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Patricia A. Meagher

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MARKET SHARE LIABILITY: A NEW METHOD OF RECOVERY FOR D.E.S. LITIGANTS

In recent years, courts have encountered serious problems in applying products liability law to fungible defective products. While some plaintiffs injured by fungible products have identified the culpable manufacturers and successfully litigated their claims, other injured parties have faced serious threshold identification difficulties. The nature of fungible products is such that litigants may be unable to identify the manufacturer who supplied the injury-causing product. Unless this problem of identification is overcome, the injured plaintiff is barred from presenting a valid cause of action. Consequently, traditional products liability law theories have offered an inadequate basis for compensation to many plaintiffs injured by defective fungible products.

Litigation involving diethystilbestrol (DES) illustrates the current problems in applying traditional products liability law to fungible defective products. Originally distributed in 1947 to prevent complications during pregnancy, DES was later recognized as a cause of vaginal abnor-

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1. "Fungible things are generally defined as interchangeable—capable of mutual substitution. They are of such kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation." Maritime Petroleum Corp. v. Jersey City, 1 N.J. 287, 63 A.2d 262, 266 (1949).

2. See Borel v. Fiberboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). In this case, the plaintiff sued 11 manufacturers of asbestos insulation material allegedly used by him during his working career. Four of the manufacturers settled the claim before trial. A fifth manufacturer received a favorable directed verdict by the trial court because the plaintiff had failed to show that he had ever been exposed to any product of that company. Each of the remaining six manufacturers were found to have been the cause-in-fact of some injury to the plaintiff and thus capable of being held jointly and severally liable for total damages.


4. The present theories for which a plaintiff may recover in a products liability case include negligence, breach of warranty, strict liability, fraud, deceit, misrepresentation, and a willful act. R. Hursh & H. Bailey, supra note 3, at § 1:3.

5. Diethystilbestrol is a synthetic estrogen first developed in 1938 in England. It was marketed with FDA approval in the United States for the treatment of complications during pregnancy between 1941 and 1971. DES may be considered a fungible product because all manufacturers of the drug were required to follow the same United States Pharmacopoeia formula, see 21 U.S.C. § 351(b) (1976), and to use the same description of the drug on the
malities in the daughters of women who took the drug. Many of these daughters are now seeking to recover damages from drug manufacturers for injuries sustained as a result of the maternal ingestion of DES during pregnancy.\textsuperscript{6} These plaintiffs claim that the pharmaceutical companies negligently manufactured and marketed DES without adequate testing; however, most have been unable to identify the specific manufacturer of the DES ingested by their mothers.\textsuperscript{7} As a result, plaintiffs have been forced to proceed under one or more of three existing theories of liability applied when the identity of the injury-causing defendant is uncertain: alternative liability; concert of action; or industry-wide liability.\textsuperscript{8}

Courts, however, have generally been unwilling to apply these theories to DES cases.\textsuperscript{9} Among the reasons given for finding these theories inapplicable to DES cases are the number of defendants involved in the suits, the failure of all potential guilty parties to be joined as defendants, and the unique characteristics of the pharmaceutical industry. As a result, most plaintiffs have been left with no means of recovery under current products.


6. The maternal ingestion of DES has been linked to a rare form of vaginal cancer called adenocarcinoma and other abnormalities of the female reproductive tract. See notes 24-34 and accompanying text infra.


7. The long delay between the time of maternal ingestion of the drug and the time of the discovery of abnormalities in the daughters and subsequent litigation is the prime cause of the difficulties in identifying the manufacturers. During this period of time, physicians have died, records have been lost, memories have faded, and pharmaceutical companies have gone out of business. Furthermore, the fungible nature of DES allowed pharmacists to substitute one brand of the drug for another. Kroll, Intra-Industry Joint Liability.- The Era of Absolute Products Liability, 687 Ins. L.J. 185, 187 (1980).

8. These theories have been developed and applied by the courts in various situations in which requiring identification of the defendant responsible for the injury-causing instrumentality would have placed an undue burden on the plaintiff or would have been unjust because of policy considerations. See notes 42-77 and accompanying text infra.

9. See Gray v. United States, 445 F. Supp. 337 (D. Neb. 1978). In that case, the plaintiff sued drug manufacturer Eli Lilly & Co. and the United States under the Federal Torts Claim Act for its approval of the sale of DES. The court granted the defendant’s motion for summary judgment based on plaintiff’s failure to present evidence that defendant had manufactured the drug ingested by her mother. The court did not address the question of whether any other theory of liability could be applied. The claim against the United States was also dismissed. See also McCreevy v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978). The defendant’s motion for summary judgment was affirmed in this case. The court stated that the plaintiff failed to prove that all DES manufacturers misrepresented the risks of the drug and thus could not maintain a cause of action based on the concert of action theory.
liability theories. 10

The California Supreme Court has recently proposed a solution to this dilemma in Sindell v. Abbott Laboratories. 11 In this case, the plaintiffs brought a class action 12 against eleven pharmaceutical companies, 13 seeking damages for injuries sustained as a result of their mothers' consumption of DES during pregnancy. Although the plaintiffs failed to identify the specific manufacturers of the DES actually taken by their mothers, they suggested that liability could be based on one of the three traditional theories of liability. 14 The court refused to apply any of these theories, but it enunciated a new basis for liability upon which the action could be tried. Basing its decision on a modification of the alternative liability theory, the court held that the plaintiffs would be allowed to recover upon a showing that the manufacturers, in the aggregate, produced a substantial percentage of the drug causing the plaintiffs' injuries. 15 Under the ruling, each manufacturer would be liable for damages proportionate to its share of the market unless the manufacturer could demonstrate that it did not produce the drug which induced the plaintiffs' injuries. The court concluded that under this approach, each manufacturer's liability would approximate the damages caused by its product. 16

The controversial theory of liability espoused in Sindell represents a dramatic breakthrough for DES victims. Moreover, this theory of market share liability could extend to cases which involve other fungible products and an unidentifiable manufacturer. Under this theory, plaintiffs need prove only that the defendants were manufacturers of the same defective product which caused their injury and that the joined defendants represent a substantial portion of the market for the product in question. Plaintiffs

10. Two state courts, however, have recently ruled in favor of DES plaintiffs. In Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625 (App. Div. 1981), the plaintiff recovered for injuries sustained from the maternal ingestion of DES although she did not identify the specific manufacturer of the drug. Similarly, in Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979), the court allowed the plaintiff to proceed with her cause of action although identification of the manufacturer was not made.


12. The plaintiff class, represented by Judith Sindell, consisted of women residing in California whose mothers ingested DES during pregnancy and who may or may not have been aware of the dangers to which they were exposed. Id. at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 133 n.1.


14. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

15. Id. at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

16. Id. at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.
need not prove which individual defendant manufactured the specific injury-causing product, nor must they rely on an expanded judicial interpretation of the traditional theories of liability to support a valid cause of action. Essentially, the Sindell court made a policy decision to forgo rigid adherence to prior doctrines and instead to design a remedy which could meet the needs of modern plaintiffs injured by fungible products like DES.

This Note will examine the various theories upon which DES plaintiffs have advanced their claims prior to Sindell and will explain why these theories have not provided plaintiffs with a recognized cause of action. It will then examine the theory of market share liability enunciated in Sindell and assess it in conjunction with the policy considerations underlying products liability law. Finally, this Note will conclude that the theory of market share liability is a novel yet well-founded approach to litigation involving fungible defective products, consistent with the prior doctrine of products liability law, and represents a necessary expansion of tort liability in today’s complex industrial society.

I. HISTORY OF DES

In 1947, the Food and Drug Administration (FDA) approved the distribution of DES on an experimental basis for use in the prevention and treatment of complications during pregnancy. This approval was based on two studies attesting to the safety and effectiveness of DES in preventing pregnancy problems. Between 1947 and 1952, approximately eighty-

17. For a general analysis of the FDA approval system for new drugs see Merrill, Compensation for Prescription Drug Injuries, 59 VA. L. REV. 1 (1973). The author states that: [t]he drug approval system thus necessarily contemplates that drugs will be available for general use before all of their hazards are known. All consumers of prescription drugs serve as guinea pigs for the pharmaceutical industry, for every new drug remains basically “experimental” even after it has been approved for general use. Id. at 20-21 (footnote omitted).

18. DES was designed to prevent complications including imminent spontaneous abortions, premature delivery, and various complications of pregnancy exacerbated by diabetes or hypertension. See Smith, Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy, 56 AM. J. OBSTETRICS & GYNECOLOGY 821 (1948).


