

NOTES

LEAD-BASED PAINT LITIGATION AND THE PROBLEM OF CAUSATION: TOWARD A UNIFIED THEORY OF MARKET SHARE LIABILITY

In 1987, attorneys for Monica Santiago filed suit in the United States District Court for the District of Massachusetts seeking damages from several manufacturers of the lead pigment used in lead-based paint, charging that their negligence caused her to suffer lead poisoning.¹ At the heart of Santiago's claim was the argument that the court should adopt a theory of market share liability and hold each defendant liable for damages proportional to its share of the lead pigment market.² In 1991, the City of Philadelphia brought an even more sweeping suit in the United States District Court for the Eastern District of Pennsylvania seeking damages to cover the entire expense of removing lead-based paint from city buildings and for creating programs to screen and treat the public for lead poisoning.³ Like Santiago, the City asked the court to adopt a theory of market share liability.⁴ Despite the predictions of some attorneys that injuries from lead paint poisoning would be the next mass tort, the United States Courts of Appeals for the First and Third Circuits recently issued decisions in these cases in which they refused to endorse a market share theory of liability.⁵ Although these decisions do not foreclose the possibility of future courts' holding the lead paint industry liable under a market share

¹ *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186, 188 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1993).

² *See id.*

³ *City of Phila. v. Lead Indus. Ass'n*, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *4 (E.D. Pa. Apr. 23, 1992), *aff'd*, 994 F.2d 112 (3d Cir. 1993).

⁴ *Id.*

⁵ *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 115 (3d Cir. 1993); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993); Julie G. Shoop, *Class Actions Add Momentum to Lead Paint Litigation*, TRIAL, Apr. 1992, at 11, 11.

theory, they appear to indicate that courts are going to be very cautious about expanding mass tort theories.⁶

The doctrine of market share liability has encountered significant resistance from most courts throughout its short history.⁷ The California Supreme Court first adopted the theory as a means of holding manufacturers of diethylstilbestrol ("DES") liable for injuries caused to plaintiffs whose mothers had taken the drug during pregnancy to prevent morning sickness and miscarriages.⁸ Even so, DES plaintiffs have been only moderately successful in winning acceptance of market share liability in other courts.⁹ Furthermore, attempts to use market share liability theories outside the DES context have had almost no success.¹⁰ The most notable failures have occurred in litigation over injuries caused by asbestos and defective vaccines.¹¹

This Note analyzes the *Santiago v. Sherwin-Williams Co.* and *City of Philadelphia v. Lead Industries Ass'n* decisions in light of the history of market share liability litigation and argues for a unified theory of market share liability based on underlying theories of tort law. Section I explores the medical effects and primary sources of lead poisoning and the difficulties associated with diagnosis and treatment.¹² Section II reviews the history of the market share theory of liability, focusing primarily on the different versions that have been developed by various courts.¹³ Section III sets out the district court and Third Circuit opinions in the *City of Philadelphia* case.¹⁴ Section IV reviews the opinions of the district court and First Circuit in the *Santiago* case.¹⁵ Finally, Section V analyzes the two competing theories underlying causation in tort law and argues for a theory of market share liability consistent with both.¹⁶

⁶ See Joseph J. Ortega & Josh H. Kardisch, *Lead Paint Cases Raise Causation Issues*, NAT'L L.J., Nov. 8, 1993, at 19, 21.

⁷ Andrew B. Nace, Comment, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395, 418 (1991).

⁸ See *Sindell v. Abbott Lab.*, 607 P.2d 924, 937-38 (Cal.), cert. denied, 449 U.S. 912 (1980).

⁹ See David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1647 (1981); Nace, *supra* note 7, at 418.

¹⁰ Nace, *supra* note 7, at 414-18.

¹¹ *Id.*

¹² See *infra* notes 17-36 and accompanying text.

¹³ See *infra* notes 37-84 and accompanying text.

¹⁴ See *infra* notes 85-127 and accompanying text.

¹⁵ See *infra* notes 128-78 and accompanying text.

¹⁶ See *infra* notes 179-228 and accompanying text.

I. THE MEDICAL EFFECTS OF LEAD POISONING

Despite passage of numerous laws designed to reduce environmental lead levels, many sources for lead exposure persist in the United States.¹⁷ The most significant sources of lead poisoning today result from lead deposited prior to the passage of anti-lead statutes.¹⁸ Lead is indestructible in the environment, and thus much of our current problem results from the fact that lead was once a common ingredient in paints, gasoline and solders.¹⁹ The principal sources for lead exposure today include lead-based paint in the form of paint chips and dust, drinking water tainted by lead in plumbing and distribution systems, and soil contamination due mostly to motor vehicle exhaust and lead paint dust.²⁰ Of these sources, lead-based paint is the most significant source of lead exposure, particularly among children.²¹

Infants and young children are considered most vulnerable to lead and its adverse health effects.²² Young children are more likely to ingest lead and, because their bodies are growing rapidly, they absorb and retain more lead than adults.²³ In addition, children suffer adverse health effects at lower blood lead levels than adults.²⁴ A child can become severely lead poisoned by ingesting a mere one milligram of

¹⁷ See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS* 8-9 (1988) [hereinafter *ATSDR REPORT*]; Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 47, 61-70 (1990). Anti-lead laws include, most notably, the regulation of lead in gasoline and laws requiring abatement of lead paint in apartment buildings. Mahoney, *supra* at 61-70.

¹⁸ *Lead Poisoning: Hearings on H.R. 2840 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 52 (1991) [hereinafter *Hearings*] (statement of Linda J. Fisher, Assistant Adm'r, Office of Pesticides and Toxic Substances, U.S. Env'tl. Protection Agency).

¹⁹ *Id.*

²⁰ *ATSDR REPORT*, *supra* note 17, at 8-9; *Hearings*, *supra* note 18, at 52. Other less significant sources of lead include food, smelters, gasoline, secondary exposure to lead transported home from work, lead-glazed pottery and certain folk medicines. *ATSDR REPORT*, *supra* note 17, at 8-9.

²¹ *Hearings*, *supra* note 18, at 61. For a good review of the history of lead-based paint production, see Michelle Gilligan & Deborah Ann Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 246-51 (1987).

²² *ATSDR REPORT*, *supra* note 17, at 9. The developing fetus is also at risk for lead exposure, as lead is readily transferred across the placenta. *Id.*

²³ *ATSDR REPORT*, *supra* note 17, at III-9; Gilligan & Ford, *supra* note 21, at 253-54. Toddlers have a tendency to eat paint chips and other nonfood items (referred to as pica) as part of the normal hand-to-mouth exploration phase of development. *ATSDR REPORT*, *supra* note 17, at II-7; Gilligan & Ford, *supra* note 21, at 253 n.66. Children excrete less lead than adults because their still-developing bones absorb greater quantities of lead. *ATSDR REPORT*, *supra* note 17, at III-8.

²⁴ Gilligan & Ford, *supra* note 21, at 254.

lead paint dust—as much as three granules of sugar—each day.²⁵ Finally, lead poisoning is difficult to diagnose at early stages because there are no obvious or unusual symptoms.²⁶

Approximately three to four million children in the United States have toxic levels of lead in their blood.²⁷ Severe lead poisoning usually results in convulsions, coma, irreversible mental retardation, seizures and even death.²⁸ At lower blood lead levels, where there are few if any clinical symptoms, children suffer from reduced IQ, impaired hearing, attention disorders, behavioral disturbances and learning disabilities.²⁹ Most of these injuries are the result of damage done to the central nervous system.³⁰ Although studies have yet to produce firm conclusions, they do indicate that these effects are persistent and long-term, if not permanent.³¹

Due to the generic nature of the effects of lead poisoning, it can be difficult to show both that lead poisoning is the cause of specific health defects and that a specific case of lead poisoning is due to lead paint.³² When a child has been diagnosed with lead poisoning, testimony of parents, friends or relatives who have seen the child chewing on surfaces coated with lead paint or putting paint chips in his or her mouth can be used to prove that lead paint was the cause of the poisoning.³³ Also, scientific analyses can be used to match lead found in a child's primary teeth or blood to the lead from a paint sample.³⁴ Showing that effects such as attention disorders and learning disabilities are the result of lead poisoning is more difficult.³⁵ The best evidence available is the testimony of a physician with expertise in treating childhood lead poisoning and the evaluation of a neuropsychologist.³⁶

²⁵ Steven Waldman, *Lead and Your Kids*, NEWSWEEK, July 15, 1991, at 42, 46.

