
Barbara J. Koperski
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol60/iss2/9

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Market Share Liability for DES (Diethylstilbestrol) Injury: A New High Water Mark in Tort Law.


I. INTRODUCTION

Dynamic changes in products liability have occurred during the past several decades. The courts, focusing on consumer protection, have expanded producers' liability by moving away from the privity doctrine and toward strict liability for manufacturers. A current effort to protect consumers through products liability law involved a series of DES cases, in which the plaintiffs proposed

1. Diethylstilbestrol (DES) is a man-made estrogen which was approved by the Food and Drug Administration (FDA) in 1947 for use to prevent miscarriages. Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963, 963 (1978). In 1971 the FDA revoked its approval of DES, effectively banning its use by pregnant women because of its danger and its ineffectiveness. U.S. FOOD & DRUG ADMIN., DEP'T OF HEALTH, EDUC. & WELFARE, DIETHYLSTILBESTROL CONTRA-INDICATED IN PREGNANCY, IN DRUG BUL., Nov. 1971, at 1-2. Henderson, Products Liability, 1980 CORP. L. REV. 143, 143. In 1971 DES was linked to the subsequent development of adenocarcinoma (cancer) of the vagina and uterus in the females born to women who had used the drug during pregnancy. Herbst, Ulfelder & Poskanzer, Adenocarcinoma of the Vagina, 284 NEW ENG. J. MED. 878-80 (1971); Note, supra, at 964-65. More recently, the use of DES during pregnancy has been linked to structural and functional changes in the genital tracts of males born to such women. These changes may include genital and lower urinary tract abnormalities, as well as reduced fertility. Gill, Schumacher & Bibbo, Structural and Functional Abnormalities in the Sex Organs of Male Offspring of Mothers Treated with Diethylstilbestrol (DES), 16 J. REPROD. MED. 147, 152-53 (1976); N.Y. Times, May 10, 1979, § C, at 7, col. 3.


3. Note, supra note 2, at 981-82 & nn.7-11.
"intra-industry joint liability." This theory of products liability allows plaintiffs to hold entire industries liable for injuries caused by defective products of unknown origin. The number of plaintiffs involved in these cases and the likelihood that other plaintiffs will adapt the theory to different types of cases give the implications of intra-industry liability a continuing interest.

There are four possible bases for intra-industry liability: concerted action, alternative liability, industry-wide liability, and market share liability. Each would allow a plaintiff to collect substantial damages from multiple defendants without proof that any particular defendant caused the plaintiff's injuries. Eliminating the plaintiff's burden of proving which manufacturer's product injured the plaintiff virtually guarantees that plaintiffs will prevail on the causation issue.

In *Sindell v. Abbott Laboratories*, the California Supreme Court discussed intra-industry liability for adverse effects of drugs and adopted the market share liability theory for DES injuries. Although the majority purported to shift only the burden of proving causation from the plaintiff to the defendants, the effect of its adopting the intra-industry joint liability concept (or, more specifically, the market share doctrine) is to guarantee that the plaintiff will prevail on the causation issue. By departing from traditional

8. Plaintiffs have recovered damages of up to $800,000 for cancer caused by their mothers' use of DES during pregnancy. *N.Y. Times*, Aug. 26, 1979, at 26, col. 1. The *New York Times* reported that $250,000 was awarded to the parents of a seventeen-year-old girl whose fatal cancer was attributed to DES, and $500,000 was awarded to a twenty-five-year-old social worker in a similar DES action. *N.Y. Times*, Jan. 19, 1980, at 26, col. 1.
9. Sindell v. Abbott Labs., 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting).
10. *Id.*
12. 26 Cal. 3d at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.
13. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting). Defendants are in no better position to disprove factual causation than plaintiffs are to prove it. Note, supra note 1, at 973; Note, supra note 2, at 1000-01.
tort doctrine and effectively eliminating causation as an issue, "[m]arket share' liability thus represents a new high water mark in tort law."

This Note will analyze Sindell and the various approaches taken to overcome the obstacle of product identification in DES cases. In addition, it will examine the legal, social and economic ramifications of intra-industry joint liability.