These two studies, conducted in the 1940’s, concluded that DES could be used to prevent progesterone deficiency during pregnancy and minimize resulting abnormalities including abortion, miscarriage, and premature delivery. A total of 632 pregnancies were analyzed in the Smith study, with 117 collaborating obstetricians in 16 states. The Karnaky study was conducted on a much smaller basis and was centered in the Houston, Texas area.
five companies manufactured DES. In 1952, the FDA declared that DES was no longer a new drug and was considered safe for general use. This declaration meant that any manufacturer could market the drug without submitting additional data to the FDA concerning its safety and effectiveness. By the end of that year, no fewer than 191 companies were manufacturing and distributing DES.

In 1971, two medical studies associated an increase in a rare form of vaginal cancer called adenocarcinoma with the maternal ingestion of DES during pregnancy. Pursuant to these findings, the FDA required that

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(p) The term “new drug” means
1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a “new drug” if at any time prior to June 25, 1938, it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or
2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.
22. Petition for Hearing, supra note 20, at 6. At the time defendants filed their new drug applications, such applications became effective on the 60th day after filing if the Secretary of the U.S. Department of Health, Education and Welfare did not disapprove the application. The Secretary could disapprove an application if he found that the reports submitted with the new drug application did not include adequate testing results or the method of testing the safety of the drug or if the reports did not contain sufficient information on which a decision could be made. 21 U.S.C. § 355(d) (1976).
23. Petition for Hearing, supra note 20, at 6.
24. See Herbst, Ulfelder & Poskanzer, Adenocarcinoma of the Vagina, 284 New Eng. J. Med. 878 (1971); Greenwald, Barlow, Nasca & Burnett, Vaginal Cancer after Maternal Treatment with Synthetic Estrogens, 285 New Eng. J. Med. 390 (1971). These studies, upon which the FDA relied, were conducted after an abnormally high number of women were discovered to have contracted adenocarcinoma between 1966 and 1970. The studies noted that these women were born during those years in which estrogen was commonly used in high-risk pregnancies. In addition, it was found that all but one patient in the Herbst study was exposed to estrogen in utero and that such exposure increased the risk of vaginal adenocarcinoma development in the child.
25. Adenocarcinoma is a rare form of vaginal cancer, the causes of which are unknown. It may occur spontaneously in nature without exposure to DES before birth. Herbst, Cole, Colton, Robboy & Scully, Age-Incidence and Risk of Diethylstilbestrol-Related Clear Cell
pregnancy be listed by the manufacturers of DES as a contraindication to the use of the drug and that all other estrogens include a warning on their labels concerning the association between DES and vaginal cancer. Additional studies have since confirmed this association. Although DES is no longer used during pregnancy, it is still prescribed for treatment of unusual menopausal symptoms and of certain kinds of cancer of the breast and prostate.

It is estimated that between one-half million and three million women were exposed to DES between 1947 and 1971. A large number of these women remain unaware of that exposure and of the potential complications. Although only a small percentage of DES daughters have contracted adenocarcinoma, the vast majority of the DES women suffer from adenosis and must be constantly monitored by a physician.


26. Contraindication is an indication, symptom, or condition that makes a particular treatment or procedure inadvisable. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976).

27. FOOD AND DRUG ADMINISTRATION, U.S. DEPT' OF HEALTH, EDUCATION & WELFARE DRUG BULLETIN, Diethylstilbestrol Contraindicated in Pregnancy (Nov. 1971). In addition to the FDA requirement that DES manufacturers warn pregnant women about the drug's dangers, the agency also initiated epidemiological studies to determine the validity of the reported dangers.

28. See Ulfelder, The Stilbestrol-Adenosis-Carcinoma Syndrome, 38 CANCER 426 (July Supp. 1976) (in utero exposure to stilbestrol was confirmed in two-thirds of the cases of adenocarcinoma reported); Herbst, Cole, Norusis, Welch & Scully, Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix, 135 AM. J. OBSTETRICS & GYNECOLOGY 876 (1979) (estimated that the correlation between the use of the drug and adenocarcinoma ranged between .14 to 1.4 per thousand daughters exposed to the drug); Nordqvist, Fidler, Woodruff & Lewis, Clear Cell Adenocarcinoma of the Cervix and the Vagina, 37 CANCER 858 (1976) (adenocarcinoma can occur spontaneously in nature and develop in women without maternal exposure to estrogen).


30. Ulfelder, supra note 28, at 429.


34. Adenosis is abnormal tissue present on the cervix or vagina. QUESTIONS AND ANSWERS, supra note 29, at 3. It is a precancerous condition which must be closely monitored by a biopsy or coloscopy examination every six months. The treatment for adenosis is cauterization, surgery, or cyrosurgery. 26 Cal. 3d at 594, 607 P.2d at 925, 163 Cal. Rptr. at 133.
II. THEORIES OF LIABILITY PRIOR TO SINDELL

It is estimated that more than one thousand DES cases are presently pending nationwide, with most of the major pharmaceutical companies joined as defendants.35 Prior to the Sindell decision, few DES plaintiffs had succeeded in presenting a valid cause of action against the drug companies for injuries sustained from the maternal ingestion of the drug.36 Various procedural barriers such as the statute of limitations,37 failure to obtain class action certification,38 in personam jurisdiction,39 and the non-applicability of the successor-liability doctrine,40 resulted in early dismissal of many cases. Some plaintiffs, including Ms. Sindell, have had difficulty asserting a valid cause of action under one of the traditional theories of liability because causation is difficult to establish when no specific manufacturer of the injury-causing product can be identified.41 A review of the theories of alternative liability, concert of action, and industry-wide liability provides a foundation to determine whether the market share liability theory presented in Sindell is a consistent development in products liability law.

A. Alternative Liability

The alternative liability theory is one which provides a plaintiff with a means to hold more than one defendant liable when the specific source of the injury is uncertain. Under this theory, a plaintiff who cannot identify which one of multiple defendants caused an injury may shift the burden of proof to the defendants to show that they were not responsible for the

36. See note 10 and accompanying text supra.
37. See, e.g., Diamond v. E.R. Squibb & Sons, Inc., 366 So. 2d 1221 ( Fla. App. 1979) (plaintiff's cause of action barred by statute of limitations because it had not been brought within 12 years of the date of the last delivery of the drug).
38. See, e.g., Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979) (class action could not be maintained because individual determinations of proximate cause would be required and would predominate over common questions of law and fact).
39. See, e.g., Rowell Laboratories, Inc. v. Superior Court, 117 Ariz. 400, 573 P.2d 91 (1977) (dismissed for lack of in personam jurisdiction, where defendant foreign drug manufacturing companies engaged in no systematic and continuous course of conduct within the state).
40. See, e.g., Lemire v. Garrard Drugs, 95 Mich. App. 520, 291 N.W.2d 103 (1980) (successor liability doctrine not applied since the defendant had no connection with the plaintiff's mother nor knowledge of the alleged sale of DES to her 16 years prior to the defendant's purchase of the drug store, and since they had no connection with the former owner other than the purchase of his store).
41. See note 9 and accompanying text supra.
plaintiff's injuries. The theory is applied to cases in which the plaintiff proves that each defendant acted tortiously and that the harm suffered by the plaintiff resulted from the conduct of one of the defendants. Alternative liability is premised upon the rationale that proven wrongdoers should not escape liability merely because a plaintiff is unable to identify which defendant actually caused the injury. When the burden of proof is shifted, each defendant has the opportunity to exonerate himself by submitting proof that he could not have caused the plaintiff's injury. Shifting the burden of proof in such situations is justified by the presumption that a defendant would normally be in a far better position than the plaintiff to offer evidence establishing that another defendant caused the injury. Traditionally, this theory has been limited to cases where all of the potential tortfeasors have been joined as defendants and where the conduct occurred simultaneously and created substantially the same risk. These requirements preclude the possibility that one who actually caused the harm to the plaintiff might escape liability by not being joined as a defendant in the action.

The classic illustration of the alternative liability theory is embodied in Summers v. Tice. In that case, each of the defendants had simultaneously and negligently shot in the direction of the plaintiff during a hunting expedition, and each was forced to bear the burden of proving that the shot which injured the plaintiff was not fired by him. In holding both defendants jointly and severally liable, the California Supreme Court made a policy determination that a plaintiff should not go without a remedy merely because the defendants' tortious acts made it impossible for the plaintiff to identify the specific party responsible for causing the harm.

