

NOTES

DES: JUDICIAL INTEREST BALANCING AND INNOVATION

In a typical products liability action, the plaintiff must identify the defendant as the manufacturer or seller of the defective product that caused him harm.¹ Failure to establish that it is more likely than not that the defendant made or sold the product complained of is generally fatal to a products liability claim.² Although the necessity of such an identification has not often been litigated, an emerging group of cases has cast doubt upon the wisdom and fairness of universal application of the identification requirement.³ Principally, these cases have involved suits brought by women against pharmaceutical companies in which the plaintiffs have alleged that in utero exposure to the synthetic estrogen diethylstilbestrol (DES),⁴ once commonly prescribed to prevent

¹ See, e.g., *Neubauer v. Coca Cola Bottling Co.*, 96 Ill. App. 2d 18, 23, 238 N.E.2d 437, 439 (1968); *Rockett v. Pepsi Cola Bottling Co.*, 460 S.W.2d 737, 738 (Mo. Ct. App. 1970). See generally 1 R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 1:41 (2d ed. 1974) [hereinafter cited as HURSH].

² See, e.g., *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978); *C.T. Kinsey v. Coca Cola Bottling Co.*, 137 Ga. App. 681, 682, 225 S.E.2d 96, 97 (1976); *Shanks v. Oneita Knitting Mills*, 58 A.D.2d 741, 395 N.Y.S.2d 856 (1977). See also HURSH, *supra* note 1, at § 1:41.

³ See generally Kroll, *Intra-Industry Joint Liability: The Era of Absolute Products Liability*, INS. L.J. 185 (April 1980); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) [hereinafter cited as FORDHAM COMMENT]; Note, *Industry-Wide Liability*, 13 SUFFOLK U. L. REV. 980 (1979).

⁴ DES is a synthetic female hormone, one of the class known as estrogens. It was originally synthesized in 1938, and it has been widely used in medicine and in animal husbandry because it was the first available inexpensive estrogenic compound that remained active after oral administration. *Diethylstilbestrol (DES) Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 14 (1975) (statement of Dr. Alexander Schmidt, Commissioner of the United States Food and Drug Administration). In 1947, the United States Food and Drug Administration (FDA) approved the use of DES, on an experimental basis, as a treatment to prevent miscarriage. Additional Brief for Appellant at 2, 11, *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 49 U.S.L.W. 3270 (1980) [hereinafter cited as *Sindell*, Plaintiff's California Supreme Court Brief]. As early as 1953, there was evidence that DES was ineffective in preventing miscarriages. Dieckman, Davis, Rynkiewicz & Pottinger, *Does the Administration of Diethylstilbestrol During Pregnancy have Therapeutic Value?*, 66 AM. J. OBSTET. & GYNEC. 1062 (1953). In 1971, a possible link between in utero exposure to DES and clear cell adenocarcinoma was reported in the medical literature. Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina*, 284 N. ENG. J. MED. 878 (1971). In November of 1971, the FDA required that DES be contraindicated for use by pregnant women. 36 Fed. Reg. 21,538 (1971).

DES was and is produced from a single chemical formula. See, e.g., UNITED STATES PHARMACOPOEIA 234-35 (20th rev. 1980). Indeed, federal law imposes criminal penalties on any manufacturer labelling its product as DES if that product deviates from the officially recognized formula for DES contained in the UNITED STATES PHARMACOPOEIA. See 21 U.S.C. §§ 331, 333, 351(b) (1976).

miscarriage, has caused them to develop genital tract disorders such as adenosis⁵ and clear cell adenocarcinoma.⁶

Plaintiffs in the DES cases generally have argued that application of the identification requirement to them is unfair. They claim that they often face many serious obstacles in attempting to identify the source of the specific units of DES to which they were exposed while in their mother's womb.⁷ There are indeed three major impediments to identification.

First, at one time or another, between 100 and 300 firms produced DES in bulk and pill form for various purposes.⁸ Thus, the possible sources of the DES to which a given plaintiff was exposed can be extraordinarily numerous, making the need for detailed prescription or other purchase or sales records critical if the plaintiff is to identify the source of the DES to which she was exposed. Yet, with the passage of time, such records, whether those of the plaintiff's mother, the mother's doctor, or the mother's pharmacy, tend to disappear.⁹

⁵ Adenosis is the presence of glandular tissue in the vagina. It may or may not be a precancerous lesion. As of 1977, no case had been reported to Doctors David Poskanzer or Arthur Herbst (specialists and scholars in the field of DES-related disorders) in which adenosis had progressed to cancer under direct observation. In one study of 110 young women exposed in utero to DES, vaginal adenosis was detected in 35 percent of the women. Poskanzer & Herbst, *Epidemiology of Vaginal Adenosis and Adenocarcinoma Associated with Exposure to Stilbestrol in Utero*, 39 *CANCER* 1892, 1893-95 (1977).

⁶ Adenocarcinoma of the vagina in young women had been recorded rarely before the appearance of several such cases at the Vincent Memorial Hospital (Gynecological Service of the Massachusetts General Hospital) between 1966 and 1969. Doctors Arthur Herbst, Howard Ulfelder and David Poskanzer, intrigued by this sudden outbreak of an extremely rare vaginal cancer, proceeded to study the cases of eight women, born between 1946 and 1951, who were suffering from clear cell adenocarcinoma. It was found that the mothers of seven of the eight women had been treated with diethylstilbestrol during pregnancy. Herbst, Ulfelder & Poskanzer, *Adenocarcinoma of the Vagina*, 284 *N. ENG. J. MED.* 878 (1971). The incidence of this cancer in females exposed in utero to DES appears to be quite low, less than 1 in 1,000. Ulfelder, *Stilbestrol, Adenosis and Adenocarcinoma*, 117 *AM. J. OBSTET. & GYNEC.* 794, 795 (1973). But of 68 women (most of whom were over 60 years of age when treated) who contracted this cancer and were treated during the period from 1927 to 1963, less than 50 percent survived for five years following radical surgery therapy. Herbst, Green, Jr. & Ulfelder, *Primary Carcinoma of the Vagina*, 106 *AM. J. OBSTET. & GYNEC.* 210, 216 (1970). The authors of the preceding article expressed the hope, however, that earlier detection and treatment would allow young women now suffering from adenocarcinoma to enjoy higher survival rates. *Id.* at 217.

