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Perspectives on Market Share Liability: Time for a Reassessment

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I. Introduction

Few cases have created a stir as dramatic as the case of Sindell v. Abbott Laboratories.1 It has been variously described as "a blockbuster,"2 a "novel and unprecedented case,"3 and "a radical departure from the body of products liability law."4 The judgment of dissenting judge Richardson that the case "represent[ed] a new high watermark in tort law"5 for plaintiffs seemed difficult to dispute. California, a state which pioneered product liability ideas which theoretically permitted recovery without a showing of manufacturer fault, had again apparently blazed an electrifying and revolutionary trail of product liability compensation.6

However, the market share theory of recovery enunciated in Sindell has met with less than an enthusiastic response in other courts.7 The fairness, efficiency,
and workability of the market share theory as a proxy for the traditional identification requirement in a products liability case have been questioned by those courts and by commentators. Its potential for application in non-pharmaceutical contexts has either been ambiguously realized or merely proposed. Nevertheless, it is in the pharmaceutical field that Sindell arose, and it is the pharmaceutical field which promises to yield additional scores of cases where market share theories are advanced to attempt to secure recovery for persons allegedly injured by dangerous generic drugs.

After setting out more fully the nature of the identification problem, this article will examine some of the perceived shortcomings of the market share theory, as well as the continuing judicial reception of Sindell. This judicial reception includes recent efforts to accept in principle but modify in application the holding of that case. More importantly, the case has been vigorously attacked as substantially dampening the incentive of drug companies to engage in research and development for new drugs. If this were so, it would have a pervasive and deleterious effect on society. This objection has been overstated, however, and courts should not regard it as a serious impediment to an application of the market share theory in these Sindell-like settings. Furthermore, some of the other uncertainties of Sindell


1 See infra text accompanying notes 43-63.

9 The most controversial application of market share principles has been in the context of asbestos cases. At least two courts have to varying extents upheld the application of market share principles against asbestos manufacturers. See Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), rev'd on other grounds, 681 F.2d 334 (5th Cir. 1982); Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. Dist. Ct. App. 1984). Contra In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982) (market share liability rejected because of inherent difficulties in ascertaining accurate division along market share lines).

10 One action presently in litigation involves the proposed application of market share principles to electrical wiring manufacturers who incorporate polyvinyl chloride (PVC) into wiring. PVC is purchased by wiring manufacturers in base form. They then use this insulation on the wiring. PVC is a chemical component produced by many manufacturers and the identification of the producer of PVC is impossible. Allegedly, PVC when exposed to heat suffers a spontaneous breakdown of its properties. Gases are emitted and a concentration of gas and heat result, producing a low level explosion. Then a white gas is given off and reduced to carbon gas. This noxious gas causes a relaxation of the traches and an inhalation of black smoke which immobilizes the victim. PVC is used widely in electrical wiring. Because identification is not possible, plaintiffs seek to have market share principles applied to the defendants. A jury has held that the insulation contributed to the spread of the fire, but the other issues of defectiveness and damages await separate trial. At the time this article was completed, only one defendant remained in the case, as settlements with all others were effected. Interview with Thomas Zurek, an attorney for plaintiff (June 8, 1984).

11 Drugs are generally equivalent when the active ingredient in each is described by the same chemical formula. Nevertheless, they may not be therapeutically equivalent because of differences in inert ingredients which constitute the major part of the total weight of the drug in most cases and in certain physical characteristics of the active ingredient, including solubility and crystalline structure. See D. Schwartzman, Innovation in the Pharmaceutical Industry 213 (1977).

are solvable by continued judicial refinement of the terms of that decision. While a complete rehabilitation of this much-criticized case is improbable, Sindell remains as the respectable germinal effort to treat the vexing identification roadblock which infects these generic pharmaceutical cases. Given the almost inevitable filing of many more cases in this field, and the substantial criticism of the market share approach, a fresh look at this liability and damage allocation theory is warranted.

II. **SINDELL: THE GENESIS OF MARKET SHARE LIABILITY**

A. **DES Daughters**

The problem presented by so-called generic drugs is most dramatically demonstrated in the Sindell case itself. Plaintiff Judith Sindell brought an individual and class action against eleven drug companies which allegedly manufactured, promoted, and sold diethylstilbestrol (DES), a synthetic form of the female hormone estrogen. She claimed that DES was ingested by her mother and the mothers of those represented by the class. DES had been approved by the Food and Drug Administration (FDA) in 1947 for use as an anti-miscarriage drug. Between 1947 and 1971, a large number of manufacturers produced and marketed DES, and apparently millions of pregnant women had the drug prescribed for them. In 1971, the FDA forbade the sale or promotion of DES because it was unsafe and ineffective as a preventor of miscarriages. Statistics showed a frightening correlation between users of DES and the development of cancerous and precancerous vaginal growths in the daughters of users. The complaint in Sindell graphically demonstrated the horrors faced by daughters of DES users:

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years. It is a fast-

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14 Synthetic estrogens were desirable because of the high cost and impractical side effects of administering natural estrogen. For a detailed narration of the facts behind the synthesis of DES, its resulting development, marketing, and ultimate removal from the market for anti-miscarriage purposes, see Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert denied*, E.R. Squibb and Sons, Inc. v. Abel, 105 S. Ct. 123 (1984). It should be noted that DES does have other uses, even now. It is approved for use as an estrogen replacement for cases of hormone deficiency, for treatment of symptoms of menopause and some forms of cancer, to suppress lactation, and as the primary ingredient of a post-coital contraceptive, see Ferrigno, 175 N.J. Super. at 565, 420 A.2d at 1312.

15 *Sindell*, 26 Cal. 3d at 593, 163 Cal. Rptr. at 133, 607 P.2d at 925.

16 *Id.*

17 *Id.*
spreading and deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterezation, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.8

Numerous suits on behalf of DES daughters were brought against DES manufacturers, with the strong prospect of many future claims.9 The problems represented by such actions are manifold, ranging from a possible statute of limitations bar to rules restricting recovery for injuries inflicted on pre-viable fetuses.10 Most insidious, however, is an impediment presented by DES in its form as a generic product, that of identification. That is, because DES was produced from a common formula and is a fungible, interchangeable drug, prescriptions were filled from whatever stock a pharmacist had available, irrespective of the brand names of DES specified on a prescription blank.21 Consequently, even if such records had been retained by the pharmacist involved (an unlikely prospect given the substantial period of time spanned), the accuracy of such records was open to question. In short, while the plaintiff could perhaps identify the defective product, she could not identify the specific producer of the specific DES ingested by her mother. It is with this background that the California Supreme Court faced the identification issue.

B. Identification as a Roadblock

The so-called identification requirement in a products liability case, in most instances, serves useful, necessary ends. In a doctrinal sense, it fits comfortably within the framework of a torts negligence case.22 In order to shift a loss to a defendant, a plaintiff must not only establish that the defendant breached a duty to use reasonable care to produce a safe drug and that the plaintiff suffered damage, the plaintiff must also prove that the defendant's conduct caused her injury. Her means of doing this is by identifying the defendant as the maker or party otherwise responsible for the injury-producing item. In Sindell, however, the plaintiff claimed that a mechanical application of the identification rule would be inequitable. She

11 Id.
12 See supra note 13.
14 Sindell, 26 Cal. 3d at 595, 163 Cal. Rptr at 134, 607 P.2d at 926.
15 Conventional common-law doctrine states the four elements of a negligence case to be a duty to conform one's conduct to a certain standard of care to protect others against unreasonable risks, a breach of that duty, a reasonably close causal connection between the conduct and the plaintiff's injury, and actual injury or damage to plaintiff. See PROSSER AND KEETON ON TORTS at 164-65 (W. Keeton 5th ed. 1984) [hereinafter cited as PROSSER & KEETON]. The identification requirement is a part of causation. By showing the defendant is responsible for the particular injury producing agent, the plaintiff demonstrates a causal link between the defendant's product or conduct and the plaintiff's injury.
offered three bases upon which to invoke an exception. History has proven that these exceptions have not enjoyed great success in the courts and hold only modest promise for the future.

First considered and rejected by the California Supreme Court was the "alternative liability" theory, most famously illustrated by Summers v. Tice. In Summers, two hunters negligently discharged their weapons at a point close to plaintiff. It could not be determined, however, which of the two negligent hunters actually caused the injury. Nevertheless, the California Supreme Court imposed liability jointly and severally on the hunters, reasoning that as between two negligent defendants and an innocent plaintiff, the difficult if not impossible burden of establishing causation should be borne by the defendants. The Sindell court declined, however, to apply Summers to the facts before it. Rejecting any requirement that a defendant had to be in a better position to ascertain the causation issue in order for Summers to apply, the court nevertheless perceived a significant difference between the two situations. "There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug."

Evidently, the significant disparity in odds of one in two (Summers) versus the apparent one in two hundred situation in Sindell was too much for the court to accept. A strict application of the alternative liability principle was rejected. As the court notes, and history has recorded, an "adaptation" of the Summers rule was ultimately adopted by the court.

