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David M. Schultz

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# MARKET SHARE LIABILITY IN DES CASES: THE UNWARRANTED EROSION OF CAUSATION IN FACT

David M. Schultz\*

## INTRODUCTION

As our society progresses in complexity, theories of tort law have evolved in order to provide redress for the harms caused in a changing world.<sup>1</sup> Tort law evolution has resulted in the creation of new remedies and, in many instances, the erosion of certain preconditions for recovery in tort.<sup>2</sup> Nevertheless, with limited exceptions, there has not been significant erosion of the requirement that a plaintiff must first be able to identify the person or entity that caused her injury before she can recover in tort.<sup>3</sup> In the past decade, however, a small number of courts have abrogated this principle, which is referred to as "causation in fact." In the place of causation of fact, these courts have adopted the concept of "market share liability."

The market share liability theory has developed mainly through lawsuits filed by women who claim to suffer injuries resulting from their mothers' ingestion of the drug Diethylstilbestrol ("DES") while pregnant. These plaintiffs are commonly referred to as the "DES daughters."<sup>4</sup> The time that passes between the maternal ingestion of DES and the diagnosis of the injuries is generally twenty or more years because the injuries do not manifest themselves until sometime after the daughter has reached puberty.<sup>5</sup> A DES daughter is often

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\* David M. Schultz is an associate of Hinshaw & Culbertson in Chicago, Illinois.

1. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (noting that courts cannot adhere rigidly to legal doctrine in the face of advances in science and technology), *cert. denied*, 449 U.S. 912 (1980); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463 (1962) (stating that "[a]ny legal system, to remain viable over a span of time, must have the flexibility to admit change"); Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300, 304-07 (1981) (recounting the historical development of products liability law).

2. See Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609, 609-11 (1982) (recognizing the trend towards liberalizing the requirements for recovery in products liability actions).

3. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 41, at 263 (5th ed. 1984).

4. See Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 965 (1978).

5. Children of the women who took the drug are now having their own daughters. Some of these granddaughters of women who ingested DES have suffered injuries possibly as a result of their grandmothers' ingestion of DES. The viability of the granddaughters' cause of action was tested in *Enright v. Eli Lilly & Co.*, 155 A.D.2d 64, 553 N.Y.S.2d 494 (1990), where the appel-

unable to identify the specific manufacturer of the drug her mother took for two key reasons: the long passage of time and the fungible nature of DES. Faced with the possibility of leaving these plaintiffs without a remedy as a result of their inability to identify the manufacturer, some courts have instead abolished the traditional requirement of establishing causation in fact. In place of causation in fact, these courts have adopted a theory that imposes liability upon any defendant who participated in the manufacturing or marketing of DES in the relevant market. Under this "market share liability" theory, each defendant is liable for the proportion of the judgment that its share of the market represented during the relevant time period.

Market share liability has been controversial since its inception. The concept has been adopted with varying modifications by a handful of courts<sup>6</sup> and promoted by a larger number of legal commentators.<sup>7</sup> At the same time, other courts have denounced the theory of market share liability when faced with the opportunity to adopt the proposition in either DES cases or cases involving other products.<sup>8</sup> Currently, only nine state supreme courts have addressed the

late court reversed and remanded the case to the trial court to proceed on a strict products liability theory. *See also* Marcotte, *DES Legacy*, A.B.A. J., June 1990, at 14 (examining the viability of suits by third generation DES plaintiffs); *New DES Front*, NAT'L L.J., Dec. 27, 1990, at 1 (reporting the first case claiming that DES genetically altered the grandchild of a woman who took the drug).

6. *See* *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984).

7. *E.g.*, Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982) (advocating application of the market share liability theory to all multiple causation cases); Note, *Market Share Liability: A New Method of Recovery for DES Litigants*, 30 CATH. U.L. REV. 551 (1981) [hereinafter Note, *Market Share Liability: A New Method*] (concluding that the theory of market share liability is well founded, consistent with prior doctrine, and a necessary expansion of tort liability); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981) [hereinafter Note, *Market Share Liability: An Answer*] (suggesting that adoption of the market share liability theory is necessary to meet the changing needs of consumers in today's complex society); Note, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. REV. 939 (1987) [hereinafter Note, *The DES Causation Conundrum*] (proposing that the market share liability theory is the only approach that can effectively reconcile the conflicting interests of plaintiffs and defendants in DES litigation); Note, *The DES Manufacturer Identification Problem: A Florida Public Policy Approach*, 40 U. MIAMI L. REV. 857 (1986) [hereinafter Note, *The DES Manufacturer Identification Problem*] (contending that relaxing the identification requirement is consistent with judicial policies).

8. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984).

Legal commentators have also criticized the market share concept. *See* Kroll, *Intra-Industry Joint Liability: The Era of Absolute Products Liability*, 687 INS. L.J. 185 (1980); Miller & Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W. VA. L. REV. 81 (1985) (indicating that objections to the market share liability theory may be somewhat overstated, but believing that many practical problems remain with the theory); Recent Decisions, *Torts—Products Liability—Where a Plaintiff Cannot Identify Which Drug Company Manufactured the DES Ingested, a Cause of Action Exists Under the Market Share Alternate Theory of*

market share liability issue in a DES case. Most likely, however, other jurisdictions will eventually be forced to face this issue, especially in light of the fact that DES was used nationwide, some plaintiffs have achieved success with the theory, and there is the potential for large recoveries.

Most legal commentary on the issue of market share liability has supported the adoption of the theory.<sup>9</sup> Commentators and courts that support the market share liability theory correctly argue that there is a need to adapt our existing tort law in the face of progress. They also argue that there is strong emotional appeal to insure a remedy for all plaintiffs, especially plaintiffs who are innocent of any wrongdoing. However, this Article contends that courts should not develop a market share liability concept.

This Article begins with a brief history of the development of the drug DES. In the next section, this Article reviews the tort requirement of causation in fact.<sup>10</sup> The third section outlines the DES cases in which state supreme courts have adopted market share liability, and the fourth section addresses cases where courts have rejected the theory in the DES context and in other actions.

The Article concludes that market share liability is an unsound concept, that it represents too wide a leap in our tort principles, and that the abrogation of such a fundamental tort requirement is unwarranted. Two ideas are presented to support this conclusion. First, there is insufficient data to accurately develop the required market shares for each of the hundreds of pharmaceutical companies that produced DES. This lack of data precludes the fair allocation of liability for DES related injuries among all DES manufacturers. Second, upon close scrutiny, the underlying policies offered to justify adoption of the market share liability theory are either not achieved by the theory, and even if they can be achieved, they do not provide sufficient reasons to adopt it. This Article proposes that the judicial development of market share liability involves making public policy determinations that more appropriately should be left for state legislatures. A legislative response, similar to the federal legislation established to compensate persons injured by childhood vaccines such as the diphtheria, pertussis, and tetanus ("DPT") vaccine is a proper method of compensation, and one that will not require a radical change in a state's tort law.

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*Liability*, 55 Miss. L.J. 195 (1985) [hereinafter *Recent Decisions, Torts—Products Liability*] (claiming that adherence to a market share liability theory will deter market productivity and scientific research); Comment, *supra* note 1, at 300 (concluding that the market share liability theory creates more injustice than it eliminates by completely divorcing liability from responsibility); Note, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003 (calling for more equitable and simpler legislative solutions).

9. See *supra* note 7.

10. There are two distinct aspects of causation in fact addressed in DES cases: first, whether DES caused the plaintiff's injuries; and second, which defendant produced the DES that caused the injury. This Article is generally confined to the second aspect of causation.

## I. HISTORY OF DES

DES<sup>11</sup> is a synthetic substance that duplicates the activity of estrogen, a female hormone crucial to sexual development and fertility.<sup>12</sup> In 1940, a number of pharmaceutical companies sought Food and Drug Administration ("FDA") approval to market DES in up to five milligram doses to treat vaginitis, engorgement of the breasts, excessive menstrual bleeding, and symptoms of menopause.<sup>13</sup> The FDA approved the use of DES for these purposes in 1941,<sup>14</sup> and, in 1947, the FDA approved the use of DES as a miscarriage preventative.<sup>15</sup> In 1952, the FDA declared that DES was no longer a "new

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11. The history of the development of DES and its marketing in this country is chronicled most thoroughly in cases that address whether the conspiracy and concert of action theories apply in DES cases. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981) (stating that civil conspiracy and concert of action theories are not provable); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Lyons v. Premo Pharmaceutical Laboratories*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div.), cert. denied, 82 N.J. 267, 412 A.2d 774 (1979); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); see also Note, *Market Share Liability: A New Method*, supra note 7, at 551 (chronicling the history of the drug from 1947 to the discovery, in 1971, that it might cause cancer in women); Note, *The DES Causation Conundrum*, supra note 7, at 939 (tracing FDA involvement in DES marketing from the requirement that seller submit a New Drug Application in 1938 to the withdrawal of this requirement in 1947).

12. Professor E.C. Dodds and his associates first synthesized DES in England in 1937. Professor Dodds did not patent DES; instead he left the drug available for general production by pharmaceutical companies. See *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 317, 343 N.W.2d 164, 166, cert. denied, 469 U.S. 833 (1984).

13. See *Ryan*, 514 F. Supp. at 1009; *Martin*, 102 Wash. 2d at 588, 689 P.2d at 373.

14. See *Ryan*, 514 F. Supp. at 1009-10. Standard FDA procedure for the approval of a new drug requires an applicant to file a New Drug Application ("NDA"). 21 U.S.C. § 360 (1988). The NDA includes clinical data establishing the safety of the drug, the drug's chemical composition, the methods of manufacture, the proposed uses of the drug, and proposed labeling. *Id.* § 360(b). Numerous drug manufacturers filed an NDA for DES. See *Ryan*, 514 F. Supp. at 1009-10. In an effort to simplify the application process, the FDA requested that the drug companies withdraw their NDAs and submit their data jointly in a Master File. *Id.* at 1009. Accordingly, a working committee of four companies was formed, consisting of Eli Lilly, Squibb, Upjohn, and Winthrop Chemical Company. This committee collected all the data, prepared the master file, and submitted it to the FDA. To simplify the approval process even more, the FDA requested that each company agree to "permission clauses" that would permit other applicants to refer to the data in the Master File. *Id.*

However, submission of the clinical studies alone did not constitute an application by any company for permission to market DES. After the submission of the investigational material, each company then had to file its own NDA seeking permission to market DES. Prior to approval, the FDA made independent contact with clinicians and researchers, reviewed medical literature, and, on occasion, required additional information to rebut those concerns that had been expressed by a small number of physicians at the time. *Id.* at 1010. It has been remarked that the quality and quantity of the information the FDA received about DES was higher than anything it had received to date. *Id.*; see also Note, *The DES Causation Conundrum*, supra note 7, at 948-50.

15. The first supplemental NDAs seeking FDA approval for DES as a miscarriage inhibitor were filed separately from the original DES NDAs. The new NDAs sought approval for the use of DES to treat menopause and other problems. The NDAs relied on clinical studies published in medical journals which attested to the safety and effectiveness of DES for use as a miscarriage inhibitor. See *Ryan*, 514 F. Supp. at 1010; see also Note, *The DES Causation Conundrum*, supra

drug" within the meaning of the Federal Food, Drug, and Cosmetic Act,<sup>16</sup> and was therefore considered safe for general use.<sup>17</sup> This status allowed DES manufacturers to market the drug without submitting data to the FDA concerning its safety and effectiveness for any desired use.<sup>18</sup>

In 1971, two medical studies suggested that there was a statistically significant association between the outbreak of clear cell adenocarcinoma, a form of cancer, in young women and the maternal ingestion of DES during pregnancy.<sup>19</sup> The mothers of the women stricken with clear cell adenocarcinoma generally had used DES as a miscarriage preventative.<sup>20</sup> Later that year, the FDA banned the sale of DES for use by pregnant women.<sup>21</sup> According to estimates, by the time of the FDA ban, as many as 300 companies had produced DES for sale.<sup>22</sup> Each company's product was essentially fungible, in that each product contained the same chemical composition. However, DES was marketed in a number of different colors, dosages, sizes, and shapes.<sup>23</sup>

DES is no longer used as a miscarriage preventative. The drug is, however, still prescribed as an estrogen replacement for women with hormone deficiencies, for treatment of unusual menopausal symptoms, and for treatment of certain kinds of cancer of the breast and prostate. DES is also a major ingredient in the "morning-after pill," a post coital contraceptive.<sup>24</sup>

Since the 1970s, hundreds of daughters of women who took DES while

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note 7, at 949 n.58 (citing clinical studies such as Kaniaky, *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. OBSTETRICS & GYNECOLOGY 821 (1948)).

Between 1947 and 1952, approximately 85 companies manufactured DES. By the end of 1952, up to 191 companies were manufacturing and distributing DES. Note, *Market Share Liability: A New Method*, *supra* note 7, at 554-55.

16. *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1011 (D.S.C. 1981).

17. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 589, 689 P.2d 368, 374 (1984).

18. See *id.*; see also Note, *Market Share Liability: A New Method*, *supra* note 7, at 555 (citing FDA New Drug Application provisions).

19. Greenwald, Barlow, Nasca & Burnett, *Vaginal Cancer After Maternal Treatment with Synthetic Estrogens*, 285 NEW ENG. J. MED. 390 (1971) (reporting that there can no longer be any doubt that adenocarcinoma is associated with DES therapy of the mother during pregnancy); Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina*, 284 NEW ENG. J. MED. 878 (1971).

20. See Comment, *supra* note 4, at 964-65 (indicating that estimates of the incidence of adenocarcinoma in DES daughters range from 1 in 250 to 1 in 1000).

21. *Id.* at 966 (noting that the FDA banned DES because of the danger it presented and because it was ineffective).

22. See, e.g., *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 231, 560 N.E.2d 324, 328 (1990) (estimating that as many as 300 companies had at one time produced DES for sale); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 589, 689 P.2d 368, 374 (1984) (stating that estimates of companies that manufactured and marketed DES range from 200 to 300).

23. DES was marketed in round or oval shapes, in tablet and pill form. See generally *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1011 (D.S.C. 1981) (noting that manufacturers marketed DES in different dosages at different times for different prices using different marketing methods).

24. *Lyons v. Premo Pharmaceutical Laboratories*, 170 N.J. Super. 183, 191-92, 406 A.2d 185, 189 (Super. Ct. App. Div.), *cert. denied*, 82 N.J. 267, 406 A.2d 774 (1979).

pregnant have filed lawsuits against DES manufacturers.<sup>25</sup> Generally, the complaints allege that the drug companies failed to test DES properly and to warn women adequately of its dangers.<sup>26</sup> The injuries these women suffered are unquestionably serious. Some women have died, and others have required partial or total hysterectomies due to cancer that may be linked to their mother's ingestion of the drug.<sup>27</sup> DES manufacturers, however, contend that statistics regarding DES daughters have not shown a high incidence of cancer and that it is not generally accepted that the injuries suffered are the consequence of the maternal ingestion of DES.<sup>28</sup>

25. See, e.g., *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 181, 342 N.W.2d 37, 45 (estimating that as many as 1000 class action or individual suits were pending against DES manufacturers in 1971), *cert. denied*, 469 U.S. 826 (1984); Rheingold, *The Hymowitz Decision—Practical Aspects of New York DES Litigation*, 55 BROOKLYN L. REV. 883, 896 n.44 (1989) (estimating that there have been about 3,000 DES cases filed nationally).

26. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (plaintiff attempted to proceed on the theories of negligence, concert of action, strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding, conspiracy, and lack of consent), *cert. denied*, 449 U.S. 912 (1980); *Martin*, 102 Wash. 2d at 581, 689 P.2d at 368 (plaintiff attempted to proceed on the theories of alternative liability, concert of action, enterprise liability, and market share liability); *Collins*, 116 Wis. 2d at 166, 342 N.W.2d at 37 (plaintiff attempted to proceed on the theories of negligence, strict liability, concert of action, and market share liability).

27. See *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 25-26, 427 A.2d 1121, 1124 (Super. Ct. App. Div. 1981) (total abdominal hysterectomy), *rev'd*, 116 N.J. 155, 561 A.2d 511 (1989); *Lyons*, 170 N.J. Super. at 189, 406 A.2d at 188 (after surgery, woman died of widespread metastasis of clear cell adenocarcinoma and bronchopneumonia); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 577, 436 N.E.2d 182, 184, 450 N.Y.S.2d 776, 778 (1982) (all of plaintiff's internal reproductive organs and more than half of her vagina were removed); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 583, 689 P.2d 368, 371 (1984) (radical hysterectomy, pelvic node dissection, and partial vaginectomy); *Collins*, 116 Wis. 2d at 174, 342 N.W.2d at 41 (removal of uterus, part of vagina and several lymph nodes); see also *Enright v. Eli Lilly & Co.*, 155 A.D.2d 64, 553 N.Y.S.2d 494 (1990) (child of woman who took DES suffered a malformed uterus, cervical and uterine dysfunction, and squamous metaplasia).

