MARKET SHARE LIABILITY ADOPTED TO OVERCOME DEFENDANT IDENTIFICATION REQUIREMENT IN DES LITIGATION

Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 101 S. Ct. 286 (1980)

The Supreme Court of California in *Sindell v. Abbott Laboratories*[1] sidestepped a major obstacle to recovery for Diethylstilbestrol (DES)[2] victims[3] by adopting a market share liability exception[4] to the defendant identification requirement[5] that is essential to recovery in products

1. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 101 S. Ct. 286 (1980).

2. Diethylstilbestrol (DES) is a synthetic estrogen first approved by the Federal Drug Administration (FDA) in 1947. In 1952, the FDA declared DES not to be a "new" drug and generally recognized it as safe under the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 321 (p)(1) (1976). 26 Cal. 3d at 593, 607 P.2d at 932, 163 Cal. Rptr. at 140. Currently, physicians use DES primarily in the treatment of female disorders, including menopausal disturbances, senile vaginitis, amenorrhea, dysmennorhea, functional uterine bleeding, and as a therapy in restoring menstrual rhythm. R. PATTERSON & H. MORSE, MALPRACTICE AND PRODUCT LIABILITY ACTIONS INVOLVING DRUGS 86 (1976). DES has also been proposed as a contraceptive "morning after" pill. M. DIXON, DRUG PRODUCT LIABILITY § 11:27 (1979).

3. Typically, a pregnant mother ingested the drug to prevent miscarriage, thereby exposing the plaintiff *in utero*. Henderson, *DES Litigation: The Tidal Wave Approaches Shore*, 3 CORP. L. REV. 143 (1980). In 1971 it was reported that administration of DES to pregnant women increased the risk of vaginal adenocarcinoma in the female offspring. *See* M. DIXON, *supra* note 2, at § 11:27 (citing Herbst, *Adenocarcinoma of the Vagina: Association of Maternal Stilbestrol Therapy With Tumor Appearance in Young Women*, 284 NEW ENG. J. MED. 878 (1971)). Any effects in male children remain uncertain. *See* Charfoos, *DES: Bitter Aftermath of a Pill*, 11 TRIAL 71 (1975). As a result the FDA effectively banned the drug for use during pregnancy because of its danger and ineffectiveness as a miscarriage preventative. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 966 nn.11 & 12 (1978). Prenatal DES exposure has caused injury to a large class of potential plaintiffs. Already an estimated eighty to one hundred DES cases are pending against the major drug companies. *Id.* at 963. Defendants in the *Sindell* case have been made parties to nearly seventy similar actions. Petitioner's Brief for Certiorari at 9, Sindell v. Abbott Laboratories, *cert. denied*, 101 S. Ct. 286 (1980). If found liable the drug companies could face future damages in the billions of dollars. Comment, *supra* at 968.

4. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. This exception is discussed in notes 45-109 *infra* and accompanying text. The court relied primarily on the theory of enterprise liability proposed in Comment, *supra* note 3, in forming this exception. 26 Cal. 3d at 597, 609 n.25, 612 & n.28, 607 P.2d at 934, 935 n.25, 937 & n.28, 163 Cal. Rptr. at 135, 143 n.25, 145 & n.28; *see also* 26 Cal. 3d at 621, 607 P.2d at 943, 163 Cal. Rptr. at 151 (Richardson, J., dissenting); Comment, *supra* note 3, at 394.

5. Regardless of the theory which liability is predicated upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product . . . .

Annot., 51 A.L.R.3d 1344, 1349 (1973). *See* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.41 at 125 (2d ed. 1974); Annot., 79 A.L.R.2d 301, 338 (1961).

liability actions.[6]

Plaintiff Judith Sindell brought suit against eleven drug companies[7] on behalf of herself and similarly situated women. Sindell alleged that the administration of DES to her mother during pregnancy resulted in plaintiff's development of cancerous and precancerous tumors.[8] Plaintiff was unable to identify[9] the specific manufacturer of the drug taken by her mother because of the time lapse between ingestion of the drug and discovery of plaintiff's injuries.[10] The trial court sustained the defendants' demurrers because plaintiff failed to identify the culpable

6. Identification of defendant as manufacturer of an injury causing product is an indispensable element in a products liability suit. 1 R. HURSH & H. BAILEY, *supra* note 5, § 1.41 at 125. *See* note 5 *supra*. *See generally* O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733 (6th Cir. 1950), *cert. denied*, 341 U.S. 903 (1951); Wetzel v. Eaton Corp., 62 F.R.D. 22 (D. Minn. 1973); Thompson-Hayward Chem. Co. v. Childress, 277 Ala. 285, 169 So. 2d 305 (1964). For cases finding insufficient identification of the defendant, see Miller v. Schlitz Brewing Co., 142 Cal. App. 2d 109, 297 P.2d 1024 (1956); McDonough v. General Motors Corp., 6 Mich. App. 239, 148 N.W.2d 911 (1967); Rockett v. Pepsi Cola Bottling Co., 460 S.W.2d 737 (Mo. App. 1970); Welsh v. Coca-Cola Bottlers' Ass'n, 380 S.W.2d 26 (Tex. Civ. App. 1964).