II. FACTS

The plaintiff in Sindell brought a class action suit which sought to hold several major drug companies jointly and severally liable for injuries she had sustained as a result of her mother's use of DES as a miscarriage preventative while she was pregnant with the plaintiff. The complaint alleged that DES had caused her to-

Shifting the burden of proof from the plaintiff to the defendants, thus, tips the scales in favor of the plaintiff on the causation issue.

Market share liability differs from strict tort product liability. In the latter, the manufacturer generally is assumed to have better access to the information necessary to determine the cause of the product-related accident. Market share theory, however, assumes that neither the plaintiff nor the defendant has greater knowledge concerning production of the offending product. When the market share doctrine is combined with strict tort product liability, the possible result is "absolute" liability. Kroll, supra note 7, at 194.

Throughout the history of products liability law, courts have viewed the satisfaction of the identification requirement as a prerequisite for holding a manufacturer responsible for damages. Note, supra note 2, at 982. The manufacturer named in the complaint must have made the product in question. This identification requirement is a specific instance of the general legal requirement that the defendant be the cause-in-fact of the plaintiff's injury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103, at 671-76 (4th ed. 1971); Annot., 51 A.L.R.3d 1344 (1973).

See notes 9-10 & accompanying text supra.

See generally Comment, supra note 1, at 968-76 nn.22-25.

Sindell is but one of many DES suits filed throughout the country. Most are still pending. Those cases which have already been decided have predominantly favored the drug company defendants because of the plaintiffs' failure to identify the manufacturers of the DES prescribed to their mothers. See Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978). The same result was reached in a California case prior to Sindell. See McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978). A few courts took the opposite view, adopting novel
PRODUCT LIABILITY

develop precancerous and cancerous tumors and lesions, but it did not identify the specific manufacturer of the DES ingested by her mother. The trial judge sustained the defendants' demurrers on the ground that the plaintiff failed to identify which defendant had manufactured the drug responsible for her injuries.

The California Court of Appeals reversed the trial court's decision, concluding that the plaintiff had alleged facts sufficient to state a claim against the defendants. These included allegations that the defendant drug companies had collaborated in testing, marketing, and promoting DES and that they had agreed to a common formula for the drug in order to permit filling prescriptions with a brand other than that prescribed. Pointing to these allegations, the court concluded that the theories of concerted action and alternative liability were available to the plaintiff.

III. FOUR THEORIES OF INTRA-INDUSTRY LIABILITY

The appellate court in Sindell identified two theories which would support joint and several liability of the defendants. Under the first theory, concerted action, a person would be liable for harm resulting from the tortious conduct of others if he assists or encourages that conduct, and either has breached a duty owed the plaintiff or has knowledge that the others' conduct constitutes a breach of duty.
Under the second theory, alternative liability, all negligent defendants would be liable for the plaintiff's injuries if it is possible to ascertain which defendant actually caused the injuries and if it is fairly certain that the injuries were caused by one of them.\footnote{26} The appellate court relied on a well-known California case, \textit{Summers v. Tice},\footnote{27} in which two negligent hunters were held jointly and severally liable for the plaintiff's injuries, where it was fairly certain that the shot came from one of them, but it was impossible to tell which hunter had fired the particular shot. The burden of proving causation was shifted to each defendant to exculpate himself if possible. The \textit{Summers} court concluded that it would be unfair to leave the plaintiff remediless in the face of the defendants' concurrent negligence.\footnote{28}

Although not relied upon by the appellate court in \textit{Sindell}, two other theories of liability have been proposed as bases for intra-industry liability: industry-wide\footnote{29} and market share liability.\footnote{30} The industry-wide liability theory was suggested first in \textit{Hall v. E.I.}
Du Pont De Nemours & Co., Inc., which involved children who were injured by the explosion of dynamite blasting caps. The manufacturer of the blasting caps could not be identified because their markings had been destroyed in the explosion. The plaintiffs sued six American manufacturers of blasting caps and the industry trade association, alleging concerted action. The court decided that a cause of action existed under the concerted action allegation because all of the manufacturers had agreed to not place warnings on the blasting caps although they knew that the caps were dangerous. The court also determined that the defendants jointly controlled the risk because they had delegated some safety functions to a trade association. The court concluded that imposing industry-wide liability upon the manufacturers joined in the action was justified because they were aware of the risk and jointly controlled it. The Hall theory of industry-wide liability grounds each manufacturer's liability for all injuries caused by its product upon industry-wide adherence to a specified standard of safety. The industry standard itself becomes the cause-in-fact of the plaintiff's injury. Each industry member contributes to the plaintiff's injury by adhering to the standard, thereby perpetuating the resulting manufacture of an unidentifiable injury-producing product.