Next considered and discarded in Sindell was the "concert of action" theory. The plaintiff alleged that the defendants had acted jointly to formulate, produce, and market DES without adequate warning. Such a finding would result in the imposition of liability on all parties to the conspiracy, making them joint and several tortfeasors in the strict, traditional common law sense. However, the court in Sindell found at most the type of imitative conduct on the manufacturers' part that is customarily engaged in by members of many industries. This type of behavior

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24 Id. at 88, 199 P.2d at 5.
25 Defendants claimed that in order to invoke any burden shifting rule, plaintiff must show they had better access to information regarding the cause of the injury. Sindell, 26 Cal. 3d at 600, 163 Cal. Rptr. at 137-38, 607 P.2d at 929-30.
26 Id. at 603, 163 Cal. Rptr. at 139, 607 P.2d at 931.
27 The advantages of the concert of action theory are several. First, a plaintiff can sue any one party participating in the concerted action rather than having to take on an entire industry. Second, no problems with allocation of market shares exist. Perhaps most importantly, even if a defendant can establish it didn't produce the actual injury-producing drug, liability can still attach if the showing of concerted action is made. See LaMarca, Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective but Unidentifiable Products, 31 Drake L. Rev. 61, 66-67 (1982).
fell far short of the "common plan" or "tacit understanding" requirements which serve as the underpinning of liability in concert of action cases.\textsuperscript{28} To impose liability in such a situation would be to condemn conduct outside that which the common law sought to proscribe.

The final somewhat conventional theory advanced by the plaintiff has been dubbed "enterprise" or "industry-wide" liability. It can be traced at least as far back as the case of \textit{Hall v. E.I. DuPont de Nemours}\textsuperscript{29} in 1972. The defendants were blasting cap manufacturers which together occupied almost completely the blasting cap market in the United States. The defendants had formed a trade association, also a named defendant, to which matters of safety had been delegated. The association was also responsible for issues of design and labeling. Because of this delegation, the court in \textit{Hall} thought it warranted to impose liability on the defendants jointly, or at least to shift the burden of proof to the defendants, so long as the plaintiffs could establish that the caps were made by one of the defendants. As in \textit{Sindell}, the plaintiffs had an identification problem due to the nature of the product.\textsuperscript{30} The blasting caps which had allegedly caused a number of accidents were not retrievable to aid in identification.

As with the two theories previously noted, however, the California Supreme Court rejected application of the enterprise approach. In addition to the fact that there was no delegation of safety to a trade association in \textit{Sindell}, the numbers game again worked against plaintiffs. "At least 200 manufacturers produced DES; \textit{Hall}, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers."\textsuperscript{31}

As the court refused to adopt any of the three proffered approaches, the plaintiffs in \textit{Sindell} had apparently struck out. But the court perceived several substantial reasons not to be hidebound by strict doctrinal considerations. Drawing upon Justice Traynor's opinion in \textit{Escola v. Coca Cola Bottling Co.},\textsuperscript{32} the court noted a need "in an era of mass production and complex marketing methods," for an "adaptation of the rules of causation and liability."\textsuperscript{33} Traynor's concurrence in \textit{Escola} represents one of the classic expositions of the conventional wisdom respecting strict products liability. Emphasizing the growing technological complexity and the inability of consumers to deal knowledgeably with the products, Traynor perceived a need for a change in product liability rules tied to fault. The majority opinion in \textit{Sindell} embellished this theme by holding that where these products which

\textsuperscript{28} \textit{Sindell}, 26 Cal. 3d at 605, 163 Cal. Rptr. at 140-41, 607 P.2d at 932-33.


\textsuperscript{30} The court in \textit{Hall} noted that in most instances the manufacturer of the blasting cap was unknown. \textit{Id.} at 358.

\textsuperscript{31} \textit{Sindell}, 26 Cal. 3d at 609, 163 Cal. Rptr. at 143, 607 P.2d at 935.

\textsuperscript{32} \textit{Escola}, 24 Cal. 2d 453, 150 P.2d 436.

\textsuperscript{33} \textit{Sindell}, 26 Cal. 3d at 610, 163 Cal. Rptr. at 144, 607 P.2d at 936.
cause injury are unidentifiable, conventional doctrine must flex so injured consumers do not go uncompensated.\textsuperscript{34}

The other reason cited by the court which dictated a relaxation of conventional tort doctrine is a familiar one to products liability cases. The loss is shifted from plaintiff to defendant, held the court, because the plaintiff is innocent, the defendant negligent, and imposing liability on the defendant will encourage it to expend more time, money, and effort on safety considerations.\textsuperscript{35} These factors when taken together, especially in the context of pharmaceuticals where a consumer's ignorance of the properties of the product involved is greatest,\textsuperscript{16} served as the court's justification for turning to the profoundly controversial means of allocating liability according to market shares.\textsuperscript{37}

Despite the enormous debate engendered by the \textit{Sindell} case, the court's explication of the market share theory itself is startling brief. Stated another way, perhaps because the court's explication of the theory is so brief, the enormous debate was thereby created. The essence of the court's holding can be stated best in the court's words:

We hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.\textsuperscript{38}

The plaintiff must join manufacturers of a "substantial percentage" of the DES, the court held, though what constituted such a substantial percentage was unspecified.\textsuperscript{39} Manufacturers sued then could join other DES manufacturers not originally named as parties. The respective market shares would then serve as the basis for apportioning damages among the defendants. The court dismissed any "minor" discrepancies between market shares and the liability imposed as "inevitable" and not anything which would "seriously militate against the rule" of market share liability.\textsuperscript{40} Furthermore, if a particular defendant could establish that it couldn't possibly have produced the offending drug, it would be dismissed from

\textsuperscript{34} Id.
\textsuperscript{35} Escola, 24 Cal. 2d at 462, 150 P.2d at 441.
\textsuperscript{36} Sindell, 26 Cal. 3d at 610, 163 Cal. Rptr. at 144, 607 P.2d at 936.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 611-12, 163 Cal. Rptr. at 145, 607 P.2d at 937.
\textsuperscript{39} Id. The court rejected the suggestion that 75 or 80% be used as the required percentage. This suggestion had been proposed in Comment, \textit{supra} note 20.
\textsuperscript{40} Sindell, 26 Cal. 3d at 611-12, 163 Cal. Rptr. at 145, 607 P.2d at 937.
the case. Finally, the court acknowledged the existence of "practical problems" in determining the relevant market and assigning market shares but considered these to be problems solvable at the trial and not the pleading stage of the case.

The opinion of the court was not lengthy. Its tenor was not one seeming to signal a great change in tort law. If the court thought the opinion would go unnoticed by the legal community however, it was certainly mistaken.

III. SINDELL AND ITS CRITICS

The critical commentary on Sindell has in most instances been unkind, or at least unfavorable. The criticism of the market share approach has been on several counts. A commonly cited fault of the Sindell opinion is the absence of attention to the operational details of the new theory of recovery. Though it may be, as the court asserts, reasonable to measure the likelihood any defendant made the particular offending drug by the percentage of the DES market occupied, other questions remain. What is the relevant geographic market for example? If the total amount of DES a woman ingested came from the pharmacies of a particular city, or perhaps from a single pharmacy, would market shares be calculated on the basis of what market shares a manufacturer had within that city, or even within that single pharmacy? The court does not tell us. The market share approach assumes that the records which would establish such market shares have been kept by manufacturers, wholesalers, or individual pharmacists. This is a doubtful assumption for any party in the chain of distribution, especially for a small pharmacy.

The spirit of Sindell suggests that if there is uncertainty regarding market portions, each defendant company, and not the plaintiff, would bear the responsibility to establish its market share. This is consistent with some readings of Summers v. Tice and with the view many courts take of res ipsa loquitur. Nevertheless, Sindell supplies no clue as to how this important matter is to be resolved. There is also some question as to how accurately courts could compute these market shares literally at the individual retail level. A larger relevant geographical market would

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41 Id.
42 Id.
44 In fact, there was little in Summers v. Tice to suggest the defendants would be in any better position than the plaintiff to determine which of them caused the injury. Nevertheless, the burden of proof was shifted to the defendants, in essence making them joint tortfeasors. Though not viewed as an element of the res ipsa theory, one view of its function is to place responsibility on a defendant when there is some question as to exactly what happened. See, e.g., PROSSER & KEETON, supra note 22 at 254.
be more capable of efficient judicial administration, but it is apparent that, as the relevant geographic market becomes larger, the correspondence between market share and likelihood that a particular manufacturer produced the particular offending drug becomes more tenuous. Further, the absence of explanation from the Sindell court on these points would permit market shares for a particular drug to vary according to the evidence the parties, or more likely the manufacturers, could adduce. Because this would vary from case to case, it is unlikely that a reasonably fair apportionment of liability based on market shares could be achieved over the course of many cases.

To claim, as the court did in Sindell, that these are "largely matters of proof which properly cannot be determined at the pleading stage" is simply incorrect. While not every "i" need be dotted nor "t" crossed when a court announces a new basis of recovery, a reasonable elaboration of the elements of that theory should be supplied. Critics claim that leaving such issues to the proof stage of succeeding trials provides no guidance to future litigants to know how to structure their cases. This is not a wise use of judicial resources and increases the litigation costs to all parties. Sindell, then, has been an easy target for criticism given its failure to illuminate these and other aspects of the relevant market problem.