28. There is contradictory evidence regarding the effects of exposure to DES. The National Institute of Health and the National Cancer Institute sponsor a project known as the DESAD Project. The Project has followed 1580 women born after 1940. In its January 1989 DES Update, it reported that the "risk of cancer in a DES-exposed woman remains low." DESAD PROJECT, DES UPDATE, Jan. 1989, at 1. "Although a few cancers of various types have been reported, they are not more than the number that would be expected on the basis of chance alone and are not more than those reported by unexposed women in the project." *Id.*; see also Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981). The author noted:

A worldwide registry of women suffering from adenocarcinoma indicates that only 384 of the women who have contracted the disease were born between 1940 and 1971. Moreover, only 213 of these cases were associated with the use of DES. All 213 cases may not have been caused by DES, however, because the evidence suggesting a causal connection between the use of DES by pregnant women and the subsequent development of adenocarcinoma in their offspring is not definitive. New cases almost certainly will develop in the future, but probably at a diminished rate, since the number of new cases peaked in the middle 1970s. Of course, a second peak conceivably could develop in the future, but available information does not indicate that this will

Some DES plaintiffs who could identify the manufacturer of the DES their mothers ingested have been able to proceed to trial.<sup>29</sup> Other DES plaintiffs allege, after extensive discovery, that they are unable to satisfy the identification element.<sup>30</sup> A number of circumstances contribute to the barrier of establishing causation in fact in these cases. The effect of prenatal exposure to DES usually does not manifest itself until at least after the child reaches puberty, and more years may pass before the cancer is linked to DES. During this long interval, whatever records the doctor, pharmacy, or manufacturer maintained often become lost or destroyed, and the memories of the persons involved have faded. Contributing to the lack of records is the fact that the manufacturers were not required by law to maintain records for long periods of time.<sup>31</sup> More-

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happen.

*Id.* at 1624; see also *Sindell*, 26 Cal. 3d at 620-21, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting) (noting that the incidence of cancer is estimated at one-tenth of one percent to four-tenths of one percent); Herbst, Anderson, Hubby, Haenszel, Kaufman & Nollen, *Risk Factors for the Development of Diethylstilbestrol-Associated Clear Cell Adenocarcinoma: A Case-Control Study*, 154 AM. J. OBSTETRICS & GYNECOLOGY 814, 819-22 (1986) (examining factors such as the date of DES ingestion, duration of exposure, total dosage of exposure, and ingestion of other drugs, and how these factors relate to the risk of developing clear cell adenocarcinoma); 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, 876-77 (1979) (estimating that the correlation between the use of DES and adenocarcinoma ranges from .14 to 1.4 per 1000 daughters exposed to the drug). But see Melnick, *Rates and Risks of Diethylstilbestrol-Related Adenocarcinoma of the Vagina and Cervix*, 316 NEW ENG. J. MED. 514 (1984) (the occurrence of clear cell adenocarcinoma corresponds closely with the use of DES during pregnancy); Note, *Market Share Liability: An Answer*, *supra* note 7, at 669 n.8 (referring to testimony at congressional hearings linking DES ingestion to cancerous and precancerous vaginal tract abnormalities in prenatal exposed daughters of DES users); Comment, *supra* note 2, at 612-13 (estimating that 20% of DES daughters exhibit structural abnormalities).

Whether or not there is a correlation between DES ingestion and the type of cancer afflicting a plaintiff sufficient to establish a cause of action in tort is a proper issue for a finder of fact. This Article, however, concentrates on the legal issue of whether courts should adopt the concept of market share liability.

29. A number of juries have found the drug company defendants in DES cases not liable for the injuries suffered by DES daughters. See Joint Brief for Defendants-Appellants at 54 n.9, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) (67732 & 67747) (citing *Shirkey v. Eli Lilly & Co.*, No. 84-C-288 (E.D. Wis. 1987); *McAdams v. Eli Lilly & Co.*, No. 77-C-4174 (N.D. Ill. 1986); *Becker v. Eli Lilly & Co.*, No. 83-C-5163 (N.D. Ohio 1985); *Mink v. Eli Lilly & Co.*, No. 77-C-1432 (N.D. Ill. 1983); *Keil v. Eli Lilly & Co.*, No. 570997 (E.D. Mich. 1980); *Hadden v. Eli Lilly & Co.*, 208 N.J. Super. 716, 506 A.2d 844 (Super. Ct. App. Div. 1986)); see also *Lyons v. Premo Pharmaceutical Laboratories*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div.) (plaintiff able to identify manufacturer, but the drug brokerage firm held not liable), *cert. denied*, 82 N.J. 267, 406 A.2d 774 (1979). But see, e.g., *Bichler*, 55 N.Y.2d at 571, 436 N.E.2d at 182, 450 N.Y.S.2d at 776 (\$500,000 verdict for plaintiff); Note, *Market Share Liability: An Answer*, *supra* note 7, at 674 n.37 (citing *Needham v. White Laboratories*, No. 76-1101 (N.D. Ill. 1979) (\$800,000 verdict for plaintiff)).

30. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1006 (D.S.C. 1981) (stating that plaintiff's major problem was her inability to identify the manufacturer of the DES her mother had taken 28 years before even after over three years of discovery).

31. See, e.g., *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 321, 343 N.W.2d 164, 168 (citing MICH.



over, during the twenty-five years that DES was used to treat pregnancy-related problems, as many as 300 companies manufactured the fungible product.<sup>32</sup> Additionally, many manufacturers no longer exist, having either merged with other concerns, or having gone bankrupt.<sup>33</sup>

## II. THE IDENTIFICATION REQUIREMENT

Typically, the tort causes of action DES daughters advance are based on negligence or strict liability theories. A fundamental principle of these theories, and of tort law in general, holds that the plaintiff has the burden of proving, by a preponderance of the evidence, that the named defendant caused the harm or injury complained of; mere conjecture or speculation as to the identity of the responsible party is insufficient proof of causation.<sup>34</sup> This principle is known as the identification requirement. The requirement is one aspect of the element of causation in fact, which in turn is a common element to virtually all tort law litigation. The issue of identification, although important and present in every negligence and strict liability action, is infrequently litigated. Normally, plaintiffs know the identity of the manufacturer or seller of a product, or the identity is not difficult to discover.<sup>35</sup> This is not true, however, in

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COMP. LAWS § 338.1118(1) (1976), which requires the preservation of prescription records for only five years, repealed by 1978 Mich. Pub. Acts 368 (current version at MICH. COMP. LAWS § 333.17752 (1980))), *cert. denied*, 469 U.S. 833 (1984).

32. See *supra* note 22. DES is considered to be fungible because it was sold as a generic product without regard to who manufactured it. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 589, 689 P.2d 368, 374 (1984) (noting that pharmacists filled prescriptions with whatever company's drug was available because all were chemically identical).

33. See Comment, *supra* note 2, at 622 n.72.

34. See Annotation, *Product Liability: Necessity and Sufficiency of Identification of Defendants as Manufacturers or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R.3d 1344, 1349 (1973) ("It is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product."); 63 AM. JUR. 2d *Products Liability* § 163 (1984) ("If recovery is sought from a manufacturer, it must be shown that he actually was the manufacturer of the product which caused the injury; if recovery is sought from a seller, it must be shown that he actually sold the product in question.").

In a negligence action, proof of the causation in fact entails a reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 3, § 41, at 263, 269; see also *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 79, 119 N.E.2d 74, 76 (1954) (although violation of a statute is *prima facie* evidence of negligence, the injury must still be rationally related to the negligence). In a strict liability action, the one who sells a defective product that is unreasonably dangerous to the user is liable for the resulting injury. RESTATEMENT (SECOND) OF TORTS § 402A (1965). To recover under strict liability, the plaintiff must also establish some causal relationship between the defendant and the injury-producing agent. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN *supra* note 3, § 103, at 712-13. According to Professor Keeton, in order to recover in a strict liability action, the plaintiff has the burden of proving that "claimant's injury or illness was attributable to a dangerous condition of a product identified as being one that was supplied by the target defendant, either as a manufacturer or some other seller or supplier in the marketing chain." *Id.*

35. 63 AM. JUR. 2d *Products Liability* § 164 (1984).

market share cases. Therefore, an essential issue each court must address when faced with a request to adopt market share liability is whether it is advisable to abolish the identification requirement.

The identification element of causation in fact serves important functions in the law of torts. One goal of our tort law is to compensate victims for their injuries.<sup>36</sup> However, our justice system has so far determined that a no-fault society, one in which all injuries are compensable, is not desirable. Instead, tort law only redresses those injuries that result from a defendant's culpability and then only if the defendant can be identified.<sup>37</sup>

In promoting the goal of compensating victims, however, it is necessary to avoid establishing laws that act as an excessive deterrent to useful activity, such as the production of socially desirable products.<sup>38</sup> Therefore, tort law's goal of compensation must be balanced against a second tort law interest, that of protecting people from excessive liability. Requiring the plaintiff first to identify the responsible defendant as a condition of liability insures that a defendant will only be held liable for those injuries he more than likely caused.<sup>39</sup> Because causation in fact limits a defendant's potential liability to injuries that the defendant actually caused, the goal of preventing excessive deterrence is promoted. Otherwise, if potential liability is excessive, a person's useful conduct along with his undesirable conduct will be inhibited.<sup>40</sup> Moreover, although causation in fact restricts liability, it also helps to assign blameworthiness to the culpable party.<sup>41</sup>

Notwithstanding the benefits that causation in fact provides, a narrow line of cases have created exceptions to the requirement of proof of causation in fact. The particular exceptions that DES plaintiffs most often raise are enterprise liability<sup>42</sup> and alternative liability.<sup>43</sup> These two exceptions allow a plain-

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36. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 3, § 4, at 20 (noting that if tort law did not otherwise compensate victims, a court would leave a loss where it falls); Fischer, *supra* note 28, at 1629 (noting that the law seeks to compensate victims for their loss and to discourage socially undesirable behavior).

37. A substantial factor test is often employed to evaluate the causation element of negligence. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 3, § 41, at 267-68. The substantial factor test determines that the "defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.* Obviously, the test cannot be evaluated if the defendant cannot be identified.

38. See Fischer, *supra* note 28, at 1629 (noting that some activities are useful and should not be discouraged although they may be considered potentially dangerous).

39. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 3, § 41, at 268.

40. Cf. *Shackil v. Lederle Laboratories*, 116 N.J. 155, 158, 561 A.2d 511, 512 (1989) (reasoning that imposition of market share liability would threaten the continued availability of much needed drugs).

41. *Id.* at 162-63, 561 A.2d at 515; see also Fischer, *supra* note 28, at 1629-30 (noting that in order for tort law to resolve disputes among individuals, it must reflect popular notions of moral responsibility, and people often associate moral blame and responsibility with causation in fact).

42. The elements necessary to prove an action based on enterprise liability include the following:

(1) the injury-causing product was manufactured by one of a small number of defendants in an industry; (2) the defendants had joint knowledge of the risks inherent in

tiff to shift the burden of proof on the causation issue to a defendant or a group of defendants. Liability may attach to the group of defendants as a whole if a particular defendant is not identified as the party responsible for the injury.<sup>44</sup> Besides market share liability, DES daughters have pursued two other causes of action with more lenient identification burdens: concert of action<sup>45</sup> and civil conspiracy.<sup>46</sup> These two causes of action are not exactly excep-

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the product and possessed a joint capacity to reduce those risks; and (3) each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a trade association.

*Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 285, 505 A.2d 973, 984 (1985); *see also* *Hall v. E.I. DuPont de Nemours Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (holding that joint liability among manufacturers of blasting caps could be found if plaintiffs show manufacturers have joint knowledge of risks and joint ability to reduce risk).

This theory has not been successful in DES cases because the DES industry did not contain a small number of manufacturers. There were literally hundreds of companies involved. Moreover, DES manufacturers did not delegate control or responsibility for safety functions to a trade association. Instead, the FDA exercised pervasive regulation and control from the first stages of the drug's manufacture. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245 (Mo. 1984); *see also* *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 609-10, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 143 (noting that standards DES manufacturers follow are suggested or compelled by the government), *cert. denied*, 449 U.S. 912 (1980).

43. Alternative liability applies to situations when two or more defendants act tortiously toward a plaintiff who, through no fault of her own, cannot identify which one of the defendants caused the injury. In such a case, the burden of proof shifts to each defendant to prove his innocence or be held jointly and severally liable with all other defendants. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3), at 441-42 (1965); *see also* *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (holding both defendants liable where plaintiff was injured when two hunters negligently shot in his direction and plaintiff could not ascertain which hunter's bullet injured him). Courts have analogized to this theory when adopting market share liability, however, alternative liability has not been accepted in its standard form. *Zafft*, 676 S.W.2d at 244; *see also* *Sindell*, 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139 (holding that plaintiffs are not required to establish that the defendants are in a better position to identify the actual tortfeasor). Courts have explained that, in the DES cases, it is not definite that the negligent party is before the court, and the defendants are not in a better position to determine who was the negligent party. Both of these requirements are prerequisites for invoking alternative liability. *See* *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 591-95, 689 P.2d 368, 375-77 (1984) (strict application of alternative liability does not provide DES plaintiffs with a cause of action); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984).

Another theory that relieves the plaintiff of the burden of satisfying the causation in fact element is *res ipsa loquitur*. Plaintiffs do not allege that this concept is applicable in the DES cases, although they do analogize to it as a basis for adoption of market share liability. For a thorough discussion of alternative liability and why it is not appropriate in DES cases, including a discussion of the *res ipsa loquitur* analogy, *see infra* note 219.

44. *See, e.g., Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). In *Hall*, the plaintiffs were unable to identify the manufacturer of a blasting cap that injured a child. *Id.* at 359. The court denied the defendants' motion to dismiss the complaint brought under a enterprise liability cause of action because the court believed the plaintiffs could prevail. *Id.* at 376-78.

45. Concert of action exists when a tortious act is done in concert with another person pursuant to a common design, or a party gives substantial assistance to another knowing that the other's conduct constitutes a breach of duty. RESTATEMENT (SECOND) OF TORTS § 876(a)-(b), at 315 (1979). With the concert of action theory, it is unnecessary for the parties to agree expressly to

tions to the identification requirement. Although DES plaintiffs typically allege elements of each of these causes of action, the courts almost always reject all but the market share liability theory.<sup>47</sup>

There has been a split among courts on the question of whether to adopt market share liability in negligence and strict liability actions brought against drug manufacturers for injuries suffered by women whose mothers ingested DES while pregnant. Currently, the highest courts of California,<sup>48</sup> Washington,<sup>49</sup> Wisconsin,<sup>50</sup> New York,<sup>51</sup> and, most recently, Florida<sup>52</sup> have adopted

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commit the tortious acts. The parties, however, are liable only if there is a tacit understanding between them. W. PROSSER, TORTS § 46, at 292 (4th ed. 1971). In order to support a concert of action claim, DES plaintiffs must allege that the defendants failed to test DES or to provide sufficient warning of its dangers and that the defendants adequately relied upon tests performed by one another and upon each others' promotional and marketing strategies. *Id.* However, the majority of courts have found that there never was a tacit agreement between the companies regarding marketing or testing of the drugs. Though they may have engaged in a significant amount of parallel activity in producing and marketing DES for pregnancy uses, courts agree that the activity did not rise to the level of concerted action. See *Sindell*, 26 Cal. 3d at 604-05, 607 P.2d at 933, 163 Cal. Rptr. at 140-41; *Zaffr*, 676 S.W.2d at 245 (holding that the level of agreement or cooperation between defendants was insufficient to establish the "concert of action"); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (because DES manufacturer made no motion to dismiss the complaint for failure to state a cause of action, concerted action theory became controlling law of case), *overruled by* *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 508, 539 N.E.2d 1069, 1076, 541 N.Y.S.2d 941, 948, *cert. denied*, 110 S. Ct. 350 (1989); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 599, 689 P.2d 368, 379 (1984) (finding that a substantial amount of parallel activity in the industry is not unusual and that such activity does not rise to the level of concert of action); see also Comment, *supra* note 2, at 615-18 (noting that the concert of action theory has never been applied outside of DES cases to avoid the identification requirement). But see *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (recognizing concert of action), *cert. denied*, 469 U.S. 833 (1984).

46. A civil conspiracy involves two or more persons who combine for the purpose of accomplishing by concerted action either (1) a lawful purpose by unlawful means, or (2) an unlawful purpose by lawful means. See *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 235, 560 N.E.2d 324, 329 (1990). Again, the courts generally hold that though there was parallel activity, the DES manufacturers did not act jointly in regard to gaining FDA approval to use DES for treatment of problem pregnancies. See *Collins*, 116 Wis. 2d at 188, 342 N.W.2d at 48; see also *Burnside* 351 Pa. Super. at 280, 505 A.2d at 984 (holding that allegations of parallel and imitative conduct are insufficient to establish a cause of action).

47. See *supra* notes 42-46.

48. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). The market share liability theory, as specifically developed in *Sindell*, has been adopted by only one federal district court. See *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265, 270-71 (D.S.D. 1983) (applying what the court thought would be South Dakota law). Notably, the California Supreme Court has since limited the application of market share liability to cases premised on negligence only. *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

49. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984). The market share liability theory, as adopted in *Martin*, was followed in *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1527 (D. Mass. 1985). The *Martin* court adopted the market share liability theory, finding that those injured by DES required some justice. *Martin*, 102 Wash. 2d at 603, 689 P.2d at 382. The *Martin* court cited *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982), as an example of a court that would adopt market share liability under certain circum-

some form of the market share liability theory in DES daughter cases. The supreme courts of Illinois,<sup>53</sup> Missouri,<sup>54</sup> and Iowa<sup>55</sup> have specifically rejected the market share liability theory in DES cases.

### III. JUDICIALLY PROMULGATED MARKET SHARE THEORIES

None of the five states that have adopted the market share liability concept have implemented the same procedure. All five states, however, have a number of similarities in the procedures adopted. This section generally discusses the concept of market share liability as a unified principle, noting the important variations each state has included in the particular form adopted.