²⁶ Gilligan & Ford, *supra* note 21, at 254. Early symptoms include irritability, clumsiness, fatigue, headaches and vomiting. *Id.*

²⁷ ATSDR REPORT, *supra* note 17, at 1-47. Currently, blood lead levels of over 15 ug/dl are believed to cause adverse health effects. *Id.*

²⁸ *Id.* at 10.

²⁹ *Id.* at 10; Herbert L. Needleman et al., *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood*, 322 NEW ENG. J. MED. 142, 147 (1990).

³⁰ ATSDR REPORT, *supra* note 17, at IV-23; see Needleman, *supra* note 29, at 142.

³¹ ATSDR REPORT, *supra* note 17, at IV-23.

³² See Benjamin Hiller & Jeffrey M. Feuer, *Expert Testimony in Childhood Lead-Poisoning Cases*, TRIAL, Mar. 1991, at 46, 47-49.

³³ *Id.* at 47.

³⁴ *Id.*

³⁵ See *id.* at 49.

³⁶ *Id.*

II. THE DEVELOPMENT OF MARKET SHARE LIABILITY

The few courts adopting market share liability agree on three basic requirements. First, plaintiffs must show that a particular product manufactured by all of the defendants named in the lawsuit caused their injuries.³⁷ Second, they must prove that a design defect in the product caused the harm and that each defendant sold the product in a manner that made it unreasonably dangerous.³⁸ Finally, the plaintiffs must be unable to identify the specific manufacturer of the product that caused their injury.³⁹ Beyond these initial requirements, however, the courts that have adopted market share liability disagree about how to apply the doctrine.⁴⁰

The California Supreme Court developed the market share theory of liability in 1980 in the case of *Sindell v. Abbott Laboratories*.⁴¹ The *Sindell* court held that the manufacturers of DES would be liable for the plaintiff's injuries upon a showing that the manufacturers produced a substantial share of the drug.⁴² Each manufacturer would be held liable for the proportion of the judgment represented by its share of the DES market, unless it could show it did not make the product that caused the plaintiff's injuries.⁴³ In *Sindell*, the plaintiffs⁴⁴ brought suit against eleven drug companies that manufactured, promoted and marketed DES between the years 1941 and 1971.⁴⁵ The named plaintiff, Judith Sindell ("Sindell"), alleged that, as a result of her mother's ingestion of DES, she had developed a malignant bladder tumor which had to be surgically removed.⁴⁶ The plaintiff was not able to identify

³⁷ See *Sindell v. Abbott Lab.*, 607 P.2d 924, 936 (Cal.), *cert. denied*, 449 U.S. 912 (1980); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1072, 1075 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); *Martin v. Abbott Lab.*, 689 P.2d 368, 382 (Wash. 1984) (en banc).

³⁸ *Sindell*, 607 P.2d at 936; *Hymowitz*, 539 N.E.2d at 1072, 1075; *Martin*, 689 P.2d at 382.

³⁹ *Sindell*, 607 P.2d at 936; *Hymowitz*, 539 N.E.2d at 1072, 1075; *Martin*, 689 P.2d at 382.

⁴⁰ See *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 126-27 (3d Cir. 1993). The Third Circuit noted that the various courts that have applied market share liability could not agree on how to calculate the market share of the defendants and which party should have the burden of proving the actual market share of each defendant. *Id.*

⁴¹ 607 P.2d at 937-38.

⁴² *Id.* at 936-37.

⁴³ *Id.* at 937.

⁴⁴ The action in *Sindell* was brought by a class of plaintiffs consisting of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers' to which they were exposed." *Id.* at 925 n.1 (quoting complaint).

⁴⁵ *Id.* at 925.

⁴⁶ *Sindell*, 607 P.2d at 926. DES can cause cancerous vaginal and cervical growths, known as adenocarcinoma, in women exposed to the drug before birth. *Id.* at 925. DES also causes precancerous vaginal and cervical growths, known as adenosis, that may spread to other areas of the

which of the defendant manufacturers, if any, actually produced the DES taken by her mother.⁴⁷ This predicament was common in DES cases because all manufacturers of DES produced the drug from the same chemical formula and used generic labeling.⁴⁸ These practices prevented Sindell from identifying the particular manufacturer responsible for her injuries.⁴⁹ Therefore, the plaintiff argued for joint and several liability of all defendants under three separate collective share liability theories, all of which were rejected by the *Sindell* court.⁵⁰

Having rejected traditional collective share remedies, the *Sindell* court seized on the invitation of the *Restatement (Second) of Torts* to modify existing theories of collective share liability in response to special circumstances.⁵¹ The California Supreme Court, drawing on an idea proposed in a student-authored *Fordham Law Review* note, adopted the theory of market share liability.⁵² The court did not require the plaintiff to prove that one of the defendants definitely caused her injury.⁵³ Rather, it stated that the plaintiff could recover because she had joined as defendants in the action a substantial percentage

body and must therefore be surgically removed. *Id.* Women who have any of these conditions must undergo painful and expensive biopsies or colposcopic examinations twice a year as a preventive measure. *Id.*

⁴⁷ *Id.* at 926.

⁴⁸ See *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1072 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); *Martin v. Abbott Lab.*, 689 P.2d 368, 374 (Wash. 1984) (en banc). These manufacturing and marketing practices were carried out at the request of the FDA and made possible, in part, because the chemical formula for DES was never patented. *Martin*, 689 P.2d at 373-74. Identification of the responsible defendants was further complicated by the fact that doctors often prescribed the drug by its generic name and pharmacists filled prescriptions with whatever brand of the drug they had in stock. *Sindell*, 607 P.2d at 926.

⁴⁹ See *Sindell*, 607 P.2d at 926.

⁵⁰ See *id.* at 926, 936. Sindell first sought recovery under the theory of alternate liability developed by the California Supreme Court in *Summers v. Tice*. *Sindell*, 607 P.2d at 928 (citing 199 P.2d 1 (Cal. 1948)). The *Sindell* court refused to apply this theory for two reasons. *Sindell*, 607 P.2d at 930, 931. First, the DES manufacturers were in no better position than the plaintiff to identify the producer of the DES taken by plaintiff's mother. *Id.* at 930. Second, having more than 200 possibly culpable defendants made it impossible to know whether any of the defendants before the court actually caused plaintiff's injury. *Id.* at 931. Sindell also relied on the concert of action theory in seeking recovery. *Id.* The court rejected this argument on the grounds that the defendants had no tacit understanding or common plan to fail either to conduct adequate tests or to give sufficient warnings. *Id.* at 932. The final principle relied on by Sindell was that of enterprise liability. *Id.* at 933. The court rejected this theory because of the large number of DES manufacturers, the absence of a common trade association and the close regulation of the drug industry by the FDA. *Id.* at 935.

⁵¹ See *Sindell*, 607 P.2d at 936 (citing RESTATEMENT (SECOND) OF TORTS § 433B cmts. g, h (1965)).

⁵² See *Sindell*, 607 P.2d at 937 (citing Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978)).

⁵³ See *Sindell*, 607 P.2d at 937.

of the manufacturers shown to have produced DES at the time her mother purchased the DES that caused the plaintiff's injury.⁵⁴ The court then shifted the burden to the defendant manufacturers to prove that they had not produced the DES that injured the plaintiff.⁵⁵ Those manufacturers unable to meet this burden would be held liable for the amount of the plaintiff's damages proportional to their share of the DES market at the time the plaintiff's mother used DES.⁵⁶

The *Sindell* court decided not to adhere to a rigid view of causation in order to give effect to the policies underlying tort law.⁵⁷ The court announced that it was persuaded by the principle announced in a prior joint liability case: "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."⁵⁸ Turning its attention to the policies underlying tort law, the court stated that the defendants should be held liable because they were in a better position to bear the costs of the injury resulting from the manufacture of a defective product.⁵⁹ Additionally, the court noted that holding the manufacturers liable would provide an incentive for them to produce safer products.⁶⁰ Finally, the court emphasized that these policy considerations were especially significant where medication is involved because consumers are virtually helpless to protect themselves from injuries caused by defective drugs.⁶¹

In 1984, the Washington Supreme Court in *Martin v. Abbott Laboratories* rejected the *Sindell* court's formulation of market share liability and developed its own version known as "market share alternate liability."⁶² Under the *Martin* court's theory, the plaintiff need only sue a single DES manufacturer, but that manufacturer cannot be held liable for more than its proven market share.⁶³ The *Martin* court refused to

⁵⁴ *Id.* The *Fordham Law Review* comment suggested that the plaintiff should be required to join 75% to 80% of the manufacturers in the market in order to create "clear and convincing evidence" that one of the defendants manufactured the product which caused the plaintiff's injury. Sheiner, *supra* note 52, at 996.