⁷ See, e.g., *Sindell*, Plaintiff's California Supreme Court Brief, *supra* note 4, at 11-31.

⁸ No one actually knows how many manufacturers of DES there were. For differing estimates of the number of such producers, see, e.g., *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (at least 100); *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 602, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139, *cert. denied*, 49 U.S.L.W. 3270 (1980) (approximately 200); *McCreery v. Eli Lilly and Co.*, 87 Cal. App. 3d 77, 81, 150 Cal. Rptr. 730, 733 (1978) (over 142 DES manufacturers in 1953); *FORDHAM COMMENT*, *supra* note 3, at 964 n.3 (the number of firms which manufactured DES for use in pregnancy is between 94 and 300). It can be said with certainty, however, that at least 110 firms advertised DES in trade publications in 1953. See, e.g., *AMERICAN DRUGGIST BLUE BOOK* 198-201 (1953).

⁹ For an example of how the passage of time can fatally impair the plaintiff's ability to marshal the information necessary to identify the manufacturer of the DES to which she was exposed, see *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978). See also *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 79, 289 N.W.2d 20, 28 (1979) (Moore, J., dissenting).

The passage of time, insofar as it contributes to a loss of records or testimony needed by the plaintiff in order to satisfy the identification requirement, is itself a second factor contributing to DES plaintiffs' identification problems. The genital tract cancer associated¹⁰ with in utero exposure to DES has a latency period of ten to twenty years.¹¹ The passage of such a long period of time following the ingestion of DES by the plaintiff's mother often results in the loss or destruction of important records and the loss of crucial testimony needed by the plaintiff to identify the source of the DES to which she was deleteriously exposed.¹²

A third factor inhibiting identification of the manufacturer of the DES to which a given plaintiff was exposed is the once common practice of pharmacists to fill prescriptions for a designated brand of DES with whatever brand they happened to have on hand.¹³ The decision of some pharmacists to disregard the brand of DES specified in the prescriptions they filled renders suspect the evidentiary value of any given prescription's designation of a particular brand of DES, for there is reason to doubt that the plaintiff's mother actually received the brand of DES called for by her prescription.

The specific identification difficulties confronting many if not most DES plaintiffs are extraordinary and particularly vexing as they arise from a situation involving an allegedly defective fungible product manufactured by many firms, which causes harm that manifests itself only a decade or two after use, and then in a person other than the user of the product.¹⁴ For the foregoing reasons DES plaintiffs have maintained that they should not be required to satisfy the identification requirement in order to recover for their harm from DES.

The courts have responded to DES plaintiffs' inability to satisfy the identification requirement in essentially three ways. One response has been to hold that the plaintiff's failure to identify the source of the DES to which she was exposed is fatal to her claim.¹⁵ Other courts have allowed DES plaintiffs to avoid the usually fatal legal consequences of failure to satisfy the identification requirement by employing the theories of concerted action or alternative liability.¹⁶ A third response has been to require the plaintiff to join as defend-

¹⁰ A correlation between in utero exposure to DES and clear cell adenocarcinoma exists in that of 350 studied cases of this cancer, over two-thirds have documented in utero exposure to DES or some other nonsteroidal estrogen. Anderson, Watring, Edinger, Jr., Small & Safaii, *Development of DES-Associated Carcinoma: The Importance of Regular Screening*, 53 OBSTETRICS—GYNECOLOGY 293 (1979) [hereinafter cited as Anderson]. See also AMA DRUG EVALUATIONS 424 (2d ed. 1973); and MODERN DRUG ENCYCLOPEDIA AND THERAPEUTIC INDEX 300 (A. Lewis ed. 1975).

¹¹ Anderson, *supra* note 10, at 297.

¹² See text and note at note 9 *supra*.

¹³ *Sindell*, Plaintiff's California Supreme Court Brief, *supra* note 4, at 37.

¹⁴ See N.Y. Times, June 17, 1976, at 41, col. 4. Interview with noted drug liability lawyer Paul Rheingold.

¹⁵ Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

¹⁶ Abel v. Eli Lilly and Co., 94 Mich. App. 59, 72-77, 289 N.W.2d 20, 25-27 (1979); *Accord*, Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, —, 420 A.2d 1305, 1312-16 (1980)

ants manufacturers that together were responsible for a substantial portion of the DES that her mother might have taken. The court then shifts the burden of proof on the question of which firm actually produced the DES complained of from the plaintiff to the defendants.¹⁷ Among those defendants unable to prove that they could not have made the DES in question,¹⁸ liability is apportioned between them according to each's share of the pertinent DES market.¹⁹

The purpose of this note is to examine selected cases that together represent the range of current judicial responses to the inability of most DES plaintiffs to identify the source of the specific units of the drug which harmed them. The note will first consider the decision that the plaintiff must, in order to avoid dismissal or summary judgment, identify the source of the particular DES to which she was exposed while in her mother's womb. It will be argued that such a rule of law takes insufficient cognizance of the identification problems confronting the typical DES plaintiff and, therefore, that it is in most cases inequitably harsh. Next, a case holding that DES plaintiffs may skirt the identification requirement by relying on the theories of concerted action or alternative liability will be considered. It will be contended that neither theory represents an appropriate approach to the DES identification problem. The concerted action theory will be found inappropriate for use in most DES cases

(plaintiffs could utilize the alternative liability, but not the concerted action, theory in their DES suit against twenty-two drug company defendants); *Bichler v. Eli Lilly and Co.*, N.Y. Times, March 1, 1981, at 34, col. 4 (New York Supreme Court, Appellate Division, upheld a jury's award of \$500,000 against defendant Lilly, even though the plaintiff did not know which firm produced the DES to which she was exposed. Lilly was liable because it had engaged in " 'concerted action' " with other drug companies to win government approval of the drug and to market it without proper testing).