Aside from that specific deficiency, there are still other shortcomings stemming largely from the terseness of the court's opinion. For example, by making defendant-manufacturers responsible for proving their respective percentages of the relevant market, did the court mean a percentage of the relevant market possessed only by the named defendants in a case? Or did the court mean a percentage of the total relevant market, whether or not all manufacturers in the market were parties in the case?

The court in Sindell held that the plaintiff need only bring a substantial percentage of the relevant market into the case. Defendants are then free to join other "market-sharing" manufacturers, subject of course to the circumscriptions of jurisdiction and service principles inherent in civil litigation. Nevertheless, the likelihood that one hundred percent of the market would be represented in a particular case is remote. The tenor of Sindell, if little else, suggests the defendants would have to pay one hundred percent of the plaintiff's damages even if one hundred percent of the market was not represented in the suit.

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41 Sindell, 26 Cal. 3d at 614, 163 Cal. Rptr. at 146, 607 P.2d at 938.
42 Another criticism of Sindell is its failure to specify how the market for DES can be allocated fairly when DES has been prescribed for uses other than as a miscarriage preventative. Moreover, Sindell did not make clear whether it was the defendant's burden to establish market shares.
43 Sindell, 26 Cal. 3d at 612, 163 Cal. Rptr. at 145, 608 P.2d at 937.
44 At least one court has suggested, however, that by bringing into the case less than 100% of the relevant market, the plaintiff is correspondingly limited to a deduction from the damages she can recover. Copeland, 447 So. 2d 908.
45 For example, assume a plaintiff proves damages of one million dollars. Assume also that X Company occupied twenty percent of the total relevant market. Further assume that only 70% of the
Imposing liability based on a manufacturer’s share of the appropriate relevant market in generic drug cases is premised on the excusable inability of a plaintiff to identify the producer of the particular offending drug.\textsuperscript{50} As has been noted, however, this may provide an incentive for plaintiffs to remain ignorant of the manufacturer’s identity. In knowing who the manufacturer is and bringing suit only against it, a plaintiff is running the risk of encountering potential jurisdiction and service problems or, the even crueler fate, insolvency. By remaining ignorant, plaintiff will have the opportunity to look to other manufacturers under the market share arrangement. If courts were to apply the traditional principles of joint and several liability to such cases, the damages unrecoverable from one defendant would be picked up by another. Legal rules according more favorable treatment to the ignorant may have a salutary purpose, but the costs associated with such a policy must also be taken into account by the courts.

An underlying premise of \textit{Sindell} is that it is fair to shift liability onto defendants who not only marketed a product which was dangerous but who can better stand to bear the cost of such injuries. One wonders, however, about this fairness rationale in light of the rather chilly reception accorded \textit{Sindell} in other states. If the market share theory is fair because of its diffuse allocation of liability, it is certainly not a fair result when only manufacturers subject to suit and process in California and a few other states are subject to its application. Until more states adopt the market share approach, this jurisdictional limitation will punish defendants amenable to suit in those states recognizing the theory. This distorts the market share distribution of liability and seriously undercuts the fairness rationale of \textit{Sindell}.

Finally, one other argument criticizing the market share theory is difficult to assess. The claim is made that expansive liability doctrines such as espoused in \textit{Sindell} have sufficiently mobilized defendant-insurance and manufacturing interests to lead them to press for national product liability legislation. Certainly a recent session of Congress came closer to adopting nationalized legislation than any other.\textsuperscript{51} Such legislative thrusts do not augur favorable times for plaintiffs. Though the effect of \textit{Sindell} in this respect should not be overstated, if it can be evaluated at all, one can be certain that it has not gone unnoticed. In pressing their case of the necessity of such legislation, however, drug manufacturers no doubt would

\textsuperscript{50} The court in \textit{Sindell} also emphasized that by holding the defendants liable for defective products, safety incentives are promoted. \textit{Sindell}, 26 Cal. 3d at 612, 163 Cal. Rptr. at 145, 607 P.2d at 937.

\textsuperscript{51} The Kasten bill (S.44) of the 98th Congress would have set national standards for product liability cases which would have preempted state law to the contrary. The bill was reported to the Senate without any recommendation by the Labor and Human Resources Committee. The bill was not debated on the Senate floor before adjournment and it died. There was an amendment proposed by the Commerce Committee in the Senate whereby a three member panel would “study the need for federal legislation” which would provide compensation to claimants who are unable to recover damages because the manufacturer of the product could not be identified. The amendment died with the bill.
advance the following: "Holding manufacturers liable for accidents for which they are in no way responsible, merely because they sold the same product, offends the notion that liability must bear some connection to responsibility." 52

IV. Judicial Reception of Sindell

A. Sindell Rejected by Some Courts

It is fair to say that courts in other jurisdictions have not embraced Sindell with open arms. In fact, the judicial response to the new market share concept has been underwhelming. Representative of the judicial antipathy to Sindell is Payton v. Abbott Labs, 53 a case where a class of approximately 4,000 DES daughters sought to invoke a market share theory of recovery against six manufacturers of DES. The plaintiffs, in addition to seeking to have liability “apportioned among named defendant’s share of the DES distributed by all named defendants,” 54 sought to expand the Sindell rationale. Sindell permits a manufacturer to escape liability by proving it could not possibly have produced the particular DES which injured a plaintiff. This could be done, presumably, by a defendant establishing it did not distribute DES at the time of the pregnancy of a plaintiff’s mother, or that it did not distribute DES in the relevant geographic market. The plaintiffs in Payton, however, sought to prevent defendants from adducing any such exculpatory evidence.

In answering certified questions of law, the Supreme Judicial Court of Massachusetts rejected the application of Summers v. Tice or Sindell to these facts. Summers, the court stated, required all negligent parties who might have caused the injury to be before the court; only six DES distributors were named in Payton. This created the risk that the named defendants would be held liable “for more harm than they caused.” Because of this, one purpose of the traditional identification requirement in a products liability case, that wrongdoers are held liable only for the harm they have caused, is disserved. Moreover, in seeking to prohibit exculpatory proof, the plaintiffs would frustrate the other purpose served by identification, separating wrongdoers from innocent actors. But in rejecting the plaintiffs’ effort to impose market share liability, the court noted a consideration ignored in Sindell, and explored in this article. If the plaintiffs’ theory were accepted, reasoned the court, and the defendants were held liable for injuries caused by the negligence of others, research and development in the drug industry could suffer. This would be so especially with generic drugs. Such a result would violate the public policy favoring the discovery of new and efficacious drugs, a policy reflected in Comment K to the Restatement (Second) of Torts, 55 wherein a negligence standard is prescribed.

52 Newcomb, supra, note 43 at 327.
54 Id. at 572, 437 N.E.2d at 189.
55 RESTATEMENT (SECOND) OF TORTS § 402A comment K states:
K. Unavoidably unsafe products. There are some products which, in the present state of
for drug-related product injuries.\textsuperscript{64} As the court stated, “if a cure for clear-cell adenocarcinoma lies in the development and manufacture of some new drug, imposing market share liability might prevent the marketing of a cure for the very cancer threatening the plaintiffs.’’\textsuperscript{57}

The court in \textit{Payton} did not discuss whether the plaintiffs had joined a substantial percentage of the DES market, though the court stated “the plaintiffs would have us assume that these six defendants were responsible for all the DES distributed” in the relevant geographic market. This market was stated to be the total Massachusetts market for DES use in pregnancy. Perhaps the court did not examine the relevant market issue more closely because it was unprepared to accept market share liability in any respect. Certainly a careful plaintiff would not lightly ask a court to assume that a group of defendants represented one hundred percent of the relevant market, though, of course, \textit{Sindell} requires only that a substantial percentage of the market be joined. Perhaps the plaintiffs were in fact claiming that a substantial percentage of the market was before the court, leaving those defendants free to bring in other manufacturers. Such being the case, the plaintiffs might have claimed that they were entitled to recover one hundred percent of their damages. Still, it seems in \textit{Payton} that deficiencies in the plaintiffs’ case played a substantial role in the court’s decision, for the market share door was left ajar.

\textsuperscript{56} The court in \textit{Payton} does not address the contention that because DES was not “accompanied by \ldots warning” it should not reap the benefit of being free from strict liability treatment under \textit{Restatement (Second) of Torts} § 402A. In \textit{Sindell} and, presumably, many other DES cases plaintiffs will not advance as a primary theory strict liability. \textit{Sindell}, for example, included claims that the defendants during the period they marketed DES knew or should have known that it was carcinogenic. This is obviously a negligence theory at work.

That is not to say that on an adequate record this court would not recognize some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by defendant's contribution of DES to the market in the relevant period of time.\textsuperscript{58}

Whether the "appropriate circumstances" on an adequate record would overcome the court's reservations relating to dampening the development of new drugs is uncertain. However, this very real social cost, ignored in Sindell, is at least addressed by Payton, though incompletely and anecdotally.