#### A. Reasons for Adopting a Market Share Liability Theory

The DES cases are examples of the reality that in our complex industrialized society, advances in science and technology have created fungible goods that may harm consumers and that are difficult to trace to a specific producer.<sup>56</sup> Courts faced with cases involving fungible products must determine

stances. *Id.* In *Payton*, the question certified from a federal district court was whether Massachusetts would recognize market share liability. *Payton*, 386 Mass. at 541-42, 437 N.E.2d at 173. The *Payton* court found that it could not answer the question in the form presented and pointed out flaws in the plaintiff's proposal. The court did, however, imply that under other circumstances it might adopt market share liability. *Id.* at 574, 437 N.E.2d at 190; see also *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987) (refining the *Martin* theory by altering the relevant market from a local market to a national market).

50. *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826 (1984).

51. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989).

52. *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990).

The *Conley* decision is very recent, therefore, it is not discussed in this Article. In *Conley*, the Florida Supreme Court adopted the Washington Supreme Court version of alternative market share liability with a few modifications. *Id.* at 286. This Article's discussion of Washington's alternative market share liability as adopted in *Martin v. Abbott Laboratories* applies for the most part to the theory adopted by the Florida Supreme Court.

Florida's market share liability theory differs from Washington's theory in two respects. First, under the Florida theory, a plaintiff must make a showing that she made "a genuine attempt to locate and identify the manufacturer responsible for her injury." *Id.* A second modification is that the Florida theory is restricted to negligence causes of action. *Id.*

53. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

54. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); see Note, *DES Recovery in Missouri: Confined by Traditional Tort Principles*, 53 UMKC L. REV. 692 (1985) (discussing the *Zafft* case).

55. *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986).

56. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (noting that two possible responses of the court to such advances are to adhere to prior doctrine or to fashion remedies to meet the changing needs), cert. denied, 449 U.S. 912 (1980); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 507, 539 N.E.2d 1069, 1075, 541 N.Y.S.2d 941, 947 (noting that traditional unmodified common law doctrine would provide no relief for DES plaintiffs "who cannot identify the particular manufacturer of the DES ingested by their mothers"), cert. denied, 110 S. Ct. 350 (1989).

whether they will fashion a procedure to allow the plaintiff to overcome the obstacles of identification that these technological advances cause. Courts in the DES cases answering this question affirmatively generally rely on three basic policy reasons as justification for adopting market share liability.

The first policy is that as between an innocent plaintiff and a manufacturer of a defective product, the manufacturer should bear the cost of the injury.<sup>57</sup> The courts conclude that the plaintiff in these cases is not at fault in failing to provide evidence of causation, reasoning that the conduct of the defendants played a significant role in creating the unavailability of proof.<sup>58</sup> The Washington and Wisconsin courts expanded on this justification, explaining that because each defendant contributed to the risk of injury to the public and consequently to the risk of injury to the plaintiff, each defendant shared, in some degree, culpability for producing or marketing DES.<sup>59</sup>

Courts also articulate two other policy reasons to support the adoption of market share liability. The second policy justification is that as between the injured plaintiff and the possibly responsible drug company, the drug company is in a better position to absorb the cost of the injury.<sup>60</sup> The large pharmaceutical companies, the courts conclude, not only can insure against the costs of injury, they also can pass on these costs to the public.<sup>61</sup> The final reason given to support market share liability adoption is that because the manufacturer is in the best position to recognize defects in its products and to guard against them, holding the producer liable for these defects provides an incentive to produce safe products.<sup>62</sup>

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57. See *Hymowitz*, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947; *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 191, 342 N.W.2d 37, 49 (concluding that "interests of justice and fundamental fairness" demand that manufacturers who may have provided the product that caused the injury shoulder the cost of that injury), *cert. denied*, 469 U.S. 826 (1984).

58. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

59. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984); *Collins*, 116 Wis. 2d at 191, 342 N.W.2d at 49. The *Collins* court also noted that it was compelled to adopt a theory of recovery because of the substantive right to a remedy the state's constitution established in its "certain remedy" provision. *Id.* at 182, 342 N.W.2d at 45 (quoting Wis. CONST. art. 1, § 9).

60. See, e.g., *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (noting that the cost of an injury and the loss of time or health can be an overwhelming misfortune to the injured person); *Martin*, 102 Wash. 2d at 604, 689 P.2d at 382 (explaining that drug companies and consumers should share the cost of the injury, rather than placing the burden solely on the innocent plaintiff).

61. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 507, 539 N.E.2d 1069, 1075, 541 N.Y.S.2d 941, 947 (concluding it would be inconsistent with the expectations of modern society to place the burden of DES injuries on the victims), *cert. denied*, 110 S. Ct. 350 (1989); *Martin*, 102 Wash. 2d 604, 689 P.2d at 382 (concluding that it is better to have the drug manufacturers and the public share the burden of the loss, rather than putting it all on the innocent plaintiff).

62. See *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 191-92, 342 N.W.2d 37, 49 (noting "the cost of damages awards will act as an incentive for drug companies to test adequately the drugs they place on the market for general medical use"), *cert. denied*, 469 U.S. 826 (1984); see also *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (stating that the manufacturer is in the best position to prevent product defects, and holding

### B. Market Share Liability Theory

These three policy reasons have prompted courts to reevaluate their state's tort laws in an attempt to hold DES manufacturers responsible for injuries their drugs caused. The first court to adopt market share liability was the California Supreme Court in *Sindell v. Abbott Laboratories*.<sup>63</sup> The *Sindell* court based the market share liability theory it adopted, and some of its rationale in adopting the theory, on a student law review article.<sup>64</sup> The article argued that, in DES cases, some form of enterprise liability should be fashioned.<sup>65</sup> The court, however, did not literally follow the article's proposal.<sup>66</sup> Similarly, each court adopting market share liability since *Sindell* has likewise placed its own twist on the market share liability theory.

The preliminary component of any case using market share liability concerns the number of defendants who must be joined. In *Sindell*, the court held that the plaintiff had to join as defendants the manufacturers of a *substantial percentage* of the DES sold in the relevant market.<sup>67</sup> This requirement must be met before defendants may cross-claim against other possibly responsible

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manufacturers liable for defects will provide an incentive to make safe products), *cert. denied*, 449 U.S. 912 (1980).

63. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). The plaintiff in *Sindell* did not seek the adoption of market share liability. The *Sindell* court rejected the three theories for recovery proposed by the plaintiff and *sua sponte* developed the market share liability concept. *Id.* at 597-613, 607 P.2d at 928-38, 163 Cal. Rptr. 132-46. Two facts that the court cited may have influenced it to adopt the theory. First, the court believed that injuries resulting from the use of DES were widespread and that many DES daughters would be looking to the courts for recovery but would be unable to identify the culpable party. *Id.* at 597, 607 P.2d at 927-28, 163 Cal. Rptr. at 135-36. Second, the plaintiff represented to the court that as few as six companies produced 90% of the DES marketed. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The *Sindell* court, therefore, may have believed that imposing liability on a small group of manufacturers was not inequitable and that it was probable that the small group was likely responsible for plaintiff's injuries. The small group of manufacturers involved made it appear more likely that the market shares for the group could be developed. However, it is unlikely that six companies produced 90% of the DES marketed, and it does not appear that any other plaintiff or court has ever cited this small estimate.

64. Comment, *supra* note 4, at 963.

65. See *id.* at 1003-06. The Comment suggested that industry-wide standards caused the plaintiff's injury. *Id.* at 997. The Comment proposed seven requirements for a cause of action based upon industry-wide liability: (1) insufficient industry-wide standards as to the manufacture of a product, (2) lack of proof as to the causative agent is due to defendant's conduct, (3) a generally similar defective product was manufactured by all of the defendants, (4) the defective product caused plaintiff's injury, (5) defendants owed a duty to the class of which plaintiff was a member (6) clear and convincing evidence that the plaintiff's injury was caused by a product made by one of the defendants, and (7) all defendants were tortfeasors. *Id.* at 995.

The Comment suggested that if a plaintiff proves all seven elements, the burden of proof of causation should shift to the defendants, who may exonerate themselves only by proving their product could not have caused the injury. *Id.* at 999-1000.

66. See *Sindell*, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

67. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145 (emphasis added). The court defined substantial share as less than 75-80% of the market share. *Id.*

manufacturers.<sup>68</sup> The substantial share component was important in the concept of the market share liability theory conceived in the law review comment the court relied upon.<sup>69</sup> The substantial share requirement diminishes the likelihood that a manufacturer will be liable for injuries a product it did not produce caused.<sup>70</sup> Therefore, the substantial share requirement helps preserve the causation in fact element to a limited extent because a manufacturer who contributed to a substantial share of a market for DES will more likely be liable for injuries its products actually caused.<sup>71</sup>

On the other hand, the other four states, which have adopted market share liability have not adopted the substantial share component of the California theory. In Washington, Wisconsin, and New York, the plaintiff need only sue one drug company that produced DES and that company's DES sales need not constitute a substantial share of the market.<sup>72</sup> Inevitably, though, a single named defendant will implead other companies that sold DES in the relevant market.<sup>73</sup>

The next element necessary to succeed in a market share liability action is that the plaintiff must prove a *prima facie* case on every element of a negligence or strict liability action except identification of the direct tortfeasor.<sup>74</sup> Therefore, the plaintiff must prove, by the preponderance of the evidence, that her mother took DES, that the DES caused subsequent injuries, that the defendant produced or marketed the type of DES the plaintiff's mother ingested, and that the production and marketing of DES breached a legally recognized duty to the plaintiff.<sup>75</sup>

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68. *Id.*

69. *Id.* (citing Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 996 (1978) which noted that a substantial market share of 75-80% mimics the plaintiff's clear and convincing evidence standard).

70. Comment, *supra* note 4, at 996 (reasoning that an alternative liability cause of action is approached by naming manufacturers having a substantial share of the market).

71. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-12, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980).

72. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 605, 689 P.2d 368, 382 (1984) (holding that requiring the joinder of a substantial share of the market does not alter the probability of liability under a market share alternate liability theory; thus, the plaintiff need only commence suit against one defendant); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 193, 342 N.W.2d 37, 50, *cert. denied*, 469 U.S. 826 (1984); cf. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512-13, 539 N.E.2d 1069, 1079, 541 N.Y.S.2d 941, 950, *cert. denied*, 110 S. Ct. 350 (1989) (noting that a DES defendant's liability can only be several, and not joint).

73. See, e.g., *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383 (recognizing that a single named defendant may implead other drug manufacturers in order to establish its presumptive share or to reduce its projected market share).

74. *Id.* at 604-05, 689 P.2d at 382.

75. See, e.g., *Hymowitz*, 73 N.Y.2d at 510-11, 539 N.E.2d at 1076-77, 541 N.Y.S.2d at 948-49; *Martin*, 102 Wash. at 604, 689 P.2d at 382; *Collins*, 116 Wis. 2d at 193, 342 N.W.2d at 50. The *Collins* court later stated in detail the *prima facie* requirements for each cause of action:

On a negligence theory, the plaintiff must prove that a defendant drug company had a duty of care and breached that duty of care when it produced or marketed Des [sic]. . . .



Once the plaintiff has presented a *prima facie* case of negligence, the burden shifts to the defendant to exculpate itself.<sup>76</sup> In order to do so, a defendant must prove by a preponderance of evidence that it did not produce or market the type of DES the mother took, that it did not produce or market DES for the prevention of miscarriage in that geographical area, or that it did not produce or market DES at that time.<sup>77</sup>

In *Hymowitz v. Eli Lilly & Company*,<sup>78</sup> New York's highest court, the Court of Appeals, made it difficult for a defendant to exculpate itself.<sup>79</sup> New York uses a national market. Therefore, a defendant can only exculpate itself through proof that it did not participate in the marketing of DES for pregnancy use.<sup>80</sup> Even conclusive proof that the defendant-manufacturer could not have caused a particular plaintiff's injury is insufficient for exculpation purposes in New York.<sup>81</sup>

If the defendant fails to exculpate itself, the court next defines the relevant geographic market area for the purpose of measuring and apportioning liability. Remaining defendants which provided DES in the relevant geographic market become members of the plaintiff's DES market.<sup>82</sup> The relevant geographic market area ideally is defined on a local level, however, where local market share evidence is unavailable, county, state, or even national market share figures are admissible to determine the defendant's market share.<sup>83</sup> Damages are then apportioned according to the likelihood that any of the defendants supplied the product.<sup>84</sup> This apportionment is achieved by holding

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[In a strict products liability action] the plaintiff must prove (1) that the DES was defective when it left the possession or control of the drug company; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the plaintiff's injuries or damages; (4) that the drug company engaged in the business of producing or marketing DES or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the drug company; and (5) that the product was one which the company expected to reach the user or consumer without substantial change in the condition it was sold.

*Id.* at 195-96, 342 N.W.2d at 51.

76. *See, e.g., Martin*, 102 Wash. 2d at 605, 689 P.2d at 382.

77. *See, e.g., Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 195-96, 342 N.W.2d 37, 51, *cert. denied*, 469 U.S. 826 (1984); *see also Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980).

78. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989).

79. *See infra* note 87 and accompanying text (discussing the impact of New York's adoption of a national market).

80. *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

81. *Id.* Because liability is based on the overall risk created by each defendant, the court considered it "a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here." *Id.*

82. *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

83. *See George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987).

84. Punitive damages may not be assessed in an action using the market share theory under which liability is based solely upon the manufacturer's participation in the market. *See, e.g., Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889, 213 Cal. Rptr. 547, 554 (1985) (describing punitive damages in the market share scheme as "inherently unfair"); *Collins v. Eli Lilly &*

each defendant liable for the proportion of the judgment its share of the market represents.<sup>86</sup> The intended result of market share liability is that a manufacturer's liability for an injury will be approximately equivalent to the amount of damage caused by the DES the manufacturer supplied in the relevant market area.<sup>86</sup>

New York is the only state which refuses to narrow the relevant market. Rather, New York uses a national market.<sup>87</sup> New York rejected the idea that a market share liability theory could be finely tailored so that liability for many injuries would equal the injuries actually caused by the product of a particular manufacturer.<sup>88</sup> Nevertheless, the New York court realized that a national market could not provide a reasonable link between liability and the risk a defendant created toward a particular plaintiff.<sup>89</sup> Instead, a national market apportions "liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."<sup>90</sup>

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Co., 116 Wis. 2d 166, 202, 342 N.W.2d 37, 54 (denying a cause of action for punitive damages on summary judgment), *cert. denied*, 469 U.S. 826 (1984).

Punitive damages are imposed upon an identified defendant for its malicious acts which have caused the plaintiff's injuries. Punitive damages are intended to punish and deter wrongdoers for acting with malice, not just because they distributed their products in the marketplace. AMERICAN LAW OF PRODUCTS LIABILITY 3D § 9:36 (1989). *But see* Note, *Sindell and Beyond: A Case for Imposing Punitive Damages in Market Share Litigation*, 17 PAC. L.J. 1445, 1466-70 (1986). The Note argues that to allow only compensatory damages will not adequately deter the defendant from future wrongdoing because liability insurance often covers most of a compensatory claim, and the defendant will not feel the pain of having to pay the awards. The Note suggests that if a plaintiff can prove an industry-wide conscious disregard for the public safety, then punitive damages may be apportioned under the market share liability theory. *Id.*

85. *See, e.g., Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512-13, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950 (holding the liability of DES defendants is several based upon national market share), *cert. denied*, 110 S. Ct. 350 (1989); *Martin v. Abbott Laboratories*, 581 Wash. 2d 581, 605-06, 689 P.2d 368, 383 (1989) (noting that defendants that prove market share shall pay that percentage of the damages awarded to the plaintiff).

86. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980); *see also Martin*, 102 Wash. 2d at 605-07, 689 P.2d at 383 (noting that no defendant will be held liable for more harm than it statistically could have caused); Fischer, *supra* note 28, at 1643-44 (calling for adoption of a broad, uniform definition of the relevant market on the grounds that it is far more likely to result in fair apportionment of damages than using small or local markets). *But see Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950 (realizing that liability will not, over the run of cases, approximate causation).

87. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court most likely was influenced to adopt the national market concept because the attorneys for the parties favored that market, and a California court had already worked out figures based on a national market. *Rheingold*, *supra* note 25, at 893.

88. *See Hymowitz*, 73 N.Y.2d at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

89. *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

90. *Id.* Though it is too early to determine how *Hymowitz* will be received, it certainly is unique in its departure from established tort principles. The decision is criticized as flawed in that liability cannot be equated to actual harm caused. *See Shackil v. Lederle Laboratories*, 116 N.J. 155, 197, 561 A.2d 511, 532 (1989) (O'Hern, J., dissenting) (recognizing *Hymowitz* as perhaps

A last common characteristic of market share liability is that the liability is not joint and several; rather, it is only several.<sup>91</sup> In adopting market share liability, the New York Court of Appeals concluded that joint and several liability would represent a retreat from the attempt to achieve as close an approximation as possible between a defendant's liability for damages and its individual responsibility for the injuries that the products it manufactured caused.<sup>92</sup> In cases in which all manufacturers in the market are not joined, a plaintiff will receive less than 100% recovery because liability will be limited to the market share represented.<sup>93</sup>

Beyond this basic framework of market share liability, each state has developed certain important distinctions. The unique twists to the theory adopted by California and New York courts have already been discussed.<sup>94</sup> However, Washington and Wisconsin also have developed profound variations in their versions of market share liability. These variations generally relate to the apportionment of damages.

