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Market Share Liability: A Current Assessment of a Decade-Old Doctrine

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I. INTRODUCTION

Ten years ago, in *Sindell v. Abbott Laboratories*,¹ the California Supreme Court created market share liability as a remedy for plaintiffs who had suffered injuries from prenatal exposure to diethylstilbestrol (DES), but were unable to identify the specific manufacturer of the drug. The court fashioned the remedy because the available tort theories at the time—enterprise liability, alternate liability, and concert of action—were inadequate remedies for DES plaintiffs.² The court's motivation was compensatory: redress innocent plaintiffs' injuries at the expense of collectively negligent defendants.³ Because of the victims' inability to show actual causation, the new doctrine sought to approximate a manufacturer's portion of liability for the actual injury suffered by a DES victim. *Sindell* apportioned the defendants' damages, therefore, based on their respective share of the relevant market from which the plaintiff's mother most likely had purchased the drug.⁴

Several problems with the *Sindell* opinion,⁵ however, took years of litigation to resolve and caused other jurisdictions to reject *Sindell* in favor of their own market-based collective liability regimes.⁶ Only five states other than California have adopted some version of market share liability, and each contains drawbacks.⁷ Virtually no state has applied market share liability to other areas of tort law mainly because the circumstances surrounding DES have resurfaced in few other products.⁸ Despite several calls for reform, no legislature has addressed directly any alternative solution to the problems posed by DES, which leaves to the courts the burden of compensation.⁹

In 1989 the highest courts of New York and New Jersey revisited market share liability in the DES context and for recovery for vaccine-

1. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

2. *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

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

4. *Id.* at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

5. The court failed to define what constitutes a substantial share of the market. Additionally, the decision failed to explain whether courts should use a local or national market to determine market shares and whether defendants were jointly and severally liable. *Id.* at 612-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46; see *infra* notes 48, 56-58 and accompanying text.

6. See *infra* notes 78-79, 112 and accompanying text.

7. See *infra* note 132; see also *infra* subpart VI(A). Despite its shortcomings, however, market share liability remains the only remedy for DES victims who cannot link their injuries to a specific DES manufacturer.

8. See *infra* Part V.

9. See *infra* note 333.

related injuries. *Hymowitz v. Eli Lilly & Co.*¹⁰ allowed a market share cause of action for New York DES victims and instituted an innovative variation of the original *Sindell* doctrine. *Shackil v. Lederle Laboratories*¹¹ rejected market share liability for vaccine victims and endorsed the National Childhood Vaccine Injury Act¹² as the most appropriate solution to the vaccine problem. Together, these two cases illustrate the continued vitality of market share liability in DES cases and the consistent rejection of the doctrine elsewhere in the torts system.

Part II of this Note provides a brief overview of DES. Part III discusses the creation of market share liability in California. Part IV tracks the development of the doctrine in other jurisdictions within the context of DES litigation. Part V reviews the application of market share liability to other products liability cases. Part VI presents *Hymowitz* and analyzes the New York court's contribution to market share liability jurisprudence. Part VI also analyzes *Shackil* and the application of market share liability to vaccine injuries. Finally, Part VII reviews the problems posed by market share liability and proposes a legislative solution modeled after the National Childhood Vaccine Injury Act. This Note concludes that market share liability is an appropriate solution to the situation presented by DES; indeed, it is the only solution. The inherent limitations of the doctrine, however, and the burden it imposes on judicial resources suggest that the legislature can handle best the undertaking for which market share liability was designed and the required balance between compensation and societal concerns.

II. DES BACKGROUND

DES is a synthetic estrogen discovered by a group of British scientists in the 1930s.¹³ In 1947 the Federal Drug Administration (FDA) approved DES for use in preventing morning sickness and miscarriages.¹⁴ DES never was patented and consists of a generic chemical compound.¹⁵ Hence, during the twenty-four years that DES remained on the market, approximately three hundred different companies manufactured and distributed the drug according to its generic formula, and

10. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989).

11. 116 N.J. 155, 561 A.2d 511 (1989). For a discussion of *Hymowitz*, see *infra* subpart VI(A). For a discussion of *Shackil*, see *infra* subpart VI(B).

12. 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988).

13. *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 9, 527 N.E.2d 333, 338 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

14. 173 Ill. App. 3d at 10, 527 N.E.2d at 338.

15. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 587, 689 P.2d 368, 373 (1984).

many of these companies marketed DES generically.¹⁶ The FDA prohibited use of DES for pregnancy-related complications in 1971, but by this time about three million pregnant women already had taken the drug.¹⁷

DES injuries generally have been limited to women whose mothers used DES during pregnancy.¹⁸ These victims typically suffer from adenocarcinoma—cancer of the vagina, cervix, or uterus.¹⁹ Because the latency period of adenocarcinoma is ten to twenty years,²⁰ by the time a plaintiff had become aware of her injuries, physicians, pharmacies, and manufacturers had discarded most of their records.²¹ This lack of records, combined with the number of DES manufacturers, the generic appearance of the drug, and the latency period between exposure and injury, made the plaintiff's duty of identifying the culpable manufacturer virtually impossible.²² DES victims, therefore, were unable to allege the requisite elements of a traditional tort claim and were forced to bear their injuries without a remedy.²³

III. THE DEVELOPMENT OF MARKET SHARE LIABILITY IN CALIFORNIA

A. *Sindell v. Abbott Laboratories*

At the time that Judith Sindell filed suit against Abbott Laboratories and ten other drug companies, only two DES plaintiffs had reached

16. *Smith*, 173 Ill. App. 3d at 11, 527 N.E.2d at 339.

17. See Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 964-66 & n.6 (1978). Containing a thorough discussion on the historical development of DES, this Comment was the first law review article advocating the use of a market share formula and served as a catalyst for the *Sindell* decision. For another review of the history of DES, see Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 *CALIF. L. REV.* 941, 943-45 (1985).

18. See Case Comment, *Refining Market Share Liability: Sindell v. Abbott Laboratories*, 33 *STAN. L. REV.* 937, 937 & n.3 (1981) (stating that although DES has been linked to genital tract injuries in both sexes, women between the ages of 14 and 23 are the most frequent victims).

19. See Comment, *supra* note 17, at 965 & nn.6-10 (stating that epidemiological studies have linked prenatal exposure to DES with the presence of rare forms of cancer of the vagina and that as many as 3 million women may have taken DES for use during pregnancy).

20. *Smith*, 173 Ill. App. 3d at 11 n.8, 527 N.E.2d at 339 n.8 (citing Biebel, *DES Litigation and the Problem of Causation*, 51 *INS. COUNS. J.* 223, 227 (1984)).

21. See *id.* at 11, 527 N.E.2d at 339.

22. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 600-01, 607 P.2d 924, 930, 163 Cal. Rptr. 132, 139, *cert. denied*, 449 U.S. 912 (1980). Paradoxically, courts created market share liability because of the unique facts surrounding DES. Yet the very uniqueness of these facts has limited the doctrine considerably. Because similarly unique facts have yet to surface in products liability law, the doctrine lies dormant outside the DES context. See *infra* Part V.

23. See Case Comment, *supra* note 18, at 937 & n.1 (stating that "[u]nder traditional tort law, plaintiffs are required to match the cause of their harms to a particular defendant"). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 41 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; Wright, *Causation in Tort Law*, 73 *CALIF. L. REV.* 1737 (1985).

the merits of their claims successfully.²⁴ The remaining judgments favored defendants, and many of these dispositions were made on pretrial motions.²⁵ Plaintiffs in these cases could not overcome one of the fundamental elements of causation: proving that their injuries were the result of the defendants' acts.²⁶ The dilemma of identifying the manufacturer of the drug her mother used also confronted Judith Sindell. She presented three main arguments based on existing tort doctrines, and all three were rejected.²⁷

Sindell first sought recovery under the theory of alternate liability, which she based on *Summers v. Tice*.²⁸ *Summers* held that when two or more defendants breach a duty to the plaintiff, but the plaintiff cannot show which defendant actually caused the injury, the burden of proof shifts to the defendants to prove their innocence.²⁹ The court in *Sindell*, however, refused to apply the *Summers* holding for two reasons. First, the drug manufacturers were in no better position than the plaintiff to identify the producer of the DES taken by the plaintiff's mother.³⁰ Second, having two hundred to three hundred possibly culpable defendants made it very difficult, if not impossible, to determine whether any of the defendants before the court actually harmed the plaintiff.³¹ By contrast, *Summers* joined both of the two possible defendants, creating a fifty percent chance that either one of them caused the plaintiff's injury.³²

Sindell's second theory was based on concerted action between the drug manufacturers. Concert of action allows joint and several recovery

24. *Sindell*, 26 Cal. 3d at 594, 597 & n.7, 607 P.2d at 925, 927 & n.7, 163 Cal. Rptr. at 133, 135 & n.7. At the time of *Sindell*, the two exceptions were *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (allowing plaintiff to proceed under a concerted action theory), and *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984) (allowing the plaintiff to proceed under alternate liability). For a discussion of *Bichler*, see *infra* note 215. For a discussion of *Abel*, see *infra* notes 125-31 and accompanying text.

25. See Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 719 & n.23 (1982) (citing several cases that granted dismissals or summary judgments).

26. See *supra* note 23. See generally Note, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, 69 CALIF. L. REV. 1179 (1981).

27. *Sindell*, 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

28. 33 Cal. 2d 80, 199 P.2d 1 (1948).

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

30. *Sindell*, 26 Cal. 3d at 602, 607 P.2d at 930, 163 Cal. Rptr. at 138. Part of the *Summers* rationale of shifting the burden to the defendants is that the defendants are in a better position than the plaintiffs to identify the actual wrongdoer.

31. *Id.* at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.

32. *Id.* at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139. In *Summers* a bullet negligently fired by one of two hunters injured the plaintiff. The plaintiff was unable to prove, however, which hunter fired the shot causing the injury. Both defendants were negligent, but only one actually caused the plaintiff's harm. Nevertheless, the court held both defendants jointly and severally liable and shifted to the defendants the burden of apportioning damages. See *Summers*, 33 Cal. 2d at 80, 199 P.2d at 1.

from all defendants expressly or tacitly committing a tortious act with a common plan or design.³³ Sindell argued that the defendants failed to test DES adequately and to provide sufficient warnings about the drug's dangers. She argued also that the manufacturers acted in concert because they produced DES from a common formula.³⁴ The court rejected this argument, finding that the defendants had no tacit understanding or common plan to omit tests and warnings.³⁵ At most, the defendants may have acted in parallel to one another regarding testing and marketing, but such parallel action was standard practice in the industry.³⁶ The court feared that allowing a concert of action claim in Judith Sindell's case would expand liability beyond the doctrine's intended scope and could result in holding a defendant liable for the defective products of an entire industry.³⁷

Finally, the court considered Sindell's enterprise liability argument. Enterprise liability rests on the defendant's adherence to an industry-wide safety standard and cooperation in the manufacture or design of a defective product.³⁸ Under this theory, defendants jointly control the risk; a showing that one of the manufacturers made the defective product shifts the burden of proof to all of the defendants.³⁹ After noting that enterprise liability was recommended for industries consisting of small numbers of defendants, the court in *Sindell* rejected the theory because of the large number of DES manufacturers, the absence of any delegation of duty to a trade association, and the drug industry requirement of FDA approval.⁴⁰

Having exhausted the existing remedies,⁴¹ the court created market

33. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 506, 539 N.E.2d 1069, 1074, 541 N.Y.S.2d 941, 946, *cert. denied*, 110 S. Ct. 350 (1989); PROSSER & KEETON, *supra* note 23, § 52, at 346 (stating that when "two or more persons act in concert, it is well settled . . . that each will be liable for the entire result"). The classic example of concerted action is a drag race in which two drivers act with the same plan or design that results in an injury. Both drivers would be held jointly and severally liable for the injury. PROSSER & KEETON, *supra* note 23, § 46, at 322-24.

34. *Sindell*, 26 Cal. 3d at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.

35. *Id.*

36. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

37. *Id.*

38. See *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 376-78 (E.D.N.Y. 1972). In *Hall* blasting caps injured 13 children in 10 different states, and the court held one manufacturer jointly and severally liable for the negligence of the entire industry. The negligence stemmed from the industry standard of failing to place a warning on the blasting caps. See *id.* at 378; see also PROSSER & KEETON, *supra* note 23, § 72 (discussing joint enterprises).

39. *Sindell*, 26 Cal. 3d at 608, 607 P.2d at 934, 163 Cal. Rptr. at 142.

40. *Id.* at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 144. The court in *Hall* recommended limiting enterprise liability to industries with few manufacturers. *Hall*, 345 F. Supp. at 378.

41. See *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court noted that either confining the plaintiff to *Summers* or *Hall* or requiring the plaintiff to show concert of action would have forced the dismissal of the lawsuit.

share liability based on a modification of *Summers v. Tice* alternate liability.⁴² The court partly relied on the flexibility of the common-law torts system to accommodate new causes of action in compelling cases like those presented by DES.⁴³ The court noted also that one of the comments in the *Restatement (Second) of Torts* provides for modification of the *Summers* rule.⁴⁴ Most important, however, the court reiterated the compensation-oriented philosophy of *Summers*: between negligent defendants and an innocent plaintiff, the former should carry the cost of the injury.⁴⁵ An undiluted *Summers* rationale was inadequate, however, because the court could not ascertain with reasonable certainty that any of the defendants before the court actually were culpable. By apportioning liability solely between the joined defendants, a significant chance existed that the culpable manufacturer would escape liability.⁴⁶ Thus, the court allocated liability according to the percentage of DES sold by each defendant for pregnancy-related uses in relation to the entire production of the drug sold by all defendants for this purpose.⁴⁷ The court required the plaintiff to join a "substantial share"

42. *Id.* at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. The court found that when defendants produced an identical drug and plaintiffs, through no fault of their own, could not identify the particular defendant, a modification of *Summers* was warranted.

43. Citing Justice Roger Traynor's opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467-68, 150 P.2d 436 (1944), the court stated that "in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances." *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

44. *Sindell*, 26 Cal. 2d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citing RESTATEMENT (SECOND) OF TORTS § 433B comment h (1977)). The comment states that it "is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is or cannot be joined as a defendant, or because of the effect of lapse of time." RESTATEMENT (SECOND) OF TORTS, *supra*, § 433B comment h.

45. *Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court stated that the "most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." *Id.* From an economic standpoint this argument is sound because the most efficient cost bearer, the manufacturer, bears the risk. See Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

46. See *supra* notes 31-32 and accompanying text. *Summers* was devised to place the burden of disproving causation on a small group of defendants. The smaller the group, the greater the chance that one of the defendants actually caused the harm. In *Sindell* only 5 defendants were joined out of a possible 200 to 300. Thus, the court found little mathematical certainty that any defendant in the action actually harmed the plaintiff and a strong likelihood that the culpable manufacturer would escape liability. See *Sindell*, 26 Cal. 3d at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. For a discussion of alternate liability within the DES context, see Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1630-35 (1981); Robinson, *supra* note 25, at 724-25; Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 671-72 (1981).