The alternative liability theory has also justified shifting the burden of proof.
proving causation in other situations. In *Ybarra v. Spangard*,,50 another California case, the plaintiff suffered paralysis of his shoulder while undergoing an appendectomy. The court determined that it would be an unfair burden to require the plaintiff, since he was unconscious on an operating table when the injury was sustained, to identify the particular defendant who inflicted his injury. The plaintiff was allowed to join as defendants all those medical personnel responsible for his safety during the operation, and to infer negligence under the doctrine of *res ipsa loquitur*.,51 The court then shifted the burden of proving causation and disproving negligence to the individual defendants. Once again, the court's justification for this shifting of the burden of proof was its determination that the plaintiff should not go remediless merely because he could not identify the specific cause of his injury under the circumstances created by the defendants' conduct.52

Furthermore, alternative liability may be used in situations where the plaintiff has suffered indivisible injury through defendants' independent tortious actions.53 Multiple automobile collisions are a common example of this situation, as illustrated by *Eramdjian v. Interstate Bakery*.54 There, determination have been adopted by the *Restatement (Second) of Torts*, Explanatory Notes § 433(B)(3), Illustration 9.

Prior to *Summers*, courts had generally limited the imposition of joint liability to four situations:

(1) the actors knowingly join[ed] in the performance of the tortious act or acts; (2) the actors fail[ed] to perform a common duty owed to the plaintiff; (3) there [was] a special relationship between the parties . . . ; (4) although there [was] no concerted action nevertheless the independent acts of several actors concur[red] to produce indivisible harmful consequences.

1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 697-98 (1956).


51. 25 Cal. 2d at 489, 154 P.2d at 689. In *Ybarra*, the court stated that the doctrine of *res ipsa loquitur* has three conditions:

(1) the accident 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.


Since the *Ybarra* decision, the doctrine has been modified by various courts. The requirement of "exclusive control" has been given broad judicial interpretation by some courts, while the condition of no voluntary action on the part of the plaintiff has been eliminated in California. The California courts have also added a requirement of probable superior knowledge of the defendant as to the cause of the accident in certain cases. *See* McCoid, *Negligence Actions Against Multiple Defendants*, 7 STAN. L. REV. 480, 482-85 (1955).

52. 25 Cal. 2d at 489, 154 P.2d at 689.

53. W. PROSSER, supra note 51, § 52 at 315-17.

the plaintiff was involved in a motorcycle accident, and as he was lying unconscious on the street was subsequently run over and crushed by a truck. The California Court of Appeals held that each defendant must bear the burden of establishing that his acts did not cause the plaintiff's injuries. The court concluded that the wrongdoer should bear the burden of explaining circumstances where he would otherwise escape liability. As these cases illustrate, the alternative liability theory provides a plaintiff with the means to present a valid cause of action when the defendants' negligence is clear but when there is doubt as to the issue of causation.

B. Concert of Action

The second theory under which causation may be proved in situations where the identity of the injury-causing defendant is uncertain is concert of action. This theory is applied where a plaintiff seeks to recover damages for injuries caused by a defendant who, by express or tacit agreement, encouraged, cooperated, or actively participated in a common plan or design to commit a tortious act. The plaintiff may elect to sue one, all, or any combination of participants, each being jointly and severally liable for plaintiff's injuries. Imposition of joint liability is justified by the court's determination that the causative tortious event was the concerted action in which each of the defendants participated, rather than the actual infliction of injury to the plaintiff.

The most common illustration of concerted action is an illegal drag race where each participant is held liable for any injuries sustained by an innocent bystander, whether or not the particular defendant in fact injured the plaintiff. In *Bierczynski v. Rogers*, for example, two drivers were participating in such a race when one of their automobiles struck an oncoming pedestrian.

55. 153 Cal. App. 2d at 315 P.2d at 29.
56. RESTATEMENT (SECOND) OF TORTS, § 876 (1977) provides:
   For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
   a) does a tortious act in concert with the other or pursuant to a common design with him, or
   b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
   c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.
57. W. PROSSER supra note 51, § 46, at 292.
58. The imposition of joint liability may also be justified under the theory that where there is a joint enterprise, all the actors are vicariously liable for the negligent acts of each other. W. PROSSER, supra note 51, § 46, at 291. See note 61 and accompanying text infra.
59. 239 A.2d 218 (Del. 1968).
automobile driven by the plaintiff. The court held that regardless of which defendant's automobile actually collided with the plaintiff's, participation in an illegal drag race proved negligence and therefore both participants were liable for injuries sustained by an innocent third person.\textsuperscript{60} Similarly, in \textit{Sprinkle v. Lemley},\textsuperscript{61} the concert of action theory was applied to hold two physicians liable, each for the negligence of the other. The two physicians were held liable for plaintiff's ischemic contracture which resulted from the treatment of a fractured leg. The court noted that the concert of action theory was applied correctly because the acts of one physician were not independent of the other when both physicians treated the patient in concert.\textsuperscript{62}

To establish concert of action, the conduct of the defendants must be shown to constitute an agreement to participate in the commission of a tortious act; mere knowledge by one defendant of another defendant's actions is insufficient. Moreover, each defendant must intend to act in furtherance of the tortious act.\textsuperscript{63} Thus, in \textit{Duke v. Feldman},\textsuperscript{64} the fact that a wife watched her husband assault a third person and subsequently drove him away from the scene was insufficient to impose liability on the wife in an action for civil assault. Absent evidence that she assisted her husband or encouraged the assault, the wife could not be considered a participant in a design to perpetuate the tortious action.\textsuperscript{65}

The rationale underlying the concert of action theory is probably more the deterrence of hazardous group behavior than the solution of the problem of identifying the actual injury-producing party.\textsuperscript{66} Nevertheless, the theory effectively obviates the need to identify the actual defendant who caused a plaintiff's injury by holding each defendant liable for substantial encouragement of a tortious act.

\textbf{C. The Theory of Industry-Wide Liability}

The theory of industry-wide liability is the most recent exception to the general requirement that a plaintiff must identify the actual party causing his injury in order to present a valid cause of action.\textsuperscript{67} This theory was

\begin{itemize}
  \item \textsuperscript{60} \textit{Id.} at 221.
  \item \textsuperscript{61} 243 Or. 521, 414 P.2d 797 (1966).
  \item \textsuperscript{62} \textit{Id.} at 524, 414 P.2d at 800-01.
  \item \textsuperscript{63} W. PROSSER, \textit{supra} note 51, § 46, at 292.
  \item \textsuperscript{64} 245 Md. 454, 226 A.2d 345 (1967).
  \item \textsuperscript{65} \textit{Id.} at 457-59, 226 A.2d at 347-48.
  \item \textsuperscript{66} Comment, \textit{supra} note 5, at 979.
  \item \textsuperscript{67} This theory has also been termed "enterprise liability." However, enterprise liability should be confined to describing the application of risk distribution theory which states that losses to society created by an enterprise should be borne by that enterprise to further the
suggested in *Hall v. E.I. Du Pont De Nemours & Co.*, where the court held that there are certain circumstances in which an entire industry may be liable for harm caused by its operations.

The *Hall* case, commonly known as the "blasting cap case," arose when the parents of children injured by exploding dynamite blasting caps sought to recover from the manufacturers. The individual blasting caps were neither labeled nor marked with any warning of the potential danger, and the plaintiffs alleged that the defendants, six manufacturers and their trade association, consciously agreed to establish an industry-wide practice of omitting such warnings. This practice, together with the failure of the defendants to take other safety precautions, allegedly created an unreasonable risk of harm which resulted in injuries to their children. The United States District Court for the Eastern District of New York reasoned that under such limited circumstances, industry-wide liability may be imposed. The court stressed that the evidence established that the defendants had jointly controlled the risk through their adherence to an industry-wide standard of safety, and that some functions of safety, including labeling, had been delegated to their trade association. Furthermore, although all

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68. 345 F. Supp. 353 (E.D.N.Y. 1972). This case consisted of two consolidated causes of action. *Chance v. E.I. Du Pont De Nemours & Co.* involved 12 unrelated blasting cap accidents in 10 states between 1955 and 1959, allegedly injuring 13 children. The manufacturer who actually produced the injury-causing caps was unknown. The plaintiffs joined as defendants six manufacturers and their trade association. In *Hall v. E.I. Du Pont De Nemours & Co.*, the original complaint involved 43 plaintiffs and 230 claims against 15 defendants, including the manufacturers and their trade association. An antitrust complaint was dismissed, 312 F. Supp. 358 (E.D.N.Y. 1970), and the amended complaint was based on tort theory. The plaintiffs were three families with injured children, residing in three states; the defendants were two manufacturers allegedly responsible for manufacturing the blasting caps which injured the children. Subsequently, the plaintiffs' claims were severed and transferred to the federal district court sitting in the district where the accident occurred. *Chance v. E.I. Du Pont De Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974). Thus, the theory espoused in *Hall* is merely "suggested" because the court decision was confined to its ruling on the motions of defendants for dismissal, severance, and transfer. 26 Cal. 3d at 608 n.22, 607 P.2d at 934 n.22, 163 Cal. Rptr. at 142 n.22.