The market share liability theory is an extension of the Summers doctrine. Using an undiluted Summers rationale, it is inappropriate to shift the burden of proving causation to the defendants where there is a possibility that none of them made the product which injured the plaintiff. However, the market share theory alters this doctrine by shifting the burden of proof to the defendants if the plaintiff joins the manufacturers of a "substantial

32. Id. at 359. See note 25 supra.
33. 345 F. Supp. at 373-76.
34. Id.
35. Id. at 386.
36. Those manufacturers who could exonerate themselves by proving that they did not make the precise unit which caused the injury would not be liable for the plaintiff's injury. All other manufacturers of the same type of product would be held jointly and severally liable. Note, supra note 2, at 1000.
37. 26 Cal. 3d at 608, 607 P.2d at 935, 163 Cal. Rptr. at 143.
38. Id.
39. This extension was suggested in the Restatement (Second) of Torts § 433B(3), Comment h (1964). The Fordham Comment advocated the market share theory and explained its application to the DES cases. Comment, supra note 1, at 994-95, 999-1000. The California Supreme Court adopted the article's proposal and applied it in Sindell. 26 Cal. 3d at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.
40. 26 Cal. 3d at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. Restatement (Second) of Torts § 433B(3), Comment g (1964).
share” of the type of product which caused the plaintiff's injury. Under the market share theory, each manufacturer's liability is equivalent to its percentage of total sales by all manufacturers of the product. Thus, a manufacturer's liability should correspond to its responsibility for the injuries caused by its own products.

IV. THE DECISION

Although the California Supreme Court rejected the appellate court’s reasoning, it affirmed the outcome of the case on a different basis: market share liability. The supreme court concluded that the concerted action and alternative liability doctrines, as interpreted by the appellate court, could not be applied to hold the Sindell defendants liable. The court reasoned that the defendants' parallel or imitative conduct in relying on each others' testing and promotion methods described a common practice in the industry, not a concerted action. The formula for DES is a scientific constant which a manufacturer producing the drug must follow by law. For these reasons, and because application of the concerted action theory to Sindell would expand the doctrine beyond its intended scope, the court found no concert of action among the defendants.

The supreme court also rejected the alternative liability the-
While in *Summers v. Tice* there was a fifty percent chance that one of the two defendants was responsible for the plaintiff's injuries, the court noted in *Sindell* that any one of two hundred companies which manufactured DES might have made the product which injured the plaintiff. Therefore, there was no "rational basis upon which to infer that any defendant in the action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible." The court found the chance that any one of the five defendants supplied the DES to plaintiff's mother was "so remote that it would be unfair to require each defendant to exonerate itself." The court, therefore, did not use the alternative liability doctrine to relieve the plaintiff's burden of proving which drug manufacturer caused her injuries.

The supreme court also discussed two other bases of liability: industry-wide and market share liability. It declined to apply the former theory, but concluded that adoption of the latter doctrine

49. *Id.* at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.
50. 33 Cal. 2d 80, 199 P.2d 1 (1949).
51. 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139. Some estimates of the number of drug companies which manufactured DES for use during pregnancy are as high as three hundred. Comment, *supra* note 1, at 964 n.3.
52. 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.
53. *Id.* According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff demonstrates that all of the defendants acted tortiously and that the harm resulted from the conduct of one of them. *RESTATEMENT (SECOND) OF TORTS* § 433B(3), Comment g (1964). However, the rule so far has applied only where all actors involved were joined as defendants and where their conduct was simultaneous, although cases might arise in which modification of the rule would be necessary because one of the actors is not or cannot be joined or because of lapse of time or other circumstances. *Id.*, Comment h.
54. Abbott Laboratories, Eli Lilly & Co., E.R. Squibb & Sons, the Upjohn Co., and Rexall Drug Co. were the remaining defendants in *Sindell*. Either the action was dismissed or the appeal was abandoned on various grounds as to five other defendants named in the complaint. 26 Cal. 3d at 596 n.4, 607 P.2d at 927 n.4, 163 Cal. Rptr. at 135 n.4. In similar DES cases, plaintiffs have joined as many as 94 DES manufacturers as defendants. Comment, *supra* note 1, at 973.
55. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139. Under the alternative liability theory, a defendant can be dismissed from the action if there is no possibility that the defendant could be responsible for the plaintiff's injury. One defendant in *Sindell* was dismissed after it demonstrated that it had not manufactured DES during the period that plaintiff's mother took the drug. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. *See also* Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980) (DES case in which the court adopted the alternative liability theory, but used the market share approach for the limited purpose of apportioning damages).
56. 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.
57. *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.
58. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.
was warranted.\textsuperscript{59} The court rejected industry-wide liability because the large number of producers of DES\textsuperscript{60} would create practical problems of management. In addition, it would be unfair to impose liability upon a manufacturer for injuries resulting from the use of a drug manufactured within standards suggested or mandated by the government.\textsuperscript{61}