Less equivocal in opposing the Sindell principle is Mizell v. Eli Lilly & Co.\textsuperscript{59} In refusing to apply California law to a diversity case in South Carolina, the federal court stated the application of the theory "would violate the public policy of this forum."\textsuperscript{60} The case involved a woman whose mother allegedly took DES in California in 1954. The plaintiff learned she had developed cancer in 1976. In filing suit, the plaintiff was unable to identify the manufacturer of the specific harm-producing DES, and her mother when deposed stated that she could not remember where the prescription was filled. Six drug companies which allegedly sold DES in California at the relevant time were named as defendants. The court, however, declined to become involved in issues of relevant market definition, whether a substantial percentage of the market was present, or similar issues. Instead, the court peremptorily dismissed the theory.

Market share liability represents a radical departure from the body of products liability law that has been developed in South Carolina. By removing the traditional requirement that the plaintiff identify the responsible manufacturer, the doctrine destroys the nexus between production of a defective item and the plaintiff's injury. As a result, liability is placed on defendants bearing no responsibility for the defective product.\textsuperscript{61}

Other cases have similarly taken Sindell to task. Included among these is Starling v. Seaboard Coast Line R. Co.,\textsuperscript{62} which rejected for theoretical and practical reasons application of a market share approach to asbestos cases. The court held that market share liability took a "quantum leap" toward rendering manufacturers insurers of their products as well as generically similar products of others. This would violate the policy of Georgia product liability law and could result "in opening a Pandora's box of undesirable economic and social effects."\textsuperscript{63}

\textsuperscript{58} Payton, 386 Mass. at 574, 437 N.E.2d at 190.
\textsuperscript{59} Mizell, 526 F. Supp. 589.
\textsuperscript{60} Id. at 596.
\textsuperscript{61} Id.
\textsuperscript{62} Starling, 533 F. Supp. 183.
\textsuperscript{63} Id. at 190. See the following cases for other rejections of Sindell: Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D. S.C. 1981); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D. D.C. 1982); Namm v. Charles E. Frostt & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981); See also supra note 7. It has also been held that the Sindell principle does not apply where a plaintiff is able to identify at least
But plaintiffs have enjoyed some success employing either the *Sindell* principle itself, or, more often, one of the other theories which the California Supreme Court rejected in *Sindell*. Market share liability was advanced by the plaintiff in *McElhaney v. Eli Lilly & Co.*, for the usual reasons. That is, the plaintiff was unable to identify the manufacturer of the DES ingested by her mother, and neither the mother nor the pharmacist had any “recollected of the color, size or manufacturer of the DES plaintiff's mother ingested while pregnant with plaintiff.” The federal district court quoted approvingly from *Sindell* and section 433B(3) of the Restatement (Second) of Torts, the provision embodying the rule of *Summers v. Tice*. Moreover, the court suggested that despite the fact not all possible tortfeasors were before the court, the alternative liability principle could attach. Like *Sindell*, there was emphasis on the consumer's relative ignorance of complex products in the marketplace and the responsibility of manufacturers in marketing a product which was insidiously dangerous. The court stopped short, however, of adopting the pure alternative liability approach of *Summers* even though “it represent[ed] a reasonable application of the rationale which supports strict liability.” Instead, because of what the court termed the “unusual circumstances” here, and the fact that the court believed the defendants to be in a better position to determine who produced the offending drug, the court held there was “ample justification” for adopting the *Sindell* approach.

*McElhaney* has few partners, however, in its adoption of the *Sindell* formulation of market share liability. A New Jersey court in *Ferrigno v. Eli Lilly & Co.*, applied a type of alternative liability which the California Supreme Court declined to adopt in *Sindell*. While in its simplest form, this approach would attach joint and several liability to all negligent parties unless they could exculpate themselves, the New Jersey court added an important qualification. When more than one unexculpated party remained, these defendants would be regarded as joint tortfeasors. However, their liability would be assessed according to New Jersey's Comparative

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65 *Id.* at 268.
66 *Id.* at 270.
67 *Id.* This is a departure from *Sindell* where the court rejected a strict application of *Summers* on the ground that for it to be used fairly all persons who could have been responsible must be before the court. *Sindell*, 26 Cal. 3d at 603, 163 Cal. Rptr. at 139, 607 P.2d at 931.
69 *Id.* Presumably by “unusual circumstances” the court meant only the combination of a plaintiff’s severe injuries and the identification barrier.
70 *Id.*
72 See supra note 44.
Negligence Act. This statute makes the parties liable not for their "prorated" share, but their "percentage share" of liability. The question of how to assess these percentages remained, but by this point the solution was nearly inevitable. Sindell could no longer be resisted and the court somewhat begrudgingly acceded to its logic.

Sindell fashioned a new theory of liability denominated the "share of the market" liability. Although our cases indicate a preference for joint and several liability, I find the California approach a reasonable solution to determine the "percentage share" among unexculpated defendants . . . and shall invoke it in this case for that purpose alone.

Clearly, the influence of Sindell was substantial and differences between the operation of its liability assessment and that of Ferrigno's are few, if any material ones exist whatsoever.

A federal district court decision in California not involving DES has also followed Sindell. In this case, the injury arose out of the plaintiff's reaction to a diphtheria, pertussis, and tetanus vaccine (DPT). The plaintiff alleged that as a result of the vaccination he suffered irreversible brain damage. As in Sindell, however, he was unable to identify the manufacturer of the specific vaccine he was given. Consequently, he sued five pharmaceutical companies that allegedly "manufactured a substantial share of the DPT vaccine on the market at the time of . . . injury." The court accepted without question that market share liability would be an appropriate mechanism to apportion compensatory damages and focused on the availability of punitive damages in a Sindell-type case. In rejecting the defendants' arguments against the availability of punitive damages, the court held that upon establishment of liability under Sindell, and a demonstration of conscious disregard for human safety by defendants in marketing DPT, punitive damages would be available.

The cases possesses little legal voltage on the adherence to Sindell, however. The federal court was obliged under the Erie principle to adopt Sindell. Rather than indicate an increasing acceptance of Sindell, it only reaffirms the complaint of the manufacturers of generic drugs that they are unfairly treated because they do business in California.

More significant for various reasons is the recent Michigan case of Abel v. Eli Lilly & Co., a massive action involving 180 plaintiffs and at least sixteen defen-

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73 Ferrigno, 175 N.J. Super. at 572, 420 A.2d at 1316.
74 Id.
75 Id.
77 Id. at 1325.
78 Id. at 1330.
79 Abel, 418 Mich. 311, 343 N.W.2d 164. The case is a state supreme court case rather than
By DES standards the case was otherwise unremarkable. Daughters of women who ingested DES during pregnancy sued for the damages they suffered as a result of cancer and other cellular abnormalities produced by DES. Many of these plaintiffs were unable to identify the manufacturer of the specific DES prescribed for their mothers.

The Michigan Supreme Court, in modifying a state court of appeals decision, found that the plaintiffs had proven enough to escape summary judgment both on alternative liability and concert of action grounds. It adopted the Summers v. Tice principle that wrongdoers should not be able to escape liability for an injury inflicted upon an innocent plaintiff "merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them caused the harm." The court obviously regarded this principle as paramount, for it pointed out that "Summers, the polestar case for alternative liability," did not serve as a "neatly fitting analytical template for application to this case." Indeed. Here there were 180 plaintiffs versus one in Summers, and at least sixteen defendants versus two in Summers. Moreover, there was a substantial question as to whether all possible responsible parties were before the court, unlike Summers, with the defendants asserting that several hundred other manufacturers should have been in the case. In fact, the court did not relax this standard, for in addition to requiring the plaintiffs to prove all the defendants acted tortiously and that the plaintiffs were blameless in not being able to identify the culpable defendant, the court stated that the plaintiffs "must bring before the court all the actors who may have caused the injury in fact." The court in a footnote did allow for a possible easing of this "all possible defendants must be joined" principle. Abel has one other significant factor distinguishing it from Ferrigno. While the latter applied alternative liability principles to ameliorate the identification problem, it assessed liability according to market share percentages. This made the case substantially similar to Sindell. Abel on the other hand, permits no such allocation. As the court stated, "[i]f the defendants are unable to exonerate themselves, joint and several liability results." This is a difference which will make defendants sit up and take notice.

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a federal court trying to predict state law. Moreover, it permitted plaintiff to avoid summary judgment on a concert of action theory of recovery.

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10 Abel, 418 Mich. at 327, 343 N.W.2d at 171.
11 Id. at 329, 343 N.W.2d at 172.
12 Id. at 331, 343 N.W.2d at 173.
13 Id. at 331, 343 N.W.2d at n.14. The court quoted approvingly from RESTATEMENT (SECOND) OF TORTS § 433B(3):
   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 not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created.
But the court stated it was unnecessary to consider the application of this principle to the facts because of the allegations in the plaintiff's petition.
14 Abel, 418 Mich. at 334, 343 N.W.2d at 174.
While the court's discussion of the concert of action theory was somewhat truncated, it did hold that the plaintiffs had established enough to escape summary judgment. The plaintiffs satisfied the court that there was sufficient proof to proceed to trial on claims that the defendants had acted jointly and negligently in manufacturing and promoting DES and that the drug was inadequately tested and warned against. With this claim, the identification issue is not of primary importance. Even if a defendant can establish it did not or could not have produced the particular offending drug, the concert of action theory still permits liability.