⁵⁵ *Sindell*, 607 P.2d at 937.

⁵⁶ *Id.* The *Sindell* decision has been criticized for failing to specify what percentage of the product market should be considered substantial, for not determining whether national or regional markets should be used in calculating market share, and for not stating which party has the burden of establishing a defendant's market share. See Kurt M. Zitzer & Marc D. Ginsberg, *Illinois Rejects Market Share Liability: A Policy Based Analysis of Smith v. Eli Lilly & Co.*, 79 Ky. L.J. 617, 621-22 (1990-91).

⁵⁷ *Sindell*, 607 P.2d at 936.

⁵⁸ *Id.* (citing *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)).

⁵⁹ *Sindell*, 607 P.2d at 936.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 689 P.2d 368, 382 (Wash. 1984) (en banc).

⁶³ *Id.* at 382, 383.

adopt the *Sindell* market share theory of liability on two grounds.⁶⁴ First, the court stated that the *Sindell* court failed to explain what constitutes a "substantial" share of the relevant market.⁶⁵ Second, it was troubled because, under the *Sindell* theory, less than 100% of the market would be required to bear 100% of the cost of plaintiff's injuries.⁶⁶

The *Martin* court stated that the plaintiff must allege four elements.⁶⁷ First, that her mother took DES.⁶⁸ Second, that her injuries were caused by the DES.⁶⁹ Third, that the defendant produced the "type" of DES taken by the plaintiff's mother.⁷⁰ Finally, that manufacturing or producing the DES constituted a breach of the defendant's duty of care.⁷¹ The court explained that defendants could exculpate themselves from liability by establishing that they did not produce or market the type of DES taken by the plaintiff's mother.⁷² Alternatively, defendants could exculpate themselves by showing that they did not market DES within the geographic area where plaintiff's mother obtained DES or during the time period when plaintiff's mother purchased the drug.⁷³

Those defendants unable to exculpate themselves from potential liability are presumed to have equal shares of the plaintiff's DES market, adjusted to total 100% of the market.⁷⁴ Defendants are entitled to rebut this presumption and reduce their potential liability by establishing their actual market share within the geographic area.⁷⁵ The *Martin* court went on to point out that where all defendants are able to prove their actual market share, and the resulting total is less than 100%, the plaintiff will recover less than 100% of awarded damages.⁷⁶

⁶⁴ *Id.* at 381.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Martin*, 689 P.2d at 382.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* The court noted that evidence of dosage, color, shape, markings, size or other identifiable characteristics could be used to show that a manufacturer produced the same type of DES used by the plaintiff's mother. *Id.*

⁷¹ *Id.*

⁷² *Martin*, 689 P.2d at 382.

⁷³ *Id.*

⁷⁴ *Id.* at 383.

⁷⁵ *Id.*

⁷⁶ *Id.* The court illustrated the application of this rule with the following three hypotheticals: Assume that plaintiff's damages are \$100,000 and defendants X and Y remain subject to liability after exculpation by other named defendants. If neither establishes its market share then they are presumed to have equal shares of the market

The New York Court of Appeals announced a third version of market share liability in 1989 in the case of *Hymowitz v. Eli Lilly & Co.*⁷⁷ The *Hymowitz* court decided that a defendant's share of potential damages ought to be determined based on its share of the national market.⁷⁸ The court reasoned that use of a national market would be the most fair method because it apportions defendants' liabilities according to their total culpability in marketing DES to the public at large.⁷⁹ As with most other successful market share suits, the plaintiffs in *Hymowitz* were women seeking damages for injuries caused by their mothers' ingestion of DES during pregnancy.⁸⁰ As a result of using the national market to determine a defendant's share of the damages, a defendant could not exculpate itself by showing that it had not marketed DES at the time of the plaintiff's injury or in the geographical area where the plaintiff's mother lived.⁸¹ Additionally, the *Hymowitz* court stated that it would not allow a defendant to exculpate itself from liability by showing that it had not produced or marketed the particular type of DES that caused the plaintiff's injury.⁸² The court reasoned that the culpability of a manufacturer of DES is not lessened because it happened to market a more identifiable pill or sold only to certain drugstores.⁸³ The *Hymowitz* court also stated that the liability of DES producers is several only, and thus the liability of the defendant manufacturers should not be adjusted to total 100% where all DES manufacturers have not been named as defendants.⁸⁴

and are liable respectively for 50 percent of the total judgment, X, \$50,000 and Y, \$50,000.

Assume defendant X establishes that it occupies 20 percent of the relevant market, and defendant Y fails to prove its market share. Defendant X is then liable for 20 percent of the damages, or \$20,000, and defendant Y is subject to the remaining 80 percent, or \$80,000.

Assume that defendant X establishes a market share of 20 percent and defendant Y a 60 percent market share. Then defendant X is subject to 20 percent of the judgment, \$20,000, and defendant Y to 60 percent of the judgment, \$60,000. The plaintiff does not recover her entire judgment because the remaining 20 percent of the market share is the responsibility of unnamed defendants.

Id.

⁷⁷ 539 N.E.2d 1069, 1078 (N.Y.), *cert. denied*, 493 U.S. 944 (1989).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 943. Plaintiffs did not bring a class action; rather, the cases decided by the court were representative of nearly 500 similar actions pending in New York state courts. *Id.*

⁸¹ *Id.* at 950.

⁸² See *Hymowitz*, 539 N.E.2d at 1078.

⁸³ *Id.*

⁸⁴ *Id.*

III. *CITY OF PHILADELPHIA v. LEAD INDUSTRIES ASS'N*

On May 11, 1993, the United States Court of Appeals for the Third Circuit, in *City of Philadelphia v. Lead Industries Ass'n*, held that Pennsylvania law would not permit recovery against the lead-based paint industry under a theory of market share liability.⁸⁵ The plaintiffs in the case, the City of Philadelphia (the "City") and the Philadelphia Housing Authority ("PHA"), sued several manufacturers of lead pigment and their trade association to recover the costs of abating hazardous lead-based paint from city buildings.⁸⁶ The Court of Appeals for the Third Circuit upheld the district court's ruling that the plaintiffs could not proceed under a theory of market share liability because the Pennsylvania Supreme Court had neither adopted that theory nor sent any authoritative signal that it would do so.⁸⁷ In reaching its decision, the Third Circuit reasoned that, as a federal court sitting in diversity jurisdiction, it could not significantly expand state law without clear indication that the Pennsylvania Supreme Court would reach the same result.⁸⁸ The court emphasized that caution was especially important because there was no single widely accepted version of the market share doctrine.⁸⁹

The *City of Philadelphia* plaintiffs brought suit against the defendants in response to new regulations promulgated by the United States Department of Housing and Urban Development ("HUD") that became effective in the spring of 1990.⁹⁰ These regulations required the City and PHA to warn residents of HUD-associated housing built prior to 1978 about the dangers of lead paint and to remove all lead-based paint from these housing units.⁹¹ The City and PHA⁹² brought suit

⁸⁵ 994 F.2d 112, 115 (3d Cir. 1993).

⁸⁶ *Id.* at 115-16.

⁸⁷ *Id.* at 115.

⁸⁸ *Id.*

⁸⁹ *Id.* at 127.

⁹⁰ 24 C.F.R. § 35.1 (1995). The new regulations were issued pursuant to the Lead-Based Poisoning Prevention Act. 42 U.S.C. §§ 4821-46 (1988 & Supp. V 1993).