The supreme court did adopt the market share doctrine as the basis for the defendants' liability.\textsuperscript{62} Although it perceived that some discrepancy in the correlation between the market share and liability is inevitable,\textsuperscript{63} the court concluded that policy reasons

\textsuperscript{59} Id. at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.
\textsuperscript{60} Id. at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143. According to the court in \textit{Hall}, to establish industry-wide joint liability, plaintiffs will have to show the defendants' joint awareness of the risks at issue and their joint capacity to reduce those risks. In \textit{Hall}, the plaintiffs demonstrated this by alleging that the industry had delegated some safety functions to a trade association. \textit{Hall} v. E.I. Du Pont De Nemours & Co., Inc., 345 F. Supp. at 372-73. There were no such allegations in \textit{Sindell}.

The court in \textit{Hall} cautioned against applying the theory to industries composed of a large number of producers. "What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers." \textit{Id.} at 378.

Even if it is feasible to join many defendants in the complaint, it would be less than fair to spread DES-related losses among the defendants equally, because some companies produced and distributed larger amounts of DES than others. Similarly, proportional distribution seems inequitable, because many states lack contribution systems flexible enough to adopt such a theory. Thus, losses would fall more heavily on those manufacturers amenable to suit in states with flexible systems of contribution. In addition, the courts are not equipped to administer a system of apportionment. Henderson, \textit{supra} note 1, at 147. The appellate court in \textit{Sindell} noted these difficulties, but concluded that they were not to be resolved at the pleading stage. \textit{Sindell} v. Abbott Labs., 149 Cal. Rptr. at 149-50. The California Supreme Court concluded that a proportional distribution system was feasible, and it adopted the market share liability concept. 26 Cal. 3d at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

\textsuperscript{61} The drug industry is regulated closely by the FDA. Federal regulations specify the type of tests a manufacturer must perform for certain drugs, 21 C.F.R. §§ 436.100-.541 (1980), the warnings which appear on labels, 21 C.F.R. § 369.20 (1980), and the manufacturing standards, 21 C.F.R. §§ 211.100-.115 (1980). FDA approval of a drug is persuasive in a products liability case, unless there is proof of fraud or nondisclosure by the manufacturer in obtaining the approval. \textit{McDaniel v. McNeil Labs., Inc.}, 196 Neb. 190, 241 N.W.2d 822 (1976) (involving the use of Innovar, an anesthetic manufactured and marketed under FDA approval).

\textsuperscript{62} 26 Cal. 3d at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.
\textsuperscript{63} Id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. It is impossible to determine market share with mathematical exactitude; therefore, a defendant may be liable for a different percentage of the injuries than its share of the relevant market would justify. \textit{Id.} The court concluded that an approximation was as
nevertheless warranted application of the market share theory. The policy reasons presented by the court were: (1) A change in the rules of causation and liability is necessary to fashion remedies that meet the changing needs arising from our complex, industrialized society; (2) between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury; (3) defendants are better able to bear the cost of injuries resulting from the manufacture of a defective product; and (4) holding drug manufacturers liable for defects provides an incentive for product safety.

The majority did not define what constitutes a "substantial share" of the DES market, but it did reject a suggested requirement of seventy-five to eighty percent. Therefore, from the majority's viewpoint, it appears that a "substantial share" is something less than seventy-five percent.