69. 345 F. Supp. at 358.

70. *Id.* at 359. The relevant part of the court's decision on industry-wide liability occurred in its discussion of the facts in *Chance*. The plaintiffs in *Chance* proceeded on a concert of action theory. However, this theory needed to be modified to the facts due to plaintiff's failure to offer evidence of an "agreement" essential to concert of action. *See* note 63 and accompanying text supra.

71. The court stated that joint control of the risk could be established by (1) the existence of an explicit agreement; or (2) evidence of parallel behavior sufficient to support an inference of a tacit agreement; or (3) independent adherence to an industry-wide standard or custom. 345 F. Supp. at 373-74.
the defendant-manufacturers had participated in joint creation of the risk, the specific defendant manufacturing the injury-causing blasting cap could not be identified because the evidence was destroyed in the explosion. In such circumstances, the court reasoned, a shifting of the burden of proof of causation could be justified.\footnote{72} The theory of industry-wide liability combines elements of classic concerted action and alternative liability for use in situations where neither theory would be applicable by itself.\footnote{73} The concept of "joint control of the risk" by the defendants in industry-wide liability evolves from the required "agreement" between the defendants in concert of action cases. Under both theories, each defendant's participation in the tortious event may be regarded as the cause-in-fact of the plaintiff's injury. Liability is imposed on each defendant to deter hazardous group behavior in the future. Joint control of the risk, however, may be proved by evidence of an independent adherence to an industry-wide standard or custom, although such adherence is insufficient to constitute a tacit agreement under the concert of action.\footnote{74} This evidence is sufficient to shift the burden of proving causation to the defendants,\footnote{75} so that, as in alternative liability, a guilty rather than an innocent party would bear the loss from the failure to meet the burden of proof.\footnote{76}

The theory of industry-wide liability is consistent with the general policy considerations of products liability law: namely, to compensate for injuries caused by the use of a defective product and to discourage manufacturers from producing unsafe products.\footnote{77} Furthermore, industry-wide liability promotes the theory that losses to society caused by such activity should be internalized by the responsible party to further the social policies of conservation of resources and fair distribution of the cost of accidents among society's members.


In 1976, Judith Sindell initiated a class action in a California trial court...
The plaintiff filed her complaint against eleven drug manufacturing companies, and sought to recover general damages in the amount of $1,000,000 and punitive damages in the amount of $10,000,000. She also sought equitable relief in the form of an order compelling defendants to inform the public of the risks inherent in DES exposure and to establish appropriate clinics for treatment of DES daughters.

The plaintiff proceeded under eight causes of action, each alleging that the manufacturers were jointly liable because they had acted in concert and in reliance upon each other's testing and marketing methods to exploit the drug. Since the plaintiff could not identify the manufacturer of the injury-causing drug, the complaint suggested that liability be based on alternative liability, concert of action, or industry-wide liability.

In a well-reasoned and thorough opinion, the California Supreme Court did not apply these theories to the facts of the Sindell case. The court, however, declined to bar the plaintiff from recovery and proceeded

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78. Opening Brief for Appellant, supra note 13, at 1. The complaint was filed on August 2, 1976, and on October 22, 1976, defendant Abbott Laboratories demurred to the complaint. The plaintiff did not appear in opposition to the demurrer and it was sustained on November 8, 1976. Judge Hupp, of the California Court of Appeals, stated that there was "[n]o allegation that any product manufactured by demurring Defendant caused any harm to the Plaintiff." Id. The plaintiff failed to amend her complaint within 30 days to allege that Abbott Laboratories had manufactured the DES ingested by her mother. The plaintiff's complaint was then dismissed by Judge Pacht on January 14, 1977. Notice of Appeal of the judgment was filed by the plaintiff on January 31, 1977. Similar demurrers were brought by the other defendants and granted. The plaintiff filed Notice of Appeal from the judgments. Id. at 2-3.

79. See note 13 supra.
80. Opening Brief for Appellant, supra note 13, at 1.
81. 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.
82. Opening Brief for Appellant, supra note 13, at 3.
83. The Complaint sets forth eight causes of action, namely negligence, strict liability in tort, lack of consent, breach of warranty, breach of implied warranty, fraud, violation of Federal law (misbranding), and conspiracy. Each cause of action arises out of the manufacture and/or sale of DES products by the Defendants; the promotion of those products as a safe drug among one of whose purposes was the prevention of miscarriage in pregnant women when the Defendants knew or should have known that the drug caused cancer in certain test animals and was likely to cause cancer in the women who took the drug or their offspring. Id. at 3-4.
84. Associate Judge Stanley Mosk, who wrote the majority opinion in Sindell, was recently selected as outstanding appellate judge by the Association of Trial Lawyers of America. TRIAL, Sept., 1980, at 11.
85. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.
to enunciate a novel theory under which Ms. Sindell could proceed with her cause of action. This theory, based upon each manufacturer's market share of the defective product, will be referred to as "market share liability."

In Sindell, the plaintiff first claimed to have a valid cause of action under the doctrine of alternative liability. Essentially, the plaintiff averred that the manufacturers had acted tortiously in marketing, manufacturing, and promoting DES, and that this conduct had resulted in injury to the daughters of women who had ingested the drug. Additionally, she argued that had the manufacturers provided adequate warnings to those who ingested the drug, documentation would have existed which, in the case of potential injury resulting from the use of the drug, would have eliminated the uncertainty in identifying the specific manufacturer. Under these circumstances, the plaintiff maintained that the burden of proof should shift from the innocent plaintiff to the negligent defendants. This shift would require the defendants to exonerate themselves by presenting evidence establishing that they could not have manufactured the specific drug ingested by the plaintiff's mother.

The plaintiff sought to analogize her case to Summers v. Tice. In both cases, the defendants committed negligent acts, the plaintiffs were innocent, and the fungible nature of the injury-causing substance made it impossible for the plaintiff to identify which of the negligent defendants had caused the actual damage. Since the plaintiff argued that the manufacturers' negligence in failing to provide warnings on the drug's label directly created the identification problem, she contended that application of the theory of alternative liability was even more appropriate here than in the Summers case, where the identity problem was due to the defendants' simultaneous shooting, not itself tortious conduct.

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86. Additional Brief for Appellant, at 10, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), at 10 [hereinafter cited as Additional Brief for Appellant].
87. Id. at 11-13.
88. See notes 48-49 and accompanying text supra.
89. In Summers, the negligent act on the part of the defendants was shooting in the direction of the plaintiff without due care. The product which caused the injury was a shotgun pellet. Each of the defendants' guns was loaded with identical pellets. 33 Cal. 2d at 81, 199 P.2d at 2.
90. In Sindell, the plaintiff alleged that defendants' negligent act was the marketing, manufacturing, and promoting of DES without adequate testing. This product was manufactured under a common formula established by the United States Pharmacopeia. 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.
The plaintiff also compared her case to *Haft v. Lone Palm Hotel*, where the plaintiff was uncertain as to the cause of the drowning of his son in the defendant's hotel pool. The *Haft* court ruled that the lack of evidence of causation was due to defendant's failure to provide a lifeguard as required by law. The court then shifted to the defendant the burden of proving causation—that its action was not the cause of the boy's death. In so doing, the court stated that the absence of definite evidence on the issue of causation was a direct and foreseeable result of the defendants' negligence, and that, under the circumstances, the defendant should bear the burden of proof. Ms. Sindell asserted that her case presented a similar situation since the defendants' negligence in not properly labeling the drug as experimental, and in failing to discover or warn of the dangers of DES, had resulted in the plaintiff's mother's failure to keep adequate records or to remember the identity of the manufacturer which had supplied the DES.