47. *Sindell*, 26 Cal. 3d at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court used each

of DES manufacturers before it would shift the burden to the defendants to prove affirmatively that they did not make the product that injured the particular plaintiff.⁴⁸

The court supported its theory on several grounds. First, requiring the plaintiff to join a substantial share of manufacturers diminishes the injustice of shifting the burden to the defendants by accounting for more of the market and increasing the likelihood of joining the responsible manufacturer.⁴⁹ The court reasoned also that allowing defendants both to exculpate themselves and to join other possibly negligent defendants further refines causal responsibility.⁵⁰ The court concluded that its approach would allocate liability in approximation to the harm caused by the product if the plaintiff had been able to identify the defendant.⁵¹ Thus, the court attempted to link liability with culpability, while dispensing with the insurmountable identification requirement. Admittedly, this approach satisfies causation with approximations rather than the theoretical certainty that causation normally requires.⁵² The court noted, however, that juries always have faced difficulty in apportioning damages under comparative negligence and partial indemnity schemes.⁵³ The court's rationale again came from *Summers*: if a jury cannot apportion liability with exactitude, it simply must do the best it can.⁵⁴

Although theoretically innovative, the *Sindell* approach contains several practical shortcomings. The court neglected to explain fully the

defendant's share of the market to apportion damages. *Id.* To overcome the identification problem, the court eliminated the requirement of individual causation. *Sindell*, however, did not change the standard of proof that a plaintiff must satisfy to recover. Robinson, *supra* note 25, at 727. A plaintiff still must show that the defendant's product was defective and that the plaintiff's injuries proximately resulted therefrom. Thus, only the identification element is relaxed. *Id.* at 727-28.

48. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court designed the substantial share requirement to minimize the injustice of shifting the burden of proof to the defendants by ensuring that an adequate representation of the market was before the court. The court never defined the required percentage precisely, but stated that it is less than 75 to 80%. *See id.* One commentator has suggested that the court meant substantially more than 50% of the market. *See* Robinson, *supra* note 25, at 725 n.53.

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

50. *See id.*

51. *Id.*

52. *See id.* The court noted that some discrepancy between a defendant's market share and liability is inevitable and that some defendants may have to pay more than their actual share of the market. The court concluded, however, that juries always have faced difficulty in apportioning damages under comparative negligence and partial indemnity schemes and that any discrepancies do not "seriously militate against the rule" adopted by the court. *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.

53. *Id.*

54. The court stated that when "a correct division of liability cannot be made, 'the trier of fact may make it the best it can.'" *Id.* (quoting *Summers v. Tice*, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948)).

requirement of joining a "substantial share" of the market.⁵⁵ The court merely dismissed the issue of market definition as a matter of proof,⁵⁶ which has engendered substantial debate.⁵⁷ The biggest unanswered question of the *Sindell* decision, however, was whether the defendants would be held jointly and severally liable. *Sindell* ignored this issue, which remained unresolved until *Brown v. Superior Court*.⁵⁸

B. *Brown v. Superior Court*

Brown, rendered seven years after market share liability was introduced in *Sindell*, finally resolved whether courts following *Sindell* should hold defendants jointly or severally liable.⁵⁹ *Brown* held that DES manufacturers in market share liability would be held severally liable only.⁶⁰ As the court noted, the two forms of liability yield substantially different results. A holding of joint liability assures plaintiffs a one hundred percent recovery from any one of the solvent defendants joined by a plaintiff under the substantial share requirement.⁶¹ The court determined that this approach saddled defendants with the burden of paying more than their market share in the event that any one or more of the defendants before the court were insolvent, or that a potential defendant was not joined in the action.⁶² In contrast, the sev-

55. See *supra* note 48 and accompanying text.

56. *Sindell*, 26 Cal. 3d at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46. The court provided: "We are 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." *Id.* (footnote omitted).

57. See, e.g., Fischer, *supra* note 46, at 1642-45; Schwartz & Mahshigian, *supra* note 17, at 956-60; Note, *supra* note 26, at 1189-93; Comment, *The Market Share Theory: Sindell's Contribution to Industry-Wide Liability*, 19 Hous. L. Rev. 107, 128-32 (1981).

58. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). If *Sindell* expressly had resolved the joint liability problem, more courts might have adopted the *Sindell* model.

59. *Brown* was a complex litigation action involving approximately 70 plaintiffs who had been exposed prenatally to DES. The plaintiffs brought action under the theories of strict liability, breach of express and implied warranty, fraud, and negligence. *Brown*, 44 Cal. 3d at 1055, 751 P.2d at 473, 245 Cal. Rptr. at 414-15.

For a general discussion of joint and several liability, see PROSSER & KEETON, *supra* note 23, § 47, at 327-28 (providing that "[w]hen joinder is permitted, it is not compelled, and each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it," and that "[s]ince each is severally liable, a verdict in favor of one will not discharge the others").

60. *Brown*, 44 Cal. 3d at 1075, 751 P.2d at 486-87, 245 Cal. Rptr. at 428. The court held also that DES manufacturers were not strictly liable for design defects, that market share liability cannot be used with fraud or breach of warranty claims, that comment k of the *Restatement (Second) of Torts* applies to all prescription drugs not simply to those that are found to be "unavoidably dangerous," and that a manufacturer's standard of knowledge for failure to warn of danger is what was known or should have been known at the time the drug was distributed. *Id.* at 1061-72, 751 P.2d at 477-84, 245 Cal. Rptr. at 418-26.

61. *Id.* at 1072, 751 P.2d at 485, 245 Cal. Rptr. at 426.

62. *Id.* at 1075, 751 P.2d at 486-87, 245 Cal. Rptr. at 428.

eral liability approach apportions damages in a pro rata fashion according to each defendant's market share.⁶³ Thus, the percentage of the plaintiff's award is limited to the actual market share represented by the defendants joined in the action. Under this approach the plaintiff, rather than the defendant, bears the financial burden if any of the joined defendants are insolvent or if a potentially liable defendant was not joined at all.⁶⁴

The court in *Brown* found that even though *Sindell* did not address joint and several liability directly, it contained support for both plaintiffs' and defendants' arguments.⁶⁵ In response to the plaintiffs' assertions, the court found that *Sindell's* failure to discuss this point did not imply a holding in favor of joint and several liability.⁶⁶ The court equally was unpersuaded that the theory of market share liability required a finding of joint and several liability and that without this finding a defendant would have no incentive to join other defendants.⁶⁷

The court based its holding of several liability on the policy reasons for market share liability. The court characterized market share liability as a compromise that allows a plaintiff to proceed with an action without showing specific causation at the expense of holding some innocent defendants liable.⁶⁸ The court, however, was concerned about burdening defendants with excessive liability.⁶⁹

The court explained that market share liability's objective is to approximate reasonably the defendant's portion of the plaintiff's injuries by bringing to court a substantial number of DES manufacturers and

63. *Id.*

64. *Id.* at 1072-73, 751 P.2d at 485, 245 Cal. Rptr. at 426. The question of allocating this financial burden bears directly on the apportionment of damages and the amount of plaintiff's award because, as the *Sindell* court noted, that all of the manufacturers in the relevant market could be brought to court is unlikely. *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The *Brown* court noted that the plaintiff would recover an entire judgment only "in the unlikely event that all manufacturers were [solvent and] joined in the action." *Brown*, 44 Cal. 3d at 1072, 751 P.2d at 485, 245 Cal. Rptr. at 426.

65. *Brown*, 44 Cal. 3d at 1072-75, 751 P.2d at 485-87, 245 Cal. Rptr. at 426-28; see Case Comment, *supra* note 18, at 941-42 (analyzing the two possible interpretations of *Sindell*).

66. *Brown*, 44 Cal. 3d at 1073, 751 P.2d at 485, 245 Cal. Rptr. at 427. The court stated that "[t]he question of joint liability was not considered in *Sindell*, and this omission should not be read as an implied holding in favor of such a rule." *Id.*

67. *Id.* at 1074, 751 P.2d at 486, 245 Cal. Rptr. at 427. The court enunciated three reasons why a defendant would be inclined to join other defendants despite a holding of several liability:

[A] defendant might desire to show that another producer made the DES that caused the injury; the presence in the action of additional defendants might assist in providing a more complete picture of the relevant market, thereby possibly diluting a defendant's ultimate liability; or the addition of another defendant could assist with the burden of defending the action.

Id.

68. *See id.*

69. *See id.* at 1075, 751 P.2d at 486, 245 Cal. Rptr. at 428.

requiring them to prove that they did not harm the plaintiff.⁷⁰ To comply with this objective the court must try to avoid holding defendants liable for injuries caused by another manufacturer's product and must try to ascribe liability according to the market instead of the small group of defendants joined in the action.⁷¹ A holding of joint liability, however, contradicts market share liability because a financially sound defendant could be required to pay a plaintiff's entire judgment, an amount wholly irrelevant to its percentage of the market.⁷² Finally, *Brown* rejected the plaintiff's suggestion that the court should inflate a defendant's liability in proportion to its market share to allow full recovery.⁷³ This novel approach, the court reasoned, also was inconsistent with the objective of closely approximating defendant's liability.⁷⁴

IV. OTHER APPROACHES

A. Market Share Alternate Liability

1. *Martin v. Abbott Laboratories*⁷⁵

In 1984 the Washington Supreme Court in *Martin v. Abbott Laboratories* followed *Sindell's* initiative and allowed a DES cause of action for plaintiffs who could not identify the specific negligent manufacturer.⁷⁶ The court in *Martin*, however, expressly rejected *Sindell's* approach and created its own solution entitled "market share alternate liability."⁷⁷ Although agreeing that *Sindell* introduced an attractive concept,⁷⁸ the court in *Martin* found that the framework in *Sindell* in-

70. *Id.*

71. *See id.*

72. *See Fischer, supra note 46, at 1646* (explaining the "inherent distortion" of joint and several liability). Joint liability would apportion damages according to a defendant's solvency rather than its approximate responsibility for the plaintiff's injuries. The court's finding of several liability is consistent with the views of some commentators. *See, e.g., Schwartz & Mahshagian, supra note 17, at 957; Note, supra note 26, at 1194; Note, supra note 46, at 673; Comment, supra note 57, at 131-32.*

73. *Brown, 44 Cal. 3d at 1075, 751 P.2d at 487, 245 Cal. Rptr. at 428.*

74. The court stated that although inflating a defendant's damages was not as severe as joint and several liability, it was still a retreat from the objective of achieving the closest approximation of a defendant's liability based on the amount of DES produced. *Id.*

75. 102 Wash. 2d 581, 689 P.2d 368 (1984).

76. *Id.* For a general overview of *Martin*, see Comment, *Into the Quagmire: Washington Adopts Market Share Liability in DES Cases*, 21 GONZAGA L. REV. 199 (1985).

77. *Martin*, 102 Wash. 2d at 602, 689 P.2d at 381. Aptly named, market share alternate liability, like *Summers*, joins a certain group of defendants, but the system ultimately attempts to apportion damages according to market share and, thus, is a hybrid of *Summers* and *Sindell*.

78. *Id.* at 601, 689 P.2d at 380; *see also* Comment, *supra note 76, at 226.* Like *Sindell, Martin* rejected concert of action, enterprise, and the unmodified version of alternate liability and found support for creating a new remedy in the *Summers* rationale of placing the burden of the injury on defendants. *Martin*, 102 Wash. 2d at 591-601, 689 P.2d at 375-80.

The court also found support in comment h of the *Restatement (Second) of Torts* § 433B(3),

herently distorted liability by conferring joint and several liability on the defendants.⁷⁹ This finding in *Martin* highlights the gravity of *Sindell's* failure to address joint and several liability and to define what constitutes a substantial share of the market because the relative distortion in the defendant's liability depends on the percentage of the market that is joined in the case.⁸⁰

Martin devised its own solution to the DES dilemma. First, in contrast to the substantial share requirement, the court held that a plaintiff only need commence suit against one defendant.⁸¹ Defendants can exculpate themselves from liability by showing by a preponderance of the evidence that their products did not reach the plaintiff.⁸² The remaining defendants form the plaintiff's DES market and are presumed to have equal shares unless a defendant can prove by a preponderance of the evidence that its share of the market was less than its presumptive share.⁸³ If a defendant can make this showing, its presumptive share is reduced accordingly.⁸⁴ The defendants unable to prove their share of the market must increase their liability to account for one hundred percent of the market.⁸⁵ If each defendant can carry the burden of proving its share and the resulting market is less than one hundred percent, the plaintiff's judgment is reduced accordingly.⁸⁶ Only under this

which states that "[t]he [alternate liability] rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it." *Id.* at 604, 689 P.2d at 382.

79. *Martin*, 102 Wash. 2d at 601-02, 689 P.2d at 380-81; see also *supra* text accompanying note 72. The *Brown* decision showed that the court's concern about the possibility of *Sindell* providing for joint and several liability was unfounded. See *supra* notes 60-67 and accompanying text.

80. See Fischer, *supra* note 46, at 1645-46; Comment, *supra* note 76, at 228.

81. *Martin*, 102 Wash. 2d at 604, 689 P.2d at 382. For a discussion of the remaining elements of a plaintiff's suit, see Comment, *supra* note 76, at 227-29.

82. *Martin*, 102 Wash. 2d at 605, 689 P.2d at 382; cf. *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987). *Parke-Davis* prohibited defendants from attempting to reduce their presumptive share by impleading a defendant that is not amenable to suit and whose share of the market cannot be calculated. 107 Wash. 2d at 596, 733 P.2d at 514. *Parke-Davis* also resolved the issue of defining the relevant market, which was left open by the court in *Martin*. The court in *Parke-Davis* opted to define the market as narrowly as the evidence permits. The court recognized, however, that each case will present a different quantum of evidence. Thus, although the court favored a local market, "other figures, such as distribution figures within the county, state, or even the country may in certain circumstances be introduced." *Id.* at 592, 733 P.2d at 512.

83. *Martin*, 102 Wash. 2d at 605, 689 P.2d at 383.

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

85. *Id.* at 606, 689 P.2d at 383. This requirement is similar to the liability inflation suggested by the plaintiffs, but rejected by the court, in *Brown*. See *supra* notes 73-74 and accompanying text.