V. ANALYSIS

A. Is Market Share Liability an Extension of, or a Break from, Traditional Tort Law?

According to the Sindell majority, the DES cases are merely a factual variant upon the theme composed in Summers v. Tice; hence, the shift in the burden of proof inherent in market share liability does not completely lack precedent.

However, according to the dissenting justices, the Summers

justified here as it is in comparative fault or partial indemnity cases. Id. at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.
64. 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
65. Id.
66. Id. at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).
67. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. See Comment, supra note 1, at 996.
68. The court will measure the likelihood that any of the defendants supplied the product which injured the plaintiff by the percentage obtained by dividing the amount of DES sold by each defendant manufacturer into the total amount of the drug sold for the purpose of preventing miscarriages. For example, the Sindell plaintiff asserted that the defendants produced 90% of the DES marketed. If this is established at trial, then there would be a 90% likelihood that this handful of defendants caused the plaintiff's injury, and only a 10% chance that the responsible manufacturer, not named in the action, would escape liability. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Difficulties also may arise in attempting to define the terms "market" and "substantial share." Kroll, supra note 7, at 193.
69. 26 Cal. 3d at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. See id. at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting); note 28 & accompanying text supra.
70. Note, supra note 2, at 1006.
case differs so fundamentally from the DES cases that its precedential value is suspect. In Summers the entire class of responsible parties was before the court; however, only some of the potential defendants were joined in Sindell. Furthermore, the negligence of the defendants in Summers caused the plaintiff's inability to identify the tortfeasor. Conversely, in Sindell the plaintiff's inability to satisfy the identification requirement resulted from the passage of time. Thus, the dissenters' suspicions of an unprecedented extension of liability seem well-founded.

The majority in Sindell argued that the plaintiff's cause of action was based on a reason similar to that advanced in Summers: as between an innocent plaintiff and negligent defendants, the latter should (Summers), or are better able to (Sindell), bear the cost of the injury. This "deep pocket" theory of liability, however, should not play a role in the legal analysis of the case because a defendant's wealth is an unreliable indicator of fault. In addition, "[a] system priding itself on 'equal justice under law' does not flower when the liability . . . aspect of a tort action is determined by a defendant's wealth."

B. Policy Considerations

Adoption of the market share doctrine seems unfair if one considers that the theory imposes liability upon manufacturers who may have had nothing to do with causing the injury. Such an inference of fault approaches the imposition of liability on the basis of injury alone. Allowing courts to infer fault in this manner transforms manufacturers into insurers of societal safety. Also,
such a broad extension of liability may diminish the money available for recovery.\(^8\)

In addition to the problems involved in imposing liability under the market share theory, allocation of liability is similarly perplexing.\(^8\) Assuming that no state other than California will adopt the market share doctrine because of its radical departure from traditional tort principles, California courts will allocate liability only to those manufacturers who are amenable to suit in California.\(^8\) Accordingly, as an eventual result of *Sindell*, California producers of DES may be held liable for 100 percent of a plaintiff’s injuries despite the fact that their aggregate share of the market may be considerably less.\(^8\)

Similarly, DES victims would recover unevenly under the market share theory.\(^8\) California plaintiffs are in a better position than are out-of-state plaintiffs to recover fully for their injuries because California plaintiffs can pick and choose their defendants.\(^8\) For example, if the producer which actually caused the injury is now insolvent, a California plaintiff may recover by joining in the action other manufacturers of the same product.\(^8\) Conversely, in other states which still require identification a plaintiff may have a judgment which is valid but unenforceable because of insolvency.\(^9\)

C. Practical Implications of the Market Share Approach

In view of the legal,\(^9\) social, and economic consequences of the duty of guarding against all possible types of accidents and injuries. 401 F.2d at 557.

\(^{83}\) Note, *supra* note 2, at 1010-11.

The fear . . . that liability extended too far will mean recovery at an unsatisfactory level receives support from two fairly recent developments in the field of products liability. First, the cost of insurance for products liability has increased tremendously, to the point at which some businesses have already been forced to close rather than pay the premiums. Second, many states have enacted products liability statutes restricting, rather than broadening, the scope of liability.

*Id.* at 1011.

\(^{84}\) 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

\(^{85}\) *Id.* See note 60 *supra*.