⁹¹ *City of Phila.*, 994 F.2d at 115 (citing 24 C.F.R. §§ 35.5(a), 35.24(b) (1992)). HUD provides no funding to cities to help them comply with the regulations. *Id.*

⁹² The plaintiffs also brought a class action on behalf of:

The City of Philadelphia and all other cities in the United States with a population over 100,000 persons, the Philadelphia Housing Authority, and all housing authorities and/or public health authorities affiliated with such cities (collectively the "Cities" or "Class") engaged in and/or contemplating a program:

a. for the inspection, testing, monitoring or abatement of lead paint in properties within the respective jurisdictions of the Cities, which have been built or whose interiors have been painted within the period from the early 1900s through 1977, which are owned and/or managed by the Cities, and/or privately owned or man-

against several manufacturers of lead pigment and the Lead Industries Association ("LIA") in order to shift the costs of complying with the HUD regulations to those they viewed as being primarily responsible for this public health threat.⁹³

The plaintiffs' complaint alleged that the defendant manufacturers and trade association had known since the early 1900s that lead paint was extremely hazardous.⁹⁴ In addition, the plaintiffs asserted that despite the availability of nontoxic substitute pigments, the defendants continued to encourage the use of lead pigments in paint intended for interior residential use.⁹⁵ The plaintiffs alleged that the LIA, of which all of the defendants were members at some point, misrepresented the health effects of lead paint to the public and attempted to discredit studies that documented the toxicity of lead pigment.⁹⁶ In addition, they argued that the LIA carried out a vigorous lobbying effort to mislead state and federal legislative bodies considering restrictions on the use of lead paint.⁹⁷ In response to the plaintiffs' suit, defendant manufacturers and the LIA filed a motion to dismiss on the grounds that market share liability was not a viable theory for recovery under Pennsylvania law.⁹⁸

A. *The District Court Opinion Dismissing Plaintiffs' Complaint*

In its 1992 opinion granting defendant's motion to dismiss, the district court held that Pennsylvania law did not recognize a market share theory of liability.⁹⁹ In a brief two paragraph analysis, the court

aged where a known lead paint hazard exists and private owners refuse to abate such hazard; and/or

b. to screen, test, diagnose and treat the residents of the Cities for exposure to lead paint and to educate them about its hazards.

City of Phila., 994 F.2d at 115 n.1.

⁹³ *Id.* at 115-16. Plaintiffs sought \$100,000,000 in damages from NL Industries, Inc., Atlantic Richfield Co., Sherwin-Williams Co., Glidden Co. and Fuller-O'Brien Corp. *Id.* at 115 n.1.

⁹⁴ *Id.* at 116. Plaintiffs' amended complaint asserted claims for negligent product design, strict product liability, negligent failure to warn, breach of warranty, fraud and misrepresentation, indemnification, restitution and punitive damages. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *City of Phila.*, 994 F.2d at 116.

⁹⁸ *Id.* at 117.

⁹⁹ *City of Phila. v. Lead Indus. Ass'n*, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *49 (E.D. Pa. Apr. 23, 1992), *aff'd*, 994 F.2d 112 (3d Cir. 1993). In a separate decision, the court held that the statute of limitations barred the City's claims but not those of the PHA because, as an agency of the Commonwealth of Pennsylvania, the PHA was protected by the doctrine of nullum tempus. *City of Phila. v. Lead Indus. Ass'n*, No. 90-7064, 1992 U.S. Dist. LEXIS 3720, at *25-*26 (E.D. Pa. Feb. 3, 1992), *aff'd*, 994 F.2d 112 (3d Cir. 1993). The district court dismissed plaintiffs' negligent product design and strict product liability claims because there was no evidence that

stated that Pennsylvania courts would reject market share liability because the theory abandons the requirement of proximate causation.¹⁰⁰ The court explained that Pennsylvania courts had consistently rejected similar collective action theories on the grounds that they violated the proximate cause requirement.¹⁰¹ The court described market share liability as a novel theory and, citing its role as a federal court sitting in diversity jurisdiction, the court refused to expand state tort law.¹⁰²

B. *The Third Circuit's Opinion*

The United States Court of Appeals for the Third Circuit affirmed the district court's order and held that Pennsylvania law would not allow recovery under the theory of market share liability.¹⁰³ In reaching its holding, the court emphasized the limits on its authority to expand state common law.¹⁰⁴ The Third Circuit reasoned that it could not relax the proximate causation requirement without a clear authoritative signal of approval from the Pennsylvania Supreme Court.¹⁰⁵ The Third Circuit rejected the plaintiffs' claim on the grounds that market share liability was a controversial and radical theory that had never been endorsed by the Pennsylvania Supreme Court.¹⁰⁶

Before evaluating plaintiffs' market share claim, the Third Circuit presented an extensive review of the constraints on its authority as a federal court presiding over a diversity case.¹⁰⁷ The court stated that

lead pigment could be made safer, only that it should not have been used at all. *City of Phila.*, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *7-*9, *11-*12. Plaintiffs' breach of warranties claim was dismissed because the challenged conduct was the misleading sale of lead-based paint where the defendants only produced lead pigment, an ingredient in lead paint. *Id.* at *12-*14. Plaintiffs' claim for fraud and misrepresentation was dismissed because plaintiffs failed to show justified reliance by the public on the alleged misrepresentations by the defendants. *Id.* at *14-*21. The court dismissed the claim for indemnification on the grounds that a statutory obligation did not equal a judgment of liability and therefore there was no damages award for the defendants to reimburse. *Id.* at *34-*36. The court dismissed the restitution and failure-to-warn claims because plaintiffs conceded they could not show proximate causation. *Id.* at *9-*10, *21-*23. Finally, the court dismissed all plaintiffs' joint and several liability claims including those of civil conspiracy, concert of action, enterprise liability, market share liability and alternative liability. *Id.* at *36-*59.

¹⁰⁰ *City of Phila.*, No. 90-7064, 1992 U.S. Dist. LEXIS 5849, at *49.

¹⁰¹ *Id.*

¹⁰² *Id.* at *45-*46, *49-*50.

¹⁰³ *City of Phila.*, 994 F.2d at 115. The Third Circuit upheld the district court's holding that the City, but not the PHA, was barred by the statute of limitations. *Id.* at 114. Plaintiffs appealed the district court's decision only on three theories of collective liability: alternative liability, market share liability and enterprise liability. *Id.* at 114-15. The Third Circuit upheld the district court's order dismissing these claims on the grounds that the plaintiffs failed to establish the causation element of each of these causes of action. *Id.* at 115.

¹⁰⁴ *Id.* at 122-23.

¹⁰⁵ See *id.* at 126.

¹⁰⁶ *Id.* at 127.

¹⁰⁷ *Id.* at 122-23.

although federal courts may act as judicial pioneers when interpreting the United States Constitution or federal law, they are not free to engage in judicial activism in diversity cases.¹⁰⁸ According to the court, federalism concerns require federal courts to simply apply state law as they infer it to be at the present time, not according to what they think it might develop to be.¹⁰⁹

The *City of Philadelphia* court then turned its full attention to the market share theory of liability.¹¹⁰ Looking first to state common law, the Third Circuit noted that the Pennsylvania Supreme Court had never decided or even considered the issue of market share liability.¹¹¹ A review of lower court decisions turned up a single trial court decision allowing a DES plaintiff to proceed under a market share theory.¹¹² The Third Circuit also examined discussions of market share liability in three state superior court cases that, according to the plaintiffs, indicated acceptance of the doctrine.¹¹³ The Third Circuit, however, determined that these courts did not actually apply the theory and never stated whether it should be adopted in Pennsylvania.¹¹⁴

The Third Circuit continued its analysis of market share liability by reviewing the policy arguments for and against acceptance of the doctrine.¹¹⁵ The court reasoned that market share liability did further one primary objective of tort law by compensating innocent victims.¹¹⁶ In addition, the court noted that market share liability is effective in distributing the high cost of injuries from defective products.¹¹⁷ Rather than placing the whole financial burden on individual victims, it allows companies to spread the cost of the injuries among consumers as a cost of doing business.¹¹⁸

The court noted, however, that there were many policy arguments against adoption of market share liability.¹¹⁹ It stated that market share liability would be unfair to many defendants who would be forced to pay high litigation costs to defend themselves against claims in-

¹⁰⁸ *City of Phila.*, 994 F.2d at 123.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 124.

¹¹² *Id.* (citing *Erlich v. Abbott Lab.*, 5 Phila. 249 (C.P. 1981)). The *Erllich* court applied the version of market share liability developed by the California Supreme Court in *Sindell*. *Id.*

¹¹³ *City of Phila.*, 994 F.2d at 125 (citing *Pennfield Corp. v. Meadow Valley Elec., Inc.*, 604 A.2d 1082, 1087 (Pa. Super. Ct. 1992); *Burnside v. Abbott Lab.*, 505 A.2d 973, 986 (Pa. Super. Ct. 1985); *Cummins v. Firestone Tire & Rubber Co.*, 495 A.2d 963, 971-72 (Pa. Super. Ct. 1985)).

¹¹⁴ *City of Phila.*, 944 F.2d at 125.