86. See *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383. For the plaintiff to receive less than full recovery, each defendant must prove its market share to avoid paying the pro rata amount. The court noted that the theory enhances liability because, by eliminating individual causation, plaintiffs can recover without having to identify the defendant. According to the court, the approach also limits liability, however, because defendants can dilute responsibility by joining other defendants. *Id.*

unlikely situation will a defendant avoid paying more than its statistical share of the market requires.⁸⁷ Thus, the court in *Martin* overcame its greatest objection to *Sindell*—holding defendants liable for more than their market share—but only if all the defendants meet their burden of proof.⁸⁸

2. Further Application of *Martin*

a. *Massachusetts*

The modified alternate liability theory devised by the Supreme Court of Washington in *Martin* has received the most widespread acceptance of any solution to the DES problem.⁸⁹ In 1985 the United States District Court in Massachusetts adopted the *Martin* approach verbatim in *McCormack v. Abbott Laboratories*.⁹⁰ The district court concluded that of the then existing options, the framework in *Martin* was most consistent with the concerns set forth by the Massachusetts Supreme Court in *Payton v. Abbott Laboratories*.⁹¹ Agreeing that some relaxation of causation may be warranted under the right set of facts, the court still was convinced that a joint recovery method was excessive because it holds defendants liable for more than their market share.⁹² Additionally, the court favored a system that allowed defendants to exculpate themselves to limit liability in cases with insolvent defendants.⁹³ The court concluded that the *Martin* approach best facilitated the goal of holding defendants liable according to their negligence, while still providing plaintiffs with a method to overcome the identification obstacle.⁹⁴

87. That all defendants could carry their burden of going forward with the market information is unlikely because of the lack of adequate records.

88. Although the court avoided what it perceived to be outright joint liability in *Sindell*, it still provided for inflation of damages if defendants cannot rebut the presumption of its pro rata share of the market. Thus, some defendants quite possibly will bear a greater percentage of the plaintiff's award than their market shares represent.

89. Courts in Massachusetts and Florida also have adopted the *Martin* approach. See, e.g., *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *Conley v. Boyle Drug Co.*, No. 67,626 (Fla. Nov. 1, 1990) (LEXIS, States library, Fla. file). Arguably, the only jurisdiction to adopt *Sindell* in a DES case is South Dakota in *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983). One commentator has stated that the South Dakota opinion does not amount to a following because the opinion is brief and was written by a federal district court judge. See Comment, *supra* note 76, at 226.

90. 617 F. Supp. 1521 (D. Mass. 1985).

91. 386 Mass. 540, 573, 437 N.E.2d 171, 189-90 (1982); see *Martin*, 617 F. Supp. at 1526. In *Payton* the Massachusetts Supreme Court declined to adopt market share liability in the DES context, but expressed its views on market share. The court favored a system that would not hold defendants jointly and severally liable and stated that all defendants should be given the opportunity to exculpate themselves to ensure that defendants innocent of wrongdoing to a particular plaintiff would not be held liable. *Payton*, 386 Mass. at 573-74, 437 N.E.2d at 189-90.

92. See *McCormack*, 617 F. Supp. at 1525-27.

93. See *id.*

94. See *id.* at 1526-28.

b. *Florida*

Recently, in *Conley v. Boyle Drug Co.*,⁹⁵ Florida also adopted *Martin's* market share alternate liability theory. The Florida Supreme Court rejected the drug manufacturers' argument that the legislature must initiate such a drastic departure from traditional tort law.⁹⁶ Instead, the court emphasized its continuing duty to modify tort law and maintain a fair system in light of societal and technological change.⁹⁷ The court in *Conley* viewed *Martin* as a starting point only, however, and discussed several modifications proposed by the lower court.⁹⁸

The supreme court rejected the lower court's suggestion that the defendants' geographic market should encompass the entire state of Florida.⁹⁹ Rather, the court chose to define the relevant market as narrowly as the evidence would permit in each case.¹⁰⁰ The court reasoned that the narrowest possible market is most consistent with the theory behind *Martin*.¹⁰¹ The court rejected also the lower court's proposal of

95. No. 67,626 at 1.

96. *See id.* at 20.

97. The court stated: "This court has consistently recognized its 'continuing responsibility to the citizens of this state' to modernize traditional principles of tort law when such becomes necessary 'to ensure that the law remains both fair and realistic as society and technology change.'" *Id.* (quoting *Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447, 451 (Fla. 1984)).

98. *Id.* The Florida Supreme Court addressed the issue of market share liability in response to a 1985 certified question posed by the district court of appeals. The supreme court responded affirmatively to the following inquiry: "Does Florida recognize a cause of action against a defendant for marketing defective DES when the plaintiff admittedly cannot establish that a particular defendant was responsible for the injury?" *Conley v. Boyle Drug Co.*, 477 So. 2d 600, 607-08 (Fla. Dist. Ct. App. 1985); *see also Conley*, No. 67,626, at 2-3.

99. *Conley*, No. 67,626, at 21-22.

100. *Id.* at 21. Thus, depending on the evidence, the relevant market could be a pharmacy, a county, or a state. *Id.* By citing *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987), *see supra* note 82, the court implied that even a national market could be appropriate if required by the evidence. By the same reference, the court also apparently relegated the choice of marketplace to the trial court, which "is in the best position to decide in each case whether the national or regional figures are a good approximation for the relevant geographic market." *Conley*, No. 67,626, at 22 n.12 (quoting *Parke-Davis*, 107 Wash. 2d at 592-93, 733 P.2d at 512).

101. *See Conley*, No. 67,626 at 21-22. The court based its conclusion on two points. First, the court agreed with *Parke-Davis*, *see supra* note 82, that the narrowest possible market facilitates exculpation by defendants able to prove their product was not distributed in that market. Second, the court asserted that a narrow market advances the overall goal of market share liability: imposing liability "only on those drug companies who could have manufactured the DES which caused the plaintiff's injuries." *Conley*, No. 67,626, at 21-22 (citing *Parke-Davis*, 107 Wash. 2d at 592, 733 P.2d at 512); *cf. 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) (advocating use of a national market); *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) (discussing the difficulty experienced by a trial California court with local market and reversion to national market); *infra* note 147; *infra* notes 228-34 and

joint and several liability¹⁰² for essentially the same reasons presented in *Brown v. Superior Court*.¹⁰³

The court in *Conley* accepted the lower court's recommendation that a plaintiff must make a due diligence effort to identify the responsible manufacturer as a prerequisite to recovery.¹⁰⁴ In support of this requirement, the court noted several cases in which DES plaintiffs had identified the specific defendant, thus rendering market share liability unnecessary.¹⁰⁵ Like *Martin*, *Conley* permits defendants to exculpate themselves from liability.¹⁰⁶ Also like *Martin*, defendants unable to exculpate themselves face a rebuttable presumption that they have equal shares of the market.¹⁰⁷ Although defendants can reduce their presumptive shares by impleading third-party defendants, the court will permit impleader only when actual market share statistics are available for the third-party defendants.¹⁰⁸

B. The Wisconsin Approach: Risk Contribution

About the same time that the Washington Supreme Court adopted market share alternate liability, the Wisconsin Supreme Court over-

accompanying text.

102. *Conley*, No. 67,626, at 23. The lower court proposed to hold joined defendants unable to exonerate themselves jointly and severally liable.

103. *See supra* notes 70-72 and accompanying text. The court noted also that Florida permits joint and several liability only in limited circumstances. *Conley*, No. 67,626, at 24-25.

104. *Conley*, No. 67,626, at 26. The court characterized market share liability as a remedy of last resort to be used only when the plaintiff cannot identify the defendant. *Id.* (citing *Celotex Corp. v. Copeland*, 471 So. 2d 533, 537 (Fla. 1985)). For a discussion of applying a due diligence requirement to DES, see Note, *The Application of a Due Diligence Requirement in DES Litigation*, 19 J.L. REFORM 771, 782-83 (1986) (arguing that a due diligence requirement is needed as an incentive for plaintiffs to identify the responsible defendant).

105. *See* cases cited at *Conley*, No. 67,626, at 26-27. The court listed five elements necessary for a market share action:

- 1) that [the plaintiff] has made a reasonable attempt to identify the manufacturer responsible for her injury;
- 2) that [the plaintiff's] mother ingested DES during the pregnancy which resulted in the plaintiff's birth;
- 3) that DES caused the plaintiff's subsequent injuries;
- 4) that the defendant or defendants produced or marketed the type of DES taken by the plaintiff's mother;
- and 5) that the defendant or defendants acted negligently in producing or marketing the DES.

Id. at 28.

106. *Id.* at 29; *see supra* notes 82-87 and accompanying text.

107. *Conley*, No. 67,626, at 29; *see supra* note 83 and accompanying text.

108. *Conley*, No. 67,626, at 30. The court's requirement that defendants who implead third parties bear the burden of proving the actual market shares for impleaded manufacturers is designed to prevent defendants from diluting presumptive shares by joining insolvent or defunct corporations. The court's opinion is unclear, however, about whether a defunct manufacturer can be joined if market share statistics are available for that manufacturer. *Cf. Parke-Davis*, 107 Wash. 2d at 596, 733 P.2d at 514, discussed *supra* note 82 (allowing impleader of defunct manufacturer if a market can be established for that manufacturer).

came the DES identification hurdle with a risk contribution theory.¹⁰⁹ Although *Martin* referred to the risks created by DES manufacturers in its rationale for developing a market share theory, the concept of a risk-based system never was integrated into the approach.¹¹⁰

In *Collins* the Wisconsin Supreme Court found *Sindell* entirely unworkable. The court agreed with the objective¹¹¹ of *Sindell*, but focused on the practical difficulty of applying a theory dependent on a defined, proven market share.¹¹² The court noted that without adequate records and data, the fact finder's task of constructing a market would be almost impossible.¹¹³ The court was skeptical about the possibility of creating a marketplace because the DES market was fluid; manufacturers frequently entered and left, producing little trustworthy data even at the national level.¹¹⁴ Hence, the court decided that a defendant's market share would be only one consideration in the risk equation.¹¹⁵

Under the *Collins* theory, a plaintiff only is required to sue one

109. *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 468 U.S. 826 (1984). Rather than attempt to approximate the actual harm that the defendants caused to the plaintiff, the *Collins* approach is based on the idea that each defendant contributed to the plaintiff's risk of injury by either distributing DES or participating in gaining approval. See Robinson, *supra* note 25, at 737-42 (advocating a risk contribution theory); Wright, *supra* note 23, at 1820 (explaining that with a risk contribution theory damages can be apportioned accurately by multiplying the total amount of a plaintiff's award by a manufacturer's contribution to the aggregate risk, which is measured by its market share of DES).

110. *Martin*, 102 Wash. 2d at 604, 689 P.2d at 382. *Martin* mentions the concept of risk contribution, but ultimately attempts to apportion damages according to the actual harm suffered by each plaintiff. The difference is not crucial to a finding that defendants were negligent, but rather factors into the process of awarding damages. See *infra* note 115. Market share is only one of several factors to be considered by the jury under the *Collins* approach.

111. *Sindell's* objective was to socialize costs and shift the burden of negating causation to defendants. *Sindell*, 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, cert. denied, 449 U.S. 912 (1980).

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

113. *Id.* at 190, 342 N.W.2d at 48. The court stated, "We 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 injuries." *Id.* (citation omitted).

114. *Id.* at 189-90, 342 N.W.2d at 48; cf. *infra* note 229 and accompanying text (stating that California courts have found sufficient evidence available at national level).

115. *Collins*, 116 Wis. 2d at 190, 342 N.W.2d at 49. The court also was concerned about wasting judicial resources by holding a mini-trial to determine market shares. See *id.* In determining a defendant's contribution to plaintiff's risk the court instructed juries to consider:

- (1) whether the defendant tested DES for safety in use during pregnancy, (2) the role that the defendant played in gaining FDA approval of the drug for use during pregnancy, (3) the size of the defendant's market in the relevant area of distribution, (4) whether the defendant took an active or passive role in producing or marketing the drug, (5) whether the defendant issued warnings about the drug's dangers, (6) whether the defendant changed its marketing stance after learning of the drug's dangers, and (7) the steps taken by the defendant to reduce the risk to the public.

Id. at 200, 342 N.W.2d at 53.

defendant.¹¹⁶ The court dismissed as unrealistic the possibility of requiring a defendant to join a reasonable number of potentially liable defendants because of the tremendous number of DES manufacturers.¹¹⁷ Once a plaintiff has established her prima facie case,¹¹⁸ the burden shifts to the defendants to exculpate themselves.¹¹⁹ To be exonerated, a defendant must show that its product did not reach the plaintiff either by proving that it did not produce or market DES during the time of the plaintiff's exposure or by proving that it did not distribute DES in the plaintiff's geographic market.¹²⁰ The court believed that this exemption process would create a group of defendants likely to have caused the plaintiff's injuries by assembling only those that could have contributed to the risk to which the plaintiff was exposed.¹²¹ The jury then apportions damages among the pool of defendants using a comparative negligence scheme.¹²² The court chose a comparative negligence scheme rather than a percentage-of-the-market approach because the court valued consideration of a defendant's overall participation in the production and marketing of DES.¹²³ Among the collective liability theories, the attempt in *Collins* to evaluate completely the defendant's activity makes *Collins* one of the most refined DES remedies.¹²⁴

116. *Id.* at 193, 342 N.W.2d at 50; see also *supra* note 81 and accompanying text. Like *Martin*, *Collins* rejected the *Sindell* requirement of joining a substantial share of the defendants. While requiring the plaintiff to sue only one defendant, the court noted that joining several defendants is in the plaintiff's best interest because the plaintiff has a better chance of showing liability, a better chance of getting a full recovery, and a decreased possibility of having a later suit barred by the statute of limitations. *Collins*, 116 Wis. 2d at 194, 342 N.W.2d at 51. Additionally, defendants can help their own cases by impleading other manufacturers to dilute liability. *Id.*

117. *Collins*, 116 Wis. 2d at 193, 342 N.W.2d at 50.

118. *Id.* at 193-94, 342 N.W.2d at 50. The plaintiff's prima facie case must establish by a preponderance of the evidence that the joined defendant marketed the type of DES ingested by the plaintiff's mother by showing similar color, shape, markings, or size. Further, the plaintiff must show that the defendant was negligent in the design or manufacture of the drug and that plaintiff's injuries proximately resulted from exposure to DES. *Id.* The court also allowed the plaintiff to proceed under a theory of strict liability. *Id.* at 195, 342 N.W.2d at 51.

119. *Id.* at 197-98, 342 N.W.2d at 52.

120. *Id.*

121. *Id.* at 198, 342 N.W.2d at 52.

122. *Id.* at 198-99, 342 N.W.2d at 52-53 (citing Wis. STAT. ANN. § 895.045 (West Supp. 1990)).

123. *Id.* at 199, 342 N.W.2d at 53. The court stated that "the conduct of the parties considered as a whole . . . should control. In other words, once it has been established that each has been negligent, it is then the jury's function to weigh their respective contributions to the result." *Id.* (quoting *Taylor v. Western Casualty & Sur. Co.*, 270 Wis. 408, 411-12, 71 N.W.2d 363, 365 (1955)).

124. *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).