\(^{86}\) 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting). *But see* note 42 & accompanying text *supra*.

\(^{87}\) *Cf.* Note, *supra* note 2, at 1009 (by analogy to industry-wide liability).

\(^{88}\) *Id.* at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147.


\(^{90}\) Note, *supra* note 2, at 1010.

\(^{91}\) The DES cases represent only one series of cases in which plaintiffs cannot
market share theory, it is essential to consider its practical implications. Market share liability would pervasively affect product safety and research and development of new products, and it also could have a detrimental impact on free competition.92

Theoretically, market share liability would promote product safety because manufacturers of similar products would find it advantageous to join in establishing higher industry safety standards.93 However, it is also possible that the market share doctrine would decrease product safety because manufacturers would feel that despite whatever extra precautions are taken during production, they still could be held responsible for injuries resulting from the careless manufacturing practices of others.94 In addition, if manufacturers are liable regardless of fault,95 products liability judgments may become a mere business expense.96 If it is less costly to pay tort claims than to improve safety, producers may not bother to correct an injury-causing product.97 Market share liability, therefore, loses sight of one of the principal goals of the tort system: to reduce the number of injuries.98

recover under traditional tort doctrines because they cannot satisfy the identification requirement. Note, supra note 1, at 1007. Other types of suits in which plaintiffs may seek to employ the market share theory to overcome the identification obstacle include those involving diseased smokers, chemical pollution, industrial waste, food additives, and injuries related to drugs other than DES. See generally Note, supra note 2, at 1002 nn.112-16.

92. Note, supra note 2, at 1003. Many of the effects of market share liability would seem to be similar to those of industry-wide liability; therefore, the arguments for or against industry-wide liability, used by authorities cited herein, apply by analogy to market share liability as well. For a view that the Sindell doctrine may have no application beyond the context of injuries caused by unidentifiable, generic-name drugs manufactured according to government-approved formulas, see Note, Market Share Liability: An Answer to the DES Causation Problem, 94 Harv. L. Rev. 668, 678-79 (1981).


94. Campbell, supra note 93, at 1235; Note, supra note 2, at 1004.

95. Justice Richardson, dissenting in Sindell, argued that it is wholly speculative whether any of the defendant drug manufacturers actually was at fault for the plaintiff's injuries. 26 Cal. 3d at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting). The majority did not attempt to find which defendant (if any) was responsible for the injuries; rather, liability was assigned according to each defendant's market share. 26 Cal. 3d at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.

96. Note, supra note 2, at 1004 n.124.

97. Id.

98. Campbell, supra note 93, at 1237.
Adoption of the market share doctrine may prove to be similarly shortsighted as a matter of social policy concerning the promotion of research and development of new products. Although one commentator maintained that current drug research is duplicative and wasteful, public policy favors the research and development of new pharmaceuticals. The market share theory could hamper this research and development because each new discovery would be a potential source of liability. If policymakers want to encourage the development and marketing of new pharmaceuticals, they must absolve manufacturers of liability arising from dangers hidden prior to the marketing of the new drug. Furthermore, if the drug industry is required to anticipate side effects or medical complications which might surface a generation after ingestion, pharmaceutical research laboratories would be burdened with the duty to predict the future.

Free competition is one of the most important underpinnings of the American standard of living. However, it also could suffer from the Sindell decision. The market share theory suggests the socialistic concept of centralized authority for redistributing private resources. If all producers were held liable for similar products manufactured by the various members of the industry, the larger producers would have an incentive to organize the industry and to attempt to set quality-control standards. Dissenting marginal producers could be driven out of the market, leaving the largest manufacturers in control.

99. 26 Cal. 3d at 619-20, 607 P.2d at 941-42, 163 Cal. Rptr. at 149-50. The drug industry may develop a drug critical to the diagnosis, treatment, or cure of adenocarcinoma itself; however, the liability created by the market share doctrine may inhibit the dissemination of the new drug by manufacturers. Id.

100. Note, supra note 1, at 1006 n.250.


102. Note, supra note 2, at 1004.


104. 26 Cal. 3d at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150. DES met every fair test and medical standard available and applicable at the time of its use. Id.