¹¹⁵ *Id.* at 126.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *City of Phila.*, 994 F.2d at 126.

volving their products irrespective of the size of their market share.¹²⁰ In addition, the court noted that some experts believe that market share liability would inhibit new research and development, especially among pharmaceutical companies.¹²¹ Finally, the court questioned the ability of the judicial system to manage broad market share liability actions.¹²²

In concluding its analysis of market share liability, the Third Circuit noted that there is no single accepted version of the theory.¹²³ The *City of Philadelphia* court reasoned that even if it were to find that Pennsylvania would adopt market share liability, it would wait for the Pennsylvania Supreme Court to do so explicitly.¹²⁴ The many different models of market share liability from which it could choose, in addition to the lack of a clear signal from the Pennsylvania Supreme Court regarding how it would balance the competing policy concerns, convinced the Third Circuit that as a federal court in a diversity case, it should leave it to the state courts to adopt the theory.¹²⁵ The court rejected plaintiffs' contention that market share liability would not be a radical departure from traditional tort law principles.¹²⁶ Thus, holding market share liability to be a novel and unsettled doctrine, the Third Circuit rejected its applicability in litigation against the lead paint industry.¹²⁷

IV. SANTIAGO V. SHERWIN-WILLIAMS CO.

On September 10, 1993, four months after the Third Circuit announced its decision in *City of Philadelphia*, the United States Court of Appeals for the First Circuit decided the case of *Santiago v. Sherwin-Williams Co.*, holding that Massachusetts law did not permit recovery under the theory of market share liability.¹²⁸ In *Santiago*, the First Circuit stated that although it was possible that the Massachusetts Supreme Judicial Court would adopt some form of market share liability, the Supreme Judicial Court would not do so in this particular

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Zaffit v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984); Keith C. Miller & John D. Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W. VA. L. REV. 81, 102-03 (1985)).

¹²² *City of Phila.*, 994 F.2d at 126.

¹²³ *Id.*

¹²⁴ *Id.* at 126-27.

¹²⁵ *Id.*

¹²⁶ *Id.* at 127.

¹²⁷ See *City of Phila.*, 994 F.2d at 127.

¹²⁸ 3 F.3d 546, 551 (1st Cir. 1993).

case.¹²⁹ The *Santiago* court reasoned that the plaintiff's inability to identify a specific time when lead paint was applied to the interior of her house made it likely that manufacturers would be held liable for a harm that they did not cause.¹³⁰ Thus, the court reasoned that the plaintiffs failed to meet even the relaxed identification burden under market share liability.¹³¹ The *Santiago* court held that although the Supreme Judicial Court might adopt a theory of market share liability, that remedy would not be made available to the current plaintiff.¹³²

The plaintiff, Monica Santiago ("Santiago"), resided in the same house in Boston from the time of her birth in 1972 until 1978.¹³³ Santiago alleged that during the time she lived in that house, she ingested lead paint that had been applied in layers to the inside walls of her home at various times between 1917, when the house was built, and 1970.¹³⁴ By the time Santiago was a year old, tests showed that she had highly elevated levels of lead in her blood.¹³⁵ In 1976, the level of lead in Santiago's blood had reached emergency levels, and she was hospitalized and underwent chelation therapy to remove the lead from her body.¹³⁶ While Santiago's early development appeared to progress normally, she was diagnosed with a hyperactivity-attention disorder and motor skill difficulties that medical experts attributed to lead poisoning.¹³⁷

The plaintiff brought suit against the defendant manufacturers in 1987, contending that the defendants, or their predecessors in interest, produced and marketed virtually all of the lead used in lead paint in the United States between 1917 and 1970.¹³⁸ Santiago was not able to identify which, if any, of the defendants produced the lead she ingested.¹³⁹ She was also not able to identify when the paint she ingested

¹²⁹ *Id.* at 550.

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.* at 550.

¹³³ *Santiago*, 3 F.3d at 547.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* Monica Santiago's blood lead level was alleged to have reached as high as 70 ug/dl. Brief of Plaintiff/Appellant Monica Santiago at 5, *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546 (1st Cir. 1993) (No. 92-2263). According to the Center for Disease Control, a blood lead level of 69 ug/dl and above places children at immediate risk of brain injury and death. *Id.* at 5 n.5. Chelation therapy is a painful procedure which involves administering a chemical to the child through injection, intravenous solution or orally, depending on the chemical used. *Id.* at 6. The chemical binds with the lead, allowing the body to excrete the lead more rapidly. *Id.*

¹³⁷ *Santiago*, 3 F.3d at 547.

¹³⁸ *Id.*

¹³⁹ *Id.*

was applied to the interior of her home.¹⁴⁰ Although there was no direct evidence that Santiago actually ate lead paint, there was expert testimony that lead paint was at least a substantial contributing factor to her poisoning.¹⁴¹

A. *The District Court's Decision*

In its 1992 opinion, the district court allowed the defendants' motion for summary judgment that precluded Santiago from proceeding under a theory of market share liability.¹⁴² The court reasoned that although market share liability had some viability in Massachusetts, the plaintiff had not shown sufficient causality in this instance to meet even the relaxed causation burden under the market share theory.¹⁴³ In addition, the court found that market share liability was not applicable because it would be impossible to determine the amount of contribution each defendant made to the risk of harm.¹⁴⁴

The district court first acknowledged that, under certain circumstances, the Massachusetts Supreme Judicial Court ("SJC") would allow recovery under a market share theory of liability.¹⁴⁵ The court noted that the SJC had refused to adopt market share liability in the 1982 DES case *Payton v. Abbott Laboratories* because the market share theory proposed by the plaintiffs did not allow defendant manufacturers to present exculpatory proof.¹⁴⁶ The court emphasized, however, that dicta in *Payton* indicated that use of market share liability might be allowed by the SJC under appropriate circumstances.¹⁴⁷ Those circumstances were present in the 1985 federal district court case *McCormack v. Abbott Laboratories*.¹⁴⁸ According to the *Santiago* court, the district court in *McCormack* endorsed a market share theory that al-

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 547 & n.3. The First Circuit noted that there was evidence that the plaintiff could have been exposed to lead in the air, in her food or water, and/or from soil in her neighborhood that was found to be heavily contaminated with lead. *Id.* at 547 n.3.

¹⁴² *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186, 195 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1995).

¹⁴³ *Id.* at 192, 193.

¹⁴⁴ *See id.* at 194-95.

¹⁴⁵ *Id.* at 192.

¹⁴⁶ *Id.* at 191 (citing *Payton v. Abbott Lab.*, 437 N.E.2d 171, 189 (Mass. 1982)).

¹⁴⁷ *Santiago*, 782 F. Supp. at 191. The *Payton* court stated that it might allow "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 that defendant's contribution of DES to the market in the relevant period of time." 437 N.E.2d at 190.

¹⁴⁸ 617 F. Supp. 1521, 1529 (D. Mass. 1985).

lowed defendants to introduce exculpatory evidence, making each defendant liable only for that percentage of the market it held during the relevant time period.¹⁴⁹ The *Santiago* court thus concluded that Massachusetts courts would allow recovery under the market share theory as long as the defendant manufacturers were held liable only for the amount of plaintiffs' damages proportional to their actual market share.¹⁵⁰

In holding that market share liability was not appropriate in Santiago's case, the district court first addressed the absence of proof that her injuries were caused by lead paint.¹⁵¹ The court distinguished injuries caused by DES by pointing out that exposure to DES results in a rare form of cancer not attributable to any other cause.¹⁵² Santiago's injuries, however, could, according to the court, be attributed to many causes, such as her parents' child rearing techniques or the educational and social setting in which she was raised.¹⁵³ In addition, the court emphasized that even if Santiago's injuries could be attributed to lead, it could not be proven that lead-based paint was the source of her poisoning.¹⁵⁴ The court noted that Santiago could have been exposed to lead in the air and water in her home and that the soil in her neighborhood was highly contaminated by lead.¹⁵⁵ The district court found that although it was possible that lead paint caused Santiago's injuries, a "mere possibility" was not enough for her to proceed under the theory of market share liability.¹⁵⁶

The district court further reasoned that it would be impossible to calculate accurately how much each defendant contributed to the risk of harm to Santiago.¹⁵⁷ First, because none of the defendants consistently and actively produced lead pigment throughout the relevant

¹⁴⁹ *Santiago*, 782 F. Supp. at 191-92 (citing *McCormack*, 617 F. Supp. at 1526, 1527). *McCormack* involved a suit against manufacturers of DES. 617 F. Supp. at 1523 n.1. The *McCormack* court based its decision on the SJC's dicta in *Payton* and declared that its adoption of market share liability was consistent with guidelines articulated in that decision. *Id.* at 1526.