C. Michigan's Method: Alternate Liability

In *Abel v. Eli Lilly & Co.*¹²⁵ the Supreme Court of Michigan applied alternate liability in a DES action. The method employed is similar to that in *Martin*¹²⁶ except that the plaintiff must make a genuine effort to identify the culpable defendant as a prerequisite to relief.¹²⁷ All defendants unable to exculpate themselves from the pool of manufacturers are held jointly and severally liable.¹²⁸ Unlike *Martin*, *Abel* will not allow a defendant to limit its liability solely by proving its market share.¹²⁹ Presumably, damages are allocated on a pro rata basis between the defendants unless a defendant does not have the financial ability to pay.¹³⁰ The court's rationale for allowing the cause of action is similar to the rationale of courts using the market share approach.¹³¹

D. Rejection of Market Share

Against the backdrop of states that have adopted a form of market share or alternate liability,¹³² three state supreme courts expressly have rejected a common-law theory of recovery for plaintiffs in DES cases.¹³³ In *Zafft v. Eli Lilly & Co.*¹³⁴ the Missouri Supreme Court refused to follow the initiative of Michigan, Washington, and Wisconsin.¹³⁵ In-

125. 418 Mich. 311, 343 N.W.2d 164 (1984).

126. See *supra* notes 81-88 and accompanying text (discussing *Martin*).

127. *Abel*, 418 Mich. at 332, 343 N.W.2d at 173.

128. *Id.* at 334, 343 N.W.2d at 174. *Abel* is the only DES solution expressly adopting joint and several liability and requiring a due diligence attempt to locate the culpable defendant as a prerequisite to recovery.

129. See *id.* Because of its joint and several liability holding and the requirement of exhausting identification efforts, *Abel* closely resembles *Summers*. *Abel* does not set forth how many defendants must be brought to trial.

130. The *Abel* regime does not account for a defendant's share of the market in apportioning liability.

131. The *Abel* court rationalized its decision on the bases of socialization of cost, fairness to innocent plaintiffs, and shifting the burden of exculpation to defendants. *Abel*, 418 Mich. at 325-29, 343 N.W.2d at 170-72; see also *supra* notes 44-45 and accompanying text.

132. Before 1989 only four state supreme courts had adopted some form of collective liability to deal with the DES dilemma: Washington, California, Michigan, and Wisconsin. The *Conley* decision in Florida, see *supra* notes 95-108 and accompanying text, and the *Hymowitz* decision in New York, see *infra* subpart VI(A), increased the total to six.

133. The majority of state supreme courts have not taken a position on market share liability, but some federal district courts have rejected the market share doctrine under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See *Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1018 (D.S.C. 1981); see also Schwartz & Mahshigian, *supra* note 17, at 965 & n.120 and cases cited therein.

134. 676 S.W.2d 241 (Mo. 1984) (en banc). For a more thorough discussion of this case, see Casenote, *DES Recovery in Missouri: Confined by Traditional Tort Principles*, 53 UMKC L. Rev. 692 (1985).

135. See *Abel*, 418 Mich. at 311, 343 N.W.2d at 164; *Martin*, 102 Wash. 2d at 581, 689 P.2d at 368; *Collins*, 116 Wis. 2d at 166, 342 N.W.2d at 37.

stead, the court adhered to the traditional tort law requirement of identifying the source of the harm.¹³⁶ Characterizing the case as a public policy decision,¹³⁷ the court implied that any relaxation of causation requirements should come from the legislature.¹³⁸

The Iowa Supreme Court in *Mulcahy v. Eli Lilly & Co.*¹³⁹ also refused to adopt a market share or alternate liability theory of recovery in response to a certified question posed by the district court.¹⁴⁰ Like the Missouri court in *Zafft*, the court cited broad policy reasons for its decision.¹⁴¹ The court noted that DES cases are appealing claims for relief, but concluded that the legislature was the appropriate body to address the "social engineering" inherent in burdening a defendant that has not been identified as the plaintiff's wrongdoer simply to aid an innocent plaintiff.¹⁴²

In the recent decision of *Smith v. Eli Lilly & Co.*¹⁴³ the Illinois Supreme Court also rejected market share liability. *Smith* is perhaps the biggest setback for DES victims because it reversed a 1988 lower court decision¹⁴⁴ permitting a market share cause of action based on *Martin*.¹⁴⁵ The court in *Smith* simply concluded that, regardless of the model used, market share liability is a flawed concept.¹⁴⁶

136. *Zafft*, 676 S.W.2d at 246-47. The court acknowledged the unique facts of DES cases, but stated that placing the cost burden on the defendants simply because they can afford it "substantially alters the existing rights and liabilities of the litigants." *Id.* at 247. Additionally, the court emphasized the "fundamental . . . concept of tort law . . . that a plaintiff prove . . . some nexus between wrongdoing and injury." *Id.*; see also *supra* note 23 and accompanying text.

137. *Zafft*, 676 S.W.2d at 247. The court showed concern over discouraging research and development by pharmaceutical corporations. See generally Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 Nw. U.L. Rev. 300 (1981).

138. See *Zafft*, 676 S.W.2d at 247; see also Casenote, *supra* note 134, at 701 (stating that the need to confine further growth of tort liability and Missouri's failure to adopt *Summers* possibly influenced the court's reluctance to adopt market share liability).

139. 386 N.W.2d 67 (Iowa 1986).

140. *Id.* at 70. The district court posed the questions as follows: In a DES liability case when a plaintiff cannot identify the manufacturer of the product after substantial effort and through no fault of her own, will Iowa law recognize market share, alternate, or enterprise liability? If so, what must a plaintiff prove to prevail? How may a defendant exculpate itself from liability? The Iowa Supreme Court also rejected enterprise liability as a viable solution. *Id.* at 70-72.

141. See *id.* at 76. The court identified three reasons: Concern about shifting the burden of proof to the defendant without identification, the burdensome procedures governing the shift, and the problem of allocating damages.

142. *Id.* The court stated that the departure from traditional tort law required to hold liable a potentially innocent defendant lies "more appropriately within the legislative domain." *Id.*

143. 137 Ill. 2d 222, 560 N.E.2d 324 (1990). The decision contains a thorough discussion of the development and current state of market share liability.

144. 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988).

145. For a discussion of *Martin*, see *supra* notes 75-88 and accompanying text.

146. *Smith*, 560 N.E.2d at 337 (stating that the jurisdictions which have adopted market share liability have criticized and rejected "in whole or in part the theory as developed in the other

The first of the court's extensive criticisms focused on the unavailability of reliable market information. The court pointed out that the dearth of information presents trial courts with great difficulty in formulating market shares,¹⁴⁷ prevents apportionment of damages based on a manufacturer's actual market percentage,¹⁴⁸ and results in arbitrary variations in plaintiffs' awards.¹⁴⁹ The court also expressed concern that market share liability would levy a tremendous burden on the judiciary and could result in better treatment for plaintiffs who are unable to determine which manufacturer caused their harm than for those plaintiffs who actually can identify the negligent defendant.¹⁵⁰

V. MARKET SHARE LIABILITY OUTSIDE THE DES CONTEXT

A. Asbestos

Asbestos litigation parallels some of the characteristics in the DES cases that gave rise to the development of market share liability and its offspring, modified alternate liability. Like DES injuries, asbestos-related injuries can have a latency period of about twenty years.¹⁵¹ As in the DES market, a large number of companies—as many as 165—manufactured asbestos at one time or another.¹⁵² Asbestos plaintiffs also have experienced difficulty in identifying the manufacturer responsible for their injuries.¹⁵³ Most courts, however, have refused to extend market share or alternate liability theories to asbestos victims who were

jurisdictions," and "that market share liability is not a sound theory," and should not be applied in DES cases).

147. *See id.* at 337-38 (describing a trial judge's frustration in attempting to develop a narrow, local market without enough data and concluding that a national market is the only realistic alternative).

148. *Id.* at 338. The court noted the inherent difficulty of linking damages to a defendant's actual market share.

149. *Id.* The court posited that without reliable information, the composition of defendants in each case will be somewhat arbitrary. With many manufacturers not amenable to suit for a variety of reasons, such as nonjoinder, mergers, or bankruptcies, a plaintiff's recovery is bound to change without a meaningful reason. *Id.*

150. *Id.* The court explained that a plaintiff who proves causation must bear the risk of a defendant's insolvency. Yet under market share liability, the risk of insolvency is reduced because it is spread throughout an entire industry. Thus, market share liability may provide plaintiffs with more protection against insolvent defendants. *Id.* at 339.

151. *See* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 579 n.10 (1983).

152. *Id.* at 581, n.22.

153. The identification problem stems from two causes. First, many asbestos products carry no manufacturer's label. Second, plaintiffs often are exposed to several different asbestos products in their workplace, resulting in causation by multiple defendants and an inability to recall specific manufacturers. *See* Endress & Sozio, *Market Share Liability: A One Theory Approach Beyond DES*, 1 DET. C.L. REV. 1, 8-9 (1983); *see also* Case v. Fibreboard Corp., 743 P.2d 1062, 1066-67 (Okla. 1987) (describing how identification of an asbestos manufacturer is almost impossible when the materials were installed years before the plaintiff's exposure).

unable to identify the specific wrongdoers.¹⁵⁴

*Goldman v. Johns-Manville Sales Corp.*¹⁵⁵ and *Case v. Fibreboard Corp.*¹⁵⁶ are illustrative of the position taken by state supreme courts.¹⁵⁷ In both cases, the plaintiffs were unable to link causation to a specific company. Both courts rejected market share liability principally for two reasons: Asbestos products are not fungible, and the asbestos marketplace is complex, making the apportionment of damages difficult.¹⁵⁸

In *Goldman* the court noted that the asbestos tape to which the plaintiff allegedly was exposed could have contained an asbestos content ranging from fifteen percent to one hundred percent.¹⁵⁹ In contrast, DES is a truly fungible product made from a generic formula that caused injury in the single context of use by pregnant women.¹⁶⁰ Hence, the primary *Sindell* rationale for shifting the burden to the defendant—the similarity of risk posed by all manufacturers—is not present in the asbestos industry. Because manufacturers produce asbestos in approximately three thousand different forms, the variation in asbestos content is complicated even further.¹⁶¹

Although *Goldman* held that the different degrees of risk posed by asbestos products alone was sufficient to undercut *Sindell*, additional problems plague the asbestos marketplace, such as a complex market and the absence of Johns-Manville, one of the largest producers.¹⁶² Ultimately, notwithstanding the absence of other remedies, both *Goldman* and *Case* held that unlike DES the facts presented in asbestos litigation do not provide a sufficient rationale for shifting the burdens of proof and cost to manufacturers.¹⁶³

154. See *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 554 N.E.2d 468 (1990) and cases cited therein; Special Project, *supra* note 151, at 623 and cases cited at note 284. *But see* *Menne v. Celotex Corp.*, 641 F. Supp. 1429 (D. Kan. 1986) (applying Nebraska law holding alternate liability applicable in case in which asbestos products of each defendant joined in the action were present at plaintiff's workplace).

155. 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987).

156. 743 P.2d 1062 (Okla. 1987).

157. See *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985) and cases cited therein.

158. *Goldman*, 33 Ohio St. 3d at 50-51, 514 N.E.2d at 700-01; *Case*, 743 P.2d at 1065-66.

159. 33 Ohio St. 3d at 46, 514 N.E.2d at 697.

160. *Case*, 743 P.2d at 1065; see *supra* text accompanying notes 15-16.

161. See *Goldman*, 33 Ohio St. 3d at 50, 514 P.2d at 700.

162. *Id.* at 51, 514 P.2d at 701. For these same reasons, the court also rejected alternate liability when the plaintiff could not show that two or more defendants committed tortious acts and that one of these defendants proximately caused plaintiff's injuries. *Id.* at 45, 514 P.2d at 696.

163. Both courts concluded that any change must come from the legislature. See *id.* at 50-52, 514 N.E.2d at 700-02; *Case*, 743 P.2d at 1066-67.

B. Vaccines

Courts have relaxed causation's identification requirement in only one other area of products liability—vaccines. The developments are quite narrow, however, with only three published opinions prior to 1989.¹⁶⁴ Not long after *Sindell*, a California appellate court disallowed market share liability in *Sheffield v. Eli Lilly & Co.*¹⁶⁵ The plaintiff in *Sheffield* alleged that she was injured by a defective antipolio vaccine. The court held *Sindell* inapplicable for several reasons even though the plaintiff could not identify the responsible defendant.¹⁶⁶ The court found that a single producer defectively manufactured the antipolio vaccine and that the underlying formula was not defective.¹⁶⁷ All of the producers and manufacturers of DES, by contrast, adhered to a uniformly defective formula.¹⁶⁸ Thus, because the negligence in *Sheffield* occurred at the manufacturing stage rather than the design stage, not all manufacturers were equally culpable, nor did they all pose the same risk to society.¹⁶⁹ Shifting the financial burden to defendants in this instance necessarily would require holding innocent defendants liable.¹⁷⁰

The court's second line of reasoning was that polio vaccines did not have a prolonged latency period before a plaintiff discovered the in-

164. See *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987); *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983); *Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 305 Or. 256, 751 P.2d 215 (1988). The use of market share liability outside of the DES context is limited because few truly fungible products exist. See *infra* text accompanying notes 315-20. *Shackil v. Lederle Laboratories*, 116 N.J. 155, 561 A.2d 511 (1989), is the fourth published decision addressing the application of market share liability to vaccine-related injuries. *Shackil* is discussed *infra* at subpart VI(B).

165. 144 Cal. App. 3d at 583, 192 Cal. Rptr. at 870.

166. See *id.* at 592-99, 192 Cal. Rptr. at 875-80.

167. 144 Cal. App. 3d at 594, 192 Cal. Rptr. at 876. For a discussion of the difference between design and manufacturing defects, see Fischer *supra* note 46, at 1652-54.

168. See *Sheffield*, 144 Cal. App. 3d at 594, 192 Cal. Rptr. at 876; see also *supra* notes 15, 16 and accompanying text.

169. Culpability in manufacturing defects differs with each producer and even between various lots of the drug made by the same producer. Hence, the risk of harm to the plaintiff also varies. See Fischer, *supra* note 46, at 1653 (arguing against application of market share liability to manufacturing defect injuries).

170. The *Sheffield* court noted that:

[shifting liability] indiscriminately to penalize the careful and careless producer alike . . . fails to act as a deterrent to the latter or provide an incentive to produce safety industry-wide, and it may result in keeping beneficial but potentially dangerous products off the market. . . . The imposition of such liability . . . would inhibit drug research and development, unreasonably raise the cost of health care, and punish drug manufacturers who have done no wrong.