105. Note, supra note 2, at 1005.

106. Campbell, supra note 93, at 1237.


108. Marginal producers may dissent because they cannot afford to follow the new standards. Note, supra note 2, at 1005-06 n.132. Even if the new standards were affordable by the smaller companies, the consequent industry-wide increase in prices could indicate an antitrust violation. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655 (1962); Note, supra note 2, 1005-06 n.132. Increased liability resulting from adoption of the market share doctrine would increase the cost of manufacturers' products liability insurance, with a devastating effect on small companies. Id. at 1003.
trine would affect the economic structure of American industry extensively.109

VI. A NEW APPROACH TO THE INTRA-INDUSTRY LIABILITY PROBLEM

The Sindell majority referred to Justice Traynor's opinion in Escoha v. Coca Cola Bottling Co.,110 which recognized the need to adapt tort principles to changing and complex methods of mass production and marketing.111 One cannot quarrel with the need for some alteration in the present system of compensating plaintiffs injured by defective products.112 The theory of intra-industry joint liability, which eliminates proof of causation, is an attempt by the courts to keep pace with society. While market share liability is a worthy effort at balancing the rights of producers and consumers, the problems inherent in the market share theory113 warrant a search for an alternative solution.

Many commentators have proposed no-fault schemes of products liability to replace our current system.114 Others have suggested a limited no-fault version to be administered by an administrative tribunal.115 However, the problems that would arise from these systems make such changes undesirable.116 There are, undoubtedly, more satisfactory alternatives for apportioning losses from DES injuries than no-fault or market share liability.117 Yet, such an apportionment exceeds judicial competence. It is the province of the legislature, not the judiciary, to weigh the various economic, social, and political factors involved in such a complex policy determination.118

Several minor legislative changes might result in better apportionment of DES losses. Partial governmental liability has been

109. Note, supra note 2, at 1005.
111. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.
113. See notes 80-109 & accompanying text supra.
115. Id. at 1019-22.
116. A no-fault products liability system may be too socialistic for Americans to accept. Such a system also would require new insurance coverage methods. No-fault products liability could diminish the safety level of products. Kroll, supra note 7, at 196; Note, supra note 2, at 1015-19.
118. 26 Cal. 3d at 621, 607 P.2d at 943, 163 Cal. Rptr. at 151 (Richardson, J., dissenting); Parnon & Pratt, supra note 112, at 536-37; Note, supra note 2, at 1022.
suggested,\textsuperscript{119} relying upon the belief that government approval of DES should carry with it some financial responsibility.\textsuperscript{120} Another suggestion is to limit the amount of damages a plaintiff could recover; this would decrease a manufacturer's exposure in individual cases in order to offset its overall expanded liability.\textsuperscript{121} A legislature also might boost funding for the agencies responsible for regulating manufacturing. Banning sales of products which violate statutory quality and safety standards would spur manufacturers to develop safer products.\textsuperscript{122} Agency scrutiny, if properly funded, would deter irresponsibility in the research and development of new products without substantially inhibiting such undertakings.\textsuperscript{123}

While minor changes in the system will aid plaintiffs today, major alterations are needed to cope with the increasing number of plaintiffs who cannot locate or even identify the manufacturers of injury-causing products.\textsuperscript{124} Perhaps the most satisfactory solution would be congressional action to establish a framework for uniform loss apportionment. This would eliminate the market share doctrine's problems of uneven distribution of recovery and unfair allocation of liability.

For example, a scheme similar to the Federal Deposit Insurance Corporation (FDIC) could be instituted, whereby each manufacturer deposits into a federal fund a percentage of its gross sales. Such a plan could be called Manufacturer's Deposit Insurance Corporation (MDIC) and would function as follows: Each manufacturer of a designated product would pay into the fund a percentage of its gross income from sales of that product according to a flexible rate assigned to the product. Federal administrators\textsuperscript{125} could increase the rate for a manufacturer found negligent in its manu-