The market share liability theory that the Washington court has adopted is known as "alternative market share liability" because of its similarities to alternative liability.<sup>95</sup> Under the Washington theory, after defining the geographic market, all defendants are presumed to have equal market shares and are liable on a pro rata basis.<sup>96</sup> Manufacturers may rebut this presumption by proving their actual market share.<sup>97</sup> A defendant proving actual market share in the relevant market is only liable for a percentage of damages equivalent to the market share.<sup>98</sup> The presumptive share of the remaining defendants that are unable to establish their actual market share is then adjusted upward, so that 100% of the market is accounted for.<sup>99</sup> If all defendants are able to es-

the most controversial of the market share decisions); *Wilner & Bayer, Hymowitz v. Eli Lilly: New York Adopts a "National Risk" Doctrine for DES*, 25 TORT & INS. L.J. 150, 150 (1989) (the court "abrogated hundreds of years of common law and the basic tort principle of causation by holding that liability of DES manufacturers is based on the 'overall risk produced' to the 'public at large' and not on causation in a single case"). *But see Twerski, Market Share—Tale of Two Centuries*, 55 BROOKLYN L. REV. 869, 870 (1989) (praising *Hymowitz* for not "paying senseless obeisance to tradition").

91. *See, e.g., Brown v. Superior Court*, 44 Cal. 3d 1049, 1074-75, 751 P.2d 470, 486-87, 245 Cal. Rptr. 412, 428 (1988).

92. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512-13, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, 110 S. Ct. 350 (1989).

93. *See, e.g., id.* (acknowledging that under several liability, some plaintiffs might not receive a 100% recovery).

94. *See supra* notes 67-71 and accompanying text (discussing the California theory); *supra* notes 87-90 and accompanying text (discussing the New York theory).

95. *See Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 602, 689 P.2d 368, 381 (1984).

96. *Id.* at 605, 689 P.2d at 383.

97. *Id.* at 605-06, 689 P.2d at 383.

98. *Id.*

99. *Id.* at 606, 689 P.2d at 383. In *George v. Parke-Davis*, 107 Wash. 2d 584, 586, 733 P.2d 507, 514 (1987), the Washington Supreme Court held that if a defendant impleads a third party defendant who is not amenable to suit in an attempt to reduce its presumptive share, then the impleading defendant has the burden of establishing the actual market share of the impleaded

establish their actual market share and the percentage of the market represented is less than 100%, plaintiff's recovery is limited to the percentage of the market that is actually represented.<sup>100</sup>

Wisconsin's theory, on the other hand is known as the "risk contribution theory," and relies on that state's comparative negligence statute for apportioning damages.<sup>101</sup> Under Wisconsin's theory, if only one company is sued and no others are impleaded, that company is liable for all the damages if it cannot exculpate itself.<sup>102</sup> If more than one defendant is joined or impleaded, then damages are determined according to the jury's assignment of liability under Wisconsin's comparative negligence statute.<sup>103</sup> A number of factors may be considered in apportioning damages. These factors include the market share of the defendant, whether the company conducted safety tests on DES, the role the company played in seeking FDA approval of the drug, and whether the company issued warnings about the dangers of DES.<sup>104</sup>

#### IV. COURTS THAT HAVE REJECTED MARKET SHARE LIABILITY

##### DES CASES

The concept of market share liability has not received strong support. The supreme courts of Illinois,<sup>105</sup> Missouri,<sup>106</sup> and Iowa<sup>107</sup> have refused outright to adopt the market share liability theory in the context of DES daughter cases. The extent of each court's analysis varies, although there are certain common justifications that each court has given for its holding. Each court has recognized the strong appeal of imposing liability on manufacturers that profited

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defendant. *Id.*

100. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 597, 689 P.2d 368, 383 (1984).

101. *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 199-200, 342 N.W.2d 37, 52-53, *cert. denied*, 469 U.S. 833 (1984); *see also* Wis. STAT. § 895.045 (1990) (proportioning damages among culpable defendants based upon the percentage of causal negligence attributable to each).

102. *Collins*, 116 Wis. 2d at 194, 342 N.W.2d at 50.

103. *Id.* at 199-200, 342 N.W.2d at 52-53; *see also* Wis. STAT. § 895.045 (1990).

104. *Collins*, 116 Wis. 2d at 200, 342 N.W.2d at 53. Specifically, the court concluded:

In assigning a percentage of liability to each defendant, the jury may consider factors which include, but are not limited to, the following: whether the drug company conducted tests on DES for safety and efficacy in use for pregnancies; to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; whether the company had a small or large market share in the relevant area; whether the company took the lead or merely followed the lead of others in producing or marketing DES; whether the company issued warnings about the danger of DES; whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and whether the company took any affirmative steps to reduce the risk of injury to the public.

*Id.*

105. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

106. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *see also* Note, *supra* note 54, at 692 (discussing the *Zafft* case).

107. *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986).

from the sale of a product that has injured an innocent victim.<sup>108</sup> However, these courts have realized that the market share liability theory was too great a deviation from existing tort law and, therefore, as the theory presently existed, was not a viable concept.<sup>109</sup> The market share liability theory, as these courts perceived it, did not present sufficient policy reasons to alter causation in fact.<sup>110</sup> Rather, if any change was to be made to the existing tort laws, the courts reasoned that the legislature, and not the courts, would be better equipped to construct a solution to the DES liability problem.<sup>111</sup>

In addition, the Illinois and Missouri courts stressed that the inadequacies of the data available on manufacturers' market share made the concept unworkable.<sup>112</sup> As a result, these two courts reasoned that it would be unfair to award damages based on inaccurate evidence.<sup>113</sup> Both courts also declined to embrace the underlying policy reasons on which the courts that accepted market share liability relied.<sup>114</sup> In *Zafft v. Eli Lilly & Co.*,<sup>115</sup> the Missouri Su-

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108. *E.g.*, *Smith*, 137 Ill. 2d at 222, 560 N.E.2d at 324 (stating that "[i]t is tempting in this case to impose liability based on the fact that these companies profited from the sale of the type of drug which may be responsible for the plaintiff's injuries, regardless of the manufacturers' ability to cover these costs"); *Mulcahy*, 386 N.W.2d at 75-76 (acknowledging that a "plaintiff in a DES case with an unidentified product manufacturer presents an appealing claim for relief"); *Zafft*, 676 S.W.2d at 246 (noting that the court "acknowledges and respects the compelling reasons motivating the trial court and courts of other states to resolve the dilemma presented in these cases by straining existing law or adopting novel theories").

109. The Iowa court recognized market share as a radical departure from traditional tort concepts, refusing to allow "negligence in the air" to serve as a substitute for causation in fact. *Mulcahy*, 386 N.W.2d at 76 (quoting F. POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920)); *see also Zafft*, 676 S.W.2d at 246-47 (noting that there was insufficient justification to adopt a theory that shifted the burden of causation to the defendant and substantially altered existing rights and liabilities).

110. *E.g.*, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 261-65, 560 N.E.2d 324, 341-43 (1990) (considering and rejecting policy reasons the plaintiffs proposed for adopting the theory).

111. In *Mulcahy*, the court equated the market share liability theory to a judicially developed insurance plan that required manufacturers to pay for injuries their product may not have caused. *Mulcahy*, 386 N.W.2d at 76. The *Mulcahy* court concluded that "awarding damages to an admitted innocent party by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain." *Id.*; *see also Smith*, 137 Ill. 2d at 262-63, 560 N.E.2d at 342 (noting that "[p]erhaps . . . this change is more appropriate for the legislature to develop, with its added ability to hold hearings and determine public policy").

112. *Smith*, 137 Ill. 2d at 253, 560 N.E.2d at 337-38 (finding that it would be an unwise burden placed on the courts, both monetarily and in terms of workload, to require them to re-create the market shares of the many manufacturers involved in the production and distribution of DES); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984).

113. *Smith*, 137 Ill. 2d at 253, 560 N.E.2d at 338 (noting that "[i]f we were to allow courts and juries to apportion damages when reliable information is not available, the clear result would be that the determinations will be arbitrary and there will be wide variances between judgments, without sufficient explanation as to these differences"); *Zafft*, 676 S.W.2d at 246 (stating that "market share liability continues the risk that the actual wrongdoer is not among the named defendants, and exposes those joined to liability greater than their responsibility").

114. *See Smith*, 137 Ill. 2d at 260-68, 560 N.E.2d at 337-43 (discussing and rejecting policy reasons relied upon by courts adopting the market share liability theory); *Zafft*, 676 S.W.2d at

preme Court discounted the argument that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury" because "defendants can better absorb [the] cost" of injury.<sup>116</sup> The *Zaffi* court stated that this argument ignored the strong countervailing interests that support the causation in fact requirement.<sup>117</sup> The Illinois and Missouri courts also both recognized that adoption of market share liability would have little effect on production of safer products.<sup>118</sup> In fact, these courts believed adoption of market share liability would have a detrimental effect on desired pharmaceutical research and development.<sup>119</sup> In addition, the Illinois Supreme Court disputed whether the theory would have any significant effect on enhancing record keeping.<sup>120</sup>

The Illinois Supreme Court, in *Smith v. Eli Lilly & Co.*,<sup>121</sup> further explained that the market share liability theory had the potential for treating plaintiffs who were unable to identify the culpable manufacturer better than the average plaintiff who was able to do so. Where the manufacturer can be identified, a plaintiff runs the risk that the culpable party may not be amenable to suit or may be insolvent.<sup>122</sup> The *Smith* court also refuted the plaintiff's

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247 (concluding that policy justifications were not persuasive enough to veer from existing state tort law requirements).

115. 676 S.W.2d 241 (Mo. 1984).

116. *Id.* at 246. Likewise, the *Smith* court pointed out that, due to the increased insurance costs, a number of drugs are no longer available to the public and that the federal government has interceded to insure the availability of some drugs. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 261-63, 560 N.E.2d 324, 341-42 (1990). However, the court refused to consider whether there was an insurance crisis, or whether the manufacturers were in a position to insure against these losses and should, therefore, bear the burden of the damages. *Id.* at 261, 560 N.E.2d at 341.

117. *Id.*

118. *Smith*, 137 Ill. 2d at 261-63, 560 N.E.2d at 341-42; *Zaffi*, 676 S.W.2d at 247.

119. *Smith*, 137 Ill. 2d at 261-62, 560 N.E.2d at 342; *Zaffi*, 676 S.W.2d at 247.

120. *See Smith*, 137 Ill. 2d at 264, 560 N.E.2d at 343.

121. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

122. *Id.* at 255, 560 N.E.2d at 338-39. The *Smith* court reasoned that the typical plaintiff in a tort case takes the risk that the defendant will be unable to assume financial responsibility for injuries caused. With market share liability, however, liability is spread among industry members, reducing the risk that plaintiff will be without a solvent defendant. The theory, therefore, may punish plaintiffs who satisfy the identification element, while creating an incentive not to locate the particular manufacturer. *Id.*, 560 N.E.2d at 339; *see also* Comment, *supra* note 2, at 632-33 (arguing that the market share liability theory exposes defendants to double liability, first to plaintiffs who can identify them as the causal party and again to plaintiffs who cannot).

One commentator argues that to avoid this unfairness, a plaintiff should have to prove that she used due diligence in her attempt to identify the responsible manufacturer. Comment, *The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation*, 19 J.L. REFORM 771, 782-83 (1986). A federal district court, however, rejected the due diligence requirement, reasoning that a plaintiff already has sufficient incentive to identify the responsible manufacturer, as well as the unlikelihood that, if ascertainable, the identity of the culpable defendant would not be disclosed. *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1528 (D. Mass. 1985). The *McCormack* court reasoned that any information the plaintiff has relevant to identity will be available to the defendants through discovery. *Id.* at 1527-28. Availability of identity evidence will frustrate a plaintiff who desires not to discover the culpable defendant. *Id.* at 1528. Second, the plaintiff has incentive to identify the defendant because she will be ensured full

contention that the defendants' breach of a duty to her formed a basis for adopting the theory.<sup>123</sup> Moreover, the *Smith* court concluded that imposing liability under the market share liability theory would make the remaining manufacturers of DES the insurers of the industry.<sup>124</sup> The Illinois court reasoned that imposing liability would be especially unfair because the relevant industry existed between twenty and forty years ago and there were some 300 manufacturers involved; however, only the few manufacturers still in existence would have to shoulder the liability costs.<sup>125</sup> Lastly, the *Smith* court rejected the plaintiff's analogies to *res ipsa loquitur* and alternative liability as too tenuous.<sup>126</sup>

Most federal courts that have addressed the issue of whether to apply market share liability in a DES case have declined to adopt the theory.<sup>127</sup> The federal courts generally characterize the theory as a radical departure from the common law of the state in which they sit.<sup>128</sup> Therefore, without a clear direction from a state's supreme court, a federal court sitting in diversity would be usurping the proper authority of a state court.<sup>129</sup>

For example, in *Mizell v. Eli Lilly & Co.*,<sup>130</sup> the South Carolina federal district court refused to apply California's market share liability law.<sup>131</sup> Even though the *Sindell* rule was the appropriate law according to conflict of law

recovery at a much lower litigation cost. *Id.* Also, the plaintiff, through no fault of her own, may have a difficult time establishing due diligence. The concept of due diligence itself is at odds with market share liability, which presumes that the plaintiff cannot identify the manufacturer. *Id.* at 1528-29; see also Note, McCormack v. Abbott Laboratories: Application of Market Share Liability to Resolve the DES Dilemma, 29 ARIZ. L. REV. 155 (1987) (discussing McCormack).

123. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 265-67, 560 N.E.2d 324, 343-44 (1990); see also *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (stating that proof of negligence alone is insufficient to impose liability).

124. *Smith*, 137 Ill. 2d at 267-68, 560 N.E.2d at 344; see also *Mulcahy*, 386 N.W.2d at 76 (characterizing market share liability as a court-constructed insurance plan).

125. *Smith*, 137 Ill. 2d at 259-60, 560 N.E.2d at 341.

126. *Id.* at 257-58, 560 N.E.2d at 340. The *Smith* court noted that, unlike alternative liability and *res ipsa loquitur*, there was a possibility that with market share liability, the defendant causing the injury may not be before the court. *Id.*

127. Federal courts typically gain jurisdiction over DES tort disputes in diversity actions where the plaintiff is a resident of a state in which none of the named defendants is incorporated. See, e.g., *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589, 591 (D.S.C. 1981). *Contra* McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1526 (D. Mass. 1985) (adopting the market share liability theory based on the court's interpretation of Massachusetts law).

128. See *Morton v. Abbott Laboratories*, 538 F. Supp. 593, 599 (M.D. Fla. 1982).

129. See, e.g., *id.* (noting that the "market share theory unquestionably represents a radical departure from the traditional concept of causation" and that there was no indication that Florida would abandon such a fundamental principle); *Pipon v. Burroughs-Wellcome Co.*, 532 F. Supp. 637, 639 (D.N.J. 1982) (noting that there was no indication that the New Jersey Supreme Court would deviate from the causation requirement), *aff'd*, 696 F.2d 984 (3rd Cir. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1019 (D.S.C. 1981) (noting that the South Carolina supreme court has not made any exceptions to the rule that the plaintiff has the burden of proving causation).

130. 526 F. Supp. 589 (D.S.C. 1981).

131. *Id.* at 596-97.

principles,<sup>132</sup> the *Mizell* court refused to apply market share liability because it violated the public policy of the forum state, South Carolina.<sup>133</sup> The *Mizell* court concluded that “[m]arket share represents a radical departure from the body of products liability law that has been developed in South Carolina” and has the potential for placing liability on defendants who bear no responsibility for the defective product.<sup>134</sup>

Likewise, in *Tidler v. Eli Lilly & Co.*,<sup>135</sup> a case decided under Maryland law, the Court of Appeals for the District of Columbia declined to adopt the market share liability theory.<sup>136</sup> The *Tidler* court reasoned “that the theory that plaintiffs would have us ‘construct’ requires that we build on a new foundation, not on the structural underpinnings of the traditional common law of torts.”<sup>137</sup> Neither the highest court of Maryland nor the District of Columbia had addressed the issue.<sup>138</sup> The *Tidler* court, therefore, held that such a marked deviation from the common law was beyond the authority of a federal court bound by the *Erie* doctrine.<sup>139</sup>

#### *B. Attempts to Expand Market Share Liability Beyond DES Cases*

Plaintiffs have attempted to extend market share liability to contexts other than DES cases but with considerably less success. In *Shackil v. Lederle Laboratories*,<sup>140</sup> the New Jersey Supreme Court refused to apply market share liability in an action filed against manufacturers of the diphtheria, pertussis, and tetanus (“DPT”) vaccine.<sup>141</sup> The plaintiff in *Shackil* allegedly became severely retarded as a result of receiving a DPT vaccine.<sup>142</sup> The plaintiff was

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132. In *Mizell*, the plaintiff's mother took DES in 1954 while a resident of California. *Id.* at 592. The court held California tort law applied since the injury, the plaintiff's *in vitro* exposure to DES occurred in California. *Id.* at 594-95.

133. *Id.* at 596-97.

134. *Id.* at 596.

135. 851 F.2d 418 (D.C. Cir. 1988).

136. *Id.* at 427. The *Tidler* court noted that it could have certified the question of state adoption of the market share liability theory to state court but concluded that the record lacked sufficient information to warrant certification. *Id.* at 424-26.

137. *Id.* at 424.

138. *Id.*

139. *Id.*; see also *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts sitting in diversity to apply the law of the several states to the issues being litigated).

140. 116 N.J. 155, 561 A.2d 511 (1989).