Ms. Sindell also addressed economic considerations, contending that the defendants realized cost savings and increased sales through their improper labeling and manufacturing of DES. Accordingly, the plaintiff argued that, as a matter of policy, all customers of the drug companies rather than one particular user of DES should bear the burden of loss resulting from these economies. In presenting this argument, the plaintiff again relied on *Haft*, in which the court had stated that the burden of the loss should be borne by the entire group benefiting from the cost savings realized by not employing a lifeguard rather than by one particular guest.

After arguing initially that an appropriate situation existed for application of alternative liability, the plaintiff confronted the substantive problems associated with the theory's use. First, she asserted that the burden of proof should shift to the defendants regardless of their lack of knowledge on the subject of causation. According to the plaintiff, the issue was not whether the defendants had knowledge of the cause of the
injury but whether the plaintiff’s inability to identify the defendant responsible for her injury was due to the defendant’s conduct in marketing the drug. Second, the plaintiff contended that the alternative liability theory did not require all potential defendants to be before the court, for if a defendant could exonerate himself as a causative factor, he could do so regardless of the number of defendants joined in the action. Moreover, the plaintiff asserted that liability under the theory was joint and several and that the plaintiff could select the party or parties against whom to execute the judgment. Accordingly, an individual defendant’s potential liability would be arguably the same regardless of the number of codefendants in the action.

Finally, the plaintiff argued that even if Summers required all potential defendants to be before the court, the modification of the equitable indemnity rule by the California Supreme Court in American Motorcycle Association v. Superior Court of Los Angeles County rendered this prerequisite unnecessary. After American Motorcycle, the defendants named in the suit could join all other appropriate defendants, thereby gaining the opportunity to recover from their codefendants, according to their percentage of negligence. Consequently, she argued that defendants’ ability to seek indemnity from other jointly liable defendants strengthened her contention that she should not have to bear the undue burden of naming more than a small number of defendants.

The California Supreme Court declined to accept the alternative liability theory presented by the plaintiff. The court first addressed the defend-

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98. Id. at 22. In support of this argument, the plaintiff cited Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938), where the court held that it was not necessary for the plaintiff to join both constables who shot at the plaintiff in an action for damages for wrongful and negligent shooting of the plaintiff. The plaintiff also cited Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926), in which the court held that the plaintiff could recover against either negligent defendant although it was impossible to tell with certainty who actually inflicted the injury. Finally, plaintiff cited Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906), where the court held that the plaintiff could proceed against two of the three negligent defendants who could have fired the bullet which had injured him.


100. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). In that case, the court decided that the adoption of the comparative negligence rule did not warrant the abolition of joint and several liability and that a comparative negligence defendant was authorized to file a cross-complaint against any person, whether already a party to the action or not, from whom the named defendant sought to obtain total or partial indemnity.


102. Id. at 29. The court of appeals below held that the plaintiff could survive a motion to dismiss for failure to state a cause of action through the application of the alternative liability theory. That court, citing American Motorcycle, also held that the defendant could possibly bring in other DES manufacturers as cross-defendants. Sindell v. Abbott Laboratories, 149 Cal. Rptr. 138, 150 (Ct. App. 1978).
ants' contention that the theory could not be applied because the manufacturers were not in a better position to offer evidence to determine which one caused the injury. However, the court correctly pointed out that the factual circumstances of the Summers case itself precluded an explanation of the cause of the plaintiff's injury. Thus, although defendants are ordinarily in a better position to offer evidence of causation, application of the alternative liability theory is not foreclosed when they cannot offer such evidence.

The court did find, however, that the alternative liability theory as previously applied could not be the basis for liability in this case. According to Judge Mosk, in applying the traditional theory of causation, the possibility that one of the five defendants joined in the action was actually the supplier of the DES given to the plaintiff's mother was too remote. In support of this conclusion, the court noted that the theory had previously been limited to situations in which all potentially guilty parties were before the court. Without this limitation, the offending party might not be named and therefore could escape liability altogether. Thus, the court concluded that in the Sindell case, where any one of 200 companies could have produced the particular drug ingested by the plaintiff's mother, only five of whom were before the court, application of the alternative liability theory was precluded.

The plaintiff next contended that she could recover under the concert of action theory, alleging that her injury was caused by a tacit understanding among the defendants to act in concert to market, manufacture, and promote DES as a miscarriage preventative. The plaintiff relied on Orser v. George in asserting that under the concert of action theory, her claim was valid even though the possibility existed that none of the named defendants had manufactured the DES actually ingested by her mother. In Orser, a wrongful death action, decedent was killed by a pistol fired by

103. 33 Cal. 2d at 83, 199 P.2d at 4.
104. 26 Cal. 3d at 601, 607 P.2d at 929, 163 Cal. Rptr. at 137.
105. The court also distinguished Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), because in the present case, the difficulty of identifying the cause of the injury resulted from the passage of time rather than the negligence of the defendants. The court rejected the plaintiff's contention that, had her mother been warned of the risks associated with taking DES to prevent miscarriages, she would have kept more complete records to indicate which drug had caused the plaintiff's injuries. 26 Cal. 3d at 602, 607 P.2d at 930, 163 Cal. Rptr at 138.
106. 26 Cal. 3d at 604, 607 P.2d at 931, 163 Cal. Rptr. at 139.
107. Id.
108. Additional Brief for Appellant, supra note 86, at 35.
109. Id.
one of defendant's two companions. The court reversed a summary judgment and held that the rifle-carrying defendant could be found liable for the decedent's injuries on a concert of action theory. There was evidence in the record that defendant possibly knew that his companions' conduct breached a duty of care owed to the decedent, and that the defendant substantially assisted or encouraged such tortious conduct.\footnote{111}

The Sindell plaintiff argued that as in Orser, no one defendant could be shown to have been the actual cause of the plaintiff's injury; nevertheless, each could be found to have substantially encouraged the tortious conduct of the others.\footnote{112} Emphasizing that there existed a common and mutually agreed upon formula for DES, that the drug was marketed by each defendant as a safe and effective product, and that each defendant knew of its generic nature, the plaintiff contended that these facts were sufficient to satisfy the requirements of Orser to proceed under the concert of action theory.\footnote{113}

The court found the facts before it inappropriate for application of the concert of action theory. It rejected plaintiff's argument that the conduct of the defendants, collaborating in and relying upon each other's inadequate testing and marketing methods and failing to give warnings concerning the hazards of DES, constituted a tacit understanding among the defendants to commit a tortious act against the plaintiff.\footnote{114} The court noted that DES was produced from a common and mutually agreed upon formula in compliance with the requirements set forth in the United States Pharmacopoeia\footnote{115} and not as a concerted tortious action.\footnote{116} The court found further that parallel testing and marketing techniques were characteristic of the drug industry and that a decision rendering such conduct concerted action would be an unjust expansion of the theory.\footnote{117} The court distinguished the cases cited by the plaintiff by noting that they involved situations where only one plaintiff was injured; the tortious conduct was by

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  \item \footnote{111} 60 Cal. Rptr. at 716-17.
  \item \footnote{112} Additional Brief for Appellant, supra note 86, at 38.
  \item \footnote{113} The court of appeals stated that the allegations of the plaintiff satisfied the pleading requirement necessary to hold the defendants liable on a concert of action theory. 149 Cal. Rptr. at 145.
  \item \footnote{114} 26 Cal. 3d at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.
  \item \footnote{116} 26 Cal. 3d at 605, 607 P.2d at 932-33, 163 Cal. Rptr at 140-41.
  \item \footnote{117} Id. at 605, 607 P.2d at 933, 163 Cal. Rptr at 141. Specifically, the court stated that: [a]pplication of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.
a small number of individuals over a short span of time; and each defendant either directly participated in or encouraged and assisted in the act causing the injury.\textsuperscript{118} In Sindell, however, millions of women were allegedly injured; the tortious conduct occurred over a quarter of a century and involved approximately 200 individual drug manufacturers; and there was no evidence that each defendant directly participated in or encouraged and assisted a concerted tortious act.