Sheffield, 144 Cal. App. 3d at 598, 192 Cal. Rptr. at 878-79; see also Fischer, *supra* note 46, at 1652-53; Case Comment, *supra* note 18, at 944; Note, *supra* note 26, at 1200-02.

jury.¹⁷¹ Hence, the identification problem with DES, which is caused by a lengthy passage of time, was not present in *Sheffield*.¹⁷² Finally, the court emphasized the chilling effect that liability in *Sheffield* could have imposed on drug manufacturers' willingness to develop new products.¹⁷³

Several years after *Sheffield*, a federal district court in California allowed a market share action in *Morris v. Parke, Davis & Co.*¹⁷⁴ The plaintiff in *Morris* also alleged that a vaccine caused his injuries.¹⁷⁵ The court found that the diphtheria-pertussis-tetanus (DPT) vaccine differed enough from the polio vaccine in *Sheffield* to justify relaxing the standard of causation.¹⁷⁶ *Sheffield* dismissed a market share solution largely because the polio vaccine was manufactured defectively by only one company.¹⁷⁷ *Morris*, by contrast, held that all of the defendants' DPT vaccines were defective and that the defendants were collectively negligent in manufacturing, testing, storing, and marketing the vaccine.¹⁷⁸ *Morris* recognized the critical distinction between a common design defect and an isolated manufacturing defect and, consequently, left *Sheffield* intact.¹⁷⁹ The court, however, explained that no meaningful distinction exists between design and manufacturing defects when the latter stems from substandard practices employed by all defendants.¹⁸⁰ Hence, the court held the defendants liable for their share of the mar-

171. See *Sheffield*, 144 Cal. App. 3d at 595, 192 Cal. Rptr. at 877. The court noted that "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.* In fact, "the onset of the illness occurred shortly after the victim was inoculated with the vaccine." *Id.*

172. See *id.* The court noted that the *Sindell* problem of identification bore little or no resemblance to the facts surrounding vaccine injuries. *Id.*

173. See *id.* at 597, 192 Cal. Rptr. at 879. The court emphasized the necessity of vaccines to the public welfare, citing the Salk polio vaccine's virtual elimination of poliomyelitis. See *id.* at 597 & n.9, 192 Cal. Rptr. at 879 & n.9.

174. 667 F. Supp. 1332 (C.D. Cal. 1987).

175. *Id.* at 1334. The plaintiff was unable to identify the precise manufacturer of the drug. *Id.*

176. See *id.* at 1340-43. The court found that the nature of the defect aligned the case with *Sindell* rather than *Sheffield*, thereby justifying a shift in the burden of proof to the defendants. See *id.* at 1341-42.

177. See *supra* notes 167-70 and accompanying text.

178. *Morris*, 667 F. Supp. at 1342. The court accepted the plaintiff's reasoning that the case was distinct from *Sheffield* because the manufacturing defect in *Morris* was present in each of the defendants' products because of "'shared common inadequacies' in manufacturing, testing, storage and marketing." *Id.*

179. See *id.* at 1341-42. The court distinguished *Sheffield* on two grounds: First, *Sheffield* concerned an isolated manufacturing defect only, and second, a uniform design defect justifies shifting the burden of proof to the defendants. See *id.* at 1342.

180. *Id.* at 1342. The court argued that if the defect is common to all of the products resulting from "common . . . substandard means of production, storage, transportation, or marketing," *id.*, then the fact that the defect was caused by design or manufacturing is irrelevant.

ket in which they had acted tortiously.¹⁸¹ The *Morris* opinion, however, ignored two issues at the forefront of *Sheffield*: The *Sindell* latency issue and market share liability's potential deterrent effect on vaccine research and development.¹⁸²

Morris has not spread beyond California.¹⁸³ In *Senn v. Merrell-Dow Pharmaceuticals, Inc.*,¹⁸⁴ the only other pre-1989 decision addressing a market share claim for DPT injuries, the Oregon Supreme Court did not follow *Morris*.¹⁸⁵ At the time of the decision, Oregon had not adopted the *Summers v. Tice*¹⁸⁶ version of alternate liability.¹⁸⁷ *Senn* refused to adopt *Summers* even though both possible vaccine manufacturers were before the court. The court held that alternate liability represented a significant change in traditional tort law causation and that the legislature must make a change of this magnitude.¹⁸⁸

C. Products Liability Generally

Market share solutions to the problem of indeterminate defendants have had limited acceptance in DES cases and have been rejected almost entirely when applied to other semifungible products, such as asbestos and vaccines. Courts uniformly have denied attempts to apply market share liability to the remaining spectrum of products liability injuries.¹⁸⁹ In *Poole v. Alpha Therapeutic Corp.*¹⁹⁰ an Illinois federal district court refused to extend market share alternate liability to an action seeking recovery for an allegedly defective antihemophilic blood product. Stephen Poole, a hemophiliac, allegedly contracted Acquired Immune Deficiency Syndrome (AIDS) from an internal injection of antihemophilic factor VIII, resulting in his death.¹⁹¹ Poole's mother

181. *Id.* at 1343.

182. *See supra* notes 171-73 and accompanying text.

183. California is the only state that has allowed the use of market share liability in vaccine cases. The impact of *Morris* is limited further by the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988), which requires exhaustion of the federal remedy before pursuing a state tort claim. *See infra* note 311.

184. 305 Or. 256, 751 P.2d 215 (1988).

185. The court did not adopt any other market share solution either. *See id.* at 265-71, 751 P.2d at 219-23.

186. 33 Cal. 2d 80, 199 P.2d 1 (1948).

187. *See Senn*, 305 Or. at 263, 751 P.2d at 219. Possibly the justices felt that the move from no collective liability theories to market share liability was too radical for one case.

188. *Id.* at 271, 751 P.2d at 223. The court stated that the legislature has the job of adopting one form of alternate liability, although the court found all forms of alternate liability to be inconsistent with common-law theories of causation. *Id.*

189. Aside from DES cases and *Morris v. Parke, Davis & Co.*, very few, if any, courts have allowed market share liability in products liability cases. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

190. 696 F. Supp. 351 (N.D. Ill. 1988).

191. *Id.* at 352.

claimed that the named defendants solicited blood donors from high-risk segments of the population without adequate screening and testing procedures.¹⁹²

Ms. Poole was able to identify and join all the manufacturers that supplied the blood product, but she could not prove that any specific defendants were liable.¹⁹³ The district court refused the plaintiff's plea to apply *Smith v. Eli Lilly & Co.*,¹⁹⁴ which at the time permitted a market share alternate liability action for DES, because the court was concerned about expanding Illinois tort law unjustifiably beyond precedent.¹⁹⁵ The court noted that *Smith* expressly limited its holding to DES cases.¹⁹⁶ The court emphasized also that market share liability is an inappropriate solution for cases in which the plaintiff has identified all potentially negligent defendants.¹⁹⁷ The court stated that a plaintiff's inability to identify the wrongdoer was one of the primary rationales of *Sindell*,¹⁹⁸ the absence of which forecloses a market share cause of action.¹⁹⁹

192. *Id.*

193. *Id.*

194. 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988). The Illinois Supreme Court subsequently reversed *Smith*. See *supra* notes 143-50 and accompanying text. Relying on *Smith*, the plaintiff in *Poole* sought to have damages apportioned between the defendants based on their respective market shares. 696 F. Supp. at 353.

195. *Poole*, 696 F. Supp. at 354. The court was concerned about expanding the scope of market share liability beyond that which *Smith* provided for at the time. Because *Smith* expressly limited market share liability to the facts of DES cases, the court expressed doubt in *Poole* that an Illinois state court would expand the doctrine in the same circumstances. *Id.* at 353-54.

196. *Id.* at 353.

197. *Id.* The court cited *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 505 N.E.2d 1213 (1987), an asbestos case which held that market share liability is inapplicable in cases in which "the plaintiff has offered evidence that the identified defendant's product is the cause of the injury." *Poole*, 696 F. Supp. at 353 (quoting *Lipke*).

198. See *Poole*, 696 F. Supp. at 353. The court strongly emphasized the identification dilemma of *Sindell* as one of the primary reasons why market share liability was adopted in *Smith*. The court reiterated that "[t]he fundamental premise of the market share theory is that the plaintiff lacks sufficient identification information to make out a cause of action under traditional standards of tort liability." *Id.* (quoting *Smith*, 173 Ill. App. 3d at 22, 527 N.E.2d at 346).

199. See *id.* at 354. Predicting that the Illinois Supreme Court would extend *Summers* to the uncharted area of AIDS cases, however, the court permitted the plaintiff to amend her complaint and add an alternate liability claim. *Id.* at 355-56. The flexibility afforded by comment h of § 433B of the *Restatement (Second) of Torts* regarding modification of alternate liability supported the court's position. *Id.* at 355 (citing *RESTATEMENT (SECOND) OF TORTS* § 433B comment h (1977)); see also *supra* note 44 and accompanying text. Equally significant, however, the plaintiff satisfied one of the most important aspects of alternate liability: she brought all possible wrongdoers before the court. See *Poole*, 696 F. Supp. at 354.

The court cited two fairly recent cases that permitted the use of alternate liability when the plaintiff was able to bring all possible wrongdoers before the court: *Menne v. Celotex Corp.*, 641 F. Supp. 1429 (D. Kan. 1986) (allowing use of alternate liability in asbestos case) and *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (permitting use of alternate liability in Agent Orange case). The court noted the potential controversy of applying alter-

Another Illinois decision, *York v. Lunkes*,²⁰⁰ further illustrates the inapplicability of a market-based recovery scheme to consumer and industrial products liability cases.²⁰¹ The plaintiff in *York* was injured when he attempted to jump-start a car and the car battery exploded. The explosion completely destroyed the battery, making identification of the manufacturer impossible.²⁰² The court, however, refused to follow the approach that *Smith* had allowed just one year earlier.²⁰³ The court stated that, unlike DES, batteries produced by different manufacturers are physically distinguishable from each other and are not uniformly defective.²⁰⁴ Hence, the court found no justification for shifting the burden of proof to the defendant even though the plaintiff, unable to identify the manufacturer, was remediless.²⁰⁵ Market share liability has found no role in traditional products liability actions because the facts that distinguish DES litigation are absent.²⁰⁶

VI. RECENT DEVELOPMENTS

A. Revitalization of Market Share Liability: *Hymowitz v. Eli Lilly & Co.*²⁰⁷

In *Hymowitz v. Eli Lilly & Co.* the plaintiff, Mindy Hymowitz, alleged that her cancer was caused by her mother's use of DES during pregnancy.²⁰⁸ The plaintiff did not discover her cancerous condition until she was a young adult, four years after the statute of limitations had

nate liability to an AIDS case, but found that an Illinois state court was likely to hold similarly. *Poole*, 697 F. Supp. at 355-56. For a discussion on the impact of products liability on AIDS cases, see McKenna, *The Impact of Product Liability Law on the Development of a Vaccine Against the AIDS Virus*, 55 U. CHI. L. REV. 943 (1988).

200. 189 Ill. App. 3d 689, 545 N.E.2d 478 (1989).

201. For other examples of the unsuccessful application of market share liability to industrial products liability cases, see *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986) (disallowing market share liability in industrial dye products liability case in which the plaintiff could not identify the specific manufacturer); *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177 (D.S.D. 1984) (holding concerted action, enterprise, and market share liability inapplicable in case dealing with defective tire rim when the plaintiff could not identify the exact defendant); and *Catherwood v. American Sterilizer Co.*, 139 Misc. 2d 901, 532 N.Y.S.2d 216 (Sup. Ct. 1988) (holding market share liability inapplicable to industrial gas case in which all possible defendants were identified); see also *Bixler v. Avondale Mills*, 405 N.W.2d 428 (Minn. App. 1987) (disallowing alternate liability in flammable cotton flannel case because product not fungible).

202. *Lunkes*, 545 N.E.2d at 479.

203. *Smith* subsequently has been reversed. See *supra* notes 143-50 and accompanying text.

204. *Lunkes*, 545 N.E.2d at 480. In addition, strong evidence suggested that the two defendants before the court did not make batteries to fit the type of car that had exploded. *Id.*

205. The court reiterated the need for plaintiffs in products liability cases to identify the supplier of the defective product and to prove the defective product actually caused the injury. *Id.*

206. See *supra* note 189 and accompanying text.

207. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989).

208. *Id.* at 502, 539 N.E.2d at 1071, 541 N.Y.S.2d at 943.

tollled.²⁰⁹ A New York revival statute, however, permitted her to file a claim against several DES manufacturers.²¹⁰ The New York State trial court denied the drug producers' motion to dismiss.²¹¹ The court held that the plaintiff's inability to identify the specific manufacturer of the DES ingested by her mother did not render the revival statute unconstitutional²¹² because the plaintiff still must prove the other elements of causation.²¹³ New York's highest court—the court of appeals—upheld the trial court's decision.²¹⁴ The court of appeals announced that New York would adopt a market share theory of liability, based on a national market.²¹⁵ The court held also that the drug companies would be severally liable only.²¹⁶ The decision, however, does not allow individual defendants to exculpate themselves by affirmatively proving that the plaintiff's mother did not ingest a particular defendant's DES.²¹⁷ Rather, a defendant is absolved from liability only after an affirmative showing that it never marketed DES for use during pregnancy.²¹⁸

1. Court's Reasoning

In reaching its decision to adopt a market share cause of action, the *Hymowitz* court traced the decade-long development of market share

209. *Hymowitz v. Eli Lilly & Co.*, 136 Misc. 2d 482, 483, 518 N.Y.S.2d 996, 998 (Sup. Ct. 1987). The plaintiff was born in 1954, but did not discover the cancer until 1979. Under the New York Statute of Limitations, the plaintiff had until 1975 to file the suit, three years after she reached the age of majority. *Id.*

210. See 1986 N.Y. Laws ch. 682, § 4. The statute provides a one-year revival period in which plaintiffs may file a suit for injuries resulting from latent effects of toxic torts. The statute revived between 500 and 700 DES claims. Rheingold, *The Hymowitz Decision—Practical Aspects of New York DES Litigation*, 55 BROOKLYN L. REV. 883 (1989).

211. *Hymowitz*, 136 Misc. 2d at 489, 518 N.Y.S.2d at 1002.

212. *Id.*

213. *Id.* The court's opinion implied that a market share cause of action is compatible with the need to allocate liability based on the defendant's negligence.

214. See *Hymowitz*, 73 N.Y.2d at 487, 539 N.E.2d at 1069, 541 N.Y.S.2d at 941. The court of appeals' decision affirmed the intermediate appeal, see 139 A.D.2d 437, 526 N.Y.S.2d 922 (1988), and upheld the constitutionality of the revival statute, thereby opening the door to hundreds of plaintiffs. See 73 N.Y.2d at 516, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952.

215. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court declined to follow its earlier holding in *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982), which was based on a modified version of concerted action. *Hymowitz*, 73 N.Y.2d at 508, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948. *Bichler* was also a DES case whose theory in essence substituted conscious parallel activity by the defendants for the plaintiff's inability to identify the specific defendant. The court in *Hymowitz* found that the commonplace occurrence of parallel activity in industry would expand this version of concerted activity beyond its "rational or fair limit." *Id.* Instead, the court opted for market share liability because it is "tailored more closely to the varying culpableness of individual DES producers." *Id.* at 508-09, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.

