154. *Id.*

quences of their negligent acts. Rather than discouraging the dissemination of modern drugs, this policy should serve to encourage their *safe* testing, marketing, and utilization.

### B. Benefits of "Market Share" Liability

The major advantage of "market share" liability is the equitable policy repeated throughout the *Sindell* decision. It is "preferable to hold liable a negligent defendant who did not in fact cause the injury than to deny an innocent plaintiff a remedy when it cannot be determined which of the defendants is responsible for the harm but it appears that one of them was."<sup>155</sup> This same general policy is the basis for virtually all of the major advances in the field of products liability in recent years.<sup>156</sup>

*Sindell* was innocent of any wrongdoing, yet suffered serious injury. Although she could not name the manufacturer that produced the DES that caused her specific injury, she named several manufacturers, and alleged that all of them negligently produced the carcinogenic drug. If the *Sindell* court had not allowed the appellant to maintain her action, the result would have been that the victims of DES would have borne the cost of their injuries while the tortious manufacturers would have avoided liability. As has been stated so often by the courts, the cost of these injuries is much better borne by the manufacturers, who have the potential to guard against such dangers, than by the innocent victims of their mistakes.<sup>157</sup>

### C. The Potential Application of "Market Share"

It is clear that California's "market share" apportionment theory is affecting almost immediately other DES cases pending in other courts. For example, in May of 1980, only one month after the *Sindell* ruling, a Cleveland woman settled out of court with four separate DES manufacturers for a total of two million dollars.<sup>158</sup> This immediate result is not unexpected. After the

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155. *Vasquez v. Alameda*, 49 Cal. 2d 674, 682-83, 321 P.2d 1, 7 (1958) (Traynor, J., dissenting opinion).

156. See notes 43-55, 98, 100-01 *supra* and accompanying text.

157. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

158. Cindy Dettelbach, of University Heights, Ohio, underwent surgery for vaginal cancer in February, 1976, at the age of 19. She will never be able to have children, faces the possibility of similar cancer developing and must be tested for cancer every six months. She filed a five million dollar lawsuit in federal district court in March of 1976 and, in wording similar to the *Sindell* allegations, has named Eli Lilly, Merck & Co., E.R. Squibb & Sons, and the Upjohn Co. as defendants. Less than a month after the *Sindell* ruling, the defendant companies settled for \$260,000.00. L.A. Daily J., May 9, 1980, at 3, col. 8.

*Sindell* decision,<sup>159</sup> one defense attorney involved in DES litigation stated that "the *Sindell* case is a major victory for the plaintiffs' bar. Especially since California traditionally is in the vanguard of tort litigation, *Sindell* might represent a watershed in terms of a trend for the future."<sup>160</sup> This seems to be the general consensus among both plaintiff and defense attorneys,<sup>161</sup> especially since the United States Supreme Court has denied the writ of certiorari sought by the *Sindell* respondents.<sup>162</sup>

If, as is expected, the *Sindell* decision sparks a rash of suits based on "market share" liability, it may be advantageous for the drug companies to unite, develop a proportional scheme based on the market, and begin to organize efficient and expeditious settlements with DES plaintiffs.<sup>163</sup> Although this type of organization would be enormously expensive and administratively complicated, it would be beneficial to all parties in the long run. A plaintiff would be compensated sooner, and although she would possibly receive a lesser amount of recovery, the legal entanglements of lengthy litigation would be avoided. The defendants, although forced to pay damages in all cases, would save tremendous litigation expenses.<sup>164</sup> This will especially be true if other jurisdictions follow the lead of *Sindell*, since without the necessity of the plaintiff identifying a specific defendant, defense verdicts would be rare. Finally, the advantage of mass settlement and avoidance of unnecessary and protracted litigation would be beneficial in promoting judicial efficiency by helping to alleviate the existing court backlogs around the country.

In regard to the further application of *Sindell* to other areas of tort litigation, the repercussions will be necessarily minimal because of the relatively few types of products liability cases that involve serious problems of defendant identification. The *Sindell* court limited itself in its application of "market share" liability to

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159. See note 20 *supra*.

160. Bruck, *supra* note 13, at 18 (quoting Henry Simon, National DES counsel for Schering).

161. See notes 140, 143 *supra*.

162. 49 U.S.L.W. 3270 (1980).

163. Defense counsel involved in DES litigation held some preliminary settlement talks in 1977, but abandoned the idea because of the money involved and the administrative complications. Such negotiations show, however, that the drug companies appreciated the risks involved in DES cases, but at that time were not interested in settlement. Bruck, *supra* note 13, at 18. With the *Sindell* decision, these settlement talks may reopen.

164. *Id.*



only cases where a plaintiff has an identification problem due to the generic quality of the product causing the injury.<sup>165</sup> The court further limited the theory by applying it, as an element of causation, only in those cases where the manufacturer is negligent.<sup>166</sup> Thus, the far-reaching impact feared by the critics of *Sindell* is unlikely to occur.

However, in those few cases that involve the type of identification problems found in DES cases, the application of the "market share" theory will be almost immediate. The most obvious of these cases are the more than 6,000 asbestos cases that are pending around the country.<sup>167</sup> The asbestos cases involve the factually analogous problem of a construction worker attempting to prove not only the identity of each of his employers during the twenty to thirty years of asbestos exposure, but also which manufacturer produced the asbestos products that were purchased by or on behalf of those employers over such period of time. This identity problem, similar to the DES cases, would without a "market share" type of approach preclude any remedy.<sup>168</sup> Like DES cases, asbestos litigation is similarly causing court backlogs throughout the country. Therefore, the judicial system, faced with such a problem, may welcome expeditious approaches to the resolution of these cases as well.<sup>169</sup>

## VII. CONCLUSION

It is clear that *Sindell* is a substantial expansion of products liability law. It is equally clear that this expansion is necessary to meet the changing needs of society. It has been said that the life of the law is a response to human needs.<sup>170</sup> The *Sindell* court, in developing the "market share" theory of liability, has expanded the law to adapt to the expansion of technology and industry in today's advancing society.

Far from stifling the drug industry, the "market share" theory should encourage more responsible testing and care in the development of modern drugs. The *Sindell* decision does not call for the pharmaceutical industry's guarantee of fool-proof drugs, rather, it calls for a responsible attitude in their development.

This decision also avails the courts of an expeditious approach to relieve court backlogs in cases where the liability is clear but

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165. 26 Cal. 3d at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

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

167. Podgers, *supra* note 143.

168. Nordstrom, *supra* note 140.

169. Podgers, *supra* note 143.

170. Lambert, *supra* note 140.

proof of causation as to a specific manufacturer is not. This decision should be a welcome answer to a practical problem felt by many members of the legal profession in eliminating expensive, time-consuming, and unnecessary litigation.

In conclusion, although some problems exist in the "market share" theory of liability the benefits to be gained from its adoption greatly outweigh any disadvantages. The inequities in the decision are limited to those manufacturers responsible of innocent plaintiffs.

N. DENISE TAYLOR