The plaintiff's final argument alleged that a valid claim existed under the industry-wide theory of joint liability.\textsuperscript{119} The plaintiff asserted that there was a considerable risk involved in manufacturing and marketing DES, and that this risk was jointly controlled by the drug manufacturers. Specifically, the plaintiff stated that all DES manufacturers knew of the risk involved in distributing an experimental drug and that the manufacturers tacitly agreed to omit the required FDA warning labels on DES packages. She also asserted that the entire drug industry adhered to an inadequate standard for testing the drug. Furthermore, she contended that the DES manufacturers' method of promotion encouraged pregnant women, physicians, and pharmacists to rely on the generic nature of the drug and to prescribe it interchangeably. The plaintiff concluded that each manufacturer had benefited from exploitation of the drug by all other manufacturers and that sales of DES had been boosted throughout the industry.\textsuperscript{120} In presenting this final argument, the plaintiff relied on Hall v. E.I. Du Pont De Némeurs & Co.\textsuperscript{121} Essentially, the plaintiff claimed that the facts evidenced parallel behavior among the drug manufacturers and an inference of tacit cooperation as well as independent adherence to a tortious industry-wide standard of behavior.\textsuperscript{122} The plaintiff concluded that this joint control of the risk should shift the burden of proving causation to the defendant manufacturers.\textsuperscript{123}

\textsuperscript{118} Id. The plaintiff relied on the following cases: Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199 (1932) (defendant held jointly liable for plaintiff's injuries when he encouraged another to commit an assault); Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25 (1921) (husband held liable with his wife for wrongful diversion of flood waters); Orser v. Viera, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (rifle-carrying defendant may be jointly liable for death caused by bullet from one of two codefendants' pistols); Agovino v. Kunze, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960) (participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer); Meyer v. Thomas, 18 Cal. App. 2d 299, 63 P.2d 1176 (1936) (two defendants held liable for participation in the conversion of a note and deed of trust).

\textsuperscript{119} Additional Brief for Appellant, supra note 86, at 38-39.

\textsuperscript{120} Id. at 41-43.

\textsuperscript{121} 345 F. Supp. 353 (E.D.N.Y. 1972).

\textsuperscript{122} Additional Brief for Appellants, supra note 86, at 41.

\textsuperscript{123} Id. at 43.
The theory of industry-wide liability, termed by the court a "novel approach to the problem," was similarly rejected for a variety of reasons. As interpreted by the court, this theory of liability would be applied when each manufacturer in a particular industry adheres to a standard found to be negligent by a court and also found to be the cause of the plaintiff's injuries. The Sindell court emphasized that the number of producers in the industry and the degree of joint control of the risk are important factors in deciding whether to apply this theory. Thus, in Sindell, where no allegations existed that safety functions had been delegated to a trade association and where the industry was decentralized, the application of the industry-wide theory of liability would be unreasonable. Furthermore, the drug industry itself is regulated by the FDA and the industry standards are defined by the FDA standards to a considerable degree. The court concluded that it would be unfair to impose liability on a manufacturer who did not supply the injury-producing drug because it followed the accepted drug industry standards.

IV. THE SINDELL SOLUTION: THE THEORY OF MARKET SHARE LIABILITY

Having rejected the three prongs of Ms. Sindell's argument, the California Supreme Court nevertheless stated that it would be unfair to allow her to go without a remedy. It began its formulation of a theory on which the plaintiff could proceed by noting that the policy considerations argued by the plaintiff, together with the court's view that legal theories should adapt to changes in society, justified the court's formulation of a novel approach. The court first recognized that, in contemporary industrial society, there is an ever increasing number of fungible goods available to the consumer. Use of these fungible goods, which often cannot be traced to a specific manufacturer, can leave an injured consumer remediless because identification is impossible and current tort theories cannot be applied. As the court noted, the response by the judicial system to this gap in tort liability can be either to deny recovery or to respond to the changing circumstances by fashioning new theories of recovery through the adaptation of the rules

124. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.
125. Id. at 608, 607 P.2d at 934, 163 Cal. Rptr. at 1. The court noted that the Hall decision stressed that the application of the theory of industry-wide liability should be limited to industries involving a small number of producers where it is feasible that all the producers had the joint capacity to reduce or affect those risks. 345 F. Supp. at 378.
126. 26 Cal. 3d at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 143.
127. Id. at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
of causation and liability. The court chose the latter alternative and proceeded to modify the alternative liability theory to encompass the situation where the fungible nature of the injury-producing product rendered identification of the manufacturer impossible.\(^\text{128}\)

Initially, the court needed to develop a method to decrease the likelihood that the manufacturer actually responsible for the injury would escape liability. It noted that the great probability of the responsible party escaping liability, when only five of a possible 200 defendants were joined in the action, rendered shifting the burden of proof according to the alternative liability doctrine as previously applied impossible.\(^\text{129}\) The court determined, however, that rather than approaching the issue of causation in the traditional manner of measuring the possibility of a particular defendant causing the injury by the number of possible defendants, it would measure the likelihood that one specific defendant supplied the injury-producing drug according to the market share of the particular manufacturer. Thus, by the plaintiff's joining the manufacturers with the largest percentage of the market, the probability that the guilty manufacturer would escape liability was significantly decreased. The problem of proving causation was satisfied by becoming a probability rather than a remote possibility. The court noted that this theory could be applied where the plaintiff had joined manufacturers that, in the aggregate, represented a substantial share of the market.\(^\text{130}\)

The court then used the market share concept to formulate the extent of liability for which each manufacturer would be responsible. In holding that each defendant would be liable for the proportion of the judgment represented by its share of the market, the court stated that this approach, although not immune from minor discrepancies in the correlation between market share and liability, would render each manufacturer's liability an approximation of its responsibility for the injuries caused by its own production of the drug.\(^\text{131}\)

The market share liability theory developed by the Sindell court was founded upon the policy determination that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury."\(^\text{132}\) The court found that, under the circumstances of the case, neither the plaintiff nor the defendants could be attributed with the failure

\(^{128}\) Id.

\(^{129}\) Id. at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144. See notes 42-47 and accompanying text supra.

\(^{130}\) 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

\(^{131}\) Id. at 612-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145.

\(^{132}\) Id. at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. As noted by the court, this was the
of providing evidence as to which DES manufacturer actually caused the plaintiff's injuries. The court stated, however, that the conduct of the drug manufacturers in marketing DES "played a significant role in creating the unavailability of proof." Furthermore, the court asserted that the pharmaceutical industry, through insurance and risk distribution, was better able to absorb the cost of injuries suffered by the plaintiff. The imposition of liability on manufacturers in this case would encourage vigilance in detecting and publicizing the harmful effects of a product. It would also provide compensation for injuries suffered by an unaware and "virtually helpless" consumer. The court concluded that these factors, along with the important policy considerations of products liability law, were determinative in their decision to create a new theory of liability upon which the plaintiff could present a valid cause of action.

V. CRITICAL ANALYSIS OF THE MARKET SHARE LIABILITY THEORY

On October 14, 1980, the Supreme Court of the United States denied a petition for a writ of certiorari to review the California Supreme Court's decision in Sindell v. Abbott Laboratories. In filing this petition, the pharmaceutical companies termed the imposition of market share liability as "wholly arbitrary and irrational" and contended that destructive liability and anticompetitive consequences would result from the imposition of this theory. Another critic referred to the decision in Sindell as being "one step further towards the dawn of the age of 'absolute' products liability." The criticisms of the Sindell decision, as well as the practical effect of the imposition of market share liability, warrant examination in order to determine the viability of market share liability as a means of closing the gap in products liability law where the identification of the manufacturer of the injury-causing product is virtually impossible.

The first contention raised by the pharmaceutical companies in their petition was that the Sindell decision created unworkable and irrational procedural devices which, in effect, eliminate proof of causation in violation

See notes 48-49 and accompanying text supra.

133. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.
134. Id.
135. See note 77 and accompanying text supra.
138. Id. at 8.
139. Kroll, supra note 7, at 185.
of due process and equal protection.\textsuperscript{140} Proof of causation is an essential element in every products liability case,\textsuperscript{141} and it serves to prevent the imposition of liability based on pure speculation or conjecture. Accordingly, the pharmaceutical companies maintained that "to establish causation by the joinder of a substantial share of a given market where identification of the responsible party is not now possible"\textsuperscript{142} is unreasonable and, in actuality, is a violation of due process. In support of this argument, the companies asserted several arguments as to why the decision is unreasonable. To illustrate this assertion, the manufacturers pose the following hypothetical:

Defendants before the court might consist of Manufacturer A with 40\% of the market, Manufacturer B with 4\% of the market, and Manufacturer C with 0.4\% of the market. Since even plaintiffs would not dispute that the statistical correlation between DES exposure and clear cell adenocarcinoma does not exceed 1.4 per 1,000, there is no way to determine whether sales by the 4\% or 0.4\% market share defendants might have resulted in any injuries whatsoever. A's presence does not in any way increase the likelihood that either B or C was the responsible manufacturer.\textsuperscript{143}

The manufacturers assert that a particular defendant's liability will almost always exceed its market share because, although only 44.4\% of the market is joined in the hypothetical, the defendants are jointly and severally liable for 100\% of the injuries sustained by the plaintiffs. However, the manufacturers failed to point out that they are afforded the opportunity to join the other pharmaceutical companies, not joined in the action, which may have supplied the DES actually ingested by the plaintiff's mother.\textsuperscript{144} Accordingly, if a particular defendant does not wish to absorb the market shares of nonparty DES manufacturers, it may proceed against such manufacturers by way of third party complaint for contribution in accordance with their respective market share. Thus, although Manufacturers \textit{A}, \textit{B}, and \textit{C} may be held liable for more than twice their market shares,\textsuperscript{145} they need not bear this total amount unless they forgo the procedural devices available to them.