¹⁵⁰ *Santiago*, 782 F. Supp. at 192 (citing *Payton*, 437 N.E.2d at 188).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 192, 193.

¹⁵⁴ *Id.* at 193.

¹⁵⁵ *Santiago*, 782 F. Supp. at 193.

¹⁵⁶ *Id.* The court stated that the public policy reasons favoring the use of market share liability do not control where there is a possibility that the defendants did not cause the plaintiff's injury. *Id.* The court cited two asbestos cases where the court refused to apply market share liability because the injuries caused by asbestos exposure are not peculiar to asbestos but could also result from cigarettes and other products. *Id.* (citing *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 191 (S.D. Ga. 1982); *Case v. Fireboard Corp.*, 743 P.2d 1062, 1066 (Okla. 1987)).

¹⁵⁷ *Santiago*, 782 F. Supp. at 194.

fifty-four year time span, the court concluded that the data was not sufficient to accurately calculate the amount of lead pigment produced by each defendant used in lead-based paint.¹⁵⁸ Second, the court asserted that the defendant manufacturers could not be held liable under a market share theory where they merely supplied lead pigment to paint manufacturers who then decided what amount of lead to add to their paint and whether to warn the public of its dangers.¹⁵⁹ For these two reasons, the district court held that Massachusetts would not apply market share liability because of the danger that the defendants would be held liable for more harm than they caused.¹⁶⁰

B. *The First Circuit*

The United States Court of Appeals for the First Circuit affirmed the district court's decision and held that the plaintiff's market share theory would stretch the identification requirement beyond what the SJC would allow.¹⁶¹ In reaching its holding, the First Circuit addressed only the question of whether each defendant's market share could be accurately determined.¹⁶² Additionally, the court refused plaintiff's request to certify to the SJC questions regarding the viability of market share liability.¹⁶³

The First Circuit began its analysis of the plaintiff's market share claim by emphasizing that the SJC had never explicitly endorsed the doctrine and had, in *Payton*, rejected a version of market share liability in a DES suit.¹⁶⁴ Addressing *Payton*, the First Circuit stated that the SJC had rejected plaintiffs' market share theory on the grounds that it

¹⁵⁸ *Id.* The court noted that in *Payton* the SJC indicated that to hold defendants liable each defendant had to have been actively involved in the DES market throughout all or a substantial part of the time in which the plaintiffs' mothers ingested DES. *Id.* (citing *Payton*, 437 N.E.2d at 188). In addition, the *Santiago* court stated that courts adjudicating asbestos cases have refused to apply market share liability because of the difficulty involved in calculating market shares where plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products. 782 F. Supp. at 194 (citing *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982)).

¹⁵⁹ *Santiago*, 782 F. Supp. at 194-95.

¹⁶⁰ *Id.* at 195.

¹⁶¹ *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 550-51 (1st Cir. 1993).

¹⁶² *Id.* The court accepted for the sake of argument (1) that the SJC would relax the identification requirements in some circumstances and allow a plaintiff to recover under a market share theory; (2) that the SJC would allow market share liability in lead poisoning cases; (3) that the plaintiff had shown sufficient evidence for a fact finder to determine that her injuries were caused by lead poisoning; (4) that lead paint was a "substantial contributing factor of her lead poisoning"; and (5) that the defendants could be found to have acted negligently toward the plaintiff despite being mere bulk suppliers of lead pigment and not manufacturers or marketers of lead-based paint. *Id.* at 550.

¹⁶³ *Id.* at 548.

¹⁶⁴ *Id.* at 549 (citing *Payton*, 437 N.E.2d at 188-90).

would violate two principles underlying the identification requirement: (1) that wrongdoers be held liable only for the harm they cause, and (2) that tortfeasors be separated from innocent actors.¹⁶⁵ The First Circuit determined that Santiago's claim failed to satisfy either principle.¹⁶⁶

The First Circuit stated that Santiago's inability to determine the specific time the injury-causing lead paint was applied to the interior of her house precluded her from satisfying the two principles underlying the identification requirement.¹⁶⁷ Because defendants' production of lead pigment varied significantly between 1917 and 1970, any calculation of defendants' market share inevitably would result in some defendants' being held liable for a share of the plaintiffs' damages larger than their market share at the time the injury-causing paint was applied to the walls of the plaintiff's home.¹⁶⁸ Additionally, the court noted that several defendants were not producing lead pigment at all during significant portions of the fifty-four year period.¹⁶⁹ Thus, the court reasoned that allowing the plaintiff to proceed under a market share theory could result in some defendants' being held liable for harm caused by paint applied when they were not in business.¹⁷⁰ Finally, the court noted that the *Payton* dicta relied on by the plaintiff indicates that relaxation of the identification requirement would be appropriate only where the plaintiff is able to identify the relevant period of time when the defendant manufactured the injury-causing product.¹⁷¹

The First Circuit rejected on equity grounds the plaintiff's request to certify to the SJC the question of whether Santiago should be allowed to proceed under a market share theory of liability.¹⁷² Santiago had originally opposed certification, and the court emphasized that she had changed her position only after losing at the district court level.¹⁷³ The court stated that, ordinarily, a party that chooses to litigate its state claim in federal court must accept the federal court's interpretation of state law.¹⁷⁴ Because Santiago chose to bring her claim in federal court and opposed certification at the district court level, and

¹⁶⁵ *Santiago*, 3 F.3d at 550.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 551.

¹⁶⁹ *Id.*

¹⁷⁰ *Santiago*, 3 F.3d at 551.

¹⁷¹ *Id.*

¹⁷² *Id.* at 548. The court noted that Judge Breyer thought the issue should be certified to the SJC. *Id.* at 548 n.4. Judge Stahl and Judge Friedman comprised the two-judge majority against certification. *See id.*

¹⁷³ *Id.* at 548.

¹⁷⁴ *Id.*

in light of the fact that it had been five years since she initiated her claim, the court held that it would be unfair to the defendants to allow the plaintiff to relitigate the core issues of her claim.¹⁷⁵

The First Circuit concluded that Santiago did not meet even the relaxed identification requirement under the market share theory of liability because she did not present evidence showing specifically when the injury-causing paint was applied to the inside of her home.¹⁷⁶ In reaching its holding, the *Santiago* court reasoned that, if market share liability were imposed, some defendants would likely be held liable for harm they did not cause.¹⁷⁷ This was due to the fact that defendants' production of lead pigment varied significantly throughout the relevant time period and thus no single, accurate market share could be determined for the whole time period.¹⁷⁸

V. UNDERSTANDING THE ROLE OF CAUSATION: TOWARD A UNIFIED THEORY OF MARKET SHARE LIABILITY

In refusing to relax the causation requirement and adopt the theory of market share liability, the First and Third Circuits firmly embraced one side of the theoretical debate over the role of causation in tort law. Those courts that have adopted market share liability generally see causation as a tool to be used to achieve certain policy goals.¹⁷⁹ Courts rejecting market share liability, however, treat causation as an end in itself.¹⁸⁰

The belief that causation should be viewed as an end in itself is espoused by those claiming to subscribe to a corrective justice view of tort law.¹⁸¹ Their reliance on corrective justice, however, is unsound. Pure corrective justice does not treat causation as an inflexible command. Rather, corrective justice allows for some manipulation of causation when doing so serves the interests of justice. Use of some form of market share liability is necessary to achieve justice in the context of lead paint litigation. A conservative form of market share liability, one adapted from the principles announced by the First Circuit in *Santiago*, would satisfy both the utilitarian and corrective justice views of causation and should be adopted.

¹⁷⁵ *Santiago*, 3 F.3d at 548.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See cases cited *infra* note 192.

¹⁸⁰ See cases cited *infra* note 191.

¹⁸¹ See *infra* notes 198–202 and accompanying text for an introduction to the corrective justice view.