7. The DES manufacturers sued by plaintiffs Judith Sindell and Maureen Rogers represented a substantial share of the DES market. 26 Cal. 3d at 588, 607 P.2d at 925, 163 Cal. Rptr. at 132. The plaintiffs' actions were joined at the appellate level, and discussion of both actions is based on the *Sindell* fact pattern. *See generally* Sindell v. Abbott Laboratories, 149 Cal. Rptr. 138 (1978), *discussed in* Levy & Ursin, *Tort Law in California: At The Crossroads*, 67 CALIF. L. REV. 497, 514 n.103 (1979).

8. Plaintiff Sindell sought compensatory and punitive damages for precancerous tumors of the vagina, cervix, and breast, and for a malignant tumor of the bladder allegedly caused by prenatal exposure to DES. 149 Cal. Rptr. 138, 141 (1978). The first cause of action alleged that defendants were "jointly and individually negligent in that they manufactured, marketed, and promoted DES . . . without adequate testing or warning." 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134. Other causes of action charged defendants with collaboration in testing and placing the drug on the market, violation of express and implied warranties, false and fraudulent misrepresentation, misbranding of drugs, conspiracy, and "lack of consent." *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

9. Both Sindell and Rogers originally filed complaints which did not specifically identify the manufacturer of the injury causing drug. Sindell failed to amend her complaint because she could not identify the DES manufacturer. Rogers amended her complaint, alleging that Eli Lilly & Co. had manufactured the drug used by her mother. The court's discussion in *Sindell* therefore applies to *Rogers* only if plaintiff Rogers fails to establish the identity of the proper defendant. 26 Cal. 3d at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135.

10. Obvious difficulties arise for a DES victim in attempting to identify the particular brand of DES administered to her mother. Approximately 300 United States manufacturers produced DES to prevent miscarriage. Henderson, *supra* note 3, at 147. *See also* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979); Comment, *supra* note 3, at 964 n.3. The *Sindell* court estimated that 200 DES manufacturers might have made the product that injured the plaintiff. 26 Cal. 3d at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139. Despite the large number of manufacturers, Eli Lilly & Co. and five or six other manufacturers controlled 90% of the DES market. Comment, *supra* note 3, at 977. *See also* B. SEAMAN & G. SEAMAN, WOMEN AND CRISIS IN SEX HORMONES

manufacturer.[11] The Supreme Court of California reversed, in a 4-3 decision,[12] and *held*: When plaintiffs cannot identify the specific manufacturer of the drug that caused their injuries, each manufacturer of a substantial percentage of the generically identical drug is liable for its proportionate share of the market. Any defendant who can prove that it did not manufacture the drug that caused plaintiff's injuries will be absolved from liability.[13]

Since the advent of products liability law,[14] courts have imposed liability on a manufacturer for harm caused by a defective product[15] only

33 (1977). Diethylstilbestrol was marketed under approximately seventy trade names but was most commonly referred to by its generic name, DES. M. DIXON, *supra* note 2, at § 9:09.

It is not unreasonable, therefore, that DES mothers have difficulty in remembering the name of the manufacturer of a drug they took almost thirty years before discovering its carcinogenic propensity. *See* Comment, *supra* note 3, at 972. The loss or destruction of pharmaceutical or medical records identifying the manufacturers compounds the problem of identification. *Id.* at 972 n.26; Note, *Industry-Wide Liability*, 13 SUFFOLK U. L. REV. 980, 999 (1979). *See also* Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Abel v. Eli Lilly & Co., 94 Mich. App. at 67, 289 N.W.2d at 22 (1980).

11. Sindell v. Abbott Laboratories., No. C 169127 (Super. Ct., L.A. County); No. 61220 (Super. Ct., Ventura County); *see* 26 Cal. 3d at 596, 607 P.2d at 926-27, 163 Cal. Rptr. at 134-35.

The court of appeals specified two theories on which liability might be imposed. The court accepted both the concert of action theory and the alternative liability theory in shifting the burden of proof of causation to the defendants in *Sindell*. 149 Cal. Rptr. 138 (1978). See notes 27-39 *infra*. The California Supreme Court discussed and criticized both of these theories. 26 Cal. 3d at 598, 607, 607 P.2d at 928, 933, 163 Cal. Rptr. at 136, 141.

12. *Id.* at 611-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46.