Briefly stated, the concerted action theory provides that all who render substantial assistance or encouragement to another in the latter's tortious conduct, are jointly and severally liable for the resulting tort. For a fuller development and analysis of this theory, and for a discussion of the theory's proper role in helping DES plaintiffs overcome their identification problems, see text and notes at notes 49-50, 53-77, and 93-106 *infra*.

The alternative liability theory, by contrast, provides generally that where the plaintiff has been harmed by one or more members of a group of tortfeasors, but cannot — through no fault of his own — identify the tortfeasor who in fact caused the harm, the burden of proof on the question who caused him harm shifts to each of the defendants. All those defendants unable to prove that they did not cause the harm are jointly and severally liable for it. See text and notes at notes 108-14 *infra* for an actual example of the application of this theory. For a discussion of the theory's applicability to DES litigation generally, see text and notes at notes 160-72 *infra*.

¹⁷ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980).

¹⁸ It has been suggested that a defendant DES manufacturer can prove that it could not have made the dosage complained of by showing that: (1) it did not make DES at the time that the plaintiff's mother obtained her dosage; (2) it did not sell DES in the state where the dosage was purchased; (3) it did not sell DES to the pharmacy from which the drug was purchased; (4) it did not manufacture dosages the size, shape, or color of those ingested by the plaintiff's mother. Respondent's Brief in Opposition to Petitions for Writs of Certiorari, at 7 n.13, *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 49 U.S.L.W. 3270 (1980) [hereinafter cited as *Sindell*, Plaintiff's United States Supreme Court Brief].

¹⁹ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980).

because it was not developed as a device to allow plaintiffs to avoid the identification requirement and because the theory presupposes a degree of collaboration among the defendant drug companies that DES plaintiffs may not be able to prove. The alternative liability theory, while developed precisely to address a situation in which the plaintiff is faultlessly unable to identify which member of a group of tortfeasors caused him harm, is apparently available only where every party that might have caused the plaintiff's injury has been joined as a defendant. Since, as will be explained, most DES plaintiffs will not be able to achieve such a comprehensive joinder of defendants, the theory of alternative liability will likely prove to be of little general utility in DES litigation. It will therefore be proposed that, of the three approaches to the DES identification problem outlined above and scrutinized below, the third, or "market share,"²⁰ approach is preferable because, by forthright judicial interest balancing²¹ and innovation, it avoids the unfair and inappropriate aspects of the two other approaches. Finally, questions concerning the market share theory will be explored and changes that can improve the theory will be suggested.

I. APPLICATION OF THE IDENTIFICATION REQUIREMENT TO DES CASES: THE GRAY APPROACH

This section considers a DES case that is quite unusual because it presents an instance where the plaintiff, without knowledge as to the source of the DES to which she was exposed, sued only one DES manufacturer.²² The court found the plaintiff's inability to prove that the defendant had actually made the DES at issue fatal to her claim.²³ It will be argued that the plaintiff's decision to arbitrarily sue only one DES producer justified the court in subjecting her to the rigors of the identification requirement. It will also be contended, however, that the holding of the case, applying the identification requirement to a DES plaintiff, should be strictly limited to those cases in which the plaintiff's joinder of defendant manufacturers is clearly arbitrary. It will therefore be proposed that the identification requirement should not be applied to plaintiffs in most multiple-defendant DES cases.

In *Gray v. United States*,²⁴ the plaintiff sued for harm allegedly caused by in

²⁰ *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting). The dissent uses this term rather derisively. This note's use of the term implies no such ridicule. Rather, the term "market share theory" is intended to serve as a descriptive reference to the theory propounded in *Sindell*.

²¹ See *Sindell*, Plaintiff's United States Supreme Court Brief, *supra* note 18, at 13; see also text and notes at notes 211-24 *infra*.

²² In most DES cases, by contrast, the plaintiffs have joined ten or more DES manufacturers. See, e.g., *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 593, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 49 U.S.L.W. 3270 (1980) (eleven named drug companies and one hundred John Does joined as defendants); *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 64-65, 289 N.W.2d 20, 21-22 (1979) (sixteen drug company defendants); *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super. 551, —, 420 A.2d 1305, 1309 (1980) (twenty-two drug company defendants).

²³ *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

²⁴ 445 F. Supp. 337 (S.D. Tex. 1978).

utero exposure to DES.²⁵ The plaintiff, unaware of the identity of the maker of the DES which her mother ingested, sued only one drug manufacturer, Eli Lilly and Company (Lilly), and alleged that it had produced the DES of which she was complaining.²⁶ Lilly moved for summary judgment, arguing that the plaintiff's failure to adduce any affidavits or other evidence indicating that Lilly had in fact made the particular DES in question demonstrated that she could not satisfy the identification requirement.²⁷ The court, persuaded that the plaintiff indeed was unable to identify Lilly as the actual manufacturer of the DES taken by her mother, ruled that the plaintiff had failed in an essential element of her cause of action.²⁸ Lilly's summary judgment motion was therefore granted.²⁹

In support of its decision to require the plaintiff to satisfy the identification requirement, the *Gray* court referred to *Wetzel v. Eaton Corporation*.³⁰ In *Wetzel*, the plaintiff sued a tractor manufacturer, Eaton, and two of its component parts suppliers for injuries sustained when the tractor on which he was riding overturned.³¹ The plaintiff claimed that the accident was caused by a malfunction in the tractor's power steering mechanism that was attributable to a faulty drag link adapter.³² The drag link adapter had been manufactured and sold to Eaton by one of the two component parts suppliers joined in the suit.³³ Neither the plaintiff nor Eaton, however, could identify which component parts supplier had in fact provided Eaton with the defective adapter.³⁴

Arguing that there was no evidence linking it to the specific drag link adapter in question, one of the component parts suppliers, FWG Corporation, moved for summary judgment.³⁵ The Eaton Corporation opposed the

²⁵ *Id.* at 338.