Second, the manufacturers contended that once a defendant exculpates itself from liability or a plaintiff succeeds in identifying the manufacturer responsible for her injuries, the defendants would bear disproportionate

\textsuperscript{140} Petitioner's Brief for Certiorari, \textit{supra} note 137, at 9, 17.
\textsuperscript{141} \textit{See} note 3 and accompanying text \textit{supra}.
\textsuperscript{142} Petitioners' Brief for Certiorari, \textit{supra} note 137, at 10-11.
\textsuperscript{143} \textit{Id.} at 12.
\textsuperscript{144} \textit{Cf.} notes 105-07 and accompanying text \textit{supra} (alternative liability precluded if all potentially liable parties not joined).
\textsuperscript{145} Petitioner's Brief for Certiorari, \textit{supra} note 137, at 13.
measures of liability. The manufacturers stated that a particular defendant may be found responsible for the entire amount of one plaintiff's injuries upon proof of causation and other elements of the case, and may still be liable for a percentage of another plaintiff's claim. The manufacturers contended that these two cases together would expose a defendant to liability greater than that of its market share.

Each plaintiff's claim, however, is a separate cause of action and each defendant's liability is determined independently. The fact that a manufacturer is found to be the sole cause of a plaintiff's injury in one cause of action should have no effect on another plaintiff's claim under the market share liability theory. Furthermore, the manufacturers' contention that this theory would discourage a plaintiff from offering evidence of one manufacturer's liability is unjustified because even if such evidence did exist, it would most likely be discoverable by the manufacturer and used to exculpate itself from any liability.

The manufacturers next argued that the definitions of the product market and the geographical market would be construed arbitrarily by the courts because the drug was dispensed in such a wide variety of quantities throughout the United States. Leaving factual determination of a defined market to the courts may present a problem in the application of the market share liability theory to particular cases, but definitional problems exist in all areas of law. For example, in the area of antitrust enforcement, courts are called upon to define the relevant market in a particular fact situation. The definition of the relevant market by the court may well determine whether a corporation has violated antitrust regulations. As in the application of antitrust laws, the determination of the "product market" and the "geographical market" in DES cases will be a matter for the court to adjudge according to the particular fact situation and evidence presented. A judicial analysis of the factors to be considered in defining the relevant market for application of the market share liability theory will most likely develop on a case-by-case basis.

The manufacturers also argued that the Sindell court failed to consider adequately the fact that its decision may render the pharmaceutical companies uninsurable and that many firms in the industry, especially the smaller ones, would not be able to absorb the costs of litigation and "ran-

146. Id.
147. Id. at 14.
148. The drug manufacturers stated that DES was manufactured in at least 13 different dosages, ranging from .1 mg. to 250 mg., and was indicated and sold for many purposes other than prevention of accidents during pregnancy. Id.
dom liability” associated with the market share liability theory. These economic considerations have been of major concern to the business and legal communities where courts have contemplated any expansion of products liability law. Although the manufacturers may have overstated the severity of the problem in their petition, it is clear that many pharmaceutical companies may suffer serious financial loss because of the Sindell decision.

One of the manufacturers’ most persuasive arguments against the market share liability theory is that the pharmaceutical industry will be unable to obtain liability insurance for its products. This problem of products liability insurance has increased in recent years, especially within the pharmaceutical industry. The major factor contributing to the increase in cost of liability insurance is the corresponding increase in the number and size of successfully litigated claims by products liability plaintiffs. The drug manufacturers asserted that the market share liability theory would render the insurer unable to determine the scope of exposure for a particular manufacturer if that manufacturer could be compelled to litigate and compensate a plaintiff for injuries sustained by an industry product not directly attributed to the insured manufacturer.

Several solutions have been proposed for dealing with the problems of products liability insurance. First, consumers may be able to absorb the increase in the cost of liability insurance of the manufacturer through an increase in the price of the product. As for those firms that cannot increase their prices because of the competitive market, there exists the option of organizing a collective insurance company to insure against products liability claims asserted against the founding firms. Small firms may also choose to become self-insured by establishing a reserve fund to protect against the risks of its product. Another alternative is for companies, especially those who manufacture products like DES which have the potential for causing injury years after consumption, to purchase claims-made policies rather than the standard occurrence policies for its

150. Petitioners’ Brief for Certiorari, supra note 127, at 15-16.
151. See Note, supra note 77, at 1003-06.
153. See Note, supra note 77, at 1003. But see L. FRUMER & M. FREIDMAN, supra note 152, at 882 app.
156. L. FRUMER & M. FREIDMAN, supra note 152, at 1186-95 apps. This alternative may not be feasible, however, due to statutory or economic limitations.
157. Id. at 1195-1200 apps.
Still another alternative exists in the form of legislative action which may limit the amount of a particular liability claim; make direct governmental insurance available to those industries producing high-risk or fungible products; or allow a periodic payment system for compensation to a successful products liability claimant.

These economic considerations were also noted in the dissenting opinion in Sindell. Justice Richardson stated that the application of the "deep pocket" theory of liability under these circumstances would result in two separate rules of law which would be determined by the wealth of the defendant. Moreover, the dissent stressed that Sindell has the effect of making the pharmaceutical industry "an insurer of all injuries attributable to defective drugs of uncertain or unprovable origin" and this effect could spread to other industries. Recent commentators have expanded on the criticisms expressed in the dissenting opinion, contending that the Sindell decision has created a system of "no-fault" products liability that will result in costly, complicated litigation in many types of products liability suits.

158. Id. at 870-73 apps. The standard products liability coverage is an occurrence policy under which injuries that occur during the policy period are insured. Alternative claims-made coverage may decrease the risk of speculation in ratemaking in that the insurance company is liable for claims asserted during the period of policy coverage only.

159. Id. at 1090-91 app. For example, California and New Hampshire have fixed a limit of $250,000 for noneconomic loss in medical malpractice claims. CAL. CIV. CODE § 3333.2 (West 1980); N.H. REV. STAT. ANN. § 507-C-7(II) (1977). Other limitations may be based on the type of injury suffered by the plaintiff. Such measures may also reduce the degree of speculation of the future liability of the insured manufacturer.

160. An analagous type of program was undertaken by the federal government during the National Swine Flu Immunization Program of 1976, 42 U.S.C. §§ 201 et seq. (1976). The program does not provide direct federal insurance, but does provide that causes of action resulting from the program can be litigated under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976). The Swine Flu Immunization Program was enacted after private insurance companies failed to provide the vaccine manufacturers with adequate insurance. See generally Baynes, Liability for Vaccine Related Injuries: Public Health Considerations and Some Reflections on the Swine Flu Experience, 21 ST. LOUIS U.L.J. 44 (1977).

161. See 5 L. FRUMER & M. FREIDMAN, supra note 152, at 1104-06 apps.

162. 26 Cal. 3d at 614-22, 607 P.2d 940-43, 163 Cal. Rptr. at 146-51 (Richardson, J., dissenting).

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

164. Id. at 621-22, 607 P.2d at 942-43, 163 Cal. Rptr. at 150-51 (Richardson, J., dissenting).

165. Kroll, supra note 7, at 195.

166. See, e.g., Wall St. J., Dec. 30, 1980, § 1, at 13, col. 1. A Chicago drug manufacturer's attorney was quoted as stating that if a person walks along the beach and cuts his foot on a bottle opener, he can prove the opener was predictably dangerous to persons walking on the beach and then invoke the market share liability theory to sue all 100 makers of bottle openers.
Essentially, such economic considerations are justified and should be given careful study by judges and legislators. The capacity of defendants to bear the loss is one factor traditionally taken into consideration, as are effects on the development of the industry and insurance consequences. However, other factors are given consideration when determining the relative ability of the parties to absorb the injury caused by a defective product, and economic considerations alone should not be the determinative factor when deciding whether a plaintiff may proceed with a cause of action in a products liability case.