216. *Hymowitz*, 73 N.Y.2d at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

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

218. *Id.*

and alternate liability from *Sindell v. Abbott Laboratories*²¹⁹ to *George v. Parke-Davis*.²²⁰ The court agreed with previous authorities that alternate liability and concerted action, although sometimes helpful to a plaintiff who is unable to identify the wrongful defendant, cannot handle the DES problems without modification.²²¹ The court rejected alternate liability principally because the defendants in DES cases are in no better position to identify the negligent party than are plaintiffs.²²² Additionally, the court argued that the rationale for shifting the burden of disproving causation is decreased substantially in actions with several potential defendants.²²³ The court found concerted action inapplicable to DES cases because of insufficient evidence to prove that the defendants tortiously acted with a common plan or design.²²⁴ Although the court recognized that some jurisdictions had refused to proceed beyond traditional common-law remedies without legislative guidance,²²⁵ the court found that the overall circumstances of DES cases weighed heavily in favor of forging a remedy for victims of DES.²²⁶

Having recognized the need for a remedy, the court looked to prior DES opinions for guidance in creating an appropriate method.²²⁷ The experience gained from previous decisions and the large number of cases pending in New York caused the court to choose a national marketplace to ascribe liability among the defendants.²²⁸ The court first

219. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). *Sindell* is discussed *supra* at subpart III(A).

220. 107 Wash. 2d 564, 592-93, 733 P.2d 507, 512 (1987) (applying *Martin v. Abbott Laboratories* market share alternate liability to DES case and advocating the narrowest possible relevant market determination); see also *supra* notes 81-88 (discussing *Martin*). *Parke-Davis* is discussed *supra* note 82.

221. See *Hymowitz*, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947; see also *supra* notes 30-37 and accompanying text.

222. *Hymowitz*, 73 N.Y.2d at 505-06, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946. The court reasoned that the substantial number of possible wrongdoers, many of which no longer exist, and the drug's long latency period have left defendants with no better information than plaintiffs could uncover. The court noted also that one of the rationales for shifting the burden of proof in *Summers* was that defendants have better information than plaintiffs. *Id.*

223. *Id.*; see also *supra* note 46.

224. *Hymowitz*, 73 N.Y.2d at 506, 539 N.E.2d at 1074-75, 541 N.Y.S.2d at 946-47.

225. See, e.g., *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); see also *supra* subpart IV(D).

226. *Hymowitz*, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947. Inherent in the court's decision were the unique facts surrounding DES litigation and the fact that the legislature "consciously created . . . expectations [of recovery] by reviving hundreds of DES cases." *Id.*; cf. *Shackil v. Lederle Laboratories*, 116 N.J. 155, 184-87, 561 A.2d 511, 526-27 (1989) (finding that the alternative remedy provided by the National Childhood Vaccine Injury Act and state legislation "evin[cing] an intent to limit the expansion of products liability law" weighed against adopting market share liability in vaccine injury case).

227. *Hymowitz*, 73 N.Y.2d at 508-11, 539 N.E.2d at 1075-77, 541 N.Y.S.2d at 947-49.

228. *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949. The court recognized the costly, time-consuming process of relitigating market shares in each new case and adopted a national

noted the developments in California following *Sindell*. Many courts in California had attempted to use small geographic markets before adopting a national marketplace as the fairest and most informed method.²²⁹ The court also discussed the approach taken by the Washington Supreme Court, which treats defendants' market shares as a question of fact to be litigated in each case based on a manufacturer's share of the relevant geographic area.²³⁰ The court found the Washington approach unacceptable because of the possible need for several market matrices in a state like New York in which many plaintiffs probably had ingested DES outside the state.²³¹ The court also referenced the *Collins* risk-based approach,²³² which the court considered to be the most thorough consideration of each defendant's activities. The court decided, however, that *Collins* would be effective only when used on a limited scale.²³³ Mindful that the revival statute renewed approximately five hundred cases, the court showed concern over the delay and inconsistencies that *Collins* would create if used in New York.²³⁴

The court's selection of a national market, however, did not blind the court to two attendant drawbacks. First, a national marketplace is likely to create an inaccurate relationship between a defendant's individual liability and the injuries actually caused by that defendant within New York State.²³⁵ Second, a national marketplace may fail to reflect accurately the connection between a defendant's liability and the risk a defendant posed to a specific plaintiff.²³⁶ Nevertheless, the court

market "for essentially practical reasons." *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 949.

229. *Id.* at 509, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948; see also *In re Complex DES Litig.*, No. 830-109 (Cal. Super. Ct. Aug. 16, 1985); Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOKLYN L. REV. 869, 870 (1989) (explaining that the actual decision to use a national market apparently stemmed from an agreement between the DES litigants).

230. *Hymowitz*, 73 N.Y.2d at 510-11, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949 (citing *George v. Parke-Davis*, 107 Wash. 2d 584, 593, 733 P.2d 507, 512 (1987)).

231. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949. The court stated that establishing separate market shares would be "an unfair, and perhaps impossible burden to routinely place upon the litigants in individual cases." *Id.*

232. See *supra* notes 109, 115 and accompanying text.

233. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077-78, 541 N.Y.S.2d at 949-50.

234. See *id.* The court stated "we are very wary, however, of setting loose, for application in the hundreds of cases pending in this State, a theory which requires . . . individualized . . . assessment of . . . liability . . . in every case." *Id.*

235. *Id.* at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

236. *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court made no pretense of approximating, in the long run, the actual causation to New York plaintiffs in general and to the litigating plaintiff in particular. This approach is a substantial departure from *Sindell*, which attempted to approximate each defendant's liability according to its responsibility "for the injuries caused by its own products." *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). The court in *Hymowitz* stated: "We have heeded the practical lessons learned by other jurisdictions, resulting in our adoption of a national market theory with full knowledge that it concedes the lack of a logical link between liability and

avored basing liability for manufacturing DES on the defendant's overall culpability in marketing DES for pregnancy-related complications; this liability is measured according to the risk created for the public at large, not the risk posed to a specific plaintiff.²³⁷ The court reasoned that this broad approach equitably satisfies the plaintiff's need for relief, but still provides defendants with a rational method for apportioning liability.²³⁸

The court extended its overall risk approach by preventing a defendant from exculpating itself with proof that its product did not cause the plaintiff's injuries.²³⁹ The court reasoned that this protection mechanism would favor defendants that marketed a conspicuous pill or sold only to certain drugstores because plaintiffs might remember the particular pill or store more readily, thus increasing the likelihood that a manufacturer would be exonerated.²⁴⁰ The court also noted that individually exculpating defendants would frustrate the overall risk scheme because the scheme does not attempt to link causation to each plaintiff.²⁴¹ Thus, *Hymowitz* holds that a defendant can avoid liability only by proving it did not market DES for use during pregnancy.²⁴²

In an effort to offset the elimination of exculpation, however, the court held that DES producers would be severally liable only.²⁴³ The court refused to inflate a defendant's share of the market to compensate for absent or insolvent defendants even though some plaintiffs likely will receive less than a full recovery.²⁴⁴ The court reasoned that the same forces working against defendant exculpation equally disfavored inflating a defendant's liability beyond its market share simply because a plaintiff was wise or fortunate enough to join solvent defendants.²⁴⁵

causation in a single case." *Hymowitz*, 73 N.Y.2d at 513 n.3, 539 N.E.2d at 1078 n.3, 541 N.Y.S.2d at 950 n.3.

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

238. *Id.*

239. *See id.* To date *Hymowitz* is the first and only case to disallow exculpation of innocent defendants. *See Twerski, supra* note 229, at 872.

240. *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court's reasoning also could have the opposite effect. A defendant with a more conspicuous pill could face increased liability because a plaintiff could recall the pill more easily and could sue the defendant directly. Similarly, a conspicuous pill or drugstore would be more readily identifiable through discovery, thereby dispensing with the need for market share altogether.

241. *See id.*

242. *See id.* at 512 & n.2, 539 N.E.2d at 1078 & n.2, 541 N.Y.S.2d at 950 & n.2. This holding is consistent with the court's overall risk approach because such a defendant obviously did not contribute to DES victims' risk of injury.

243. *Id.* at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

244. *Id.* at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

245. *Id.* The court provided, "we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liabil-

2. The Benefits of a National Marketplace

Only after years of litigation following *Sindell's* cursory treatment of the DES marketplace did the California courts learn that the paucity of DES market information would not permit an accurate local market and that a national marketplace is the only realistic alternative.²⁴⁶ Other courts still fluctuate between using national and local marketplaces²⁴⁷ even though several commentators advocate using a national market.²⁴⁸

A national marketplace offers a unitary standard that is applicable to all DES cases and, consequently, dispenses with difficult, complicated computations based on smaller geographic units.²⁴⁹ This unitary standard eases the parties' burdens at trial and should yield more consistent results for both plaintiffs and defendants on a case-by-case basis.²⁵⁰ Using a national market also reduces litigation costs for plaintiffs and defendants by eliminating the need to reconstruct a new market in each case.²⁵¹ Once the national market is established by pooling together the resources of all defendants, courts in all jurisdictions will be able to use it, thus conserving judicial resources.²⁵² A national marketplace naturally will implicate most or all large DES producers and should result in a more fully informed distribution breakdown.²⁵³

Additionally, many plaintiffs assert that a handful of large drug manufacturers are responsible for ninety percent of the DES distributed nationwide.²⁵⁴ Hence, a national market should produce an accurate division of overall liability measured by each defendant's contribution of risk to society. At the very least, a national market will capture the general distribution of DES to the American public even though many distributors no longer exist because of insolvency or

ity beyond its fair share of responsibility." *Id.* (footnote omitted).

246. See *supra* note 229 and accompanying text.

247. See, e.g., *Conley v. Boyle Drug Co.*, No. 67,626 (Fla. Nov. 1, 1990) (LEXIS, States library, Fla. file) (permitting national market figures only if necessary); *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987) (same).

248. See, e.g., *Fischer*, *supra* note 46, at 1644; *Twerski*, *supra* note 229, at 871 & n.7 (stating that "a narrow definition of the market does violence to the fundamental market share liability theory" and questioning "why have some courts still not seen the light" and opted for a national market); Note, *supra* note 26, at 1179.

249. *Fischer*, *supra* note 46, at 1643-45.

250. See Note, *supra* note 26, at 1189-90.

251. See *Rheingold*, *supra* note 210, at 894-95 (describing the difficulty of building a national market matrix, but stating that 500 cases were consolidated for one market share trial that will bind them all).

252. See *id.*

253. See *id.* at 895 (discussing the educated-guess result of a partial market analysis in a Los Angeles DES case).

254. See Note, *supra* note 26, at 1190 & n.59.

merger. Finally, a national market is well suited for a state the size of New York in which many plaintiffs likely have been exposed to DES outside the state.²⁵⁵

3. Defendant Exculpation: Attempting to Approximate Actual Causation

In using a national market, *Hymowitz* foregoes an approximation of the harm caused within the state and the harm caused to a particular plaintiff²⁵⁶—two objectives of *Sindell*²⁵⁷ and *Martin*.²⁵⁸ The sacrifice seems nominal, however, because an analysis of *Hymowitz*'s predecessors suggests that approximating a defendant's liability to each plaintiff's harm is quite difficult and perhaps unnecessary for the purposes of market share liability.

All of the decisions preceding *Hymowitz* permit defendants to exculpate themselves from liability if they can produce the requisite evidence.²⁵⁹ The main goal of exculpation is to assemble a group of defendants who most likely contributed to the plaintiff's injury by eliminating those who definitely have not.²⁶⁰ The courts allowing exculpation also show concern for the seeming injustice of holding innocent defendants liable.²⁶¹ Case-by-case exoneration, however, is based on the proof available to the defendant that a specific plaintiff's mother did not use its product, not on the degree of the defendant's responsibility for the plaintiff's actual injuries based on its percentage of the relevant market. Hence, a manufacturer's liability fluctuates arbitrarily depending on the evidence available in each case and is not truly linked to relative culpability.²⁶² The irony of this flaw is that the absence of information detailing the distribution of DES is what prevented plaintiffs from proving actual causation and was a major catalyst for creating market share liability.²⁶³ A system of recovery that rewards only those manufacturers fortunate enough to possess exculpatory evidence, while punishing those that do not, merely compounds the problem of defi-

255. *Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949; see also Rheingold, *supra* note 210, at 893 n.38 (explaining that the *Hymowitz* holding is limited to plaintiffs born in New York).

256. See *supra* note 236 and accompanying text.

257. See *supra* notes 51-54 and accompanying text.

258. See *supra* notes 82-86 and accompanying text.

259. See *supra* notes 50, 82, 106, 128 and accompanying text.

260. See *supra* note 121 and accompanying text.

261. See *id.*

262. See Fischer, *supra* note 46, at 1643-45 (stating that the exculpation process is a "lottery based on the fortuity of the availability of evidence" and that the "availability of proof rather than the [defendant's] culpability" determines liability).

263. See *supra* notes 21-22 and accompanying text.

cient information. Market share liability strives to circumvent the information gap in an individual case by using distribution statistics. Courts should not allow defendants to manipulate this information gap, thereby yielding different results for two defendants with the same share of the market merely because one possesses exculpatory evidence and the other does not. The unfortunate result is an uneven distribution of liability among DES manufacturers.²⁶⁴

Rather than justify market share liability as a gauge for a defendant's contribution to a plaintiff's actual injury, some commentators have suggested that *Sindell* and its progeny are best viewed as a risk contribution theory.²⁶⁵ According to this approach, by producing a uniformly defective product from a generic formula each DES manufacturer contributed to the aggregate risk to which a DES victim was exposed.²⁶⁶ Commentators have argued that apportioning liability according to contribution of risk is fair²⁶⁷ and that focusing on risk contribution overcomes the criticism that market share liability holds defendants responsible without proof of causation.²⁶⁸

Hymowitz fully embodies the risk contribution rationale and logically extends the principle from liability based on the risk of harm posed to a single DES victim to liability based on the risk of harm posed to society.²⁶⁹ Permitting defendant exculpation²⁷⁰ is inconsistent with *Hymowitz's* focus on the overall risk created by DES because no

264. See Fischer, *supra* note 46, at 872; Twerski, *supra* note 229, at 872 (characterizing exculpation as "arrant nonsense" because it simply dumps one defendant's "percentage of the harm upon other defendants who cannot prove the negative"). A potential drawback to disallowing exculpation, however, is that manufacturers may not receive an adequate incentive to maintain accurate records of drug distribution.

265. See, e.g., Robinson, *supra* note 25, at 716-17, 734-41; Wright, *supra* note 23, at 1819-21; Partlett, *The Common Law As Cricket* (Book Review), 43 VAND. L. REV. 1401, 1419-20 (1990) (stating: "That liability ought to accord with the risk of harm created by the manufacture and distribution of a product was a logical implication of the basis" of *Hymowitz* and the prior DES cases); see also Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984), discussed *supra* notes 109-24 and accompanying text.

266. Robinson, *supra* note 25, at 717; Wright, *supra* note 23, at 1819-20.

267. See, e.g., Robinson, *supra* note 25, at 739-40 (arguing that risk contribution is fair because "each defendant made a 'defective' product that created an unreasonable risk of the harm the plaintiff suffered," thus allowing fault to "be imputed to a defendant's conduct from the fact that it made a product that created such a risk").