²⁶ *Id.* The plaintiff also sued the United States, claiming that the FDA's approval of the sale of DES, without requiring warnings as to the drug's deleterious side effects, was negligent. *Id.* The *Gray* court ruled that the actions of the FDA, in approving the shipment and sale of DES, were discretionary within the meaning of 28 U.S.C. § 2680(a). *Id.* at 341-42. 28 U.S.C. 2680(a) provides that the federal government is not liable in tort for a federal employee's negligent acts or omissions if those acts or omissions occur in the discharge of a discretionary function. 28 U.S.C. § 2680(a) (1976). *Accord*, *Gelley v. Astra Phar. Prod., Inc.*, 466 F. Supp. 182 (D. Minn.) (alternative holding), *aff'd* 610 F.2d 558 (8th Cir. 1979), wherein it was held that the FDA's original approval of, and subsequent failure to withdraw approval of, the anesthetic xylocaine were the result of "clearly the type of policy judgment contemplated by 28 U.S.C. § 2680(a)." *Id.* at 186.

²⁷ *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 62 F.R.D. 22 (D. Minn. 1973).

³¹ *Id.* at 24.

³² *Id.*

³³ *Id.* at 24-25.

³⁴ *Id.* Actually, the Eaton Corporation did not make the tractor in question. Rather the tractor was built by Char-Lynn Company, which was subsequently acquired by Eaton. *Id.* at 24 n.1. Since Eaton's liability for Char-Lynn's products was not disputed, this note's discussion of the case will, for the sake of simplicity, treat Eaton as the actual maker of the tractor.

³⁵ *Id.* at 25.

motion.³⁶ The court, in granting FWG's summary judgment motion, observed that Eaton was at fault in not having the records necessary to establish which of the two component parts suppliers has sold it the drag link adapter.³⁷ The court also noted that one of the component parts suppliers was presumably as blameless as the plaintiff.³⁸ The *Wetzel* court therefore found no basis upon which to require that each of the component parts makers disprove responsibility for the faulty drag link adapter.³⁹ Since the burden thus remained on Eaton to prove that FWG, the movant, had actually produced the adapter complained of, and since Eaton had failed to offer any evidence on the matter, FWG was granted summary judgment.

The *Gray* court apparently viewed *Wetzel* as a relevant example of the "fundamental principle of products liability law that a plaintiff must prove, as an essential element of his case, that a defendant manufacturer actually made the particular product which caused injury."⁴⁰ Without any recognition or analysis of possibly important factual differences between *Wetzel* and the case at bar, the *Gray* court applied the identification requirement to the plaintiff.⁴¹ The *Gray* court gave no indication that it recognized any exceptions to the rule that the plaintiff in a products liability case bears the burden of satisfying the identification requirement.

More searching analysis by the *Gray* court would have disclosed that the facts of *Wetzel* were different from those of *Gray* in at least one important respect. In *Wetzel*, the party opposing the summary judgment motion was considered by the court to be at fault for not having at hand the records needed to prove whether the movant actually made the defective product in question. In *Gray*, by contrast, the plaintiff could not have been considered at fault for not having the information needed to identify the source of the DES that harmed her. As previously discussed,⁴² the large number of DES makers, the loss of crucial records and testimony attributable to the long latency period of DES-related ailments, and the decision of many pharmacists to fill a prescription for one brand of DES with whatever brand they had on hand, contribute to burdening DES plaintiffs with serious identification problems. Such identification problems are altogether different from, and more vexing than, those of a corporation seeking to identify which of two companies supplied it directly with a defective piece of equipment.

While the factual difference of *Wetzel* and *Gray* renders the former a dubious precedent for the latter, the holding of *Gray* is, in the context of its particular facts, wholly defensible. The plaintiff in *Gray* had no knowledge as to the

³⁶ *Id.*

³⁷ *Id.* at 25, 30.

³⁸ *Id.* at 30.

³⁹ *Id.*

⁴⁰ *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

⁴¹ *Id.*

⁴² See text and notes at notes 8-14 *supra*.

source of the DES to which she had been exposed, yet she chose to sue only one of many possible sources of that DES.⁴³ This apparently arbitrary choice of a defendant justified the *Gray* court's imposition of the identification requirement on the plaintiff. Holding Lilly alone liable for the plaintiff's harm, absent some proof that Lilly actually was the culpable producer, would have been capricious and unfair, and would have established an undesirable precedent. No one company should bear total responsibility for harm that might have been inflicted by any one of 100 or more drug manufacturers.⁴⁴

The *Gray* decision, while correct, should be firmly restricted to its facts and should not be applied to most multiple-defendant DES cases. The plaintiff in a DES case should not have to satisfy the identification requirement if three conditions are met. First, the plaintiff must prove that all of the defendants she has joined have acted tortiously in producing or marketing the drug. Second, the plaintiff's joinder must be sufficiently comprehensive that it can be said that one or more of the defendants most likely produced the DES that caused the plaintiff's injury. Third, the plaintiff cannot fairly be considered at fault for not being able to identify the maker of the DES that reached and harmed her. If these three conditions are satisfied, the identification requirement should be lifted from the plaintiff, for it is unfair to allow a group of tortfeasors who have between them most likely caused the plaintiff harm, to "escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm."⁴⁵

The equitable considerations that argue against general application of *Gray* to multiple-defendant DES litigation are particularly important since the precedential weight of *Gray* in relation to such litigation is not clear. The *Gray* court denied recovery against Lilly because the plaintiff failed to present any evidence indicating that Lilly had in fact made the specific dosages of DES in question.⁴⁶ The plaintiff, having sued only one DES manufacturer, did not argue, and the court, therefore, did not consider, any possible theories of joint liability by which the plaintiff could avoid the identification requirement. Therefore, if viewed narrowly in terms of its particular facts, *Gray* in no way disapproved the use of joint liability theories as a way for DES plaintiffs to circumvent the identification requirement in those cases where it is unfair to impose upon them the burden of that requirement. At least one court, however, apparently has interpreted *Gray* as standing for the proposition that failure to identify the source of the DES at issue is in every case fatal to a products liability claim.⁴⁷ If such an expansive reading of the *Gray* decision is proper, *Gray*

⁴³ See text at note 26 *supra*.