It has been fairly well established that the objective of deterring dangerous collective behavior is vindicated by imposition of liability under these circumstances. The only other case where the concert of action theory gained judicial acceptance of any sort is *Bichler v. Eli Lilly & Co.* Due to the Bichler defendants' failure, however, to preserve error on the issue of whether "conscious parallelism" could amount to a concert of action, the court's upholding of a jury verdict on a concert of action count does not carry heavy precedential weight.

B. Collins v. Eli Lilly: An Improvement on Sindell?

At least one court has shown itself to be dissatisfied with the market share approach to DES cases but has granted plaintiffs what seems to be an even wider latitude. In *Collins v. Eli Lilly,* the familiar tragic scenario was present once more. A DES daughter suffering from full cell cancer of the vagina had to have part of her uterus, her vagina, and a number of her lymph nodes surgically removed. Later, the plaintiff's bladder stopped functioning due to this surgery. Likewise, the familiar DES proof problems were extant: the DES ingested was in generic form with no identifiable characteristics of shape, color, or markings; during the relevant time period at least 120 companies marketed DES in a twenty-five milligram size; records which would reasonably isolate the manufacturer of the DES were either not kept or were no longer available; and witnesses die even as memories fade.

At an early point in the opinion, the Wisconsin Supreme Court concluded that the plaintiff was entitled to a remedy. It then examined the theories typically advanced by plaintiffs in DES cases—alternative liability, concert of action, conspiracy, enterprise liability, and, finally, the market share theory. None of these first four approaches had sufficient appeal to the court, for reasons the court in *Sindell* had also found. The market share theory, however, was also found wanting due to problems of "practical applicability," primarily those relating to establishing

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83 *Id.* at 337, 343 N.W.2d at 176.
84 *Id.* See also LaMarea, *supra* note 27 at 67.
86 *Collins*, 116 Wis. 2d 166, 342 N.W.2d 37.
87 *Id.* at 179, 342 N.W.2d at 44.
88 *Id.* at 182, 342 N.W.2d at 45.
89 *Id.* at 189, 342 N.W.2d at 48.
the appropriate market share. Just as the plaintiff had the next to insurmountable problem of identifying the maker of the particular offending drug, the defendant drug companies would be required to produce evidence of market shares when such records might not be available.\footnote{Id.} Even with marginally adequate documentation, the fact-finder would still have uncertainties caused by market fluidity, though this to a great extent is part of the overall documentation problem. In short, the court saw faithful market share allocation to be a "near impossible task"\footnote{Id. at 190, 342 N.W.2d at 49.} and one not worth "the waste of judicial resources which would be inherent in a second 'mini-trial' to determine market share."\footnote{Id. at 193, 342 N.W.2d at 50.}

Practical difficulties with the market share approach, however, did not dictate that the plaintiff go remediless. All the defendants bore a share of the blame for contributing to the risk of injury to the public and as between the totally blameless plaintiff and the culpable defendants, it was desirable to place the cost on the drug manufacturers. They, after all, could best protect against the recurrence of such injuries by adequate testing, and could pass the loss along to drug consumers.

The court in \textit{Collins} reduced the burden imposed on plaintiffs by \textit{Sindell} of bringing into the case a "substantial share" of the relevant market, to suing but a single DES manufacturer or marketer.\footnote{Id. at 197-98, 342 N.W.2d at 52.} So long as plaintiff could establish that the defendant drug company produced the type of DES taken by the mother, the plaintiff would be permitted to recover all her damages from the one defendant.\footnote{Id.} The court encouraged plaintiffs to sue more than one defendant, warning that a plaintiff suing but one defendant and failing in its case against it may face an expired statute of limitations as to other defendants, or even in a successful suit, be confronted with a judgment-proof defendant. As an added effort to fairly allocate liability, the court also would permit defendants to implead third parties which produced or marketed the type of DES taken by plaintiff's mother. However, a prima facie case can be made against one defendant alone, and total liability can be imposed on that single company.

At this point the burden is shifted to the defendant or defendants, said the court. A defendant can escape liability by demonstrating that the DES the mother ingested could not have been produced by the defendant. That is, either by establishing that the defendant did not produce or market DES at the pertinent time or by showing the absence of its product from the appropriate geographic market, the defendant will avoid being saddled with any liability whatsoever.\footnote{Id.} This is, of course, the same result \textit{Sindell} mandated and is perhaps the best reason to bring suit against more than one defendant. At the same time, any void in relevant
records will result in the defendant or defendants bearing the consequences, that is, the liability.

Given the court's encouragement to plaintiffs to sue more than one defendant in such a case, and the rather obvious benefits to doing so, one can expect plaintiffs to heed this counsel. With multiple defendants, however, the problem of damage allocation is raised. That is, if more than one defendant is not able to exculpate itself, how will the damages found to exist be distributed? The solution lay in the Wisconsin Comparative Negligence statute. Collins instructs that the fact-finder will apportion damages based upon "the percentage of causal negligence attributable to each defendant," as the statute directs. The court makes it very clear that this determination should fall to the fact-finder to resolve. Certainly, the jury is provided an abundance of criteria to which it can look to apportion liability. These factors are not definitive, for others may be considered if the court in the exercise of its discretion believes it appropriate.

Collins has raised the judicial ante in the market share sweepstakes, for it permits the focus of liability to rest on one defendant even where an identification problem is present. Yet before it is regarded as an improvement on the Sindell approach, several factors should be considered. The court in Collins rejects Sindell and the "unalloyed market share theory" because it was "limited in practical applicability." The process of defining the relevant market and allocating market shares accordingly would be a "nearly impossible task," and the "mini-trial" needed to resolve this matter would be a wasteful expenditure of judicial resources, reasoned the court. Nevertheless, market share percentages were still to be considered as relevant factors when liability was being apportioned among defendants. Rather than being the factor, however, as in Sindell, it was but one piece of the puzzle. Also to be considered are the factors previously noted, such as the role the company had in gaining FDA approval of DES.

What is gained by this tack? In terms of conserving judicial resources, nothing; in fact, one can conclude that Collins does not result in a saving of litigation costs, but an increase. Under Sindell, the practical problems of market definition and

98 Id. at 199, 342 N.W.2d at 53.
99 In assigning a percentage of liability to each defendant, the jury may consider factors which include, but are not limited to, the following: whether the drug companies conducted tests on DES for safety and efficacy in use for pregnancies; to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; whether the company had a small or large market share in the relevant area; whether the company took the lead or merely followed the lead of others in producing or marketing DES; whether the company issued warnings about the dangers of DES; whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and whether the company took any affirmative steps to reduce the risk of injury to the public.
100 Id. at 200, 342 N.W.2d at 53.
101 Id. at 189-90, 342 N.W.2d at 48-49.
102 Id. at 199, 342 N.W.2d at 53.
allocation are real and, as has been noted in this article, cannot be underestimated. But in *Sindell*, at least the focus of the case and all the parties is substantially on this issue, and on this issue alone. Though potentially substantial, litigation costs attendant to the resolution of the market share issues are at least confined to that matter. *Collins* on the other hand encourages a diffusion of litigation energy and presentation of proof across a range of issues, including, in all likelihood, market shares of the defendants. While some defendants will emphasize their minimal market share holdings, others will be accentuating their relative lack of culpability in the factual development of the DES tragedy.

Providing jurors with a wealth of factors to consider panoramically may seem to supply the freedom to give appropriate weight to the factors upon which credible proof was presented. The litigation costs of such an approach, and the risk of overwhelming jurors with proof on an excessive number of issues, are substantial. If the court in *Collins* genuinely believed the *Sindell* approach to be objectionable because it necessitated a "mini-trial" on the market share issue, what it has substituted is a "maxi-trial," where market share features are included along with a plethora of other issues.

*Collins* might be read as not necessarily permitting evidence of market percentages. The court did state that the factors to be considered by the fact-finder would be within the discretion of the trial court judge.¹⁰³ Presumably, the trial court would be empowered to exercise this discretion to refuse evidence of market share on the basis that it would be excessively time-consuming, wasteful, and inconclusive. Nevertheless, the *Collins* court did explicitly state one factor for consideration to be "whether the company had a small or large market share in the relevant area."¹⁰⁴ Despite the ambiguity of this statement, one could persuasively argue that the Wisconsin Supreme Court did intend to allow for market shares to be considered. Consequently, a trial judge's refusal to permit such evidence would probably constitute an abuse of discretion.