\textsuperscript{119.} Parnon & Pratt, \textit{supra} note 112, at 538. New York has approved a $400,000 screening and treatment program for women exposed to DES. \textit{N.Y. Times}, July 21, 1978, at 12, col. 1.
\textsuperscript{120.} Parnon & Pratt, \textit{supra} note 112, at 538.
\textsuperscript{121.} \textit{Id.}
\textsuperscript{123.} Campbell, \textit{supra} note 93, at 1236-38. Meeting regulatory-body standards will inhibit research and development of new products. \textit{Wall St. J.}, July 28, 1980, § 2, at 13, col. 2. However, meeting such standards would not affect research and development as much as would imposing market share liability upon manufacturers. \textit{See} notes 99-104 & accompanying text \textit{supra}.
\textsuperscript{124.} Note, \textit{supra} note 2, at 1022.
\textsuperscript{125.} Others also have advocated turning over the products liability field to federal administrators. \textit{E.g.}, Sandler, \textit{Strict Liability and the Need for Legislation}, 53 \textit{Va. L. Rev.} 1509, 1518-21 (1967); Note, \textit{supra} note 2, at 1020.
facturing practices or could revoke its manufacturing license. Plaintiffs could collect from the fund for injuries and losses attributable to defective products without proving that the defect was foreseeable or that the manufacturers had "joint control of the risk."126 The only producer identification required would be that the product is American-made.127

MDIC would balance the positions of both manufacturers and consumers. If products became defective, or if unforeseeable flaws were discovered, the fund could buy back the products, or pay the resulting injury claims, or both. Hence, a manufacturer would not face bankruptcy because of an unexpected imperfection in its product. Research and development of new products would flourish under MDIC because the introduction of a new product would not be inhibited by the threat of liability. Because contributions to the fund would be proportional to each producer's gross sales, marginal producers could still compete with large manufacturers, and free competition would remain as the mainstay of the American economy. MDIC would allocate liability more equitably than would the market share doctrine because manufacturers of all states (rather than just California) would contribute to the payment of claims. The fund's cost would become a business expense imposed concurrently with the manufacture of a product; consequently all producers would bear responsibility for injuries caused by their products, even those occurring after bankruptcy.

MDIC offers advantages to consumers as well as to producers. Under this plan, recovery for injuries or losses would be allocated among plaintiffs in all fifty states. In addition, a plaintiff could collect compensation for her injuries regardless of whether the producer at fault is currently solvent. The absence of a manufacturer identification requirement128 would allow recovery for plaintiffs who previously were unjustly denied compensation for their injuries or losses because of their inability to match the injury-causing product with a producer. Under MDIC, product safety and quality standards would be policed by federal administrators. Such supervision and the threat of lost sales or a rate increase would deter negligent production practices.

MDIC would include all manufacturers and would not discrimi-

126. "Joint control of the risk" is a requirement which must be met for recovery to be allowed under the industry-wide liability theory. See notes 33-35 & accompanying text supra.

127. Identification of American-made products would allow administrators to impose liability only for those products produced by American manufacturers. Thus, American producers would not be responsible for losses or injuries associated with products manufactured outside of the United States.

128. For the foreign-country exception to the elimination of the manufacturer identification requirement, see note 127 & accompanying text supra.
nate against certain industries. It would allocate liability fairly and distribute recovery evenly. The MDIC system for compensation would not sacrifice deterrence as a control on product safety.

VII. CONCLUSION

The market share doctrine is an attempt to resolve equitably the question of intra-industry joint liability. Although market share liability is not the appropriate solution, the California Supreme Court’s decision in Sindell is instructive. Several unsettling questions raised by the appellate court in Sindell were answered by the supreme court. First, it reaffirmed the Hall "joint control of risk" requirement for industry-wide liability. Second, it held that alternative liability could not be asserted in DES cases. Some queries, such as the due process ramifications of market share liability, remain unresolved and may require consideration by the United States Supreme Court.129

Sindell will affect manufacturers throughout the country. Any producer dealing in interstate commerce can reasonably expect that, at some point, its product will reach California.130 It is difficult to predict fully the effect on products liability law; however, Sindell certainly is a landmark in the struggle to solve the producer identification problem.

Legislatures should aid the courts in adapting traditional tort doctrines to modern technology. Minor changes in the present system will aid plaintiffs and judges today, but major alterations are imperative for the future. In this regard, MDIC may be a viable alternative solution to the problem of intra-industry joint liability. Legislative changes in the future will not assist the courts in making today's decisions concerning the producer identification problem in products liability cases. However, Sindell may encourage the search for more equitable solutions to the problem of intra-industry joint liability.

Barbara J. Koperski '81


130. Kroll, supra note 7, at 197.