⁴⁴ As to the varying estimates of the number of DES producers, see note 8 *supra*.

⁴⁵ RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965).

⁴⁶ See text at notes 27-29 *supra*.

⁴⁷ The Supreme Court of California characterized a DES case that it was considering, a case with eleven named drug company defendants, as another attempt to overcome the obstacle to recovery that *Gray* and similar cases had placed in the way of DES plaintiffs. The California court drew no distinction between the case it was considering and *Gray* based upon the number of

represents an unduly harsh and rigid response to the identification problems faced by most DES plaintiffs.⁴⁸

Two propositions concerning the decision in *Gray v. United States* are thus suggested. First, the decision should be applied only to those DES cases in which the plaintiff, unable to identify the source of her mother's DES, sues only one or a very few manufacturers. In most such cases, the plaintiff's choice of defendants would be clearly arbitrary and, therefore, she should not be relieved of her identification burden. Second, if the *Gray* decision is instead read as applying to all DES cases, without regard for the comprehensiveness of the joinder of defendant manufacturers in each case, it is an unfair decision that takes inadequate account of the monumental identification impediments confronting most DES plaintiffs. Indiscriminate application of the identification requirement to all DES plaintiffs would be an admission that the common law of torts, contrary to historical experience, is a captive of established rules and forms, unable to adapt itself to new and varied situations to which the considerations that gave rise to those rules and forms are inapposite.

II. THE MICHIGAN APPROACH: CONCERTED ACTION AND ALTERNATIVE LIABILITY

Courts unwilling to impose upon DES plaintiffs the heavy burden of the identification requirement have recognized or formulated at least three theories that allow the plaintiff to recover without identifying the source of the DES that harmed her. This section considers two of these theories, concerted action and alternative liability. The theory of concerted action, briefly stated, provides that all those who render substantial assistance or encouragement to another in the latter's tortious conduct are jointly and severally liable with him for the consequences of the resulting tort.⁴⁹ It will be argued that while the theory of concerted action is intended to deter and punish hazardous or otherwise anti-social group behavior by extending the scope of persons liable for a given tort, it in no way relieves the plaintiff of the burden of identifying the direct and immediate cause of his harm. It will also be contended that the theory of concerted action requires proof of a degree of cooperation between the defendant drug companies that the plaintiffs may not be able to supply.

While the theory of concerted action apparently presupposes the ability of the plaintiff to satisfy the identification requirement,⁵⁰ the theory of alternative liability does not. Under this theory, where the plaintiff, through no fault of his own, cannot identify which member of a group of tortfeasors caused him harm, the burden of proof on the issue of causation is shifted to the defendants. Any defendant unable to prove that his conduct, while tortious, did not in fact cause the plaintiff harm, is jointly and severally liable with those of his co-defendants

defendants joined in each case. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 597 n.8, 607 P.2d 924, 927-28 n.8, 163 Cal. Rptr. 132, 135-36 n.8, cert. denied, 49 U.S.L.W. 3270 (1980).

⁴⁸ See text and notes at notes 8-14 *supra*.

⁴⁹ See, e.g., W. PROSSER, LAW OF TORTS § 46 (4th ed. 1971).

⁵⁰ See text and notes at notes 93-97 *infra*.

who are similarly unable to meet their burden of persuasion.⁵¹ While in most respects the theory of alternative liability appears to be tailor-made for application to the DES cases, one facet of the theory — its requirement that all of the actors who reasonably could have caused the plaintiff's harm must be joined as defendants — renders the theory of little practical utility in DES litigation.⁵²

A. *The Concerted Action Theory in DES Cases*

According to section 876 of the Restatement (Second) of Torts, there are three kinds of factual patterns to which the concerted action theory may be applied.⁵³ In the first of these, the defendant has acted together with others pursuant to a common tortious plan or design.⁵⁴ For example, A, B, C, and D come together to E's house with the intention of committing a robbery. A breaks down E's front door; B ties up E; C beats him; and D steals E's property. A, B, C, and D are, under the concerted action theory, jointly and severally liable for all of the damages caused by their trespass to land, false imprisonment, battery, and conversion.⁵⁵ Since all who act in concert are jointly and severally liable for the harm they cause,⁵⁶ E can recover all of his damages from any one or more of the defendants, leaving them to apportion among themselves their individual shares of E's award according to the rules governing contribution in the relevant state.⁵⁷

In the second type of fact pattern to which the theory of concert applies, the defendant has given substantial assistance or encouragement to another, knowing that the latter's conduct was tortious.⁵⁸ For example, A and B take part in a riot. While throwing no rocks himself, B urges A to throw them. One of the rocks thrown by A strikes C, a bystander. Both A and B are liable to C.⁵⁹ As another example, A, a police officer, advises other officers to illegally physically coerce B. A will be liable to B for any batteries committed by those other officers pursuant to A's advice.⁶⁰ In sum, where D1 renders to D2 assistance or encouragement that proves to be a substantial factor in causing D2 to act in a manner that D1 knows to be tortious, D1 will be jointly and severally liable with D2 for the resulting tort.⁶¹

⁵¹ See, e.g., *Summers v. Tice*, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948); see also RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

⁵² See text and notes at notes 160-66 *infra*.

⁵³ RESTATEMENT (SECOND) OF TORTS § 876 (1979).

⁵⁴ *Id.*, § 876(a).

⁵⁵ RESTATEMENT (SECOND) OF TORTS § 876, Comment a, Illustration 1 (1979).

⁵⁶ See, e.g., *Thompson v. Johnson*, 180 F.2d 431, 433-34 (5th Cir. 1950); *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 73, 289 N.W.2d 20, 25 (1979). See also Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429 (1937).

⁵⁷ For a definition of joint and several liability, see BLACK'S LAW DICTIONARY 751 (5th ed. 1979).