141. *Id.* at 158, 561 A.2d at 512. In a similar case, the Oregon Supreme Court rejected use of the market share liability theory against two DPT manufacturers in the context of a design defect. *Senn v. Merrell-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988). The *Senn* court claimed that the “adoption of any theory of alternative liability requires a profound change in fundamental tort principles,” which is more properly the domain of the legislature. *Id.* at 271, 751 P.2d at 223; see also *Chapman v. American Cyanamid Co.*, 861 F.2d 1515 (11th Cir. 1988) (holding that parents could not proceed against three DPT manufacturers on an alternative liability theory where a child died after receiving a DPT vaccine). But see *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987) (applying market share liability against manufacturers of DPT based on allegations of industry manufacturing defects).

142. *Shackil*, 116 N.J. at 158, 561 A.2d at 512.



unable to identify the specific manufacturer of the DPT vaccine she received. As a result, the plaintiff sued a number of manufacturers that potentially could have produced the vaccine she received and argued for adoption of a market share liability theory.<sup>143</sup> The court determined that to adopt market share liability in a DPT case "would frustrate overreaching public-policy and public-health considerations by threatening the continued availability of needed drugs and impairing the prospects of the development of safer vaccines."<sup>144</sup> The fact that Congress had already established a fund and a mechanism to compensate plaintiffs the vaccine allegedly injured also influenced the court's decision.<sup>145</sup>

The largest area of cases in which plaintiffs have been largely unsuccessful in attempting to impose market share liability has been in asbestos litigation.<sup>146</sup> The main factor prohibiting application of the theory to asbestos cases is that asbestos is not a fungible product.<sup>147</sup> Asbestos is a generic term for a

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143. *Id.*

144. *Id.* The *Shackil* court also addressed the plaintiff's argument that there was a trend in New Jersey to relax the causation requirement. *Id.* at 172, 561 A.2d at 519. The court noted that in *Ferrigno v. Eli Lilly & Co.*, 175 N.J. 551, 420 A.2d 1305 (Super. Ct. Law Div. 1980), a trial court held that alternative liability based on percentage-share apportionment was permissible in a DES case. However, the *Ferrigno* complaint was dismissed following the appellate court's opinion in *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (Super. Ct. App. Div. 1981), which refused to adopt alternative liability or enterprise liability in a DES action. *Shackil*, 116 N.J. at 174, 561 A.2d at 520-21. Upon further review of New Jersey law, the *Shackil* court found that there was no trend toward wholesale adoption of market share liability. *Id.*

145. *Shackil v. Lederle Laboratories*, 116 N.J. 155, 185-86, 561 A.2d 511, 527 (1989); see National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300(aa)(1)-(34).

146. See *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983) (noting that departure from traditional theories of tort liability must be made by Louisiana courts), *cert. denied*, 465 U.S. 1102 (1984); *Marshall v. Celotex Corp.*, 651 F. Supp. 389, 393 (E.D. Mich. 1987); *Vigiolto v. Johns-Manville Corp.*, 643 F. Supp. 1454, 1463 (W.D. Pa. 1986); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) (finding that market share liability is not an accurate measure of liability in asbestos cases); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 190-91 (S.D. Ga. 1982) (finding the market share liability theory in asbestos cases contrary to the Georgia rule that a manufacturer is not an insurer); *Mullen v. Armstrong World Indus., Inc.*, 200 Cal. App. 3d 250, 257, 246 Cal. Rptr. 32, 37 (1988) (declining to extend market share liability to asbestos-related injuries because asbestos is not a single fungible product carrying with it a singular risk factor); *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 694 (Del. Super. Ct. 1986) (rejecting market share liability and recognizing that such a change in tort law should be left to the legislature); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (noting that "the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries"); *Gaulding v. Celotex, Inc.*, 772 S.W.2d 66, 71 (Tex. 1989) (noting that market share liability cannot be applied because "the practical impossibility of determining where or when the product was marketed makes insurmountable the problem of identifying the defendants' relevant market shares"). But see *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1359 (E.D. Tex. 1981) (holding Texas courts would adopt the theory because it depends upon concurrent and alternative liability which are recognized in Texas), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982).

147. See *Mullen*, 200 Cal. App. 3d at 257, 246 Cal. Rptr. at 37.

family of minerals. Asbestos products have wide variances in toxicity depending on the amount of asbestos contained in the product; the greater the toxicity, the greater the risk of harm.<sup>148</sup> Therefore, establishing market shares based on the amount of product a manufacturer supplied into the market would not accurately reflect the amount of harm its product caused.

In *Goldman v. Johns-Manville Sales Corp.*,<sup>149</sup> the Ohio Supreme Court clearly articulated the reasons for which market share liability theory is rejected in asbestos cases.<sup>150</sup> The *Goldman* court reasoned that market share liability is inappropriate "in an asbestos litigation case, especially where it cannot be shown that all the products to which the injured party was exposed are completely fungible."<sup>151</sup> The risk that the manufacturer created, the *Goldman* court noted, is not accurately reflected in its market share because many products contain different degrees of asbestos.<sup>152</sup> The court further reasoned that there would be difficulties with the theory as applied to asbestos cases because the largest asbestos supplier, Johns-Manville, was not amenable to suit.<sup>153</sup> Instead of adopting a market share theory, the court concluded that the problem required legislative solution.<sup>154</sup>

Plaintiffs in a less cohesive mixture of cases have likewise been unsuccessful in their attempts to expand the doctrine of market share liability.<sup>155</sup> In one line of cases, courts have held that plaintiffs, injured by the explosion of multipiece truck wheels, could not use market share liability against the manufacturers.<sup>156</sup> These courts generally reason that the plaintiff failed to prove that the product was defective.<sup>157</sup> Additionally, courts have found no proof that each company's product shared the same defect.<sup>158</sup> Manufacturers of clothing,

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148. See *id.* at 256, 246 Cal. Rptr. at 36 (recognizing that six different asbestos silicates, each with a different toxicity, exist in nature).

149. 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987).

150. *Id.* at 50-51, 514 N.E.2d at 700-01 (involving an action against suppliers and manufacturers of products containing asbestos by the wife of a man who died allegedly due to asbestos exposure).

151. *Id.* at 50, 514 N.E.2d at 700.

152. *Id.* at 50-51, 514 N.E.2d at 700-01.

153. *Id.* at 51, 514 N.E.2d at 701.

154. *Id.*

155. One court, however, appears ready to extend the concept to a non-DES situation. See *Karibjanian v. Thomas Jefferson Univ. Hosp.*, 717 F. Supp. 1081 (E.D. Pa. 1989). While ruling on a motion to strike portions of complaint, a federal district court in Pennsylvania held that the theory may apply in a case against the successor in interest to a manufacturer of Thorotrast X-ray contrast medium. *Id.* at 1086. The court stated that liability may attach if the plaintiff proved that only a few firms made the substance, that they all made it according to a common formula, and that the product was indistinguishable from that of the others. *Id.*

156. See *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1181 (D.S.D. 1984); *Tirey v. Firestone Tire & Rubber Co.*, 33 Ohio Misc. 2d 50, 52, 513 N.E.2d 825, 827 (1986); *Cummins v. Firestone Tire & Rubber Co.* 344 Pa. Super. 9, 26, 495 A.2d 963, 972 (1985).

157. E.g., *Bradley*, 590 F. Supp. at 1181 (noting plaintiff failed to show that all multipiece tire rims were defective).

158. E.g., *Tirey*, 33 Ohio Misc. at 50, 513 N.E.2d at 827 (a multipiece wheel is not fungible); *Cummins*, 344 Pa. Super. at 26, 495 A.2d at 972 (the multipiece tire and rim assemblies were not

alleged to be unreasonably flammable, were held not liable under the market share liability theory because the products were not sufficiently fungible.<sup>159</sup> The market share liability theory also was rejected in actions against the manufacturers of a type of blood product from which plaintiff contracted AIDS,<sup>160</sup> the manufacturers of benzidine congener dyes,<sup>161</sup> the manufacturers of Salk polio vaccine,<sup>162</sup> and the manufacturers of a breast prostheses.<sup>163</sup>

## V. ANALYSIS

As illustrated, a slim majority of state supreme courts have embraced the market share liability theory in DES cases. The market share liability theory, however, has been rejected in almost all other contexts. Furthermore, the five courts that adopted some form of market share liability have criticized and ultimately rejected, in whole or in part, the theory as developed in the other jurisdictions.<sup>164</sup> Each adopting court has recognized that its version of the the-

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sufficiently similar to be considered identical or fungible).

159. *E.g.*, *Mason v. Spiegel, Inc.*, 610 F. Supp. 401, 406 n.7 (D. Minn. 1985) (a cotton tennis dress is not a fungible product that is intrinsically defective no matter who manufactured it); *Bixler v. Avondale Mills*, 405 N.W.2d 428, 431 (Minn. Ct. App. 1987) (concluding that a cotton flannelette is not a fungible product).

160. *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351, 354 (N.D. Ill. 1988). In *Poole*, the court reasoned that the theory would not apply because the plaintiff had identified all possible defendants, and because there was no indication that the Illinois courts would expand the theory beyond DES cases. *Id.*

161. *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964, 967 (D.N.C. 1986). The *Griffin* court determined that it would constitute a quantum detour from existing North Carolina law to hold defendants liable based on a market share theory. *Id.*

162. *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983). The *Sheffield* court reasoned that the defect was not a design defect, as in *Sindell*, but that a manufacturer had distributed a defective product. *Id.* at 594, 192 Cal. Rptr. at 876. The court concluded that it would be unfair to hold innocent manufacturers responsible for an injury caused by a tortfeasor who manufactured the defective dosage. *Id.* at 599, 192 Cal. Rptr. at 880. Additionally, the *Sheffield* court noted that, unlike *Sindell*, the delay in discovering the alleged causation was in no way related to the nature of the defective product or any other act or omission of the unknown tortfeasor. *Id.* at 594, 192 Cal. Rptr. at 877. Finally, the court stated that the application of market share liability would subvert the important public policy of encouraging swift production and marketing of new pharmaceutical products. *Id.* at 597-98, 192 Cal. Rptr. at 878-79.

163. *Lee v. Baxter Healthcare Corp.* 721 F. Supp. 89, 94 (D. Md. 1989) (the product was not inherently dangerous, and there were warnings provided concerning possible complications), *aff'd*, 898 F.2d 146 (4th Cir. 1990).

164. *E.g.*, *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990) (criticizing other courts for not having a due diligence requirement); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 509-11, 539 N.E.2d 1069, 1076-78, 541 N.Y.S.2d 941, 948-50 (noting that "determining market shares under *Sindell* proved difficult and engendered years of litigation," while the *Collins* approach is not feasible to apply in a state having a large number of DES cases), *cert. denied*, 110 S. Ct. 350 (1989); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 601-02, 689 P.2d 368, 380-81 (1984) (criticizing *Sindell* for failing to define a substantial share of the relevant market); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 189-91, 342 N.W.2d 37, 48-49 (reasoning that the *Sindell* unalloyed market share theory is limited in practical application because market share is difficult to define and prove), *cert. denied*, 469 U.S. 826 (1984).

ory may be flawed, but adopted the market theory anyway, believing that subsequent opinions would refine the concept.<sup>165</sup> Nevertheless, after a decade of refining, the courts recognize that they apparently have been unable to resolve many of the problems with the concept.<sup>166</sup> Courts should not be swayed to adopt market share liability, or one of the slightly altered variations of it, based on the strong emotional appeal to provide injured plaintiffs with a remedy. The theory is not only infirm, it is also a marked deviation from useful tort principles.

#### *A. Criticisms of the Procedures Adopted for Implementing Market Share Liability*

Market share liability represents one of the most important, if not one of the most radical, developments in tort law in the past decade. It has understandably been the subject of criticism.<sup>167</sup> Market share liability defendants and some commentators have argued that the whole concept is flawed.<sup>168</sup> The flaws associated with the overall concept of market share liability will be addressed later in the Article. This section discusses the flaws associated with the procedural elements of market share liability.

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165. See, e.g., *Brown v. Superior Court*, 44 Cal. 3d 1049, 1074-75, 751 P.2d 470, 485, 245 Cal. Rptr. 412, 427-28 (1988) (recognizing that the California Supreme Court's articulation of market share liability did not disclose whether defendants are jointly or severally liable); *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987) (noting that the adoption of a very small market makes liability determination almost impossible).

The *Sindell* decision has not been widely accepted. Justice Richardson, joined by two other justices, dissented in *Sindell*, arguing that the majority was abandoning a traditional tort requirement for the creation of a new modified industry-wide tort. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 617, 607 P.2d 924, 940, 163 Cal. Rptr. 132, 148 (Richardson, J., dissenting), *cert denied*, 449 U.S. 912 (1980). Justice Richardson alleged that the theory would result in imposition of liability based on pure conjecture and that the theory rewarded the plaintiff who, unlike the ordinary plaintiff, no longer has to take the chance that the responsible defendant cannot be reached or is unable to respond financially. *Id.* at 618, 607 P.2d at 911, 163 Cal. Rptr. at 149. Therefore, "it is readily apparent that 'market share' liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in (those few jurisdictions which adopt some form of the theory)." *Id.* at 617, 607 P.2d at 940. 163 Cal. Rptr. at 148. The *Sindell* dissent stressed that the decision has the effect of making pharmaceutical companies insurers of their industry and that because of the sweeping effect of market share liability, the policy decision to introduce and define it should rest not with the court but with the legislature. *Id.* at 621, 607 P.2d at 942-43, 163 Cal. Rptr. at 150-51.

166. E.g., *George*, at 593, 733 P.2d at 512 (altering the relevant market in Washington from a local market to a regional market).

167. See *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 251, 560 N.E.2d 324, 337 (1990) (concluding that the market share liability theory is too great a deviation from existing tort law); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984) (noting that the actual wrongdoer may not be brought to court under the market share liability theory).

168. See, e.g., *Smith*, 137 Ill. 2d at 262, 560 N.E.2d at 341 (defendants arguing that expansion of tort law would chill production of useful drugs); Fisher, *supra* note 28, at 1654 (concluding that adoption of market share liability will dramatically increase litigation costs); Comment, *supra* note 1, at 300 (concluding that the market share liability theory creates more injustice than it eliminates by completely divorcing liability from responsibility).

The first procedural component in a market share liability case is the identification of defendants. The California market share liability theory requires the plaintiff to name defendants having a "substantial share" of the market,<sup>169</sup> while the market share liability theories of the three other states require the plaintiff to name only one defendant.<sup>170</sup> One criticism specific to the California "substantial share" requirement is that the *Sindell* court failed to define what constitutes a "substantial share" of the market, such that the burden of proof shifts to the defendant.<sup>171</sup> The law review article that the court relied upon suggested that the plaintiff join seventy-five to eighty percent of the manufacturers.<sup>172</sup> The court, though, rejected this percentage as too high and held that only a substantial percentage share is required.<sup>173</sup>

The three other state supreme courts only require the plaintiff to sue one defendant.<sup>174</sup> However, without the requirement that a "substantial share" of the market be present, perhaps at least fifty percent of the market, there is the realistic potential of creating liability disproportionate to the amount of damage a manufacturer caused, especially if only a small manufacturer or a few small manufacturers are joined. If a substantial share is joined, there is at least a likelihood that one of the defendants before the court caused the injuries. Without the substantial share requirement, one manufacturer or a handful of manufacturers could continually be named defendants and be forced to pay damages. Consider what could happen if the sole defendant is a small

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169. See *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

170. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 511-12, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, cert. denied, 110 S. Ct. 350 (1989); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 605, 689 P.2d 368, 382 (1984); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 193, 342 N.W.2d 37, 50, cert. denied, 469 U.S. 826 (1984).

171. See *Martin*, 102 Wash. 2d at 601-02, 689 P.2d at 380-81 (criticizing *Sindell* for failing to define a substantial share of the relevant market); *Collins*, 116 Wis. 2d at 193, 342 N.W.2d at 50 (noting that it is too difficult to define what is a reasonable number of defendants).

In addition to criticizing California for failing to define substantial share, the *Martin* court also stated, mistakenly, that the California theory distorted liability by providing that the defendants comprising the "substantial market share" bear joint responsibility for 100% of the plaintiff's injuries. *Martin*, 102 Wash. at 602, 689 P.2d at 380-81. But see *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1075, 751 P.2d 470, 487, 245 Cal. Rptr. 412, 428 (1988) (noting that the DES plaintiff does not necessarily receive a 100% award and that imposing joint liability upon defendants would frustrate the *Sindell* court's goal of achieving a balance between the injured plaintiff and DES manufacturers).

172. Comment, *supra* note 4, at 996. The Comment proposed that the plaintiff should be required to prove by clear and convincing evidence that the product manufactured by one of the defendants caused the injuries. *Id.* Specifically, the Comment noted that "[t]he standard of clear and convincing evidence is met by joining those manufacturers that accounted for a high percentage of the defective products on the market, approximately 75% to 80%." *Id.*

173. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, cert. denied, 449 U.S. 912 (1980); cf. *Murphy v. E.R. Squibb & Sons*, 40 Cal. 3d 672, 684, 710 P.2d 247, 255, 221 Cal. Rptr. 447, 455 (1985) (holding that to allow a plaintiff to proceed against a defendant who manufactured only 10% of the market share was insufficient as a matter of law).

174. See *supra* notes 72-73 and accompanying text (discussing the defendant identification requirements of New York, Washington, and Wisconsin).

contributor to the DES market. This manufacturer could possibly shoulder complete liability, without proof of it being the cause in fact of the injury; in fact, the great likelihood will be that the manufacturer did not cause the plaintiff's injuries. For example, under the Washington procedure, a small company that no longer has records of its actual market share is given a presumptive share which equals the portion of the damages unattributed.<sup>175</sup> Thus, that company could be responsible for seventy-five percent or more of the damages, when common sense dictates that a small company surely could not have distributed such a high percentage of the DES used in the market.