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

Traditional tort doctrine places the burden on the plaintiff of proving that the tortious conduct of the defendant caused the harm to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* at § 433B(1), comment a. *See* Rutherford v. Modern Bakery, 310 S.W.2d 274 (Ky. 1958); Tombigbee Elec. Power Ass'n v. Gandy, 216 Miss. 444, 62 So. 2d 567 (1953); Florig v. Sears, Roebuck & Co., 388 Pa. 419, 130 A.2d 445 (1957); W. PROSSER, THE LAW OF TORTS 241 (4th ed. 1971).

14. The English case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), is generally regarded to represent the birth of products liability law. W. PROSSER, *supra* note 14, at 641; Note, *supra* note 10, at 980 n.1. For a brief synopsis of the early development of products liability law, see 2 F. HARPER & F. JAMES, THE LAW OF TORTS, 744-52 (1956); Note, *supra* note 10, at 980-97.

15. The Restatement of Torts states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

on proof that defendant actually manufactured the product in question.[16] The identification requirement is also essential to prove causation[17] in negligence,[18] breach of warranty,[19] and strict liability

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(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement appears to have adopted the strict liability theory of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), discussed in note 20 *infra*.

16. *See* notes 5 and 6 *supra*.

It goes without saying that if a drug manufacturer, druggist, or other seller of drugs is to be held liable for harm caused by such a product, it is necessary to show that the drug was one with which the defendant is identified in the respect asserted—that is, it must be shown that the defendant actually manufactured, compounded, or sold the drug or medicine in question.

Annot., 79 A.L.R.2d 301, 338 (1961). *See also* Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) (asbestos case with fact pattern similar to *Sindell*); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (same); Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969) (burden of proof of causation on plaintiff in drug product liability case); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978) (failure to establish defendant as manufacturer of DES that plaintiff's mother had taken during pregnancy); Dumbrow v. Ettinger, 44 F. Supp. 763 (E.D.N.Y. 1942) (failure to establish defendant as seller of injury producing liver extract); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978) (failure to identify adequately one of multiple manufacturers of DES).

17. When manufacturers and designers are held strictly liable in tort for their defective products, the following elements of the case must be present:

(1) [T]he product is placed on the market;
(2) [T]here is knowledge it will be used without inspection for defect;
(3) [T]he product proves to have a defect; and
(4) [T]he defect causes injury to a human being.

Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745, 748 (1976) (citing Greenman v. Yuba Power Prods, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). "Inherent in that liability thesis is the proposition that the identity of the manufacturer must be ascertained and proved." McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 83, 150 Cal. Rptr. 730, 734. *See generally* W. PROSSER, *supra* note 13, at 236; Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

18. The elements of a cause of action in negligence are:

(1) A duty requiring an actor to conform to a standard of conduct to protect others against unreasonable risks.
(2) A failure to conform to the standard required.
(3) A causal connection between the conduct and the resulting injury.
(4) Actual loss or damage to another.

W. PROSSER, *supra* note 13, at 143. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1971). In MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), Justice Cardozo eliminated the need for privity of contract between the contractor and the injured plaintiff for injuries caused by defective products. When a product that is negligently made is dangerous to the user, the manufacturer owes a duty to all foreseeable users. *Id.* at 389, 111 N.E. at 1053. *See* Note, *supra* note 10, at 988.

19. With the advent of consumer reaction to injuries from defective food in 1905, a hybrid

actions.[20] Because of increasing industrialization in the last century, the judiciary developed three major exceptions[21] to the identification requirement to protect consumers' rights:[22] concert of action,[23] alternative liability,[24] and enterprise liability.[25]

The prima facie concert of action case requires proof that multiple actors[26] pursued a common plan or design to commit a tortious act.[27]

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tort/contract action known as breach of warranty developed. Like negligence, it shed the requirement of privity of contract, *see* note 18 *supra*, and finally developed into an action of strict liability, *see* note 20 *infra*. *See* Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976); Back v. Wickes Corp., 378 N.E.2d 964 (Mass. 1978); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960).

20. In Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), Justice Traynor finalized the transition of breach of warranty actions into strict liability. *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). Strict liability in tort is accepted by at least two thirds of the courts and has been incorporated into the RESTATEMENT (SECOND) OF TORTS § 402A (1965). *But see* McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 87, 150 Cal. Rptr. 730, 733 (1978); W. PROSSER, *supra* note 14, at 656. *See generally* M. DIXON, *supra* note 2, at § 9:06.

21. These three exceptions are discussed extensively in *Sindell*. *See* 26 Cal. 3d 588, 598-609, 607 P.2d 924, 928-35, 163 Cal. Rptr. 132, 136-43.

22. Justice Traynor's famous dissent in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), summarizes the courts' recognition of the need to protect consumers' rights:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

Id. at 462, 150 P.2d at 441 (Traynor, J., dissenting).

23. *See* notes 26-31 *infra*.

24. *See* notes 30-39 *infra*.

25. *See* notes 40-54 *infra*.

26. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (defendants shooting in plaintiff's direction); Orser v. George, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (same); Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968) (participating in drag race); Moses v. Town of Morganton, 192 N.C. 102, 133 S.E. 421 (1926) (polluting environment); Lemons v. Kelly, 239 Or. 354, 397 P.2d 784 (1964) (participating in drag race); Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952) (polluting environment). *See also* Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927).

27. *See* Orser v. George, 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708, 715 (citing W. PROSSER, LAW OF TORTS 258 (3d ed. 1964)).

The actors must have furthered the commission of a tort through their own actions, by cooperating with or encouraging another wrongdoer. *See* W. PROSSER, *supra* note 13, at 293; *see* notes 8-10 *supra* and accompanying text. Conspiracy is often used as a synonym for concert of action in

The agreement among the parties may be inferred from the actors' knowledge of the commission of tortious acts[28] if a tacit understanding to commit these acts existed among the parties.[29] The tortfeasors are jointly and severally liable for all damage to the plaintiff.[30] The identification requirement in the concert of action case is relaxed when the court imposes liability on the group, rather than on the individual wrongdoer.[31] The practical difficulty of apportioning damages among

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cases of vicarious liability. *See* W. PROSSER, *supra* note 13, at 293. The elements of a conspiracy are:

(1) the formation and operation of the conspiracy;
(2) the wrongful act or acts done pursuant thereto; and
(3) the damage resulting therefrom.

Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 631, 498 P.2d 1063, 1074, 102 Cal. Rptr. 815, 830 (1972). *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The following cases add "cooperation" and "encouragement" to the elements of a conspiracy to form the theory of concert of action: Weirum v. R.K.O. General, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975) (encouraging dangerous conduct of others); Weinberg v. Bixby, 185 Cal. 87, 196 P. 25 (1921) (participating in wrongful diversion of flood waters); Agovino v. Kunze, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960) (aiding and abetting); Meyer v. Thomas, 18 Cal. App. 2d 299, 63 P.2d 1176 (1936) (participating in an illegal transfer of trust); Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199 (1932) (encouraging and enticing).

The Restatement incorporates the aiding and abetting rule into § 876:

> For harm resulting to a third person from the tortious conduct of another, a person is liable if he . . .
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or
> (c) gives substantial assistance to the other in accomplishing the tortious result, constituting a breach of duty to that third person.

RESTATEMENT OF TORTS § 876(b)(c) (1934). The provision was specifically applied in Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 113, 140 Cal. Rptr. 41, 49 (1977).

28. *See* Nelson v. Nason, 343 Mass. 220, 177 N.E.2d 887 (1961); Lemons v. Kelly, 239 Or. 354, 397 P.2d 784 (1964); W. PROSSER, *supra* note 13, at 292 (citing Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968)). *See also* Skroh v. Newby, 237 So. 2d 548 (Fla. 1970) (citing Annot., 13 A.L.R.3d 431-40 (1967)).

29. W. PROSSER, *supra* note 13, at 292. Although this theory was developed to prevent tortious conspiracies and not specifically as an exception to the identification requirement, the concert of action concept deals with the same underlying problems of causation among the parties acting in concert and the injuries suffered by the plaintiff. *Id.* at 293 n.17 (citing P. WINFIELD, HISTORY OF CONSPIRACY Ch. II (1921)). *But see* Comment, *supra* note 3, at 979-80 (criticism of the two explanations supporting concert of action). *See generally* Green, *supra* note 17, at 548-61.

30. The defendants may, however, receive contribution from other tortfeasors. *See* Caldwell v. Fox, 394 Mich. 401, 231 N.W.2d 46 (1975); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937). Even if defendants caused no injury, they become liable for the injuries caused by fellow tortfeasors because they all acted jointly. *See* Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906).

31. If all of the defendants materially contribute to the commission of a tort within the description of concert of activity, and are held jointly and severally liable, identification of the

tortfeasors initially results in imposition of the entire loss on each defendant.[32] If a logical basis for apportionment exists, however, an approximate division of damages among defendants may occur.[33]

The courts developed the alternative liability theory to overcome identification problems inherent in tort cases.[34] All potential defend-

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specific wrongdoer will not be necessary for recovery, and the entire group will be liable. *See* note 26 *supra* and accompanying text. Although use of the theory may have initial appeal to the DES plaintiff attempting to impose liability on a "conspiracy" of drug manufacturers, the California Court of Appeals severely criticized use of the concert of action theory in DES cases because of the complicated fact pattern, evidentiary problems in proving concert, and the arbitrary choice of only a few manufacturers.

> [The concert of action theory deals] with cases of known concerted activity where the sole uncertainty was not whether the defendant had in some way acted so as to contribute to the injury, but rather whether the defendant's difficulty in apportioning responsibility would preclude the innocent claimant's recovery. In those cases the defendant was known to have engaged in concerted activity by either shooting in the direction of the plaintiff, polluting the environment, or participating in a drag race on a public roadway.

McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 85-86, 150 Cal. Rptr. 730, 735-36 (1978) (rejecting theory in DES cases). In Bichler v. Eli Lilly & Co., 50 A.D.2d 90, 376 N.Y.S.2d 144 (1979), however, a jury found in the plaintiff's favor despite her inability to fulfill the identification requirement. *But see* Henderson, *supra* note 2, at 145; Comment, *supra* note 3, at 980-85. At least one court allowed concert of action to overcome defendant's demurrers at the pleading stage. Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1980). Another court certified a class action, noting that concert of action will be one of plaintiff's primary arguments. Payton v. Abbott Laboratories, 83 F.R.D. 382 (D. Mass. 1979).

32. W. PROSSER, *supra* note 13, at 314-15 n.27.

> The liability of two defendants who act in concert is somewhat similar to the liability of partners or the liability of principal and agent—the plaintiff may recover his entire claim against either of the tortfeasors. Much the same thing is true where two tortfeasors act independently, rather than in concert, if their actions combine to produce a single injury in the plaintiff: between them there may be contribution or indemnity, but so far as the plaintiff is concerned, they are not entitled to limit their liability to some percentage of the plaintiff's damages.

D. DOBBS, REMEDIES 215 (1973). *See* Machado v. Katcher Meat Co., 108 Cal. App. 2d 1, 237 P.2d 715 (1951); Eidson v. Maddox, 195 Ga. 641, 24 S.E.2d 895 (1943); Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165 (1944); Walker v. Vail, 203 Md. 321, 101 A.2d 201 (1953); Briley v. Austad, 108 N.W.2d 696 (N.D. 1961).

33. W. PROSSER, *supra* note 13, at 314 n.20.

> The question is primarily not one of the facts of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes. Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made.

Id. at 313-14.

34. "There is one special type of situation in which the usual rule that the burden of proof as to causation has been relaxed. It may be called that of clearly established double fault and alternative liability." *Id.* at 243.

> The alternative liability theory . . . involves not a joint tort, but rather, involves independent acts by two or more tortfeasors, all of whom acted wrongfully, but only one of

ants must be joined in an alternative liability action to prevent the true wrongdoer from escaping liability.[35] In *Summers v. Tice*,[36] for example, the plaintiff's two hunting companions negligently fired shotguns simultaneously. A single pellet damaged plaintiff's eye. Only one of the defendants' shots was responsible for the wound, but plaintiff could not possibly identify the particular gun that caused the injury.[37] The *Summers* court reasoned that when only one actor injured a plaintiff, compensation will not be denied because plaintiff cannot establish which of two equally culpable defendants was responsible for the injury.[38]

The courts, in products liability decisions,[39] have cautiously embraced both the alternative liability and the concert of action theories to overcome the identification hurdle in DES cases. A Michigan court of appeals in *Abel v. Eli Lilly & Co.*[40] accepted the alternative liability theory to dismiss DES manufacturers' demurrers.[41] Because plaintiffs

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whom has injured plaintiff. Joint and several liability is imposed, not because all are responsible for the damage, but because it is impossible to tell which one is responsible.

Abel v. Eli Lilly & Co., 94 Mich. App. 59, 73, 289 N.W.2d 20, 25 (1980). *See* notes 36-44 *infra*.

35. RESTATEMENT (SECOND) OF TORTS § 433B(3), comment h (1965).

36. 33 Cal. 2d 80, 199 P.2d 1 (1948).

37. *Id. See* Annot., 5 A.L.R. 2d 91, 98, 100 (1948). The authors of the Restatement have adopted the *Summers* rule:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon such actor to prove he has not caused the harm.

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

38. 33 Cal. 2d at 86, 199 P.2d at 4. Some courts will not extend *Summers* to cases in which all tortfeasors are not joined. *See* Shunk v. Bosworth, 334 F.2d 309 (6th Cir. 1964); Smith v. Americania Motor Lodge, 39 Cal. App. 3d 1, 113 Cal. Rptr. 771 (1974); Eley v. Curzon, 121 Cal. App. 2d 280, 263 P.2d 86 (1953).

Summers addresses the earlier controversial decision of Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944), which formulated the alternative liability theory more broadly than *Summers*.

In *Ybarra* the plaintiff awoke from an appendectomy with a paralyzed shoulder. Unable to identify a reason for the injury, plaintiff brought suit against the six doctors and nurses attending the operation on the presumption that at least one had caused the injury. Each defendant was present at the time of the cause of the injury, and therefore under the doctrine of *res ipsa loquitur*, all of the defendants were liable for the negligence of one actor. 25 Cal. at 488, 154 P.2d at 688. *See also* Sindell v. Abbott Laboratories, 26 Cal. 3d 598, 599, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 137.

39. Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975). *Contra*, Wetzel v. Eaton Corp., 62 F.R.D. 22 (D. Minn. 1973); Garcia v. Joseph Vince Co., 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978).

40. 94 Mich. App. 59, 289 N.W.2d 20 (1980).

41. Female DES victims and their husbands brought suit for damages against seventeen DES manufacturers. Their amended complaint alleged causes of action under both the concert of action theory and the alternative liability theory for negligence in testing, manufacturing, and dis-

bear a heavy burden in proving that each defendant breached a duty of care in marketing DES, the court refused to require plaintiffs to apportion the damages among defendants.[42] The *Abel* court thus shifted the burden of dividing liability to proven wrongdoers[43] after plaintiff established the manufacturers' culpability.[44]

The theory of enterprise liability,[45] which is designed to aid the plaintiff who cannot identify the manufacturer of an injurious product,[46] is a hybrid of the concert of action and alternative liability theo-

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tributing the drug. Plaintiffs alleged that all of the known manufacturers whose products were distributed in Michigan during the relevant time period were joined as defendants. Some of the plaintiffs were unable to discover the specific manufacturer of the drug that caused their harm because of the destruction of pharmaceutical records.

42. Plaintiffs in the case at bar bear a heavy, perhaps . . . insuperable, burden of proof, one made even more difficult by the number of defendants and the [long period before discovery of the injuries]. They must establish by a preponderance of the evidence that each defendant breached its duty of care in producing the product, that the harm to each plaintiff was the result of ingestion of DES by her mother, and that one or more of the named defendants manufactured the DES so ingested. Each plaintiff must carry her burden as to these defendants in order to recover.

94 Mich. App. at 76-77, 289 N.W.2d at 26-27.

43. *Id.* at 73-74, 289 N.W.2d at 25.

44. *Id.* at 75, 289 N.W.2d at 26. *See* Holloway v. General Motors Corp., 403 Mich. 614, 271 N.W.2d 777 (1978); Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961).

45. Enterprise liability can be described as a deliberate assignment of risk to specific individuals or groups because they are in the best position to eliminate the risks or to self-insure by spreading the cost of the risks not eliminated. The risks assigned are those viewed as typical or calculable and thus can be treated as cost items. These concepts have been used to justify the first applications of strict products liability, as well as later extensions to other members of the manufacturing-distribution chain.

Note, *Products Liability—Enterprise Liability—Entire Industry May be Liable if Impossible to Identify Actual Manufacturer of Defective Product*, 19 WAYNE L. REV. 1299, 1306 (1973). *See also* Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153, 158-64 (1976).

46. *See* note 45 *supra*. The elements of enterprise liability expand traditional bases of liability in tort law while restricting the theory's scope to products liability cases. One commentator proposes the following elements of enterprise liability:

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

Comment, *supra* note 3, at 995.

ries.[47] The court in *Hall v. E.I. du Pont de Nemours*[48] first imposed the concept of enterprise liability[49] on a group of manufacturers of dynamite blasting caps for injuries caused by the product, even though plaintiff could not identify the culpable manufacturer.[50] The theory assigns the burden of proof of causation[51] to a group of blameworthy manufacturers[52] who assume calculable risks in marketing certain products[53] as a cost of doing business.[54] The theory requires the identification of defendants that are both capable of bearing the cost of the damages[55] and sufficiently culpable to warrant not only the shifting of proof of causation, but also the apportioning of the damages among them.[56] The ultimate distribution of cost hopefully achieves an efficient and proper use of society's resources to compensate the injured victim.[57] The theory, although attractive to some scholars[58] and plaintiffs,[59] has not been accepted widely by courts in DES cases.[60]

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47. *Id.*

> Enterprise liability as proposed here combines the better features of concert and alternative liability into one coherent theory. It can result in the joint and several liability of all the industry members that manufactured an identically defective product. The theory would be available to plaintiffs who cannot or might not be able to identify the actual causative agent of their injury.

Id.

48. 345 F. Supp. 353 (E.D.N.Y. 1972).

49. The *Sindell* court employs the term "suggested" because of the uncertain position of Hall v. E.I. du Pont de Nemours, 345 F. Supp. 353 (E.D.N.Y. 1972), as authority. 26 Cal.3d at 607 n.22, 607 P.2d at 934 n.22, 163 Cal. Rptr. at 142 n.22.

50. Hall v. E.I. du Pont de Nemours, 345 F. Supp. 353 (E.D.N.Y. 1972). *Hall* consolidated two cases in which six explosives manufacturers were held liable for accidents in which children were severely injured by exploding blasting caps. Evidence demonstrating the identity of the responsible manufacturer was destroyed in the explosion.

51. *See* note 45 *supra*.

52. *See* Note, *supra* note 10, at 983.