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

⁵⁹ *Id.*, Illustration 4.

⁶⁰ *Id.*, Illustration 5.

⁶¹ *Id.*, Comment d.

Third, the Restatement indicates that the concerted action theory applies where the defendant's conduct, while rendering substantial assistance to another in accomplishing a tortious result, is actionable not merely because it assisted another in acting tortiously, but also because such conduct, considered separately, itself constitutes a breach of duty to the plaintiff.⁶² For instance, in *Guillory v. Godfrey*,⁶³ one defendant constantly harassed and insulted the customers of the plaintiffs' restaurant in an attempt to force the plaintiffs to dismiss their negro cook.⁶⁴ The other defendant not only encouraged and supported the first defendant's actions but, on occasion, insulted the customers himself with the same purpose in mind.⁶⁵ As a result, instead of each defendant being held individually liable for his own tortious acts, the court found that the defendants, having acted in concert to maliciously interfere with the plaintiff's business, were jointly and severally liable for all of the harm suffered by the plaintiffs.⁶⁶ The second defendant's conduct, while tortious in and of itself, was apparently viewed by the *Guillory* court as rendering so much encouragement to the first defendant's tortious activity, that the two could fairly be considered to be acting in concert in attempting to destroy the plaintiffs' business. In this third type of fact situation, an actor whose tortious conduct renders substantial assistance or encouragement to another tortfeasor will be jointly and severally liable with the other tortfeasor even if the first defendant did not know that his acts or the acts of the other defendant were tortious.⁶⁷

A survey of the cases indicates that while the concerted action theory has been most frequently applied to the clearly cooperative efforts of a small number of persons committing a rather simple intentional or negligent tort,⁶⁸ the theory has not been confined within such narrow factual or legal parameters. While commonly applied to cases where two or more persons have

⁶² RESTATEMENT (SECOND) OF TORTS § 876(c) (1979).

⁶³ 134 Cal. App. 2d 628, 632-33, 286 P.2d 474, 476-77 (1955).

⁶⁴ *Id.* at 630-31, 286 P.2d at 476-77.

⁶⁵ *Id.* at 631, 286 P.2d at 476-77.

⁶⁶ *Id.* at 632-33, 286 P.2d at 477-78.

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 876, Comment e (1979).

⁶⁸ For cases where a few persons committed a simple intentional tort, see text and notes at notes 69-71 *infra*.

A common application of the theory of concerted action to negligent defendants has been in the context of automobile races. See, e.g., *Agovino v. Kunze*, 181 Cal. App. 2d 591, 596, 5 Cal. Rptr. 534, 537 (1960); *Biercynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968). In the typical case, X, Y, and Z are racing on a public way, either as a result of an explicit agreement or a tacit understanding that may be inferred from their conspicuously parallel conduct. See, e.g., *Biercynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968) (agreement or understanding to race inferred from evidence that the defendants' automobiles were travelling side by side at twice the legal speed). While the race is in progress, X strikes P, an innocent bystander, with his vehicle, causing injury to P. X, under traditional principles of causation, is clearly liable as the cause of P's injuries. If the concerted action theory is applied to this situation, Y and Z, whose vehicles never came in contact with P, will be jointly and severally liable with X for P's injuries. Under the theory, all those drivers participating in the race at the time that X struck P are viewed as factual causes of P's harm, so all share liability for it.

acted together in perpetrating a battery,⁶⁹ false imprisonment or arrest,⁷⁰ or malicious interference with another's business,⁷¹ the theory of concerted action has also been utilized in cases involving an illegal strike,⁷² an illegal boycott,⁷³ securities fraud,⁷⁴ intentional breach of an implied contract,⁷⁵ misuse of corporate funds,⁷⁶ and an assault involving seventy-five to eighty men.⁷⁷ Therefore, any refusal to apply the concerted action theory to DES cases must rest on grounds other than their mere factual or legal complexity.

In *Abel v. Eli Lilly and Company*,⁷⁸ the plaintiffs, many of whom were unable to satisfy the identification requirement, claimed that the sixteen defendant drug makers had acted in concert to produce and market dangerous products — DES and similar synthetic estrogens — without adequate testing or warnings.⁷⁹ At trial, the judge ruled that each plaintiff was required to identify which of the defendants actually produced the DES or other synthetic estrogen to which he or she was exposed.⁸⁰ Those plaintiffs who did not satisfy the identification requirement had summary judgment of no cause of action entered against them.⁸¹ Those plaintiffs who did allege that a particular defendant made the DES to which they were exposed had their claims against all the other defendants dismissed.⁸² Finally, the plaintiffs' concerted action claims were dismissed as to all of the defendants.⁸³

On review, the Court of Appeals of Michigan reversed the trial court, ruling that the plaintiffs had stated a legally sufficient claim under the concerted action theory.⁸⁴ The appeals court declared that the concerted action theory was well-established in Michigan decisional law, and supported this observation by referring to the case of *McCoy v. Deliefde*.⁸⁵

⁶⁹ *E.g.*, *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950); *Gutowski v. City of New Britain*, 165 Conn. 50, 327 A.2d 552 (1973); *King v. Herfurth*, 306 Mich. 444, 11 N.W.2d 198 (1943); *Francis v. Kane*, 246 S.W.2d 279 (Tex. Civ. App. 1951).

⁷⁰ *E.g.*, *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949); *Griffin v. Clark*, 55 Idaho 364, 42 P.2d 297 (1935); *King v. Herfurth*, 306 Mich. 444, 11 N.W.2d 198 (1943).

⁷¹ *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 286 P.2d 474 (1955).

⁷² *Tompkins v. Sullivan*, 309 Mass. 496, 500, 34 N.E.2d 607, 609 (1941).

⁷³ *Dinoffria v. Teamsters Local 179*, 331 Ill. App. 129, 143, 72 N.E.2d 635, 641 (1947), *appeal dismissed*, 399 Ill. 304, 77 N.E.2d 661, *cert. denied*, 335 U.S. 815 (1948).