Defendants assigned presumptive shares are also held liable for the share of the market attributable to companies no longer in business or not otherwise amenable to suit.<sup>176</sup> Defendants who are amenable to suit become insurers of the products that other manufacturers, not amenable to suit, made and marketed. Therefore, a market share liability theory that does not require the identification of a substantial number of defendants can be substantially unfair to any company that is unable to prove its market share, especially if that company is small.

Another criticism of the procedures developed is that each theory, other than New York's,<sup>177</sup> fails to identify the relevant market—the local area, the county, the state, or the nation—for purposes of determining a particular defendant's market share.<sup>178</sup> The relevant market area is important because a manufacturer's liability will vary widely depending on which market is used.<sup>179</sup> The courts adopting the theory claimed that market share liability approximates each defendant's responsibility for the injuries its own product caused.<sup>180</sup> However, these assertions are undermined by the fact that, depending on the chosen market, there is this potential for extreme variance in liability.<sup>181</sup> Furthermore, each state's theory fails to specify how the market for

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175. See *supra* note 99 and accompanying text.

176. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 255, 560 N.E.2d 324, 338 (1990). The *Smith* Court noted: "If we were to allow courts and juries to apportion damages when reliable information is not available, the clear result would be that the determination will be arbitrary and there will be wide variances between judgements . . . ." *Id.*

177. See *supra* notes 87-90 and accompanying text.

178. *E.g.*, *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 194, 342 N.W.2d 37, 48-49 (indicating that proof that plaintiff's mother took the type of DES a single defendant manufactured was insufficient to recover full damages from the sole defendant), *cert. denied*, 469 U.S. 826 (1984).

179. For example, a manufacturer that supplied DES primarily to the East Coast would have a small West Coast sales exposure. If the manufacturer were sued in Washington, the manufacturer would be exposed to a small potential liability if the relevant market is the West Coast. A relevant market consisting of the entire United States would expose the manufacturer to a larger potential liability.

180. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 606, 689 P.2d 368, 383 (1984) (noting that no defendant will be held liable for damages it statistically could not have caused if all defendants prove their market share).

181. See *Fischer*, *supra* note 28, at 1642-44 (if a defendant's liability varies depending on the market used, the goal of apportioning liability fairly according to its market share will be unattainable); see also *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987) (the purpose of market share is met by using the narrowest market possible).

DES can be allocated fairly when DES was prescribed for uses other than as a miscarriage preventative.<sup>182</sup> Failure to account for the diverse uses of DES exacerbates the improbability that the market share theory apportions liability in any way that approximates the injuries each defendant caused.

The Wisconsin provision that holds a single named defendant who can not prove market share 100% liable for a plaintiff's injury, in particular, is subject to criticism. The Wisconsin Supreme Court emphasized that it was adopting the concept due, in part, to the fact that the defendant created a *risk* of harm.<sup>183</sup> The other courts adopting market share liability did not go so far as to impose potentially total liability on a single defendant merely for creating a risk of harm.<sup>184</sup> The *Collins* decision contravenes the principle that a mere possibility that a defendant is the responsible party is insufficient to satisfy causation.<sup>185</sup> It is possible, therefore, under the Wisconsin theory that the defendant's liability will far exceed the probability that it caused the injuries.

The Wisconsin court, in *Collins*, also rejected "unalloyed market share,"<sup>186</sup> concluding that it "does not constitute the most desirable course to follow in DES cases because the theory, while conceptually attractive, is limited in practical applicability."<sup>187</sup> The *Collins* court found that defining the market and apportioning the market share are almost impossible to accomplish fairly and accurately because of the insufficiency of the data on market shares, and because a second mini-trial to determine market share would waste judicial resources.<sup>188</sup> While this observation may be true, it has been pointed out that the *Collins* single defendant method does not resolve the perceived errors in allocating market share.<sup>189</sup> Moreover, under the court's procedure, the errors are compounded by inundating a jury with a mass of information and by adding a trial on the separate issue of apportioning liability.<sup>190</sup>

The New York Court of Appeals recently declined to accept Wisconsin's

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182. See Miller & Hancock, *supra* note 8, at 88-91 (the authors argue that the difficulty in accurately establishing market share, especially one which will identify the manufacturers whose drug was used as a miscarriage preventative, undermines the claim that liability will equal the damage a manufacturer caused over the run of cases); see also Note, *The DES Causation Conundrum*, *supra* note 7, at 959-60 (analyzing flaws in the market share concept).

183. *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 191, 342 N.W.2d 37, 49 (emphasis in original), *cert. denied*, 469 U.S. 826 (1984).

184. The New York and Washington theories provide that one defendant may be presumed to be liable for 100% of the plaintiff's injury and the presumptive share can be reduced or extinguished by naming or joining other defendants, by exculpation, or by proving actual market share. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, 110 S. Ct. 350 (1989); *Martin*, 102 Wash. 2d at 605-07, 689 P.2d at 383.

185. See Note, *The DES Causation Conundrum*, *supra* note 7, at 965-66 (imposition of liability just for creating the risk of harm requires a substantial reduction in the degree of proof traditionally required and thus threatens overdeterrence and inequity).

186. *Collins*, 116 Wis. 2d at 189, 342 N.W.2d at 48.

187. *Id.*

188. *Id.* at 189-90, 342 N.W.2d at 48.

189. Miller & Hancock, *supra* note 8, at 99-101.

190. *E.g., id.* (litigation costs will increase, there is a risk of overwhelming the jurors with evidence, and the *Sindell* mini-trial is transformed into a maxi-trial on a plethora of issues).

risk contribution theory, believing that it would only be feasible on a limited scale.<sup>191</sup> The New York court was wary "of setting loose, for application in the hundreds of cases pending in this State, a theory which requires the fact finder's individualized and open-ended assessment of the relative liabilities of scores of defendants in every case."<sup>192</sup> The court concluded that the injustice resulting from delays in recoveries and inconsistent results militated against adoption of the theory.<sup>193</sup>

### *B. Inability to Reconstruct the Defendant's Market Shares*

There are numerous problems with the overall concept of market share liability aside from those concerning the procedures each court developed to implement its theory. A major flaw with DES cases is that there is only a small amount of, or in some cases no reliable information available to establish the defendants' percentages of the market. No party can be blamed for the lack of information. The lack of information is, in part, the result of the inadequacy of the laws in effect regarding maintenance of records. Other factors relate to the long lapse in time from the sale of the drug to the filing of the lawsuit. Besides the lack of records for existing manufacturers, many of those defendants named in the lawsuits are no longer in business.<sup>194</sup> For these companies especially, it is unlikely that records are available to establish their share of any market. The lack of available records is evidenced by the fact that after extensive discovery, many plaintiffs are unable to identify the responsible manufacturer or even to narrow it to a likely group of defendants. Unfortunately, the courts that have adopted market share liability have done so while ruling on pretrial motions.<sup>195</sup> These courts have not had the benefit of hearing evidence regarding the unavailability of market share data before ruling on whether or not to adopt the market share liability theory.<sup>196</sup>

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191. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 511, 539 N.E.2d 1069, 1077-78, 541 N.Y.S.2d 941, 949-50, *cert. denied*, 110 S. Ct. 350 (1989).

192. *Id.*

193. *Id.*

194. *E.g.*, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 254, 560 N.E.2d 324, 337-38 (1990) (noting 63 of 81 manufacturers were not before the court and that market share records are not available due to mergers within the industry).

195. *E.g.*, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 595-96, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 134 (deciding whether defendant's demurrers for failure to identify a defendant were properly granted by the trial court), *cert. denied*, 449 U.S. 912 (1980); *Smith*, 137 Ill. 2d at 252, 560 N.E.2d at 337 (recognizing that the four courts which have adopted the market share liability theory have done so while ruling on pretrial motions).

196. *See Sindell*, 26 Cal. 3d at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46 (stating that the court was "not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings"); *see also Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 586, 689 P.2d 368, 372 (1984) (the case was on review after the trial judge ruled on motions for summary judgment); *Miller & Hancock, supra* note 8, at 88-89 (criticizing the *Sindell* court for adopting a theory when it was obviously unaware of the capability needed to implement it).



The experiences of trial courts in California, directed by the *Sindell* court to apply the market share liability theory, exemplify the problems courts will encounter in determining market shares. The *Smith* court noted that California trial judges, in *In re Complex DES Litigation*,<sup>197</sup> attempted to define the relevant market as narrowly as possible.<sup>198</sup> After extensive discovery proceedings, the parties were unable to present data on a narrow market. Therefore, the judge determined that the only practical relevant market was a national market.<sup>199</sup> Likewise, the *Smith* court noted that another California court, in *Stapp v. Abbott Laboratories*,<sup>200</sup> expressed exasperation with the task of attempting to formulate market shares after spending over four weeks examining the DES market.<sup>201</sup> The *Stapp* court concluded that there simply was no such market share data.<sup>202</sup> The *Stapp* court criticized the courts that developed the market share concept for adopting the theory despite their obvious lack of trial experience and lack of knowledge as to what would go into proving a case based on the theory.<sup>203</sup>

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The *Hymowitz* court, though, was aware of the problems other jurisdictions had faced with their market share liability theories but proceeded to adopt the theory anyway. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 509, 539 N.E.2d 1069, 1076, 541 N.Y.S.2d 941, 947-48 (stating that "it is noteworthy that determining market shares under *Sindell v. Abbott Laboratories* proved difficult and engendered years of litigation"), *cert. denied*, 110 S. Ct. 350 (1989).

197. See *Smith*, 137 Ill. 2d at 283, 560 N.E.2d at 352 (Clark, J., dissenting) (citing *In re Complex DES Litigation*, No. 830-109, General Order No. 8 (Cal. Super. Ct. of San Francisco County, Feb. 7, 1985)).

198. *Id.* In order to approximate damages to the injury caused, the market should be defined as narrowly as possible. *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987).

199. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 283, 560 N.E.2d 324, 352 (Clark, J., dissenting) (citing *In re Complex DES Litigation*, No. 830-109, General Order No. 8 (Cal. Super. Ct. of San Francisco County, Feb. 7, 1985)).

200. *Id.* at 252-53, 560 N.E.2d at 337 (citing *Stapp v. Abbott Laboratories*, No. C 344407 (Cal. Super. Ct., Los Angeles County)).

201. See *id.* The *Stapp* judge stated that "[t]he harsh blunt fact that the evidence has shown is that that information and data is just not available" and "when the Supreme Court, . . . without having any evidence says that you can determine what the [sales are] as to a particular manufacturer, it's just, just not there. That data doesn't exist". *Id.* The *Smith* court noted that the Los Angeles judge had the benefit of experienced lawyers, the unlimited resources of the parties to attempt to obtain the information, and apparently full cooperation of everyone involved. On the record, the judge thanked the parties for all their cooperation and for the highly professional manner in which the case was presented. *Id.* at 253, 560 N.E.2d 337-38.

202. The trial judge did develop a partial national market analysis but only after a great amount of time and expense was incurred. *Rheingold*, *supra* note 25, at 895 (The market share analysis was based partially on testimony of many economists "giving what apparently amounted to nothing more than educated guesses about what the market share was.").

203. The judge in *Stapp* stated:

[T]he author of the Fordham Comment is in the same position that the Supreme Court was in *Sindell*; it had never taken one minute's evidence. And it's apparent that whoever wrote that comment doesn't know anything about the DES drug industry, to put it bluntly.

[T]hat article in the Fordham Comment needs to be preceded by a big caution in bold faced type: "This article was written by somebody who has never tried a case, never

Those who support the market share liability theory, and those courts that developed it, did so believing that attributing damages in proportion to the percentage of DES a manufacturer supplied in a narrow market would, over the run of cases, result in holding each defendant responsible for the amount of harm its own product caused.<sup>204</sup> Thus, the causation in fact element was preserved as much as possible. It is highly unlikely, however, that market share liability can meet the goal of apportioning damages in the context of DES cases.

A truly reliable market share calculation must be limited to an accurate reflection of the amount of DES a manufacturer supplied into the market. Such an accurate determination of market share apparently cannot be achieved.<sup>205</sup> Moreover, any market share determination must be limited to the amount of DES the manufacturer sold for use in preventing miscarriages. This narrow market is appropriate because the drug was, and is, safe for the other purposes for which it was sold.<sup>206</sup> The task of determining market share is especially awesome in the case of DES sales because of its widespread use and because of the long period of time over which it was prescribed.<sup>207</sup> To reconstruct the market and apportion liability accurately, evidence must be presented detailing each defendant's percentage of the relevant market for a specific year, overlapping years, or span of years. For instance, if a plaintiff's mother, for some reason, took DES intermittently over a period of three years before the plaintiff's birth, the trial court will have to reconstruct the market shares of each defendant for each year. In addition, DES cases have generally been consolidated before a single trial judge for docket management purposes. The judge has the difficult task of developing the various market shares for the numerous defendants and years involved in the multitude of DES cases before the court.<sup>208</sup> This can mean reconstructing the sales data for thirty or more manufacturers for any number of years between 1947 and 1971.

Unfortunately, reconstructing these narrow markets can be nearly impossi-

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gotten evidence in the courtroom, or anyplace else, and it's a theoretical, hypothetical article."

Stapp v. Abbott Laboratories, No. C 344 407 (Cal. Super. Ct., Los Angeles County).

204. See *supra* note 86.

205. In *Collins v. Eli Lilly & Co.*, the Wisconsin Supreme Court said that "[w]e view defining the market and apportioning market share as a near impossible task if it is to be done fairly and accurately in order to approximate the probability that defendant caused the plaintiff's injury." 116 Wis. 2d 166, 190, 342 N.W.2d 37, 48, *cert. denied*, 469 U.S. 826 (1984). The *Collins* court further noted that drug companies have not kept or cannot locate records concerning when, where, and what type of DES they sold. Additionally, a plaintiff does not usually have her mother's prescription records. *Id.* at 181, 342 N.W.2d at 44. All the problems are a result of the passage of a long period of time between the DES ingestion and recognition of the injury. *Id.*

206. See *supra* note 13 and accompanying text (describing the various uses for DES).

207. See *supra* notes 22-24 and accompanying text (discussing the widespread use of DES).

208. See, e.g., *Brown v. Superior Court*, 44 Cal. 3d 1049, 1055, 751 P.2d 470, 473, 245 Cal. Rptr. 412, 415 (1988) (noting that the judge was responsible for administering 69 DES cases each naming about 170 drug companies as defendants); see also *Rheingold*, *supra* note 25, at 894-896 (discussing the consolidated cases in New York, Los Angeles, and San Francisco).

ble due to the scant amount of market data that remains available. If courts and juries are allowed to apportion damages when reliable information is not available, the clear result will be arbitrary determinations and wide variances between judgments, without sufficient explanation for these differences.<sup>209</sup> This unpredictability makes it difficult for manufacturers to insure against liability and to reach reasoned settlements in pending suits.<sup>210</sup> Additionally, states that adopt market share liability place a burden on their trial courts and the parties involved to determine market shares. This burden bogs down trial courts and creates for them an almost futile endeavor. The burden of establishing market shares based on unreliable or insufficient data also comes at a tremendous cost to the court system and to litigants, both monetarily and in terms of manpower.<sup>211</sup>

Contributing to the misperception regarding the ability to reconstruct markets is the implicit contention that defendants amenable to suit can establish their true market shares. Throughout the history of the use of DES as a mis-carriage preventative, hundreds of manufacturers produced the product. It is impossible to bring them all before a single court. The defendants who do appear in court face the difficult burden of proving their market share. Those who cannot meet this task, but who still desire to reduce their potential liability, will have the even more difficult burden of establishing market shares of codefendants or unnamed manufacturers.<sup>212</sup> The likely result of the failure of market share proof will be that those companies that are amenable to suit, but unable to establish their market share, will be liable for a wholly speculative and disproportionate amount of the damages.<sup>213</sup> Instead of having every DES manufacturer pay damages that, in the long run, approximate the harm the manufacturer caused, the market share theory places liability on only the small percentage of the many DES manufacturers that are still viable and

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209. See *Collins*, 116 Wis. 2d at 189-90, 342 N.W.2d at 48 (the unavailability of data on market shares makes it impossible to apportion damages accurately or fairly).

210. See Fine, *A Personal Perspective from the "Manufacturer,"* 55 BROOKLYN L. REV. 899, 902 (1989); Kroll, *supra* note 8, at 196.

211. See Fischer, *supra* note 28, at 1657 (stating that the "legal fees and administrative costs arising from litigation of this magnitude easily could rival the cost of the plaintiff's judgment"); Comment, *supra* note 1, at 323-26 (discussing the effects on the cost of litigation of joining many defendants, shifting the burden of proof to the defendants, and involving the court in the issue of defining and evaluating the relevant market).

212. See, e.g., *George v. Parke-Davis*, 107 Wash. 2d 584, 597, 733 P.2d 502, 514 (1987) (requiring defendants to establish the actual market share of impleaded defendants in order to inhibit defendants from randomly impleading insolvent corporations to reduce their share of presumptive liability).

213. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1007, 1018 (D.S.C. 1981) (finding it to be too speculative to impose liability when quite possibly the proper defendant was not before the court); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 616, 607 P.2d 924, 939-40, 163 Cal. Rptr. 132, 147-48 (1980) (Richardson, J., dissenting) (finding it highly speculative that defendant's liability equaled the harm actually caused), *cert. denied*, 449 U.S. 912 (1980); Fischer, *supra* note 28, at 1645-47 (concluding that the *Sindell* rule inherently distorts defendant's liability).

amenable to suit.