> The essence of the industry-wide liability [enterprise liability] theory is a shift in the burden of proof on the identification issue from the plaintiff to the manufacturers. The shift would occur if the plaintiff, through no fault of his own, is unable to identify the manufacturer of an injury-causing product but can demonstrate other factors common to a group of manufacturers of products similar to the injury-causing product.

Id. (footnotes omitted).

53. *See* note 45 *supra*.

54. *Id.* This may have the undesirable effect of causing manufacturers to leave defects in a product if the cost in removing them exceeds the cost of paying products liability claims. Campbell, *Enterprise Liability—Adjustment of Priorities*, 10 FORUM 1231, 1235 (1975).

55. Klemme, *supra* note 45, at 183-84.

56. *Id.*

57. *Id.* at 184-91.

58. The most notable are Klemme, *supra* note 45, and the author of Comment, *supra* note 3.

59. *See* Note, *supra* note 10, at 1001-06.

The Supreme Court of California in *Sindell v. Abbott Laboratories*[61] rejected these three exceptions to the identification requirement,[62] and based its judgment on a new theory: market share liability.[63] The court first addressed the alternative liability theory,[64] which would shift plaintiff's burden of proof even though defendants did not have greater access to the injury causing information.[65] The *Sindell* court did not interpret *Summers* to require that defendant possess the information, but only that the knowledge be accessible to defendants.[66] The court noted, however, that if defendant establishes it did not manufacture the specific DES taken by plaintiff's mother, it will be dismissed from the action.[67] The court rejected the alternative liability theory,[68] however, because it is possible that none of the five defendants manufactured the injury-causing DES.[69]

The *Sindell* court dismissed plaintiff's contention that a concert of action[70] existed among the defendant manufacturers in developing, testing, and marketing DES.[71] The plaintiff did not allege a tacit understanding among the manufacturers in producing DES,[72] but stated that defendants produced the drug from an identical formula in adherence with guidelines of the Food, Drug, and Cosmetic Act[73] and common practice of industry.[74] The court held that to apply the concert of action theory would impose liability on individual manufacturers for the products of an entire industry, despite a showing that a defendant did not produce the particular drug that caused plaintiff's injuries.[75]

60. *See* Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978).

61. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

62. *Id.* at 611-12, 607 P.2d at 935-37, 163 Cal. Rptr. at 144-45.

63. *See* notes 98-108 *infra*. *See generally* Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981).

64. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

65. *Id.* at 600, 607 P.2d at 928, 163 Cal. Rptr. at 137.

66. *Id.* at 600-02, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38.

67. *Id.* at 602-03, 607 P.2d at 930, 163 Cal. Rptr. at 138.

68. The court cited Garcia v. Joseph Vince Co., 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978). In *Garcia* only one of two defendants was a wrongdoer and plaintiff's inability to establish the identity of the wrongdoer resulted in a judgment for the defendants.

69. 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.

70. *Id.* at 604-05, 607 P.2d at 932, 163 Cal. Rptr. at 140.

71. *Id.*

72. *Id.* at 605-06, 607 P.2d at 932, 163 Cal. Rptr. at 140.

73. 21 U.S.C. § 351, (b) (1976). *See* note 2 *supra*.

74. 26 Cal. 3d at 605-06, 607 P.2d at 933, 163 Cal. Rptr. at 141.

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

The majority rejected the theory of enterprise liability[76] enunciated in *Hall v. E.I. du Pont de Nemours*.[77] First, the *Hall* court imposed liability on a small number of manufacturers representing an entire industry,[78] and warned that application of the enterprise liability theory to a decentralized industry with a large number of manufacturers would be "manifestly unreasonable."[79] Second, defendants in *Hall* relied on a trade association to guard against the foreseeable risks inherent in their industry,[80] while plaintiffs in *Sindell* failed to allege a similar concerted delegation of authority.[81] Finally, because the *Hall* majority recognized that the Food and Drug Administration, which sets testing and marketing standards for new drugs, controls the drug industry,[82] DES manufacturers who follow criteria stricter than common industry practice should not be held accountable for plaintiffs' injuries.[83]

The California Supreme Court, however, did not limit its decision to the three identification requirement exceptions.[84] The court modified the most persuasive arguments of *Summers*,[85] applied the arguments to the enterprise theory of *Hall*,[86] and proposed its own market share liability theory[87] to overcome defendants' demurrers.[88] The market share liability theory ensures both the likelihood that joined defendants provided the injurious product, and that the specific wrongdoer will not

76. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

77. 345 F. Supp. 353 (E.D.N.Y. 1972). *See* notes 48-50 *supra* and accompanying text.

78. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

79. 345 F. Supp. at 378.

80. *Id.*

81. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

82. *Id.*

83. *Id.*

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

85. "As between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." *Id.*

86. *Id.* at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

87. *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 146.