⁷⁴ *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975) (liability for aiding and abetting a securities law violation may be imposed where the elements of the RESTATEMENT (SECOND) OF TORTS § 876(b) are present). *See also* *Ruder, Multiple Defendants in Securities Law Fraud Cases*, 120 U. PA. L. REV. 597, 620-21 (1972) (discussing the role of the RESTATEMENT (SECOND) OF TORTS § 876 in securities law).

⁷⁵ *Mead Corp. v. Mason*, 191 So.2d 592, 595 (Fla. Dist. Ct. App. 1966).

⁷⁶ *Hux v. Butler*, 339 F.2d 696, 699-701 (6th Cir. 1964).

⁷⁷ *Meints v. Huntington*, 276 F. 245, 248 (8th Cir. 1921).

⁷⁸ 94 Mich. App. 59, 289 N.W.2d 20 (1979).

⁷⁹ *Id.* at 71-72, 289 N.W.2d at 24.

⁸⁰ *Id.* at 66, 289 N.W.2d at 22.

⁸¹ *Id.* at 68, 289 N.W.2d at 23.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 72, 289 N.W.2d at 25.

⁸⁵ 376 Mich. 198, 135 N.W.2d 916 (1965).

In *McCoy*, three persons had been hunting together in a corn field in which it was difficult to see.⁸⁶ One of the hunters accidentally shot and wounded the plaintiff.⁸⁷ Although the plaintiff was able to identify the defendant who shot him,⁸⁸ the Supreme Court of Michigan held that the other two hunters, who had not shot the plaintiff, could also be held liable if the plaintiff could prove that they had acted in concert with the defendant who did do the damage.⁸⁹ The appeals court in *Abel* read *McCoy* as standing for the proposition that if two or more persons acting in concert negligently harm the plaintiff, all of the defendants are liable even though only one of them directly caused the plaintiff's harm.⁹⁰

While the *Abel* court correctly interpreted the rule of law underlying *McCoy*, it failed to recognize that *McCoy* was quite distinguishable from *Abel*. In *McCoy*, the plaintiff was able to identify the direct and immediate cause of his harm.⁹¹ Many of the plaintiffs in *Abel*, by contrast, were unable to make such identifications.⁹² The use made of the concerted action theory in *McCoy* was therefore fundamentally different from the use of concert endorsed in *Abel*. In *McCoy*, the court used the theory to extend liability to those rendering substantial assistance and encouragement to a tortfeasor whose causal contribution to the plaintiff's harm had been established. In *Abel*, contrariwise, the court approved use of the concerted action theory as a vehicle through which the plaintiffs could avoid having to prove that a particular defendant actually caused them harm. Therefore, the *Abel* court's reliance on *McCoy* as precedential support for its rather novel use of the concerted action theory was misplaced.

The concerted action theory apparently was developed to discourage hazardous or otherwise undesirable group behavior by expanding the scope of persons liable for a given tort.⁹³ It was not created to aid those plaintiffs that are unable to determine which member of a group of tortfeasors in fact caused them harm. It is not surprising, therefore, that a survey of the cases⁹⁴ reveals that the concerted action theory has been used almost exclusively — as it was used in *McCoy* — to extend liability to those acting in league with a tortfeasor identified by the plaintiff as a factual cause of his harm.⁹⁵ The theory rarely has

⁸⁶ *Id.* at 202-04, 135 N.W.2d at 918-19.

⁸⁷ *Id.* at 203, 135 N.W.2d at 918.

⁸⁸ *Id.*

⁸⁹ *Id.* at 205-08, 135 N.W.2d at 919-21.

⁹⁰ *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 72-73, 289 N.W.2d 20, 24-25 (1979).

⁹¹ See text at note 88 *supra*.

⁹² *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 66-67, 289 N.W.2d 20, 22 (1979).

⁹³ FORDHAM COMMENT, *supra* note 3, at 979.

⁹⁴ See cases contained in notes 68-77 *supra*.

⁹⁵ See text at notes 88-89 *supra*. Since the concerted action theory almost always has been applied to situations in which the direct and immediate cause of the plaintiff's harm was identified, it is at least arguable that merely showing cooperation among a group of actors, at least one of whom probably caused the plaintiff harm, is insufficient to make out a claim of concert. Rather, the plaintiff pleading concerted action must initially show that at least one identified actor tortiously has caused him harm. This tortfeasor may be called the hub of the tort. To this identified hub may then be joined, for the purpose of imposing joint and several liability, all those

been used to help plaintiffs circumvent the identification requirement.⁹⁶ Indeed, outside the DES area, no products liability case has been found that authorizes the use of the concerted action theory in order to allow a plaintiff to avoid the identification requirement.⁹⁷

In addition to presupposing the ability of the plaintiff to identify the direct and immediate cause of his harm, the concerted action theory requires proof of a substantial degree of cooperation between the defendants.⁹⁸ DES plaintiffs may be unable, however, to prove that the drug companies that developed and sold DES for use in preventing miscarriage acted pursuant to a common tortious plan or that they substantially assisted or encouraged one another to make and sell a defective product.⁹⁹ Thus, DES plaintiffs may lack a sufficient factual basis for their claim of concerted action.

who substantially aided or encouraged the hub's tortious conduct. Without this hub linking the group's tortious cooperation to the plaintiff's harm, a case of concerted action is not present.

⁹⁶ The only cases found which employ the concerted action theory to allow a plaintiff to circumvent the need to identify the cause of his harm, are cases involving the negligent use of firearms by two or more persons. *See, e.g.,* *Benson v. Ross*, 143 Mich. 452, 453, 106 N.W. 1120, 1121 (1906); *Oliver v. Miles*, 144 Miss. 852, 860, 110 So. 666, 668 (1926). It appears that the concerted action theory was used in these cases because it was the only theory then available under which liability could plausibly be imposed in the absence of the plaintiff's ability to identify the party which actually caused his injury. For example, in *Oliver*, the court justified its finding that the defendants had acted in concert in firing their rifles by observing that, if the two defendants were not held to have acted in concert, the result would be "to exonerate both from liability, although each [defendant] was negligent, and the injury resulted from such negligence." *Id.* With the development of the alternative liability theory, see text at notes 107-14 *infra*, a preferable theory of liability is now available for adjudication of cases such as *Oliver*, making resort to the theory of concerted action unnecessary and unjustifiable.