268. See, e.g., Wright, *supra* note 23, at 1820 (stating that "the approach avoids the . . . concern in *Sindell* that the defendants are being held liable without proof of actual causation [because] [i]n each case, a defendant firm is held liable only if the plaintiff proves that the firm tortiously contributed to the aggregate risk").

269. See *supra* notes 235-41 and accompanying text.

270. In this context exculpation means exonerating those defendants that can prove that their DES was not ingested by the victim's mother. See *supra* note 82 and accompanying text. Recall that under *Hymowitz* a defendant still can be exonerated if it did not market DES for use during pregnancy. See *supra* note 242 and accompanying text.

amount of exculpatory evidence in a single cause of action can reduce a defendant's aggregate contribution of risk to all DES victims.²⁷¹

4. Several Liability

Hymowitz's holding of several liability also is consistent with the goals of market share liability. Several liability limits a defendant's damages to its share of the DES market. As explained in *Brown*, unless each possible defendant is before the court and can carry its financial burden, joint liability is likely to distort the distribution of damages in relation to a defendant's share of the DES market.²⁷² *Abel v. Eli Lilly & Co.*, the only DES decision expressly allowing joint and several liability,²⁷³ highlights the inequity of holding one defendant liable for a plaintiff's entire judgment. Because *Abel* is a virtual replica of alternate liability, the group of defendants before the court and their respective solvency will influence heavily a defendant's share of damages.²⁷⁴ Rarely will the result resemble a defendant's market share. Yet because of the possibility that none of the defendants in a given lawsuit actually harmed the plaintiff, adhering to manufacturers' market shares is crucial to limiting liability.

5. Apportioning Damages

With *Martin* and its successors, many factors other than a defendant's market share enter the liability equation. Under *Martin*, defendants that are not exculpated constitute the plaintiff's market and are presumed to have equal market shares.²⁷⁵ A defendant can rebut this presumption only by proving by a preponderance of the evidence that a defendant had a smaller share.²⁷⁶ Defendants without this evidence receive inflated shares to account for one hundred percent of the market.²⁷⁷ Hence, all defendants must carry their burden of proof to ensure that no defendant pays more than its share. Absent this improbable

271. Arguably, defendant exculpation does not advance the rationale behind contribution of risk to a single plaintiff either. See Robinson, *supra* note 25, at 740 (arguing that "[w]hether the defendant's actions caused injury in the particular case does not alter the character of its [negligent] conduct, which was as final as the defendant could make it"). But see Wright, *supra* note 23, at 1820 (arguing that "if a certain firm can prove that it did not provide any of the [victim's] DES, . . . it cannot be held liable for . . . having exposed . . . a risk that possibly led to [an] injury").

272. See *supra* notes 61-62 and accompanying text.

273. 418 Mich. 311, 343 N.W.2d 164 (1984); see *supra* note 128 and accompanying text.

274. See *supra* note 130 and accompanying text. Apparently, under *Abel* each defendant's damages will reflect its share of the market only if each defendant is solvent and all potential defendants are joined in the action.

275. See *supra* text accompanying notes 82-83.

276. See *supra* text accompanying note 83.

277. See *supra* note 85 and accompanying text.

occurrence, a defendant's liability will not reflect its share of the market.²⁷⁸ Under the *Martin* regime, a defendant without distribution information is penalized substantially. This defendant will be unable to prove exculpation, will be unable to rebut its presumptive share, and possibly will have its presumptive share inflated to construct a complete market. In cases following *Martin*, the emphasis on narrow markets, for which less information is available, increases the likelihood that defendants in these markets will confront this problem.

Both *Martin's* default pro rata share and the inflated award are dependent on another factor unrelated to the marketplace: the group of defendants that ultimately composes the plaintiff's market. This result is caused by *Martin's* basis in alternate liability and its adjustment of a defendant's share of damages depending on the composition of defendants joined in each action.²⁷⁹ Hence, a defendant's ultimate liability could reflect the availability of market information in a given market and the solvency of the joined defendants just as well as it could reflect the defendant's distribution of DES. Because so many considerations unrelated to a defendant's "fault" as to a particular plaintiff influence the distribution of damages, *Martin's* objective of individual, fault-based liability seems impracticable.

The scheme in *Collins* is an improvement over *Martin* inasmuch as it focuses on the degree of a defendant's contribution to the risk posed to the DES plaintiff, rather than the likelihood that a defendant actually harmed the plaintiff.²⁸⁰ A jury apportioning damages under the *Collins* structure must consider many aspects of the defendant's role in producing and marketing DES for use during pregnancy.²⁸¹ No presumption about the defendant's market share is employed, and market distribution records play only a limited role in determining a defendant's contribution to risk.²⁸² Therefore, a jury award under *Collins* theoretically should reflect a defendant's contribution to the plaintiff's risk of injury more than it reflects the presence of reliable information or the solvency of the defendants before the court.

Collins, however, also suffers from shortcomings. First, while *Collins* apportions damages according to a comparative negligence scheme, a plaintiff may recover full damages from just one defendant if only one

278. See *supra* note 87 and accompanying text.

279. See *supra* note 83 and accompanying text (explaining that the damages are spread among the defendants that cannot exculpate themselves).

280. See *supra* notes 109-10 and accompanying text.

281. See *supra* note 115 (listing factors that the jury is to consider in making this assessment).

282. See *supra* note 110 (stating that defendant's market share is only one of several considerations).

is joined.²⁸³ Since this defendant is unlikely to represent one hundred percent of the plaintiff's market, the defendant's damages will not equal its contribution to the plaintiff's risk of being harmed.²⁸⁴ Second, even though *Collins* reduces the importance of market share statistics, *Collins* ironically allows a defendant to exculpate itself provided that the defendant can muster the requisite market information.²⁸⁵ Because *Collins* expressed skepticism about the existence of reliable market information, allowing defendants to use this information to avoid liability seems somewhat hypocritical.²⁸⁶ Finally, *Collins*'s focus on the risk to a particular plaintiff requires that a new market formulation be litigated in each case. Relitigating market shares is not only costly to the parties in each case, but also places a substantial strain on judicial resources.

6. *Hymowitz*'s Shortcomings

Although *Hymowitz* is an improvement over its predecessors, it leaves vital questions unanswered. Presumably, a plaintiff needs to bring suit against only one defendant, but the court does not provide any guidance on this issue. Under the court's several liability holding, however, a plaintiff would benefit from joining as many defendants as possible to increase the likelihood of a full recovery. The court also provides no solution in the event that market share statistics are unavailable for a defendant.²⁸⁷ Additionally, the court fails to announce who bears the burden of proof in establishing a market and the consequences for failing to meet this burden.²⁸⁸ These omissions are surprising considering the opportunity that the *Hymowitz* court had to learn from the debates engendered by *Sindell*'s neglect of critical issues.²⁸⁹

The biggest shortcoming of *Hymowitz* may be that it is only availa-

283. See *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 181, 342 N.W.2d 37, 50 (1984), cert. denied, 469 U.S. 826 (1984).

284. See *Wright*, supra note 109 (describing the correlation between risk and market share).

285. See supra text accompanying notes 119-20.

286. Yet by allowing exculpation for a defendant in each case in which the victim's mother did not ingest that defendant's product, *Collins* consistently focuses on the risk posed to a particular plaintiff.

287. Perhaps the court ignored this scenario under the impression that a national market would yield statistics for all defendants.

Creating a due diligence prerequisite to recovery like that which the Florida Supreme Court applied in *Couley v. Boyle Drug Co.*, No. 67,626 (Fla. Nov. 1, 1990) (LEXIS, States library, Fla. file), see supra note 104 and accompanying text, and *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984), see supra note 127 and accompanying text, would be a solid addition to the *Hymowitz* framework.

288. The defendant most likely bears the burden of going forward with the market evidence. Failure to meet this burden, however, raises the same dilemma as that of a defendant without any information.

289. See supra notes 55-58 and accompanying text.

ble in New York. Perhaps Congress and state legislatures are more to blame than state judiciaries, but the limited acceptance of the doctrine nonetheless leaves the vast majority of DES victims without a cause of action. The availability of *Hymowitz* in New York alone also detracts from the usefulness of the national market and forces the American public to absorb an increase in the cost of pharmaceuticals only to the benefit of DES victims residing in New York State.

7. Summary

Hymowitz is the apotheosis of market share liability;²⁹⁰ it embodies *Sindell's* market share theory without being weighted down by unworkable standards, such as joining a substantial share of defendants, using a local market to allocate liability, and attempting to approximate a defendant's share of the actual harm suffered by a plaintiff. *Hymowitz* actually is the only major market share decision modeled after *Sindell* rather than a modified version of alternate liability.²⁹¹ *Hymowitz* likely will have as great an impact on products liability in New York as did *Sindell* in California.²⁹²

Courts desiring to adopt a market share regime should model their approaches after *Hymowitz*. The litigation following *Sindell* amply demonstrates that insufficient local market information exists to approximate with much certainty or consistency a defendant's portion of each plaintiff's injuries.²⁹³ Reliable information appears to be available at the national level,²⁹⁴ but the national market is too far removed from the place of injury to be used as a basis for constructing a group of defendants in each case that most likely harmed the plaintiff. *Hymowitz's* overall risk approach is the most logical solution. Although it will not yield accurate correlation between liability and actual causation of a single plaintiff's injuries, it will produce consistent verdicts measured according to a defendant's contribution of risk to society. This result is satisfactory because all DES manufacturers posed a uniformly unreasonable risk of harm to the public.

290. See Partlett, *supra* note 265, at 1419.

291. See *supra* note 89.

292. Beyond the approximately 500 cases currently pending in New York, see *supra* note 210, *Hymowitz* likely will be applied to third-generation DES victims in the wake of *Enright v. Eli Lilly & Co.*, 155 A.D.2d 64, 553 N.Y.S.2d 494, 495 (1990) (permitting cause of action for a third-generation DES victim who allegedly suffered birth defects because of her grandmother's exposure to DES).

293. See *supra* notes 147-49 and accompanying text.

294. See *supra* note 229 and accompanying text.

B. *Rejecting Market Share Liability for Vaccine-Related Injuries:*
*Shackil v. Lederle Laboratories*²⁹⁵

In *Shackil v. Lederle Laboratories* Deanna Merrero's parents filed a suit on her behalf against the doctor who had inoculated her with a diphtheria-pertussis-tetanus (DPT) vaccine and the drug manufacturer believed to have produced the defective vaccine.²⁹⁶ Because Merrero's parents were ignorant of the connection between the vaccine and her injuries, they did not bring suit until thirteen years after her inoculation.²⁹⁷ This delay rendered identification of the culpable manufacturer virtually impossible because no records were kept documenting the manufacturer of the DPT.²⁹⁸ Thus, the plaintiff was forced to proceed with a market share theory of causation. The trial court granted the defendant's motion to dismiss because the plaintiff's inability to identify the defendant rendered her prima facie case incomplete.²⁹⁹ The plaintiff's appeal produced three decisions.³⁰⁰ The New Jersey Supreme Court reversed the holding of the lead opinion and held that a market share theory of causation could not be used in claims arising from vaccine injuries.³⁰¹

The *Shackil* decision discussed whether DPT is a generic product similar to DES. Unlike the uniform chemical composition of DES, DPT is made from a biological formula, with only the pertussis component producing harmful side effects.³⁰² Three different forms of the vaccine exist, and each presents a different degree of harm.³⁰³ Additionally, the

295. 116 N.J. 155, 561 A.2d 511 (1989).

296. *Id.* at 159, 561 A.2d at 513. The action alleged negligence, breach of warranty, misrepresentation, and strict liability based on a design defect. *Id.* Within hours of Deanna Merrero's inoculation at the age of two, she displayed symptoms of severe pain, which were followed by a rapid deterioration in her health. The plaintiff lost her verbal, motor, and mental capacities. She became severely retarded and required institutionalization. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 159-60, 561 A.2d at 513.

300. *Id.* at 160, 561 A.2d at 513. The lead opinion allowed the market share cause of action because failure to do so "would be an unwarranted deviation from what we believe to be a course already charted by the [New Jersey] Supreme Court." *Id.* (quoting *Shackil v. Lederle Laboratories*, 219 N.J. Super. 601, 621, 530 A.2d 1287, 1297 (App. Div. 1987)).

301. *See id.* at 174-91, 561 A.2d at 521-29.

302. *Id.* at 174-75, 561 A.2d at 521. DPT consists of three components: Diphtheria toxoid, tetanus toxoid, and a pertussis vaccine. The two toxoid portions contain small amounts of toxins that are chemically treated to stimulate immunity without causing disease symptoms and, consequently, are not harmful. The pertussis portion, however, does produce harmful side-effects because it is made from a whole-cell preparation. *Id.* at 175, 561 A.2d at 521.

303. *Id.* In addition to the whole-cell preparation, two other methods are available: A split-cell method, which also was alleged to be designed defectively, and an acellular method predominantly used in Japan. *Id.* at 175-76, 561 A.2d at 521. The risks posed by the acellular method are not known in the United States, but among the two former methods, certain drug companies produced versions significantly less harmful than others.

biological composition of the vaccine can create defects within different lots of the same type of vaccine.³⁰⁴ The court found, however, that doctors often use two of the vaccine types interchangeably, and one study showed no notable variation in the number of serious reactions caused by the different vaccine types.³⁰⁵ Consequently, the court would not reject market share liability solely because the products were based on a somewhat varying biological formula, rather than a uniform chemical compound.³⁰⁶

The New Jersey Supreme Court's main reservation about market share liability in *Shackil* was the public policy considerations of expanding liability against the vaccine industry. The court noted that vaccines are essential to public welfare.³⁰⁷ Recognizing that only two manufacturers currently are willing to produce DPT,³⁰⁸ the court stressed the need to prevent further escalation of prices caused by the costs of litigation and liability insurance.³⁰⁹ Thus, the court concluded that market share liability would not serve the public interest because of its regressive effect on manufacturing DPT and the need to encourage vaccine research and development.³¹⁰ Also central to the court's holding was the enactment of the National Childhood Vaccine Injury Act (NCVIA), which provides no-fault recovery for vaccine-related injuries or deaths.³¹¹ The court found the NCVIA critical to the outcome of

304. *Id.* at 176-77, 561 A.2d at 522.

305. See *Shackil*, 116 N.J. at 176, 561 A.2d at 522 (citing Boraff, Cody & Cherry, *DPT-Associated Reactions: An Analysis by Injection Site, Manufacturers, Prior Reactions and Dose*, 73 J. PEDIATRICS 31 (Jan. 1984)).

306. *Id.* The court concluded that the difference in risks posed by the vaccines was not significant or conclusive enough to be dispositive of market share liability.

307. *Id.* at 178, 561 A.2d at 522. The court noted that the DPT vaccine is responsible for a 99% reduction in the occurrence of the pertussis disease, and that in countries where use of the vaccine has been reduced, major epidemics have recurred. *Id.* at 178, 561 A.2d at 522-23.