One contention that may support adoption of market share and may overcome some of the problems discussed is, that after a number of jurisdictions have grappled with developing market shares, there will become a pool of generally accepted market share data for the various DES manufacturers. Such a proposition, however, is not accurate. Any generally accepted data that courts develop will likely be established for those few large companies that are still viable and amenable to suit. Also, any generally accepted data will most likely be only for large manufacturers' national market shares. Under each adopted market share liability theory, except for New York's, the trial court first attempts to determine the local market share—that is the market shares of the defendants who participated in a specific neighborhood, county, region of the state, or whole state.<sup>214</sup> Thus, regardless of a manufacturer's national market, if suits are brought throughout the country, the incentive and the burden will remain for a manufacturer to attempt to establish a more localized market share.

Even if the trial courts agree to accept only data on national market shares, inevitably disagreement will arise about these markets.<sup>215</sup> For example, after extensive discovery and hearings, a San Francisco California court developed national market shares for the years involved in the cases before it.<sup>216</sup> However, the litigants in a New York DES case declined to accept these figures.<sup>217</sup> The New York court is now attempting to construct its own market share figures. Subsequently, the San Francisco court decided to relitigate the market share issue because of perceived errors in its calculation.<sup>218</sup>

Last, the national market data will inevitably be flawed due to the lack of reliable information. Market share figures likely will not include all the companies brought before each court or will not include the many companies no longer amenable to suit.

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214. See *supra* notes 82-86 (discussing the procedure for determining market share).

215. See *Wilner & Bayer, supra* note 90, at 156 (defendants will not be able to collaterally estop plaintiffs from litigating the proper market shares and rely on already established computations because the plaintiffs were not litigants in the prior lawsuit that determined the market shares).

216. After years of discovery and hearings, the San Francisco court developed a matrix that showed the market share for each dosage strength of each company. See *Rheingold, supra* note 25, at 894.

217. *Id.* at 894-95. The plaintiffs in New York rejected this matrix because it assigned relatively low market shares to the companies. *Id.* According to the plaintiffs:

many suppliers listed in the matrix cannot be sued in New York, or have since gone out of business, or have been taken over by successor companies who cannot be sued, or have gone bankrupt . . . . Even as to a defendant who can be sued, not all plaintiffs sued all available defendant in their cases in New York.

*Id.*

218. *Id.* at 895.

### C. Tort Principles Used to Justify Adoption of Market Share Liability

Irrespective of the lack of reliable market share data, the underlying policy goals of market share liability do not justify adoption of the theory. Proponents of the theory argue that certain policy considerations of negligence and strict liability law compel courts to adopt market share liability. Although tort law must remain viable to impose liability on the responsible manufacturer or manufacturers, market share liability either does not effectuate the principles and policy reasons offered as justification, or, to the extent market share theory achieves tort law goals, the proposed reasons are insufficient to warrant adoption of the concept.<sup>219</sup>

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219. In addition to relying on policy considerations analogous to negligence and strict liability, some courts have supported their conclusion that market share should be adopted based in part on analogies to two other causation exceptions, *res ipsa loquitur* and alternative liability. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 602-03, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139, cert. denied, 449 U.S. 912 (1980); see also *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 23, 527 N.E.2d 333, 346-48 (1988) (relying on an analogy to *res ipsa loquitur* to justify shifting the burden of proving causation in DES cases to defendants), rev'd, 137 Ill. 2d 222, 560 N.E.2d 324 (1990). Under these exceptions to the identification requirement, the burden of identifying the culpable defendant is shifted from the plaintiff to defendants. If they cannot establish the responsible party, then all defendants share responsibility for the injuries. *Res ipsa loquitur* developed to allow the plaintiff to establish negligence circumstantially when direct evidence concerning the cause of injury is primarily within the knowledge and control of the defendant. In order to invoke the theory and take advantage of the inference of negligence on the defendant's behalf, the plaintiff must show that she was injured (1) in an occurrence that would not have occurred in the absence of negligence; (2) by an instrumentality or agency under the management or control of the defendant; and (3) under circumstances which were not due to any voluntary act or negligence on the part of the plaintiff. *Kolakowski v. Voris*, 83 Ill. 2d 388, 394, 415 N.E.2d 397, 400 (1980).

Regarding alternative liability, the *Restatement (Second) of Torts* provides that "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." *RESTATEMENT (SECOND) OF TORTS* § 433B(3) (1965).

There are three important distinctions between these exceptions and market share liability. *Res ipsa loquitur* and alternative liability require naming all potentially responsible defendants. Naming all possible defendants helps to preserve the identification element of causation in fact because liability will surely fall on the actual wrongdoer. By contrast, market share liability merely requires the plaintiff to name as defendants either manufacturers having a substantial share of the market or, with some theories, only one manufacturer who was in the market. See *supra* notes 67-73; see also *Smith*, 137 Ill. 2d at 257-58, 560 N.E.2d at 339-40. The *Smith* court noted:

As a result, there is a real possibility that the defendant actually responsible for the injuries is not before the court. Second, in *res ipsa loquitur* and alternative liability, burden-shifting is considered equitable because defendants are typically in a better position than the plaintiff to determine who caused the harm. Market share liability shifts the burden to defendants without regard to whether plaintiff [or defendant] is better able to identify the defendant responsible or without regard to defendants' ability to identify who among them is actually responsible. As is clearly demonstrated in these DES cases, the manufacturers are in no better position than the plaintiffs to identify the culpable party.

Third, in the earlier exceptions the burden is shifted to parties who bear some culpability for causing plaintiff's injury. In alternative liability, each defendant was at

The *Sindell* court relied upon two policy reasons for adopting market share liability: (1) as between an innocent plaintiff and a manufacturer of a defective product, the manufacturer should bear the cost of injury; and (2) as between the injured plaintiff and the possibly responsible manufacturer, the manufacturer is better able to absorb the cost of the injury.<sup>220</sup> These two policy reasons are also cited to justify imposition of strict products liability.<sup>221</sup> The courts that followed *Sindell* in adopting the market share liability also justified adoption of the theory based in part on these policy reasons.<sup>222</sup>

However, eight years after *Sindell*, in *Brown v. Superior Court*,<sup>223</sup> the California Supreme Court held that prescription drugs should be exempt from strict liability; in so holding, the *Brown* court adopted comment k of the *Restatement (Second) of Torts* section 402A for determining the liability of a pharmaceutical manufacturer.<sup>224</sup> *Brown* held that, in general, "so long as the

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least negligent toward the plaintiff, and in *res ipsa loquitur* at least one defendant caused the injury and the others are intimately connected to the activity and instrumentality that caused the harm. But with market share liability the named defendant need not have been directly connected with the activity or instrumentality that caused the harm. Indeed it is inevitable that some defendants wholly innocent of wrongdoing towards the particular plaintiff will shoulder part or all of the responsibility for the injury caused.

*Id.*; Comment, *supra* note 1, at 307-12.

220. *Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

221. See AMERICAN LAW OF PRODUCTS LIABILITY 3D § 9:30 (1987) (noting that "the same reasons of policy which were the impetus for the creation of the doctrine of strict liability have been said to support adoption of market-share liability as well"); see also *Brown v. Superior Court*, 44 Cal. 3d 1049, 1060 n.5, 751 P.2d 470, 476 n.5, 245 Cal. Rptr. 412, 417 n.5 (1988) (noting that the court adopted the market share liability theory in *Sindell* based upon policy considerations related to strict tort liability).

222. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 191-92, 342 N.W.2d 37, 49, *cert. denied*, 469 U.S. 826 (1984).

223. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

224. *Id.* at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 418. Aware of the potential negative effect on research that strict liability would have on the drug industry, the *Restatement's* drafters originally considered excluding drug manufacturers from the scope of § 402A. However, this proposal was rejected; instead, comment k was added. See RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965). See generally, *Brown*, 44 Cal. 3d at 1057-58, 751 P.2d at 475, 245 Cal. Rptr. at 416 (reviewing the history of § 402A); Note, *Unavoidably Unsafe Products and the Design Defect Theory: An Analysis of Applying Comment K to Strict Liability and Negligence Claims*, 15 WM. MITCHELL L. REV. 1049, 1053-55 (1989) (discussing the history and public policy underlying comment k); Comment, *Brown v. Superior Court: A Tonic for Prescription Drug Manufacturers*, 16 WASH. ST. U.L. REV. 753 (1989) (discussing comment k protection). Comment k provides an exception to the strict liability rule in the case of certain unavoidably unsafe products. The full text of comment k provides:

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine

drug involved was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution," a manufacturer is not strictly liable.<sup>225</sup> As shown earlier, market share liability is a theory that has essentially been limited to actions against manufacturers of DES, a prescription drug.<sup>226</sup> Interestingly, when California, the first state to adopt market share liability, explained its reasons for accepting market share, the court relied on policy reasons underlying strict liability.<sup>227</sup> Nevertheless, in *Brown*, a later California case, the California Supreme Court held that in an action under market share liability, the plaintiff could not rely on an action sounding in strict liability.<sup>228</sup> In California, a plaintiff can now recover under the market share liability theory only by proceeding under a negligence cause of action.<sup>229</sup>

The California court's legal reasoning is patently unsound. First, the court legitimized the adoption of market share liability based on the policy reasons supporting strict liability, and then the court later declared that the market share theory should not be used in a strict liability action. In the meantime, the subsequent courts that adopted market share liability unwisely accepted

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are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. 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 § 402A, comment k (1965).

However, comment k protection was held not to apply to DES in *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 197, 342 N.W.2d 37, 52, *cert. denied*, 469 U.S. 826 (1984). The court recognized that in some exigent circumstances it may be necessary to place a drug on the market before adequate testing could be done, but it found that no exigent circumstances existed that would warrant DES receiving comment k protection. *Id.*

225. *Brown*, 44 Cal. 3d at 1069, 751 P.2d at 482-83, 245 Cal. Rptr. at 424.

226. See *supra* notes 140-63 and accompanying text (summarizing cases, other than the DES cases, where market share liability has been considered).

227. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (discussing strict tort liability policy considerations), *cert. denied*, 449 U.S. 912 (1980); see also *Brown*, 44 Cal. 3d at 1060 n.5, 751 P.2d at 476 n.5, 245 Cal. Rptr. at 417 n.5 (indicating that only policies, and not the cause of action, were based on strict liability cause of action).

228. *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1061, 751 P.2d 470, 477, 245 Cal. Rptr. 412, 418 (1988).

229. *Id.* at 1059, 751 P.2d at 475-76, 245 Cal. Rptr. at 417 (noting that the principle expressed in comment k is based on negligence).

the underlying policy reasons for adopting market share without analyzing whether the policies support adoption of the concept. After scrutinizing the policy reasons, it appears doubtful that they do sufficiently support adoption of the market share liability theory.

As noted, one policy consideration relied upon in adopting the theory is that drug companies are better able to absorb the costs of the injury by insuring against liability and passing the costs on.<sup>230</sup> Linked with this principle is the contention that the pharmaceutical drug companies are in solid financial condition and, therefore, are able to afford insurance to cover the costs. Manufacturers have strongly contested the figures and conclusions regarding their financial status, or any implication that one company's solid position reflects the security of other participants in the drug manufacturing industry.<sup>231</sup> The producers further contend that expansions in tort law, such as the adoption of market share liability, have the perverted result of eliminating production of certain useful and necessary drugs.<sup>232</sup> Additionally, manufacturers contend that adoption of market share liability dramatically increases insurance costs to such an extent that some companies either can no longer obtain insurance or cannot pass the costs on to consumers, while other companies can no longer survive.<sup>233</sup>

There are a number of examples of drugs that are no longer produced because of increased product costs related to potential liability. For example, Oculinum and Benedectin were considered safe and useful but are no longer available to the public because manufacturers cannot afford to insure their sale of the drugs.<sup>234</sup> The federal government has interceded in some cases to protect companies from liability, in order to insure availability of a drug. For instance, the government intervened to insure availability of the swine flu and

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230. See *supra* notes 60-61 and accompanying text.

231. *Smith v. Eli Lilly & Co.*, 136 Ill. 2d 222, 260, 560 N.E.2d 324, 341 (1990).

232. *Id.* (noting that the defendant listed drugs that were no longer made due to the potential liability of the manufacturers).

233. See *Fine*, *supra* note 210, at 902; Comment, *supra* note 224, at 766-67 (reiterating the *Brown* court's reasoning that strict liability would be expensive to drug manufacturers, resulting in fewer products being available to the public); Note, *Market Share Liability: A New Method*, *supra* note 7, at 576-77 (indicating that the inability of drug manufacturers to obtain liability insurance is the most persuasive argument manufacturers have against the adoption of the market share liability theory); see also *Shackil v. Lederle Laboratories*, 116 N.J. 155, 178-79, 561 A.2d 511, 523 (1989) (discussing the fragility of the DPT market as a result of the increasing insurance costs).

234. See *Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479, 245 Cal. Rptr. 412, 421, (1988); Note, *A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals*, 103 HARV. L. REV. 773, 774 (1990); *Benedectin Production Ends*, N.Y. Times, Mar. 14, 1985, at A22, col. 6 (reporting Merrell Dow Pharmaceutical halted Benedectin manufacturing); *Loss of Drug Relegates Many to Blindness*, N.Y. Times, Oct. 14, 1986, § C, at 1, col. 3 (reporting that a manufacturer stopped manufacturing an experimental drug useful in treating eye problems due to liability exposure). Another area where the high cost of insurance and research has essentially shut down development and research in the United States has been in the contraceptive industry. Note, *supra*, at 775 n.11.



polio vaccines.<sup>235</sup> The New Jersey Supreme Court voiced this same concern when it declined, on policy grounds, to impose market share liability on manufacturers of DPT because of the crippling effect potential liability would have on the availability of the vaccine.<sup>236</sup>

Surely, broadening manufacturers' liability exposure through market share liability will have the concomitant effect of negatively impacting drug availability.<sup>237</sup> Manufacturers will need to insure against losses arising from the sale of their own products as well as the products of others in the industry, most of whom are no longer in existence. Even if a manufacturer decides not to insure against losses, it will still be obliged to cover the costs of any damage awards. This added potential for liability will likely contribute to a reduction of the number of participants in the market and the availability of drugs, as well as a decline in the amount of new drug research.<sup>238</sup> It may be tempting to impose liability based on the fact that these manufacturers profited from the sale of a drug that may be responsible for the plaintiff's injuries, regardless of their actual ability to cover these costs. However, this temptation alone is not a sufficiently compelling reason to adopt a theory that significantly alters a state's tort law, while only providing a clearly flawed alternative.<sup>239</sup> Likewise,

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235. See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976) (requiring the government to pay damages for injuries caused by nonnegligently manufactured vaccine) (current version 42 U.S.C. § 247(b) (1988)). See generally *Brown*, 44 Cal. 3d at 1064, 751 P.2d at 479, 245 Cal. Rptr. at 421 (the government assumed liability for injuries after drug manufacturers refused to make the drug).

236. See *Shackil*, 116 N.J. at 190, 561 A.2d at 529 (DPT industry was diminished to one supplier, and the federal government had to establish a fund to deal with liability claims); see also *Diphtheria-Tetanus-Pertussis Vaccine Shortage*, 253 J. A.M.A. 1540 (1985) (noting that there was a temporary shortage of DPT vaccine supplied by the sole manufacturer).

237. See Fischer, *supra* note 28, at 1654 (adoption of a market share theory will dramatically increase liability exposure, and it may discourage development of new products); Comment, *supra* note 1, at 321-23 (noting that increasing liability has prompted insurers to increase premiums dramatically and they are reluctant to insure particularly risky industries; this in turn has resulted in higher prices).

238. See *Brown*, 44 Cal. 3d at 1063, 751 P.2d at 479, 245 Cal. Rptr. at 420 ("Public policy favors the development and marketing of beneficial new drugs, even though some risks, perhaps serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering."); *Payton v. Abbott Laboratories*, 386 Mass. 540, 574, 437 N.E.2d 171, 189-90 (1982) ("Imposition of such broad liability could have a deleterious effect on the development . . . of new drugs, especially those marketed generically."); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (stating that there are legitimate concerns that market share liability "will discourage desired pharmaceutical research and development while adding little incentive to production of safe products"). See generally *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583, 597-98, 192 Cal. Rptr. 870, 878-79 (1983) (stating that there is a recognized public policy in encouraging swift drug development); McKenna, *The Impact of Product Liability Law on the Development of a Vaccine Against the AIDS Virus*, 55 U. CHI. L. REV. 943, 943 n.4 (1988) (noting that drug companies would not immediately market an AIDS cure without extensive testing, fearing tort liability otherwise).

239. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 618, 607 P.2d 924, 941, 163 Cal. Rptr. 132, 149 (Richardson, J., dissenting) (stating that imposition based on wealth of a defendant is not a sound principle and creates a two-tiered system of justice), *cert. denied*, 449 U.S. 912

the policy considerations regarding the ability of manufacturers to absorb costs is insufficient to justify adoption of market share liability given the unclear effect on future drug availability.