88. The court failed to consider several legislative and judicial attempts to provide alternative compensation for DES victims without expanding products liability law in the manner of market share liability. These alternatives include: Creation of a manufacturers' insurance fund for future DES related injuries to members of a class action, Payton v. Abbott Laboratories, No. 76-1514-8 (D. Mass., filed Jan. 30, 1980); prevention of exclusionary policies in various health care and disability plans towards DES victims, Ch. 776 §§ 1-7, 1980 Cal. Adv. Legis. Serv. 439 (Cal. Sen. Bill No. 1392, enacted July, 1980); and limited no-fault products liability insurance, Note, *supra* note 10, at 1019-21. *See generally* Merrill, *Compensation For Prescription Drug Injuries*, 59 VA. L. REV. 1, 107 (1973).

escape liability.[89] A particular defendant may be excluded from an action by proving that it could not have manufactured the product that caused plaintiff's injuries.[90] Remaining defendants may file cross-complaints against others not joined in the action to equitably distribute liability throughout the industry.[91] The *Sindell* court maintains that each manufacturer's ultimate liability for injuries caused by its production of DES under the market share theory would approximate the portion of damages caused by its product.[92]

When the *Sindell* court attempted to develop a market share liability theory to relieve the plaintiff's identification burden, it created a flawed and untenable doctrine. The problem lies in the theory's abrogation of the *Summers* and *Hall* requirement that all possible defendants be joined in an action to shift the burden of proof of causation.[93] The market share theory requires only that plaintiffs name manufacturers representing a substantial share of the relevant market.[94] "Substantial share" is an undefined term that infers something less than a seventy-five percent share of the appropriate market.[95] The *Sindell* dissent illustrates that the substantial share is an aggregate of the individual shares of independent manufacturers who occupy only a small portion of the relevant market.[96] An individual defendant may be held proportionately liable for injuries caused by a particular product that it probably did not produce.[97]

The tortfeasor can escape liability, under *Sindell*, if it is not joined in the action. Although the court suggests that joined defendants may implead other possible defendants,[98] all the liability will fall originally on the joined defendants. Some manufacturers will either be outside the

89. 26 Cal. 3d at 613, 607 P.2d at 937, 163 Cal. Rptr. at 146.

90. *Id.*

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

92. *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 146.

93. *See* note 39 *supra*.

94. 26 Cal. 3d at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

95. The court states that "while 75 to 80 percent of the market is suggested as the requirement by the FORDHAM Comment (at p. 996), we hold only that a substantial percentage is required." *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. *See also* Comment, *supra* note 3, at 996.

96. 26 Cal. 3d at 615-16, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).

97. *Id.*.

98. *Id.* at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146. Defendants also may seek contribution from other manufacturers in order to evenly spread the costs of damages. *See* Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

jurisdiction of California courts[99] or no longer in business.[100] Other states may not accept the market share theory,[101] which will cause an uneven distribution of costs.[102] Problems of proof relating to market share data[103] emphasize that the ultimate assignment of liability will be based arbitrarily on the conjecture of the court.

Problems associated with the rule will not be limited to DES manufacturers.[104] The *Sindell* dissent criticizes the rule as a future imposition of liability "exceed[ing] absolute liability," opening the door to a substantial increase in the volume of products liability suits.[105] The effect of a holding that guarantees plaintiffs will prevail on the causation issue at trial because remaining defendants will be incapable of disputing allegations that they manufactured the cause of plaintiff's injuries is an immediate concern to DES manufacturers.[106]

The majority, in developing a new theory, upheld the court's power to declare policy, rather than allowing the legislature to resolve the issue.[107] Similarly, the court did not discuss alternate modes of compensation for victims of defective products.[108] Although the need for compensating the DES victim is clear, the court's theory drastically alters basic postulates of products liability law.[109]

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99. 26 Cal. 3d at 617, 607 P.2d at 941, 163 Cal. Rptr. at 148. (Richardson, J., dissenting) ("such a defendant may or may not be either solvent or amenable to process").

100. *Id.*, 607 P.2d at 941, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

101. *See* note 31 *supra*.

102. 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

> Additionally, it is readily apparent that "market share" liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in California. On the assumption that no other state will adopt so radical a departure from traditional tort principles, it may be concluded that under the majority's reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their "substantial" aggregate market share may be considerably less. This undeniable fact forces the majority to concede that, "a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify."

Id.

103. *Id.*, 607 P.2d at 941, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

104. Comment, *supra* note 3, at 1007; Note, *supra* note 10, at 1001-02.

105. 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (citing Note, *supra* note 10, at 998).

106. 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting).

107. *See* note 23 *supra*. The California legislature has taken some steps for DES victims, but as one commentator points out, the answer to the DES victims' problems may lie in limited no-fault insurance, which could be imposed on manufacturers by the legislature. *See* Note, *supra* note 10, at 1015-22.

108. *See* note 88 *supra*.

109. *See* notes 109-22 *supra*; Note, *supra* note 10, at 1022.