308. *Id.* at 179, 561 A.2d at 523. In 1984 five companies produced DPT. *Id.*

309. *Id.* The court noted the rising price of a single DPT vaccination as evidence of these costs. Compared to \$.11 per dose in 1984, the vaccine cost \$11.40 per dosage in 1986, \$8.00 of which goes to insurance fees. *Id.* In 1989 a single dose cost almost \$15.00. Clayton & Hickson, *Compensation Under the National Childhood Vaccine Injury Act*, 116 J. PEDIATRICS 508, 509 (1990).

310. *Shackil*, 116 N.J. at 188, 561 A.2d at 528. The court stated explicitly that continuing DPT use is imperative, but that development of a safer alternative is even more important. The court implied that these objectives were paramount to plaintiffs' needs for recovery.

311. 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988).

Congress passed the NCVIA in 1986 in an effort to contain the vaccine problem, which endangered the continuation of widespread immunization. Clayton & Hickson, *supra* note 309, at 508-09. Although it accomplishes significant tort reform, the NCVIA is not the exclusive remedy for vaccine-related injuries. *Id.* at 510. A claimant can elect to reject compensation under the NCVIA and pursue a tort claim in state court. 42 U.S.C. § 300aa-21(a). No civil action can be pursued, however, until the claimant exhausts the NCVIA's remedies. *Id.* § 300aa-11. If a claimant accepts compensation under the NCVIA, no action can be brought against a manufacturer. *Id.* § 300aa-21(a).

the case because it provides certain, though reduced, compensation to plaintiffs and encourages safer products by establishing a national vaccine research and development program.³¹² The court stated explicitly that its holding rested on the public policy objective of fostering scientific and medical progress rather than on a flaw in market share liability.³¹³ The court expressly limited its holding to vaccine cases and indicated a willingness to adopt market share liability in the appropriate factual context.³¹⁴

VII. PUBLIC POLICY AND THE ROLE OF THE COURTS

A. Limiting Market Share Liability

Although *Hymowitz* represents considerable progress in the development of market share liability, *Shackil* is a substantial addition to the line of cases limiting market share liability to the DES context.³¹⁵ Market share liability is an innovative, yet controversial, doctrine designed to overcome a peculiar set of facts: hundreds of defendants manufactured and distributed a fungible and uniformly defective product that manifested a long latency period before causing injury, making identification of the actual defendant nearly impossible.³¹⁶ These particular facts have not surfaced entirely with any other product.

Asbestos is similar to DES, but the variety of asbestos content in a myriad of products renders apportionment of damages based on a de-

The NCVIA's claims requirements demand substantially less proof than that needed for a common-law tort action. Clayton & Hickson, *supra* note 309, at 510. If a claimant's injury is listed on the Vaccine Injury Table, 42 U.S.C. § 300aa-14, the claimant must show: (1) that an injury occurred, *id.* § 300aa-11(c)(1); (2) that resulted in damages, *id.* § 300aa-11(c)(1)(D)(i); and (3) that a preponderance of evidence does not exist that the injury was caused other than by the vaccine. *Id.* § 300aa-13(a). If the injury does not appear on the Injury Table, the claimant must show that the vaccine actually caused the injury. *Id.* § 300aa-11(c)(1)(C)(ii)(I).

Damages are limited to actual and projected unreimbursed expenses, lost earnings, and a maximum of \$250,000 for pain and suffering. *Id.* § 300aa-15(a). Attorney's fees are available, *id.* § 300aa-15(e), but punitive damages are quite limited. *See id.* § 300aa-23(d). For further commentary on the NCVIA, see Clayton & Hickson, *supra* note 309. *See also* Note, *Vaccine Injuries—Federal Law Prescribes Procedures for Alternatives to Tort Actions for Vaccine-Related Injuries*, 11 U. ARK. LITTLE ROCK L.J. 749 (1988-89); Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149 (1988).

312. *Shackil*, 116 N.J. at 186, 561 A.2d at 527.

313. *See id.* at 188, 561 A.2d at 528. The court stated that "[r]ather than approach our decision from the perspective of an analytical criticism of the market-share approach, we have chosen to posit today's ruling on the regressive effect that collective liability would have on the social policy of encouraging vaccine production and research." *Id.*

314. *Id.* at 191, 561 A.2d at 529. Presumably this context would be DES litigation. Limiting its holding to vaccines the court stated: "It should not be read as forecasting an inhospitable response to the theory of market share liability in an appropriate context. . . ." *Id.*

315. *See supra* Part V.

316. *See* PROSSER & KEETON, *supra* note 23, § 103, at 714 (listing four requirements of a market share action).

fendant's share of the complex asbestos market undesirable.³¹⁷ DPT also shares common characteristics with DES, but is not uniformly defective, and currently only two manufacturers produce DPT.³¹⁸ The Salk antipolio vaccine differs from DES in that the underlying design is not defective and no latency period exists before injury.³¹⁹ More important, DPT and the Salk vaccine are valuable to the welfare of society. Even further removed from the unique facts of DES are consumer and industrial products such as car batteries and industrial dyes. The only barrier to recovery in actions arising from these products is isolated instances of a plaintiff being unable to identify the defendant.³²⁰ The general theory of market share liability simply is not served in these cases.

Policy, as well as precedent, urges that market share liability be confined to DES cases. The tort system never was intended to compensate every victim.³²¹ A plaintiff first must prove that the defendant's negligent conduct actually caused the plaintiff's injuries.³²² A plaintiff unable to make this showing alone must bear the cost of the injury.³²³

One of the principal goals of the causation requirement is to limit the reach of a defendant's potential liability.³²⁴ Tort law must limit liability because excessive liability can discourage activities that are beneficial to society—"over-deterrence."³²⁵ In the case of DES, over-deterrence is not a problem because the product has been forbidden for use during pregnancy.³²⁶ The vaccine crisis charted in *Shackil*, however, demonstrates that even under traditional tort standards, with the causation requirement intact, socially desirable endeavors are at risk.³²⁷ Market share liability's reduced causation requirements threaten the very existence of products like DPT and possibly other generic drugs. Thus, market share liability should not be extended beyond DES.

317. See *supra* subpart V(A).

318. See *supra* notes 302-10 and accompanying text.

319. See *supra* notes 165-73 and accompanying text.

320. See *supra* subpart V(C).

321. For example, a plaintiff cannot recover merely based on "[p]roof of negligence in the air." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

322. PROSSER & KEETON, *supra* note 23, § 103, at 714; Fischer, *supra* note 46, at 1628.

323. Wright, *supra* note 23, at 1737 (citing O.W. HOLMES, *THE COMMON LAW* 64 (M. Howe ed. 1963)); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41, at 236-37, 241 (4th ed. 1971).

324. See Fischer, *supra* note 46, at 1629 (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 236-37 (4th ed. 1971)).

325. *Id.*

326. *Id.* at 1652.

327. As a further example, very few drug manufacturers today research and produce birth control drugs. Podolsky & Roberts, *Sorry, Not Sold in the U.S.*, *U.S. NEWS & WORLD REPORT*, Dec. 24, 1990, at 65 (reporting that currently only Ortho Pharmaceutical Corporation conducts contraceptive research and maintains a full line of contraceptive products, and that eight United States firms cancelled research because of "[a]n avalanche of product-liability lawsuits in the mid-1980s [that] drove liability premiums sky-high").

B. Judicial Burden

Another cost of market share liability is the burden leveled on the judiciary. In effect, market share liability is a judicial insurance plan that strives to redistribute the cost of claims in rough accordance with a manufacturer's share of the risk.³²⁸ Courts have neither the resources nor the expertise, however, to manage a compensation fund involving hundreds of claimants that requires extensive research and litigation to establish who is entitled to the fund, how large the fund must be, and how to distribute the cost of the fund.

Litigation is a notoriously slow and expensive means of compensation.³²⁹ The DES cases in New York are no exception;³³⁰ large-scale litigation gives rise to large-scale problems. Plaintiffs cannot agree on uniform tactics or lead counsel to manage the trial on defendants' national market shares. Defendants also contribute to the delay by failing to cooperate in determining their respective market shares.³³¹ Efforts have been made to consolidate cases and employ mass litigation techniques, but the New York State courts and rules of civil procedure do not lend themselves readily to mass litigation.³³² To be sure, a slow and costly resolution to the DES dilemma is better than no resolution at all. A federal administrative remedy, however, would be more efficient and would provide a better balance between compensation and competing public policy concerns.

C. Legislative Alternative

A federally administered "National DES Recovery Act" modeled after the NCVIA would resolve many of the problems posed by the various market share regimes.³³³ Primarily, the cost of liability would be

328. *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (characterizing market share liability as a "kind of court-constructed insurance plan").

329. See, e.g., Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. LEGIS. 301, 303 (1979) (stating that the "sad fact today is that the twin demons of cost and delay are asphyxiating our courts, both state and federal").

330. See Rheingold, *supra* note 210, at 895-96 (describing various practical difficulties that the New York courts are now facing with *Hymowitz* and 500 to 700 other market share cases).

331. See *id.* at 895 (counsel for *Hymowitz* reporting that "DES litigation is rather unruly in terms of the cooperation of counsel").

332. See generally *id.*

333. Various legislative proposals to the problems caused by DES and market share liability have been made over the years. The two most thorough proposals are found in Schwartz & Mahshigian, *supra* note 17, and Note, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003. With the major impact of a case like *Hymowitz*, however, and the NCVIA as a viable model, the cry for reform again must be sounded. Even manufacturers call for a legislative solution. See Fine, *A Personal Perspective from the "Manufacturer,"* 55 BROOKLYN L. REV. 899, 903 (1989). The Associate General Counsel for Johnson & Johnson, Inc. stated that the "unusual circumstances of the DES scenario cry out for a simple straightforward legislative solu-

distributed evenly throughout the industry.³³⁴ No solution can overcome the identification gap and link plaintiffs with their tortfeasors, but a nationwide act would force all defendants to pay a portion of each plaintiff's claim, which is consistent with the theory of market share liability.³³⁵ A national remedy also would promise recovery for each DES victim, not just those in the handful of states permitting market share actions. Additionally, a streamlined recovery system properly would devote more money to victims and less money to attorneys and experts at a much quicker pace than litigation. Deterrence would be achieved through a manufacturer-funded plan,³³⁶ while a limit on the amount of damages available would guard against over-deterrence of other generic products.³³⁷ Finally, administration of the fund by a congressional committee would relieve the state courts of a substantial, costly burden.

Under the plan manufacturers would contribute to a central fund in proportion to their national market share of DES as determined by a congressional committee. One proposal has suggested that manufacturers' efforts in responding to lawsuits and manufacturers' degree of culpability also should be considered when determining responsibility for funding.³³⁸ Like the NCVIA, Congress should appoint special masters to administer the fund to ensure expeditious recovery.³³⁹ Unlike the NCVIA, however, the plan should be the exclusive remedy for plaintiffs, and recovery should be available only for those DES victims unable to identify the manufacturer after reasonable efforts.³⁴⁰

Congress would have to give special consideration to claims that are stale under state law and would have to provide a time frame to establish who is eligible for recovery. Obviously, plaintiffs who already have brought suit in jurisdictions permitting market share liability would be ineligible. A list of the most widely accepted DES-related injuries could constitute the "DES Injury Table," as was done in the NCVIA.³⁴¹ Requirements for claims also could be established in a manner similar to the NCVIA. A plaintiff whose injury appears on the In-

tion, a fund administered by a government agency." *Id.*

334. See Schwartz & Mahshigian, *supra* note 17, at 970.

335. See Fischer, *supra* note 46, at 1626.

336. Schwartz & Mahshigian, *supra* note 17, at 970-71.

337. See Fischer, *supra* note 46, at 1652.

338. Schwartz & Mahshigian, *supra* note 17, at 971. The proposal, however, does not elaborate on what "manufacturer culpability" should include.

339. See 42 U.S.C. § 300aa-12(c), (d) (1988).

340. Schwartz & Mahshigian, *supra* note 17, at 967. Victor Schwartz and Liberty Mahshigian point out the possible need to create a penalty for plaintiffs who falsely identify the manufacturer in an effort to avoid compensation under the plan in favor of a higher award in state court. *Id.*

341. See *supra* note 311.

jury Table and cannot identify the defendant would have to show: (1) exposure to DES; (2) injury; (3) damages; and (4) that the injury was not caused by something other than DES.³⁴² Plaintiffs whose injuries do not appear on the list should be required to prove all causal elements of a tort action except for identification.³⁴³ Plaintiffs' damages should be limited to actual damages with a limited amount for pain and suffering, perhaps between \$100,000 and \$250,000. The fund should provide attorney's fees for plaintiffs and defendants. To facilitate its enactment, the act should cover DES victims only, as opposed to a general toxic tort recovery plan, and punitive damages should be prohibited.

VIII. CONCLUSION

For the past ten years, market share liability has been the sole recourse for DES plaintiffs who cannot identify precisely the DES manufacturer that caused their harm. Market share liability, however, has not resolved the DES problem adequately. Reflecting judicial reluctance to accept the radical change in tort law that the doctrine presents, only a handful of states have adopted market share liability in place of traditional causation requirements. Thus, the majority of DES victims are without any hope of recovery. Even in states that have adopted the doctrine, attempts to apportion damages in a rational, consistent manner have been impeded by the paucity of market share information.

Hymowitz represents New York's attempt to respond to the needs of its DES victims. The decision is also noteworthy for its consistent apportionment of damages based on manufacturers' contribution to the overall risk. *Hymowitz*, however, is hardly a panacea in that its costly and time-consuming procedures impose substantial burdens on the litigants and the judiciary.

This Note has sought to demonstrate that the judiciary, while better than no alternative, is not the optimal place for processing the claims and distributing the costs incumbent with a market share liability approach. Realistically, litigants cannot be expected to engage in a cooperative effort to determine damage entitlements and apportionment of liability. Prior to *Hymowitz*, each new case presented a new controversy over market shares and liability. A comprehensive plan from the legislature could eliminate much of this duplicative process by

342. *See id.*

343. Schwartz and Mahshigian propose that all plaintiffs who are unable to identify the defendant should be required to make this showing. Schwartz & Mahshigian, *supra* note 17, at 967. Such a requirement seems unnecessary if a reliable Injury Table can be compiled and would add substantially to the cost and delay of claims.

establishing one set of concrete rules to handle all cases, with little contention. The legislature has the resources to create and implement such a plan and to strike a balance between the competing policy concerns that arise from a relaxed showing of causation.

The NCVIA is a viable model for legislation that can address the concerns of both the litigants and society in achieving an acceptable resolution to DES injuries. An administrative remedy will offer plaintiffs quick, certain recovery, while guaranteeing limited liability for defendants. Such a plan also would provide society with an efficient use of resources. Thus, Congress should take heed of the DES cases and respond decisively with a legislative solution.

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