A. *The Circuit Court Decisions and the Problem of Causation*

A clear message in the recent circuit court decisions is that actions seeking acceptance of market share liability are best brought in state courts. This message was most clearly delivered in *City of Philadelphia*, where both the district court and the Third Circuit focused exclusively on the principle that federal courts should not expand state tort law without clear guidance from the state courts.¹⁸² The Third Circuit's lengthy explanation for its refusal to allow plaintiffs to proceed under a market share theory of liability emphasized that any relaxation of the causation requirement would be a controversial and radical step.¹⁸³ The Third Circuit's opinion does not indicate that the court is biased against the adoption of market share liability.¹⁸⁴ In fact, the court's even-handed review of policy arguments both for and against adoption of the theory indicates it would welcome whatever choice the Pennsylvania and other state supreme courts make.¹⁸⁵

In *Santiago*, the First Circuit's refusal to allow the plaintiff's market share liability claim was also a result of the court's reluctance to expand state tort law without clear approval from the Massachusetts Supreme Judicial Court.¹⁸⁶ The First Circuit's opinion in *Santiago* differed from that of the Third Circuit in *City of Philadelphia*, however, in that the First Circuit presented a much more detailed analysis of market share liability.¹⁸⁷ The First Circuit's opinion provides insight into what troubles most courts about market share liability, and what version, if any, they would find most acceptable. It is significant that the First Circuit ignored most of the issues addressed by the district court and chose to focus exclusively on the issue of causation.¹⁸⁸ In doing so the First Circuit recognized that the significance of these secondary issues would vary from case to case, while the issue of causation is the primary

¹⁸² See *supra* notes 99-127 and accompanying text for a discussion of these decisions.

¹⁸³ See *supra* notes 106, 126-27 and accompanying text for a discussion of the Third Circuit's view of market share liability. The Third Circuit's opinion stands in stark contrast with the district court decision where market share liability was dismissed in a mere two paragraphs as being contrary to Pennsylvania state law. See *supra* notes 99-102 and accompanying text for a discussion of the district court's opinion.

¹⁸⁴ See *supra* notes 103-27 and accompanying text for a discussion of the Third Circuit's opinion.

¹⁸⁵ See *supra* notes 115-22 and accompanying text for a discussion of the Third Circuit's review of policy arguments.

¹⁸⁶ See *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 551 (1st Cir. 1993).

¹⁸⁷ See *supra* notes 161-78 and accompanying text for a discussion of the First Circuit's analysis.

¹⁸⁸ See *Santiago*, 3 F.3d at 550-51.

factor at the heart of every dispute over whether to adopt market share liability.

All versions of market share liability call for a significant relaxation of the identification requirement. It is this departure from traditional principles of causation that makes courts reluctant to adopt the theory.¹⁸⁹ Although it did not allow use of market share liability in *Santiago*, the First Circuit indicated that it would allow for some relaxation of the identification requirement as long as no defendant would be liable for more than its market share's worth of damages and there was no chance that any defendant not in the market at all would be liable for any damages.¹⁹⁰ Thus, the First Circuit seems willing to allow a limited version of market share liability that would not overly weaken the causal link between tortfeasor and victim.

B. *Competing Visions of the Role of Causation in Tort Law*

Causation has played an ambiguous and uncertain role in tort law. Some courts have adhered strictly to the rule of causation, treating it as a principle of the highest order.¹⁹¹ Other courts, however, have been quick to relax causation requirements when doing so helps further certain policy goals underlying tort law.¹⁹² This rift between the courts reflects an ongoing theoretical debate over the proper role of causation—whether it should be viewed as an end in itself or as a functional means for achieving societal goals.¹⁹³

Guido Calabresi provides the foremost treatment of causation as a functional means for achieving policy goals.¹⁹⁴ The object of law, according to Calabresi, is to serve human needs, and thus legal requirements, including causal requirements, must serve this end.¹⁹⁵ Rather than representing a comprehensive legal principle, causation functions as a means through which differing policy goals are combined and

¹⁸⁹ See, e.g., *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 115 (3d Cir. 1993); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (en banc).

¹⁹⁰ See *Santiago*, 3 F.3d at 550.

¹⁹¹ See *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 337, 345 (Ill. 1990); *Mulcahy*, 386 N.W.2d at 76; *Zafft*, 676 S.W.2d at 246-47.

¹⁹² See *Sindell v. Abbott Lab.*, 607 P.2d 924, 936-37 (Cal.) cert. denied, 449 U.S. 912 (1980); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y.), cert. denied, 493 U.S. 944 (1989); *Martin v. Abbott Lab.*, 689 P.2d 368, 381 (Wash. 1984) (en banc).

¹⁹³ See generally Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987).

¹⁹⁴ See generally Calabresi, *supra* note 193.

¹⁹⁵ *Id.* at 105.

achieved. Thus, causal concepts should be used flexibly to achieve the deterrence, cost spreading and distributional goals of tort law.¹⁹⁶ Calabresi warns that if causal concepts are too rigidly defined and applied, they will no longer adequately serve recognized social goals and would not allow the introduction of goals that cannot be openly acknowledged or new goals that have yet to be articulated.¹⁹⁷

Ernest Weinrib has provided the best known treatment of causation under the theory of corrective justice.¹⁹⁸ Weinrib maintains that causation, together with wrongdoing, provides the necessary link between the wrongdoer and the victim.¹⁹⁹ Causation explains why *this plaintiff* is entitled to compensation, and wrongdoing on the part of the defendant explains why *this defendant* is obligated to compensate.²⁰⁰ When a defendant's wrongdoing inflicts a loss on the plaintiff, the transference of compensation from the defendant to the plaintiff acts to annul the effects of the wrong.²⁰¹ This, according to Weinrib, provides the concept of causation with its own inherent moral value.²⁰²

Calabresi's instrumentalist approach to causation favors application of market share liability in lead paint litigation. The tort law goals of deterrence, cost spreading and wealth distribution are all served by placing the costs to lead paint poisoning victims on those who manufactured the dangerous lead pigment and acted to prevent the public from learning of its harmful effects.²⁰³ The instrumentalist view of causation would therefore call for a relaxing of the causation principle to achieve these goals.

It seems equally clear that Weinrib's normative view of causation would leave lead paint poisoning victims without a remedy against lead pigment manufacturers unless they could identify the specific producer of the paint that harmed them. A close examination of the theoretical roots of the normative view of causation, however, casts some doubt on this conclusion. Weinrib claims that his exposition of corrective justice is consistent with the philosophy of Immanuel

¹⁹⁶ See *id.* at 73, 107.

¹⁹⁷ See *id.* at 107.

¹⁹⁸ See generally Weinrib, *supra* note 193.

¹⁹⁹ *Id.* at 409.

²⁰⁰ Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 Va. L. REV. 997, 1010 (1990); Weinrib, *supra* note 193, at 430.

²⁰¹ See Weinrib, *supra* note 193, at 430.

²⁰² *Id.*

²⁰³ The threat of over-deterrence is not present in the context of lead paint because lead is no longer an ingredient in paint and, therefore, there is no danger that manufacturers would stop producing a beneficial product due to the threat of litigation. See Fischer, *supra* note 9, at 1652 for a similar argument regarding DES.

Kant²⁰⁴ and is derived directly from Aristotle's theory of corrective justice.²⁰⁵ According to Professor Richard Wright, however, Weinrib's interpretation of the principle of corrective justice and the role of causation within it is not consistent with that of Aristotle.²⁰⁶ If one accepts Wright's interpretation of Aristotle, and the theory of corrective justice that results from that interpretation, market share liability is a viable theory.

According to Aristotle, there are two broad categories of justice: general justice and particular justice.²⁰⁷ General justice refers to justice in the sense of obeying the law, while particular justice is justice in the sense of maintaining equality or fairness.²⁰⁸ Particular justice dictates that everyone is entitled to a certain share of goods according to merit.²⁰⁹ Particular justice is further divided by Aristotle into distributive justice and corrective justice.²¹⁰ Distributive justice provides the terms according to which goods ought to be divided among members of society.²¹¹ Corrective justice applies when this distribution is disturbed.²¹² When one acquires more than one's rightful share as a result of causing injury to another person, it is the role of the judge under the principle of corrective justice to restore equality.²¹³ Justice is equal-

²⁰⁴ Weinrib, *supra* note 193, at 449 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 34 (J. Ladd trans., 1965)). Weinrib's claim of symmetry between his view of corrective justice and the views of Kant is challenged by Richard W. Wright in his article *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 644-64 (1992).

²⁰⁵ Weinrib, *supra* note 193, at 449 (citing ARISTOTLE, *NICOMACHEAN ETHICS* V.2-4); see also Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403-04 (1992). Aristotle is considered the inventor of the corrective justice theory and his treatment is still held to be the "classic analysis." Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 188 (1981) (citing George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972)); see Wright, *supra* note 204, at 629 (Aristotle's treatment of corrective justice still considered to be one of the best).

²⁰⁶ Wright, *supra* note 204, at 629-30.

²⁰⁷ Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 350 (1990) (citing ARISTOTLE, *NICOMACHEAN ETHICS* V.2 at 1130b1-4, 1130b17-18 (D. Ross trans., 1963, 1980)).