The second prong of the manufacturers' argument in their petition for writ of certiorari was that the court's decision in Sindell was invalid as contrary to federal drug policies encouraging the development and growth of the pharmaceutical industry, and that imposition of liability under this theory would create an undue burden on interstate commerce. The manufacturers asserted that the immediate effect from the imposition of this "random, destructive liability" would be to discourage the development and distribution of new drugs and result in anticompetitive trends. They argued that smaller firms would be unable to continue manufacturing generic drugs under the increased burdens of insurance and litigation costs, and that these increased costs would erect barriers for new firms considering entering the pharmaceutical industry. Essentially, the manufacturers stated that such discouragement of the development of new drugs and discrimination against interstate commerce renders the Sindell decision invalid on a constitutional basis.

There is presently no concrete evidence to determine whether the market share liability theory will result in any of the consequences asserted by the manufacturers. An argument can be made that the drugs which are not produced, or which are delayed in being marketed because of the expan-

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167. W. Prosser, supra note 51, at 22.
168. Prosser suggests that the social or moral guilt of the defendant's conduct, the ability of the judicial system to shape and administer an adequate remedy, compensation of the victim, the prevention of future wrongs, and the traditional remedies available at common law are other factors to be taken into consideration by the courts in determining which party should bear the loss. Id. at 16-23.
169. Petitioners' Brief for Certiorari, supra note 137, at 21. The public policy of encouraging the development of new drugs was noted in the dissenting opinion in Sindell. 26 Cal. 3d at 619, 607 P.2d at 941-42, 163 Cal. Rptr. at 149-50 (Richardson, J., dissenting). It has also been noted that some manufacturers may choose to forgo the introduction of new products because of the concern about products liability. See L. Frumer & M. Friedman, supra note 152, at 986 app.
171. Id. at 21.
172. Id. at 23.
sion of liability, may be those which a manufacturer suspects may be harmful to a consumer. It can also be argued that there is an important state interest in providing adequate compensation to those citizens injured by defective products. The Sindell decision will likely survive the constitutional challenge that it imposes an undue burden on interstate commerce because the sole objective of the decision is to preserve the health and welfare of citizens and not to protect the economies of the situation.

Another criticism of the Sindell decision is that it represents a radical departure from prior tort liability theories. Justice Richardson, in his dissent, asserted that "the majority now expressly abandons the foregoing traditional requirement of some causal connection between the defendants' act and the plaintiffs' injury in the creation of its new modified industry-wide tort." Justice Richardson reached this conclusion after analyzing the established principles of causation, stressing that there was no proof in the instant case that the drug manufacturers were responsible for the plaintiffs' injuries. Furthermore, he alleges that the market share theory will result in the imposition of liability on pure conjecture, that plaintiffs will be able to select the defendants against whom they wish to proceed, and that the majority's decision will result in "broad and ominous ramifications...equally threatening...to many other areas of business and commercial activities."
A careful analysis of the historical development of products liability law, especially in California, will show that the Sindell decision is a logical expansion of liability based on the policy determination that "as between an innocent plaintiff and negligent defendants, the latter should bear the loss." In the landmark case of Summers v. Tice, the practical effect of the California court's decision to shift the burden of proof to the defendants was to impose liability on each defendant. Since both defendants shot simultaneously in the direction of the plaintiff, there was no reason to believe that either defendant could have known which bullet caused the injury to the plaintiff. Similarly, the defendant hotel owners in Haft v. Lone Palm Hotel were no more capable of proving the circumstances of the child's death than was the plaintiff. These cases are but two illustrations of the broad judicial interpretation given to the requirement that the plaintiff prove a reasonable connection between the negligent act of the defendant and the injury sustained. There is no overriding policy reason why such a broad interpretation of causation should not be applied to areas where a product, rather than the acts of a person, has caused the injury to the plaintiff.

Moreover, the extent of Sindell's applicability to other industries must be examined. It is feasible that any industry now manufacturing fungible goods may be subject to liability under the market share liability theory. Such industries would most likely include those producing chemical and other pharmaceutical products, agricultural goods, cigarettes, and asbestos. The devastating effects some commentators have predicted would be significantly lessened, however, if judicial application of the theory were to be prudent and appropriate to the fact situation.

The market share liability theory should be applied primarily in cases where the passage of time or some other unusual circumstance renders impossible the identification of the manufacturer of the injury-causing product. Since the overwhelming majority of products liability cases are

179. Id. at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
180. 33 Cal. 2d 80, 199 P.2d 1 (1948).
182. W. Prosser, supra note 51, at 236.
183. See Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543 (1962). In this article, Professor Green writes that

[s]ometimes, though not often, it is thought to be a problem how much causal relation must be found between a defendant's conduct and the victim's hurt in order to resolve the issue in the plaintiff's favor. If the evidence is sufficient to support a reasonable inference that the defendant's conduct contributed to the hurt, or that reasonable men may draw different inferences, nothing more is required.

Id. at 555.
Market Share Liability in DES Litigation

reported within two years after the date of the occurrence of the injury, this limitation would allow the theory to be applied in only a small number of cases. Moreover, it should be imperative that plaintiffs have no feasible method of ascertaining the identity of the manufacturer, and that this situation is in no part due to the plaintiff's calculated oversight. Sufficient evidence is usually available to the vast majority of products liability claimants to discover the identity of the manufacturer of the injury-causing product. For example, the purchasing records of a chemical substance alleged to have caused injury may divulge the identity of one or more manufacturers who may have supplied the area in which the plaintiff resided at the time of the injury. In cases where there is some degree of loyalty to a particular brand of product, as with cigarettes, a plaintiff should not be allowed to forgo inquiry by the defendants as to the brand of cigarettes the plaintiff normally consumed. Furthermore, if a reasonable person should have known the identity of the product consumed, the plaintiff should not be allowed to plead ignorance and proceed under the market share liability theory.

In addition, the plaintiff should be required to prove that every manufacturer joined in the action under this theory is at fault for marketing a defective product. Injury alone, regardless of the severity, cannot impose liability. Courts should not apply the market share liability theory unless the plaintiff proves that the joined defendants breached their duty to market a safe product or to provide sufficient warnings as to the harmful effects of the product.

Finally, it must also be noted that the market share liability theory as applied in Sindell would allow the joined defendants to join other drug manufacturers who may have produced the injury-causing drug. Without this procedure, plaintiffs would be able to target and litigate against specific manufacturers, thereby allowing other potential defendants to avoid liability. Moreover, these targeted manufacturers may subsequently be liable for all damages awarded to plaintiffs under this theory. It is apparent that unless a similar procedural device exists in the jurisdiction,

185. L. Frumer & M. Friedman, supra note 152, at 871 app.
186. See Note, supra note 77, at 1015. The author contends that “[i]f only one plaintiff encountered an identification problem, it is unlikely that a court would strain to circumvent the identification requirement.”
187. Id. at 1014. See Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967). In holding that the plaintiff could not recover against the cosmetic company for injuries sustained from the use of hair products, the court stated that “[t]he cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use.” Id. at 853 (footnote omitted).
188. See notes 101-03 and accompanying text supra.
courts should forgo the application of the market share liability theory or risk a disproportionate number of manufacturers absorbing all litigation and liability costs.

VI. Conclusion

The market share liability theory as espoused in *Sindell v. Abbott Laboratories* is a dramatic breakthrough in products liability law. As in prior situations in which courts have expanded liability, the case presented a unique fact situation in which traditional doctrines could not be readily applied. The California Supreme Court responded to this situation, as it has done in the past, by formulating a new theory of liability rather than leaving the injured plaintiff without a remedy. The policy determination that, as between an innocent plaintiff and negligent defendant, the latter should bear the loss, has once again given rise to an expansion of liability in products liability law.

The feasibility of implementing the market share liability theory remains to be seen. Only through a case-by-case determination of the application of the theory can its consequences be realized. Moreover, any adverse effects produced by the application of the theory may well be offset by the fact that many plaintiffs, once barred from recovering for injuries sustained from defective fungible products, are now able to present valid causes of action to proceed against manufacturers of fungible goods.

*Patricia A. Meagher*