There are several substantial reasons why one or more defendants in such a case may well want to adduce proof of market share. For example, a small drug company will certainly emphasize its small percentage of the DES relevant market. To do otherwise and risk a focus upon the company's participation in the formulation, development, and marketing of DES, when that evidence is unfavorable, would be a foolish strategy. What about the converse of this situation? That is, will a drug company with an arguably large percentage of the relevant DES market necessarily direct its defense to the non-market share issues? In many instances they would not. Instead, such a defendant might well opt for the tack of attempting to demonstrate that the properly defined relevant market is one which allocates to the defendant a smaller percentage of the market. This presumably will result

¹⁰³ *Id.*
¹⁰⁴ *Id.*
in fewer damages being awarded against that defendant. Such efforts by a defendant might be more productive than centering a defense on a historical chain of events such as the role the firm took in securing FDA approval of DES. The inevitable factual discrepancies which would arise in trying to ascertain the "role" a drug company played in gaining FDA approval for DES could result in a historiographic battle of major proportions. Efficiency would be better served by a drug company defendant trying to narrowly tailor the relevant market to its relative advantage than to expend its litigation efforts in reconstructing an often uncertain historical chain of events. The danger of Collins though, is that the defendants will do both as the evidence suits them, with an attendant focus on those factors tending to make the other defendants appear more culpable or more of an occupant of the DES market. In short, the theme of Collins that Sindell's "unalloyed market share" approach is overly expensive in terms of litigation costs is mistaken. Mistaken, that is, insofar as the Collins case purports to improve upon it. By suffering from the same practical problems Sindell endures and by adding more, Collins is hardly the low-cost alternative to or improvement upon Sindell.

Collins also noted the defendant's claim that the imposition of liability under such circumstances would deter research and development.

In their briefs and at oral argument, the defendants contended that imposing liability on possibly innocent drug companies would discourage drug companies from producing or marketing generic drugs. It has been argued that society benefits from generic drugs because they are easier to produce and market and are, therefore, cheaper for the consumer. The defendants contend that, if liability were imposed on all defendants because the plaintiff cannot, due to the generic nature of DES, identify the exact producer or marketer, drug companies would seek to avoid future liability by not producing or marketing generic drugs.

While there may be some validity to the defendants' argument, we do not agree that imposing liability in this case will cause drug companies to cease producing or marketing generic drugs. We believe that this sort of liability will encourage drug companies to produce or market safe generic drugs. So long as drug companies properly test drugs and thereby produce or market a reasonably safe product, they need not fear liability under the rule of this case. Thus, it is not solely the generic status of the drug but the safety or efficacy of the drug, generic or otherwise, which may give rise to liability.

Id. at 49-50 n.11, 342 N.W.2d at 192 n.11.


In Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984), the Washington Supreme Court held that precise identification of the manufacturer in a DES case was not necessary. However, it did not adopt Sindell's solution to the problem, but a modification of the market share theory. Plaintiff was relieved of the obligation to join a substantial percentage of the market and need sue only one manufacturer. Likewise, plaintiff need not establish the temporal or geographic relevant market. Manufacturers unable to exculpate themselves by showing they could not have produced the particular offending drug are presumed to have equal shares of that market and are liable for damages only to the extent of that presumptive share. The presumption can be rebutted by establishing their market share of DES in the plaintiff's particular geographic market. The presumed market shares will be adjusted so 100% of the market is accounted for if other manufacturers fail to establish their actual market share.
V. Market Share Liability: Questions and Costs

As has been set forth, arguments against the imposition of market share liability range from the practical to the economic. The most persistent criticism of Sindell is that it was imprecise and left uncertain how the market share theory of recovery would be implemented. This is not an irremediable problem, however. Many judicial opinions that stake out new liability ground leave the details of the workings of the claim to subsequent judicial decision, or perhaps to legislation.107

The court in Sindell was mistaken to assert that issues relating to market share definition and share allocation were matters of proof. In fact, they are issues central to the implementation of the market share theory which should have been addressed by the court at that time, if only to set out some preliminary guideposts. Likewise, the court erred by not specifying what would constitute a "substantial percentage" of the market. This was an issue important enough for the court to make a ruling on at the time. These failings, however, do not themselves undermine the legitimacy of the market share doctrine, only the forcefulness of that particular court's opinion. Later opinions can address with specificity how the relevant geographic market is to be defined; whether a plaintiff joining producers of eighty percent of the market recovers only eighty percent of his damages or one hundred percent, with the defendants having the remaining twenty percent reallocated among them;108 and whether a set figure for "substantial percentage" should be established.109 These and other problems can all be addressed in later opinions or legislatively.110 Consequently, courts should not reject the Sindell approach on this basis.

One criticism of Sindell and the market share theory is more fundamental and cuts to the essence of its advisability, however. Drug companies have claimed, and some courts have accepted as real, the argument that market share liability will substantially dampen the incentive of drug companies to expend funds for the research and development of new drugs. That is to say, if drug companies are going

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107 A good example of this in the tort context is comparative negligence. In some instances, comparative negligence is adopted judicially. When a state supreme court embraces comparative negligence, it may do so in a decision indicating only that the doctrine of contributory negligence will no longer serve as a complete bar to recovery, but only a partial defense. See, e.g., Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982). Such a decision leaves significant issues unresolved. For example, is comparative fault also to be used between or among defendants? Does the common law doctrine of joint and several liability still retain its validity? Such issues are of critical importance to future litigants, but may still be reserved for subsequent decision. The common law process can put flesh on the doctrine in an accretive and definitional way. Or the legislature in a state may react to a decision and develop comprehensive legislation in the field. See, e.g., Iowa Code Ann. §§ 668.1-668.10 (West 1984) (Iowa statutes establishing structure for comparative fault cases).

108 See supra text accompanying notes 47-49. A good discussion of this problem is in Fischer, supra note 43, at 1642-50. See also Copeland, 447 So.2d at 914.

109 See Fischer, supra note 43; Newcomb, supra note 43.

110 As discussed in note 51, the Kasten bill (S. 44) at one point addressed the problem of cases where plaintiffs were unable to identify the manufacturers of the precise injury-producing drug.
MARKET SHARE LIABILITY

to be saddled with liability in situations where they may not have even produced the particular offending drug, they will be reluctant to enter or create new drug markets. This redounds to the detriment of society and consequently should be considered carefully.

Because of these concerns, it is prudent to focus on the impact of market share liability on the pharmaceutical industry. Market share liability is not a ubiquitous replacement for more traditional product liability theories but rather an alternative to be employed only under certain circumstances. Those circumstances, as identified by Sindell, arise whenever the cost to the plaintiff of identifying the culpable producer would, under these more traditional approaches, preclude compensation. If each firm's liability is identical under either the market share theory or conventional theories, its behavior will not be affected by substituting the former for any of the latter. There is, however, strong support for the conclusion that liability exposure will differ. Since alternative liability rules may not, in general, be expected to produce identical incentive structures, an investigation into the nature and significance of the noted discrepancy may prove beneficial in evaluating the propriety of adopting market share liability.

A. Incentives and Free Riders

The fundamental difference between market share liability and more traditional product liability theories lies in the fact that the former provides a socialization (among market participants) of costs of consumer injury. The effect of such a liability rule is to create what is known as the "free rider" problem. The free rider problem arises whenever the gains accruing from individual expenditures are distributed among many—the gains in this instance taking the form of reduced injury liability.

A free enterprise system, with its emphasis on autonomous economic agents seeking individual profit maximization, is ill suited to the provision of the socially optimal amount of goods with free rider aspects. Consider, for example, landowners who must contend with annual flooding. Assuming that the construction of a dam would eliminate the flooding, all affected landowners have an incentive equal to the resulting increment in land productivity to contribute to the building of the dam. At the same time, however, each has an incentive to minimize his contribution to the project—for each one realizes that once the dam is built the benefits

111 The costs in such a case are the costs of identifying the manufacturer of the specific harm-producing drug.

112 This result follows from the assumption implicit in analysis of firm behavior responding to profit motive. If alternative liability rules produce identical costs for alternative types of activity, there will be no incentive on the part of firms seeking to maximize profits to change any level of activity, like safety expenditures, which would affect liability exposure. For if a set of actions maximizes profit under one liability rule, the same result would follow from the same set of actions under any other liability rule generating the same cost structure.
will accrue to all affected land owners regardless of their contribution. The same analysis applies to the pharmaceutical industry under market share liability. The expenditure on production and other controls which enhance product safety will result in fewer and less costly injuries. This benefit will be distributed among industry members in the form of reduced liability awards. But the expenditure which reduced the liability of all is concentrated within the individual firm. As a result, the firm has less incentive to promote product safety than if it alone received the total benefits.

The free rider discussion can be more generally framed as the obverse of the now-famous problem of social cost discussed by Ronald Coase. The fundamental distinction between Coase's social cost examples and the free rider problem stems from the nature of the effects visited upon others as a result of individual decisions and consequent actions. Coase focused primarily upon those instances involving property losses to others, e.g., crop damage from sparks emitted by passing trains. But precisely the same impediment to achieving socially optimal results arises whenever the gains from individual expenditures are not entirely appropriable by the decisionmaker. Because the gains are "externalized," the activity creates social value beyond that realized by the decisionmaker, and insufficient incentives will exist for individuals to provide the socially optimal level of expenditure for that activity.