Another policy consideration supporting the development of products liability is that the production of safer goods will be promoted.<sup>240</sup> Proponents of market share liability argue that adoption of the theory is also necessary to provide incentive to produce safer generic drugs.<sup>241</sup> However, this argument is unconvincing. First, the industry arguably needs no additional encouragement above and beyond the incentives that strict liability and negligence laws provide to produce safer drugs.<sup>242</sup> For years, the pharmaceutical industry has been the frequent target of litigation, facing large damage awards. This exposure has provided the industry with incentive to produce safe products. Before any drug is introduced to the public, extensive research and development costs are incurred to ensure that the product is safe.<sup>243</sup> Furthermore, this country has established and yearly funds the Food and Drug Administration which is responsible for regulating the safety of pharmaceuticals.<sup>244</sup> The FDA must first approve the use of any new drug before it is allowed on the market.<sup>245</sup> After a drug is approved for sale, the FDA retains authority to remove the drug from the market if a problem later is discovered.<sup>246</sup>

The likelihood of an incentive towards safety resulting from the imposition of market share liability in DES cases also is questionable for another reason: liability is not imposed until forty years after the undesirable behavior oc-

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(1980); Kroll, *supra* note 8, at 195 (concluding that it is unsound to impose liability based on the perceived wealth of defendant and its ability to obtain insurance); Comment, *supra* note 1, at 328 (stating that it is an unfair system to impose liability solely due to a defendant's ability to pay and subsequently spread the costs).

240. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1119 (1960) (product liability enhances product safety); Robinson, *supra* note 7, at 741 (discussing cases where courts have imposed liability as a safety incentive); Comment, *The DES Manufacturer Identification Problem*, *supra* note 7, at 867-70 (recognizing that courts impose strict liability on industries such as the blasting cap industry as a safety incentive).

241. See *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (noting that drug manufacturers are best able to discover and guard against product defects); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 192-93, 342 N.W.2d 37, 49-50 (reasoning that the cost of damage awards will provide incentive to test drugs adequately), *cert. denied*, 469 U.S. 826 (1984).

242. See Fischer, *supra* note 28, at 1657 (suggesting that market share may result in over deterrence).

243. See generally *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 609, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 143 ("the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels"), *cert. denied*, 449 U.S. 912 (1980); see also 50 Fed. Reg. 7452 (1985) (stating that the FDA is the public health promoter and protector).

244. See 21 U.S.C. §§ 301-393 (1988). Alternatively known as the Federal Food and Cosmetic Act, the Act regulates the sale of food, drugs, cosmetics, and medical devices.

245. See *id.* § 355 (1988). Section 355 provides that "no person shall introduce or deliver into interstate commerce any new drug unless an approval of an application . . . is effective with respect to such drug. *Id.* § 355(a).

246. See Note, *supra* note 234, at 775-77.

curred and almost twenty years after the potential harm was discovered and the product removed from the market.<sup>247</sup> Most of the defendants in current DES litigation had very little to do with the marketing of the drug when it was taken as a miscarriage preventative.<sup>248</sup> Imposition of liability at this late date will have little deterrent effect. Today, drug manufacturers are guided in their safety incentive by medical and scientific research and FDA regulations not by this new concept for ensuring recovery.<sup>249</sup> A third reason why market share liability does not provide a safety incentive stems from the fact that the theory imparts potential liability on all manufacturers in the particular industry. There cannot be an incentive to produce safer products if liability is still imposed as a result of the negligence of others in the industry. The incentive towards safety is also diminished if a manufacturer knows that others in the industry will absorb the damages resulting from its negligence.<sup>250</sup>

The safety incentive rationale is questionable for a final reason: the theory has been adopted in only a limited number of jurisdictions, and thus far, market share liability is only being applied to manufacturers of DES. Therefore, if a court adopts market share liability, the goal of warning manufacturers to produce safer products will not reach a wide array of drug manufacturers or other industries. The limited reach of the rule will produce little incentive for most manufacturers to produce safer goods since only one segment of the pharmaceutical industry is affected.

Similarly unavailing is the policy argument that adoption of market share liability encourages manufacturers to maintain more detailed records that will enable plaintiffs to identify the culpable party.<sup>251</sup> Normally, when DES leaves a manufacturer's plant, it is identifiable. Somewhere along the chain of distribution, however, the drug becomes commingled and less traceable.<sup>252</sup> Due to the fungible nature of DES, drug manufacturers have very little ability to keep track of the ultimate market and user of the drug. Moreover, the drug industry did not violate any laws regarding the maintenance of sales records. With the adoption of market share liability, however, manufacturers nevertheless are punished for their failure to maintain better records.

Certainly, there are infirmities in the rationale offered to justify adoption of

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247. See *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (noting that the theory adds little incentive for production of safe products); *Fine*, *supra* note 210, at 901.

248. See generally *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 609-17, 689 P.2d 368, 385-89 (1984) (determining if a potential defendant that acquired a DES manufacturer might be amenable to suit as a result of successor liability).

249. See *Fine*, *supra* note 210, at 901-02.

250. See *Miller & Hancock*, *supra* note 8, at 103-04 (explaining by way of example that farmers affected by flooding have an incentive as a group to build a dam to prevent flooding, but an incentive as an individual to minimize any contribution to its construction).

251. See *Robinson*, *supra* note 7, at 734-35 (noting that the improved record keeping justification is scarcely dispositive in determining whether to shift the burden).

252. For instance, in *Smith*, part of the problem in identification may be attributed to the health clinic because it labeled the drug as only "Tab 98," as well as to the laws regarding maintenance of records. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 265, 560 N.E.2d 323, 343 (1990).

market share liability. Moreover, to the extent that these reasons and policy goals are met, they do not provide sufficient basis for judicial adoption of the theory.

*D. Pharmaceutical Drug Manufacturers Should Not Become Insurers of Their Industry*

Another justification offered for adoption of market share liability is that the DES manufacturers breached a duty to make a safe product and, therefore, liability should be imposed.<sup>253</sup> First, one must note that in the cases adopting the theory no breach of duty had yet been established because the issue was decided on the basis of pretrial motions.<sup>254</sup> Additionally, there is conflicting evidence as to whether DES is in fact an unreasonably dangerous product or whether it is especially harmful.<sup>255</sup> Regardless, the concept that liability may be imposed based merely on a breach of duty or creation of risk, without causation established, has long been rejected in American tort law.<sup>256</sup>

Courts should not easily discard historic tort law principles merely because the defendants are members of the drug industry or because a plaintiff has suffered an injury. Market share liability, however, does disregard tort law principals. As a result, manufacturers are insurers of not only their own products but also the products of other manufacturers in the industry.<sup>257</sup> Additionally, market share liability in DES cases causes solvent defendants to become insurers of an industry that existed approximately twenty to forty years ago.

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253. See *id.* at 265-66, 560 N.E.2d at 342-43. The plaintiff in *Smith* argued that the drug manufacturers were liable for their breach of duty to a foreseeable plaintiff. Under plaintiff's interpretation of duty, manufacturers of products for human consumption have a special responsibility, and any manufacturer of DES can be held liable because it breached a duty owed to her. *Id.* The Illinois Supreme Court rejected this argument, stating:

The plaintiff and appellate court have too broadly interpreted the duty of a drug company and to whom it owes that duty. Both negligence and strict liability require proof that defendant breached a duty owed to a particular plaintiff. Each manufacturer owes a duty to plaintiffs who will use its drug or be injured by it. However, the duty is not so broad as to extend to anyone who uses the type of drug manufactured by a defendant, and the fact that a duty is owed does not abrogate the requirement that the plaintiff maintains the responsibility of identifying the defendant who breached the duty.

*Id.* at 265-66, 560 N.E.2d at 343.

254. See *supra* note 195 and accompanying text.

255. See *supra* note 28.

256. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 100-101 (1928) (stating that negligence in the air is not a basis for imposing liability; plaintiff sues for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another); see also *Board of Educ. v. A, C & S, Inc.*, 131 Ill. 2d 428, 442-43, 546 N.E.2d 580, 591 (1989) (concluding that creation of risk is insufficient to impose liability); Note, *supra* note 8, at 1021 (adopting market share liability may lead to assessing damages based only on wrongful conduct).

257. See *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986); Kroll, *supra* note 8, at 194-97; see also *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 111, 454 N.E.2d 197, 200 (1983) (declaring that the "imposition of strict liability was not meant to make the manufacturer an absolute insurer").

As Justice Richardson stated in his *Sindell* dissent:

The majority's decision effectively makes the entire drug industry (or at least its California members) an insurer of all injuries attributable to defective drugs of an uncertain or unprovable origin, including those injuries manifesting themselves a generation later, and regardless of whether particular defendants had any part whatever in causing the claimed injury.<sup>258</sup>

Such a result is unwarranted. The majority of plausible DES defendants have not been, or cannot be, brought before a court.<sup>259</sup> Those defendants who are brought before courts bear the difficult burden of establishing their share of a relevant market. The companies that cannot prove their share will have to pay the unattributed portion of the damages, thus paying the damages that rightfully belong to companies that are insolvent, not amenable to suit in the jurisdiction, or for some other reason, are not before the court. The *Sindell* court justified its ruling in part on the belief that over the run of the cases, a company's liability would approximate the harm it caused.<sup>260</sup> However, this assumption is purely illusory, as recognized in *Hymowitz*.<sup>261</sup> This type of judicial legislation is an unreasonable overreaction in an attempt to achieve what is perceived as a socially desirable result. A decision to adopt market share liability not only distorts a state's common law but also is best decided by the legislature and not the courts.

#### VI. LEGISLATURES, NOT COURTS, SHOULD DETERMINE THE PUBLIC POLICY IN DES CASES

There is a strong appeal in compensating DES daughters for their injuries. However, in fashioning market share liability theories, the state supreme courts are, in essence, legislating. In fact, the courts that have adopted market share liability have expressly done so after determining what they perceive as public policy demands in the DES cases.<sup>262</sup> The courts declining to adopt market share liability recognized that the issue demands a judgment on public policy; these courts then concluded that the legislatures could better address

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258. *Sindell v. Eli Lilly & Co.*, 26 Cal. 3d 588, 621, 607 P.2d 924, 942-43, 163 Cal. Rptr. 132, 150-51, (Richardson, J., dissenting), *cert. denied*, 449 U.S. 912 (1980).

259. *See Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 254, 560 N.E.2d 324, 338 (1990).

260. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

261. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, 110 S. Ct. 350 (1989).

262. *Id.* at 507-08, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947. The *Hymowitz* court acknowledged that it was doing what it perceived public policy required. The court's determination of what it believed the public demanded was influenced by the fact that the New York legislature had amended its statutes of limitations to allow the plaintiffs to bring a cause of action in DES cases. *Id.*; *see also Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 199, 342 N.W.2d 37, 52 (recognizing that some innocent defendants will shoulder the burden of liability, the court stated that that was a price "defendants, and perhaps ultimately society, must pay to provide the plaintiff an adequate remedy under the law"), *cert. denied*, 469 U.S. 826 (1984).

the issue.<sup>263</sup> The *Sindell* court, however, rejected the dissent's argument that the issue should be left to the legislature because the majority found no "justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California."<sup>264</sup>

The market share liability issue involves determinations of public policy. The various state legislatures are the appropriate forums for determining public policy in this instance.<sup>265</sup> A legislature has the ability to hold hearings, listen to debate, receive data on the extent of the problem, and ultimately to determine what, if any, remedy the state should provide. In performing this function, legislatures face divergent interests when considering the adoption of market share liability. On the one hand, a state may strongly desire to ensure that its citizens are compensated for injuries and have access to courts to pursue their claims.<sup>266</sup> On the other hand, a state legislature may recognize the strong public interest that the pharmaceutical industry continue its research and development of new and safe drugs. A legislature is equipped to determine what economic effect the imposition of market share liability will have on the industry. State lawmakers may determine that the laws should not sanction a tort theory which likely will apply to only a small group of defendants—pharmaceutical manufacturers—and which may have a disproportionately large economic impact. Or lawmakers may determine that the theory unreasonably expands the state's laws to benefit a narrow class of plaintiffs. The legislature also may decide to fashion its own form of market share liability, or it may decide to remunerate the victims without assigning fault to any group of defendants.

Courts are not the proper forums for making these policy evaluations in DES cases because they do so without any concept of the extent of harm or even risk of injury involved by the maternal ingestion of the drug.<sup>267</sup> Reliable evidence indicates that although hundreds of thousands of women took DES,

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263. See *supra* note 111.

264. *Sindell v. Eli Lilly & Co.*, 26 Cal. 3d 588, 613 n.30, 607 P.2d 924, 938 n.30, 163 Cal. Rptr. 132, 149 n.30, *cert. denied*, 449 U.S. 912 (1980).

265. See *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St. 3d 40, 51, 514 N.E.2d 691, 701 (1987); Note, *supra* note 8, at 1028-42 (proposing state or federal legislation as a remedy).

266. Most state constitutions have a provision known as either the "open courts," or "access to courts," or "right to remedy," which expresses the state's policy that its courts should be open to allow redress for its citizens' injuries. See, e.g., ALA. CONST. art. I, § 13 (Courts shall be available to any person for all injuries.); FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."); MD. CONST. Declaration of Rights, art. 19 (Everyman ought to have a remedy for any injury.); MO. CONST. Bill of Rights art. I, § 15 (Courts of justice open for everyone and a remedy afforded for every injury.); N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person or reputation shall have remedy be due courts of law; and right and justice shall be administered without favor, denial or delay."); OHIO CONST. art. I, § 16 (All courts open to any injured person to give a remedy without delay.); OR. CONST. art. I, § 10 (Courts shall administer justice to everyman without delay.).

267. See *supra* note 176 and accompanying text.

the incidence of injury to their children is minimal.<sup>268</sup> The courts are thus emasculating existing tort law for the benefit of a narrow group of people while the necessity of the action remains open to question. Such a determination could be addressed more intelligently and thoroughly in the legislative forum, where both sides of the issue would be analyzed appropriately.

Certainly one may argue against deferring to the legislature in this instance because the pharmaceutical industry and the insurance industry are influential and will be able to politically sway the issue their way. On the other side of this issue, however, are the powerful trial lawyers associations and other bar groups, both of which are coordinated on the state and national levels and which have also exhibited legislative persuasion. Moreover, in similar instances, legislatures have in fact determined that persons suffering injuries resulting from drugs or other products should be compensated, thus thwarting the desires of the insurance industry and drug manufacturers.<sup>269</sup> The compensation such legislation provides is not awarded by courts. Instead, compensation comes from a specific fund established for the purpose.<sup>270</sup>

Legislation which compensates victims for injuries resulting from defective products generally establishes a fund and a procedure people must follow in order to receive money. The recovery fund is established from revenue received by members of the industry producing the product or through tax revenue. A structured and predictable system for recovery is thereby created that operates at a lower monetary cost and in a more efficient and expeditious manner. Injured parties benefit by avoiding protracted and uncertain civil litigation. The

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268. See *supra* note 28.

269. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 to 300aa-14 (1988). The Act's goal is to do away with the typically protracted civil litigation against a childhood vaccine manufacturer, as well as the risk of being denied a recovery because of the failure to prove the prima facie elements of a tort law action. The Act seeks to stabilize the fragile vaccine industry, such as DPT, in order to ensure the availability of the drugs. Victims injured after 1988 must first prosecute a claim under the Act before pursuing a separate cause of action under tort law. *Id.* § 300aa-11(4-5). Victims injured before 1988 have the option of filing a claim under the Act. *Id.* § 300aa-11. However, a victim must choose one option or the other; once the choice is made the victim is precluded from pursuing the alternative avenue. See generally 38 L. FRUMMER & M. FREEDMAN, *PRODUCTS LIABILITY* § 51.02 (1988) (analysis of the Act); Schwartz & Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L. J. 387, 389-93 (1987) (discussing the method of compensating victims).

A person who suffered an injury must submit a petition to the United States Claims Court alleging that the injury is vaccine-related. A presumption of vaccine-relatedness arises when the injury suffered is listed in the Vaccine Injury Table, and the injury occurs within the time frame set forth in the Table. See 42 U.S.C. § 300aa-14 (1988) (listing the presumptive injuries and time frames). A special master reviews each claim and the evidence and prepares findings of fact and conclusions of law on whether compensation is appropriate. 42 U.S.C. § 300aa-12(c) (1988). The "Manufacturers Excise Tax on Childhood Vaccines" funds the Act. See *Shackil v. Lederle Laboratories*, 16 N.J. 155, 183, 56 A.2d 511, 525 (1989).

270. See Note, *supra* note 8, at 1028-36 (outlining the numerous state and federal legislation that establishes funds and procedures to compensate victims who may not be compensated under existing tort law).

legislation recovery system insures that there is a source from which to recover. Also, the manufacturers' costs of defending suits and the necessity of insuring against unknowable damage awards are eliminated. A legislated recovery system is predictable in the sense that manufacturers know in advance what their costs of compensation will be. However, the public ultimately bears the costs for this either in its tax bill, if it is funded through tax revenue, or in the higher prices paid for the goods, if the manufacturers have to bear the cost and decide to pass it on in the form of higher prices.

## VII. CONCLUSION

Courts in the past have not been hesitant to develop new tort concepts. Courts should, however, decline to adopt market share liability because of the theory's infirmities. Market share liability is a flawed concept that likely will apply only to a narrow class of plaintiffs and defendants. Moreover, rejection of the market share liability concept will not leave DES daughters or other plaintiffs without a remedy. Some DES plaintiffs have been able to establish the identity of the specific manufacturer, while others will be able to establish enough evidence to proceed to trial on the issues of causation in fact or negligence. Adoption of the market share liability theory, though, contravenes existing tort principles. The theory deviates too greatly from a principle which serves a vital function in the law: causation in fact. In the final analysis, the legislature, and not the court, is the appropriate forum for determining whether to adopt or reject market share liability.