²⁰⁸ W.F.R. HARDIE, *ARISTOTLE'S ETHICAL THEORY* 185 (2d ed. 1980).

²⁰⁹ *Id.* at 189. Aristotle includes "honour or money or safety" among the goods that are distributed among citizens. 2 ARISTOTLE, *Nicomachean Ethics*, in *THE COMPLETE WORKS OF ARISTOTLE* V.2 at 1130b2 (J. Barnes ed. & W.D. Ross & J.O. Urmson trans., 1984) [hereinafter ARISTOTLE, *Ethics*].

²¹⁰ See, e.g., Heidt, *supra* note 207, at 351 (citing ARISTOTLE, *NICOMACHEAN ETHICS* V.2 at 1130b30-1131a1 (D. Ross trans., 1963, 1980)).

²¹¹ See *id.* Justice in the distribution of goods is described by Aristotle according to a geometrical formula. HARDIE, *supra* note 208, at 189 (citing ARISTOTLE, *NICOMACHEAN ETHICS* V.3 at 1131b12-13).

²¹² See Heidt, *supra* note 207, at 352-53.

²¹³ See HARDIE, *supra* note 208, at 192; Heidt, *supra* note 207, at 352-53.

ity; therefore, the judge has two responsibilities. To achieve the just result, the judge must take the unjust gain from the wrongdoer *in addition to* rectifying the unjust loss of the victim.²¹⁴ Thus, assuming that manufacturers of lead pigment acted negligently, corrective justice will be achieved only when both the manufacturers are forced to pay damages consistent with what they gained from producing lead pigment and the victims of lead poisoning are compensated for their injuries.

Weinrib's assertion that law, particularly causation, stands on its own, separate from ethics and politics, is not consistent with Aristotle's view of corrective justice.²¹⁵ According to Wright, Aristotle viewed law as an instrument that should be used to achieve justice.²¹⁶ Aristotle was a principlist.²¹⁷ He believed there are fundamental principles of morality and justice and that law should be applied in such a way as to give effect to those principles.²¹⁸ The written law will always be incomplete.²¹⁹ Aristotle argued that one should turn to the underlying principles of justice and, through wise application, fill in the details or gaps in law in order to achieve the just result.²²⁰ Thus, a pure corrective justice approach would call for the law of causation to be relaxed in lead paint litigation and allow for some form of recovery against lead paint manufacturers.

C. *Toward a Unified Theory of Market Share Liability*

Both the instrumentalist and corrective justice theories underlying causation call for relaxation of the identification principle to allow for the compensation of lead paint poisoning victims. The instrumentalist theory is the broader of the two in that it imposes no limits on how far market share liability can be expanded to achieve social goals. Therefore, to be acceptable under both theories, a market share theory of liability will have to fit within the narrower confines of corrective justice.

²¹⁴ See Wright, *supra* note 204, at 699.

²¹⁵ *Id.* at 686.

²¹⁶ See *id.* (citing 2 ARISTOTLE, *Magna Moralia*, in THE COMPLETE WORKS OF ARISTOTLE I.33 at 1195a1-7, 1194b27-29 (J. Barnes ed. & St. G. Stock trans., 1984); ARISTOTLE, *Ethics*, *supra* note 209, at V.6 at 1134a24-1134b1, V.7 at 1790-91, V.10; 2 ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE I.10 at 1368b8-9, I.13 at 1373b1-9, 1374a25-b23 (J. Barnes ed. & W. Rhys Roberts trans., 1984).

²¹⁷ *Id.*

²¹⁸ *Id.* at 686-87.

²¹⁹ Wright, *supra* note 204, at 686.

²²⁰ *Id.* at 686-87.

The guiding principles of corrective justice are that defendants should forfeit that which they gained through wrongful conduct, and plaintiffs should be compensated for what they lost.²²¹ To give effect to these principles, a market share theory of liability should be based on two requirements adapted from those endorsed by the First Circuit in *Santiago*.²²² The *Santiago* court's first requirement, that wrongdoers should only be held liable for harm they caused, is derived from the principle that causation is, in itself, a moral imperative. Under a pure Aristotelian theory of corrective justice, however, the moral imperative becomes the elimination of unjust gains and losses. Therefore, the first requirement for a theory of market share liability becomes that wrongdoers should be held liable only for what they gained from their wrongful conduct. The *Santiago* court's second requirement, that tortfeasors should be separated from innocent actors, is consistent with the principles of corrective justice and should remain unchanged.

Corrective justice calls for taking only what a wrongdoer gained from its wrongful conduct. Therefore, defendants in market share actions should be liable only for damages proportional to their true market share. This means all the defendants must have been engaged in the negligent activity throughout the relevant time span and their market shares must have remained relatively constant. Thus, there is a burden on the plaintiffs to identify a short span of relevant time. When it is not possible to establish a narrow time frame, plaintiffs' best chance for success is to bring a class action. Where a plaintiff class is made up of hundreds or thousands of individuals injured in different places and at different times, fluctuations in defendants' market shares become less significant.²²³

Additionally, as in the case of *Martin v. Abbott Laboratories*, each defendant should be able to present exculpatory evidence regarding its share of the market or whether it produced the harmful product at all.²²⁴ If the resulting market shares total less than 100% of plaintiffs' damages, the plaintiff should bear the cost of the difference.²²⁵ This may appear to conflict with the principle that victims should be made

²²¹ See *id.* at 698-99.

²²² See *supra* text accompanying note 165 for a discussion of the restrictions on market share liability suggested by the First Circuit.

²²³ See *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (total damage done to community can be assessed accurately and consistently where all possible claimants and all possible defendants are joined together in a single suit); Brief of Plaintiff-Cross-Appellee and Reply Brief of Plaintiff-Appellant Philadelphia Housing Authority at 30-31, *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112 (3d Cir. 1993) (Nos. 92-1463, 92-1419).

²²⁴ See *Martin v. Abbott Lab.*, 689 P.2d 368, 382-83 (Wash. 1984) (en banc).

²²⁵ As in *Martin*, it does not matter how many producers are sued, as long as those named

whole. It should be assumed, however, that if each defendant's market share has been accurately calculated, the plaintiffs failed to identify all those who unjustly gained at their expense. Wrongdoers must be made to forfeit only what they gained through their own negligent conduct—they cannot be made to pay for what others gained through their wrongful conduct.

Finally, market share liability should be based on a national market. Corrective justice is concerned only with whether there was wrongful conduct and whether there were unjust gains and losses as a result of that conduct. Once it is established that a defendant acted negligently, the only question is how much it gained through its negligent conduct. Therefore, as with the market share theory adopted by the court in *Hymowitz v. Eli Lilly & Co.*, a defendant cannot excuse itself from liability by showing it does not market its product in the plaintiff's geographic area.²²⁶ In addition, because what matters is wrongful conduct, a defendant cannot excuse itself from liability by showing it did not produce the specific item used by the plaintiff.²²⁷ As the *Hymowitz* court noted, it would not be just for a defendant to escape liability simply because it negligently marketed a more identifiable version of the product or sold only to certain stores.²²⁸

The plaintiff in *Santiago* would not have succeeded in her claim under the unified theory of market share liability described above. Pure corrective justice does call for a relaxation of the causation requirement in order to achieve a just result. To allow recovery against the defendants who controlled widely varying percentages of the lead pigment market over fifty-four years, however, would violate the principle of taking only what a wrongdoer gained as a result of its negligence. Where it is not possible to accurately calculate a defendant's market share, that defendant cannot be held liable under the unified theory of market share liability.

VI. CONCLUSION

The unified theory of market share liability provides an option for those courts hesitant to expand the bounds of tort law, yet determined to reach a just result. By holding lead pigment manufacturers liable

as defendants are only held responsible for damages in proportion to their true market share. 689 P.2d at 382.

²²⁶ 539 N.E.2d 1069, 1078 (N.Y.), *cert. denied*, 493 U.S. 944 (1989).

²²⁷ *See id.*

²²⁸ *See id.* For example, a defendant could excuse itself from liability by showing it did not produce DES for pregnancy use; it could not, however, excuse itself from liability by showing it produced green DES pills when the plaintiff ingested red DES pills. *See id.*

only for what they gained from their wrongful conduct at the time the plaintiff suffered his or her loss, a limit is placed on what would otherwise be an excessively far-reaching theory of liability. This limit is consistent with the principles of corrective justice. More important, however, it allows those who will suffer from the effects of lead paint poisoning for the rest of their lives a means for obtaining justice.

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