An important similarity between the free rider and social cost problem exists in that there is an incentive equal to the net social gain generated by the activity for autonomous economic agents to negotiate a resolution. In the flooding example previously mentioned, each landowner will have an incentive to see that the dam is built equal to the increased land value which the dam would generate for him. Thus, the free market may, through the exchange process, resolve the problem of either "externalized" gains or costs, and consequently provide the socially optimal outcome. Whether or not the problem is resolved by autonomous contracting agents, as perceptively noted by Coase, hinges upon the costs to the affected parties of engaging in and negotiating the exchange—that is, the transactions costs. If the net gains fall short of the transactions costs incurred in the process of internalizing them, the market will fail to provide incentives for their production. If this failure occurs, the remedy must be sought from other possible alternatives which will replace a purely market directed solution—alternatives which typically involve some form of governmental intervention. In an effort to establish whether or not the market requires such intervention, we consider more directly the free rider aspects engendered by market share liability within the pharmaceutical industry.

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114 Some alternatives concerning governmental resolution of the market share problem are considered in Comment, Market Share Liability: A Plea for Legislative Alternatives, 1982 U. Ill. L. F. 1003.
B. Substantial Share Bias

Rather than requiring the plaintiff to establish a causal link between the injurious product and the specific producer of that product, market share liability requires, in this regard, only that an injurious product be causally linked to a "substantial share" of a market supplied by certain producers. Implicit in the substantial share standard is the court's recognition that some culpable producers may escape liability. If market share liability is consistently biased, however, the free rider problem will become more acute as some firms will have even less incentive to increase safety expenditures. But does such a systematic bias in market share liability exist? The answer is provided by the substantial share standard itself.

The view of Sindell adopted by many legal commentators is that something around seventy-five percent of the relevant market will satisfy the substantial share standard. Accepting this proffered percentage as the minimum threshold necessarily implies that the omission of any firm with a market share in excess of twenty-five percent will be fatal to the plaintiff's case. If, as alleged in Sindell, the named defendants represented approximately ninety percent of the market, it must follow that no firm with a market share in excess of ten percent was omitted. Yet the opinion states that of the 200 possible defendants in Sindell only five remained at the appeal stage. To constitute ninety percent of the market, the defendants still in the case on appeal must have been large concerns, while the remaining 195, or so, must certainly have been small. It seems apparent then that the bias engendered by the substantial share rule is systematically in favor of the small producer.

It may be further argued that once the substantial share threshold has been established there is little incentive for the plaintiff to join additional producers. Though Sindell is silent on this point, its tenor suggests that a plaintiff would be permitted to recover one hundred percent of his damages once a substantial percentage of the market was in the case. That is, even if only ninety percent of the market was in the case, plaintiff could recover all damages established with the remaining percentage in some way reallocated among defendants. If total compensation is allowed the plaintiff naming five defendants with ninety percent of the market, as alleged in Sindell, where is the incentive for plaintiff to expend added resources to identify the remaining unnamed defendants? There is none, for the marginal

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111 This point was recognized in the Sindell court's discussion and rejection of the use of alternative liability. The court stated that "there [was] no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible." Sindell, 26 Cal. 3d at 603, 163 Cal. Rptr. at 139, 607 P.2d at 931.


117 Sindell, 26 Cal. 3d at 596, 163 Cal. Rptr. at 134, 607 P.2d at 926.

118 Sindell does allow for named defendants to bring in other drug manufacturers who might have produced the particular injurious drug. Sindell, 26 Cal. 3d at 612, 163 Cal. Rptr. at 145, 607 P.2d at 937.
gain of identifying additional defendants is zero while the marginal cost is surely positive and inversely related to the size of the firm. Wealth maximizing plaintiffs will therefore name the largest manufacturers to satisfy the enunciated judicial standard, and omit the smallest to minimize cost.119 The repercussions of this systematic bias is that small firms can benefit as free riders and thus face reduced incentives to produce safe products. The magnitude of this predicted effect may be evaluated by considering patented and unpatented drugs sequentially.

1. Patented Drugs

Most pharmaceuticals produced under patent should be entirely unaffected by the imposition of market share liability. Because identification costs will be insignificant, there will be no need to impose market share liability. If there is but one producer, the patent holder, the plaintiff will not encounter any obstacle to establishing a causal link between injurious product and producer—the entire justification for the emergence of the market share rule.120 Patented drugs which are produced under license, however, will not be as immune from the effects of market share liability.

Patents are granted to firms successful in the development and testing of new chemical entities. As some commentators have suggested, the scale economies inherent in research and development preclude all but the largest of firms from this activity.121 Consequently, most patents are granted to firms which are nationally recognized as industry leaders—that is, large firms. As discussed above, these are precisely the firms which are consistently put at a disadvantage by market share liability. If the patent holder perceives the added exposure to liability resulting from the possible imposition of market share liability to be in excess of the gains from leasing the patent rights, it will choose to retain those rights and thereby avoid the added liability. As a result, the adoption of the market share theory may well lead to a reduction of the number of patent leases in this field of pharmaceuticals.

Market share liability need not, however, lead to an elimination of all leased patents. Other alternatives are available to the patent holder and lessee because of their contractual relationship. Any redistribution of risk, whether biased or entirely

119 Of course plaintiffs would have an incentive to sue other companies if courts limited damage recovery to the corresponding percentage of the market they brought before the court.

120 This conclusion is based on the assumption that the patent pertains to a new chemical entity for which there are no therapeutic equivalents. Eliminating the identification costs precludes imposition of market share liability. Identification costs may become important if a competing firm develops a therapeutically equivalent but chemically distinct, therefore patentable, new drug. Then, an identification problem could re-emerge if a prescription is written for a generic class and the pharmacist supplies either. As the risk of liability exposure rises on any patented drug with competing patented substitutes, the expected returns from research and development would be expected to diminish.

121 See D. Schwartzman, supra note 11, at 307.
random, occasioned by market share liability may be contractually neutralized by adjusting the terms of the contract under which the patent rights are leased. The contract may specify that the lessees maintain detailed records—perhaps to the extent of recording each consumer’s purchases, with an indemnity provision if the lessee fails to do this and the lessor has to pay damages in a market share situation. Alternatively, production standards may be imposed on lessees to guarantee consistency of product safety between producers. Moreover, to the extent there is any geographic division of the market, firms could retain full liability for their specific market. These are but three of an infinite number of alternatives which patent holders and lessees may agree upon to ameliorate the deleterious and often unpredictable effects of market share liability. The alternative which in fact emerges will be determined by the cost of negotiating, monitoring, and enforcing each of the alternatives. In the event that these costs exceed all possible gains from contracting, the product will be produced solely by the patent holder. Factors anticipated to be of importance in the determination of these costs would seem to include such things as interfirm knowledge of quality control adherence, technical aspects of the production process such as production tolerances and costs of detecting defects, as well as the past history of the inherent safety of the drug in question. The evidence suggests that the majority of patented drugs are not produced under license. As one author states:

The top fifteen companies by sales in 1970 obtained 68.5 percent of all of the patents granted during the period 1941-71 on marketed drugs, and they issued 71.1 percent of all licenses. It is true that they issued only 186 licenses on 354 patented products, and on more than half of the patents, no licenses were granted at all.\footnote{See Cheung, Transactions Costs, Risk Aversion, and the Choice of Contractual Arrangements, 9 J. of Law and Econ. (1969), for a discussion of these opportunities.}

After an analysis of the facts, the same author is forced to conclude:

Owners of patents usually have issued few licenses. A large pharmaceutical company will issue licenses to other manufacturers when they have through their own research efforts established patent positions which threaten infringement suits. In addition, licenses may be granted in exchange for technical information and cross licenses. In addition, large foreign firms, or small domestic firms which have lacked marketing organizations have granted licenses.\footnote{See D. Schwartzman, supra note 11 at 308.}

In light of the licensing patterns of the pharmaceutical industry extant prior to the Sindell decision, the imposition of market share liability should not significantly alter production and market characteristics of patented drugs. Related to this factor is the anticipated effect on the incentive for research and development of new drugs.

Successful research and development will lead to patent rights which generate a future stream of income for the patent holder. As discussed above, these returns

\footnote{Id.}
can be insulated from the adverse effects of market share liability by the firm's decision not to lease the rights of the patent. As noted by David Schwartzman, over half of all patents granted between 1941 and 1971 were not leased. Consequently, the returns from the patent rights on these pharmaceuticals will be unaffected and no adverse effect on research and development should result. For the remaining drugs produced under patent lease, the returns to the lessor may be mitigated by either the increased transactions costs borne by the patent holder or, in those instances where transactions costs preclude the lease, by the reduced income resulting from the absence of royalty payments. Thus, the returns to research and development will be affected to the extent that the net gains from the proceeds of leasing are reduced by transactions costs. But, since the proportion of patents leased has not been even a majority of the total patent market, the incentives to invest in the development of new drugs should not be significantly affected.

2. Unpatented Drugs

The unpatented drug market is a significant and increasing portion of the entire drug industry both as a fraction of prescriptions written as well as in terms of total revenue. Out of all prescriptions written for leading drugs in 1972, unpatented drugs accounted for forty-four percent of the market. This proportion has been rising since 1972. Measured in terms of total industry revenue, available data again presents evidence of the increasing impor-

125 Id.
126 Despite the emergence of the market share theory, research and development has flourished among pharmaceutical firms. "This year, despite their profit worries, many [drug companies] have approved double-digit increases in R & D spending, pushing it to record levels. Werck's budget increased more than 12%, to $500 million. Smith Kline Beckman Corp.'s rose 10.7% to $293 million." Prescription Drugmakers Try to Cope with a Dose of Adversity, Bus. Wk., Sept. 17, 1984, at 132.

\[\text{TABLE 1}\]

<table>
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<th>Percentage</th>
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<td>1972</td>
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<td>1975</td>
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Source: D. SCHWARTZMAN, supra note 11, at 109, Table 6-5.
tance of unpatented drugs. One source suggests that unpatented drugs have risen from thirty-five percent of leading drug sales in 1972 to sixty-nine percent in 1980.\textsuperscript{128}

The risk of exaggerating the effects of market share liability would not be entirely eliminated even if accurate data on the unpatented market were available. Because many unpatented drugs were initially produced under patent, the industry will have an accumulation of information upon which to assess their safety. Since the life of an average patent extends for 12.4 years,\textsuperscript{129} a substantial history will be available and will enable prospective producers to categorize drugs as either relatively safe or risky. The former type of drug will be any which has an insignificant probability of creating injuries sufficient to warrant a liability suit. For such drugs, market share liability will have faint, if any, effect. The absence of anticipated injury considerably lessens exposure to liability—market share or otherwise.

Other drugs will be perceived as relatively risky in that the likelihood of future liability is significant. Only in this submarket of unpatented drugs will market share liability apply. Risk may arise either because the drug is new and information sufficient to evaluate its safety is unavailable or because its history has proven the drug to be unsafe. DES provides an example of the former category. After Sindell, drugs used by pregnant women will certainly be scrutinized. Whenever a drug is perceived to be risky, firms will weigh possible exposure to market share liability when deciding whether to produce the drug in question.

\begin{table}
\centering
\caption{Sales in 1972 of Leading Drugs Not Protected by Patents after 1972, 1975, 1980}
\begin{tabular}{l|c}
\hline
Year & Percentage \\
\hline
1972 & 35 \\
1975 & 41 \\
1980 & 69 \\
\hline
\end{tabular}
\end{table}

Source: D. Schwartzman, \textit{supra} note 11 at 108, Table 6-4.

However, the relative magnitude of the unpatented drug market is overstated by these figures. While the market share for 1972 is based upon actual data, that of 1975 and 1980 are projections based upon the simplifying, but dubious, assumption that no patents, beyond those extant in 1972, would be granted. Since no new patents are admitted to the model, the expiration of patents over time must, of necessity, increase the share of unpatented drugs in the market. The information in Tables 1 and 2, then, must be viewed with this in mind.

\textsuperscript{128} See D. Schwartzman, \textit{supra} note 11, at 11.
These so-called "risky" unpatented drugs are more vulnerable to the effects of market share liability due to the absence of a central contracting agent. The absence of a central contractor may be expected to produce significant barriers to establishing contractual provisions which modify the liability distribution created by market share liability. Transaction costs would be especially important when there are numerous market participants—precisely the conditions under which market share liability is most likely to be imposed, as Sindell illustrates. If, due to transaction costs, liability distribution cannot be contractually modified, firm behavior will be subjected to the new constraints imposed by market share liability. As a result, each firm will be free to decide its own profit maximizing level of safety expenditures. Since this decision will be made based on the gains and costs which it alone faces, the "free rider" aspect of allocating damages among market participants as envisioned by some commentators becomes apparent.130

Market share liability effectively disperses the gains from each firm's expenditures on safety to all market participants. Any expenditure on safety by a single manufacturer will reduce injury liability for all firms in the industry. Each firm will receive a benefit equal to the foregone damages multiplied by the market share for which it would otherwise have been held liable. As eloquently demonstrated by Guido Calabresi, this will not promote socially optimal safety expenditures.131 Since the marginal dollar expended on safety returns only a fraction of the value of resulting total injury damages foregone, profit maximizing firms will find it in their interest to reduce the level of expenditures on safety if there are no less costly alternatives available to them.

This reduction in safety expenditures by firms could create the result of greater injuries among the consumers of drugs produced within the unpatented drug market. The added injuries and subsequent liability claims will reduce profitability within the industry and possibly lead to an exit of many producers. Especially hard hit will be those producers which it has been shown market share liability discriminates against—that is, the larger producers. The ultimate effects of this scenario are difficult to predict but the costs, both in terms of consumer injury and resource misallocation, can surely be imagined as substantial. It is not unreasonable then to posit the existence of market alternatives which will evolve to limit such a digression within the industry.

One alternative suggested within the Sindell decision itself is for firms to exculpate themselves by proving the absence of their product from the relevant market. Any pharmaceutical manufacturer will be able to limit the exposure to liability by maintaining more complete and accurate records of the markets which it supplies. Given existing industry practices in documenting product batch lot numbers it is not unreasonable to assume that additional record keeping would

be a viable alternative. With the current technological advances in information processing the cost of such an alternative should not be prohibitive, and furthermore, these costs can be expected to diminish as technology improves. Indeed, the free rider effects noted above could be entirely eliminated if records were detailed to the point of identifying individual consumer purchases. With such records no producer would be held liable for injuries resulting from another firm's lax adherence to safety standards. Market share liability would then adversely affect only those firms with insufficient documentation to exculpate themselves. The existence of complete consumer records would effectively provide the information which was previously absent and eliminate the fundamental justification for imposing market share liability.

Whether or not this suggested alternative is in fact employed by the pharmaceutical industry hinges on its cost relative to other possible solutions, of which there are an infinite number. As noted, some pharmaceuticals may have an extended history as a relatively safe drug producer and not be considered by the industry to be a candidate for liability suits. For such drugs the producers may feel confident that records need not be maintained. But for any product with an uncertain history or a history indicative of potentially significant injury, market information will have value.

Thus, market share liability should have a minimal effect on the market for unlicensed patented drugs. While market share liability may preclude some products from being licensed, its effect on licensed patented drugs and on research and development efforts is predicted to be small. The most significant impact is predicted to be on product safety in the market for unpatented drugs. Even with this, there are means available for dealing with this problem.

VI. CONCLUSION

One could argue persuasively that the effect of Sindell has been overrated. While viewed as a harbinger of doom by the drug industry, it is well to bear in mind what the plaintiff confronts even after being granted the relaxed identification rule of Sindell. Under market share theory, the plaintiff must still establish wrongful conduct by the defendant—that is, the breach of a legally recognizable duty. This would include a showing that DES does cause cancer. Furthermore, under

132 Medwick, Quality-Control Education in the College of Pharmacy, in QUALITY CONTROL IN THE PHARMACEUTICAL INDUSTRY, (M.S. Cooper ed. 1972).

133 In Sindell, the plaintiff's allegations sounded in negligence, strict liability, and a variety of other claims. For a negligence claim, the plaintiff would have to establish that defendants knew or should have known of the unreasonable risk presented by the DES while the strict liability count would focus on the defective nature of the product itself.

134 Plaintiffs in such a case would customarily attempt to establish a statistically significant link between DES use and genital tract cancer in users' daughters. Two of the more commonly cited references in support of such a claim are Nordquist, Fidler, Woodruff & Lewis, Clear Cell Adenocarcinoma of
Sindell, the plaintiff must still join a substantial percentage of the market. The cost and perceived unfairness of this requirement has caused some courts recently to reject this and permit the plaintiff to sue but one responsible defendant.135 Viewed in this light, Sindell offers defendants considerable insulation from cases where plaintiffs actually recover damages.

Nevertheless, Sindell is a case drug companies must take seriously. Since the FDA permitted DES to be used as an anti-miscarriage drug until 1971, future cases can be expected. For courts to reject market share liability as "unfair, unworkable and contrary to . . . law,"136 without assessing its application and costs completely seems mistaken. While the court in Sindell may be justly criticized for much of the indefiniteness of the decision, this tack was not wholly unjustified. Given the fact that proof in these cases would be so varied and dependent upon what was available, the court may have been acting wisely in not trying to specify the particulars of this nascent claim.

By being intentionally general, the court permits the common law process to function. The cool response given Sindell by other courts and the absence of subsequent elaboration by the California Supreme Court, however, has not done much to advance the exegesis. As has been demonstrated, however, the spirit of Sindell, if not the letter, has found a place in other cases.

Finally, this article posits that many of the practical problems of the market share approach are resolvable and the economic objections somewhat overstated. As courts struggle with future cases of generic, interchangeable drugs, it may well be that Sindell's bold stroke will be looked upon more kindly.

135 See, e.g., Collins, 116 Wis. 2d 166, 342 N.W.2d 37. See supra text accompanying notes 88-105 and Martin, 102 Wash. 2d 581, 689 P.2d 368.

136 Zafft, 676 S.W.2d at 246.