⁹⁷ In one products liability case, *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), the court, in response to a situation in which children injured by defective blasting caps could not identify the maker of the caps, formulated a theory of liability that incorporated elements of the theory of concerted action. The court in *Hall* held that the plaintiffs could place upon each of the defendant explosives manufacturers the burden of disproving responsibility for the caps in question if the plaintiffs could first demonstrate that the blasting cap producers had jointly controlled the risk created by their failure to place warnings on each cap and by their failure to make the caps more difficult to detonate. *Id.* at 373-74. The *Hall* court stated that two of the three ways that defendants' joint control of risk could be shown involved demonstrating the kind of cooperation and common agreement present in cases of concerted action. *Id.* While the *Hall* theory thus resembled the theory of concert in certain respects, it differed from the concerted action theory in that it would allow individual manufacturers to escape liability upon a showing that while they did cooperate in a substantial manner with the firm that did in fact produce the defective caps, they themselves did not manufacture any of those caps. When applied to a products liability case, the theory of concert, on the contrary, would impose liability not merely on the manufacturer or seller of the defective product causing the harm, but also on all those parties that rendered substantial assistance or encouragement to the firm that made or sold the defective product. See text at notes 53-67 *supra*.

⁹⁸ See text at notes 53-67 *supra*.

⁹⁹ Plaintiffs in the DES cases generally have been unsuccessful in suing on the theory that DES manufacturers acted in concert to win FDA approval of DES as a treatment to prevent miscarriage and in testing and marketing the drug. *See, e.g.,* *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 605, 607 P.2d 924, 932, 163 Cal. Rptr. 132, 140, *cert. denied*, 49 U.S.L.W. 3270 (1980) (plaintiff unable to allege a sufficient degree of cooperation between the defendant drug companies to support a claim of concerted action); *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super. 551, ___, 420 A.2d 1305, 1315-16 (1980) (plaintiffs failed to allege any facts to support a finding

A further objection to use of the concerted action theory in DES litigation is that its imposition of joint and several liability often will result in an inequitable division of liability among defendant manufacturers. Many states still allow contribution among tortfeasors held jointly and severally liable only on an equal basis.¹⁰⁰ That is, in states that mandate equal contribution, each judgment debtor's share of liability is determined by dividing the plaintiff's recovery by the number of defendants held liable. Imposition of joint and several liability on DES makers frequently will mean, therefore, that each defendant manufacturer will share equally in the cost of any judgment awarded to the plaintiff, regardless of whether that manufacturer produced 90, 50, 25, or 0 percent of the DES that the plaintiff's mother might have taken.¹⁰¹ An equal division of liability among firms with such widely differing shares of the market from which the plaintiff's mother obtained her DES is unfair. Therefore, to the extent that use of the concerted action theory by DES plaintiffs will result in an equal division of liability among manufacturers with disparate market shares, its use in DES litigation is undesirable.

In summary, the theory of concerted action should not be used by courts to help plaintiffs avoid the adverse legal consequences of their inability to identify the manufacturers of the specific units of DES that allegedly harmed them. The theory was not devised to allow plaintiffs to avoid the identification requirement, rather it was developed to deter dangerous or otherwise unacceptable group behavior.¹⁰² The theory of concert, furthermore, has evidently never been used in a non-DES products liability case to help the plaintiff skirt the identification requirement.¹⁰³ As well, DES plaintiffs may be unable to prove the degree of collaboration between the defendant DES makers that the theory of concerted action requires.¹⁰⁴ Finally, to the extent that the concerted action theory will, when filtered through the contribution laws of many states,

that the defendants acted in concert to obtain approval from the FDA, in 1947, to market DES as a treatment to prevent miscarriage). *Contra*, *Bichler v. Eli Lilly and Co.*, N.Y. Times, March 1, 1981, at 34, col. 1 (plaintiff recovered \$500,000 after proving that the defendant acted in concert with other drug companies in obtaining FDA approval to sell DES and in marketing it without adequately testing it. Judgment and award affirmed on appeal by the New York Supreme Court, Appellate Division).

¹⁰⁰ See, e.g., ALASKA STAT. §§ 09.16.010-09.16.020 (1979); MD. ANN. CODE art. 50, § 17 (1980 Supp.), as construed in *Lahocki v. Contee Sand and Gravel Co.*, 41 Md. App. 579, 621, 398 A.2d 490, 514 (1979); MASS. ANN. LAWS ch. 231B, § 2 (Law. Co-op 1974); MICH. STAT. ANN. §§ 27A.2925(1)-27A.2925(2) (Callaghan 1980); MISS. CODE ANN. § 85-5-5 (1973); N.M. STAT. ANN. § 41-3-2 (1980); N.C. GEN. STAT. § 1B-2 (1969); N.D. CENT. CODE § 32-38-02 (1976).

¹⁰¹ Since all who act in concert with a party that tortiously harms the plaintiff are jointly and severally liable with that party, see text and note at note 56 *supra*, a manufacturer that could prove that it did not produce the DES which allegedly harmed the plaintiff would nevertheless be liable if concert between it and the DES maker that actually did supply the DES in question was shown.

¹⁰² See text at note 93 *supra*.

¹⁰³ See text and note at note 97 *supra*.

¹⁰⁴ See text and note at note 99 *supra*.

such as Michigan,¹⁰⁵ apportion liability equally among defendant DES manufacturers with differing market shares, it allocates liability unfairly and irrationally.¹⁰⁶ It is for these reasons that, while the inability of a plaintiff to identify the source of the DES that her mother ingested should not as a general rule bar her claim, the theory of concerted action is an inappropriate vehicle through which to allow her to proceed with her case. Another, more appropriate, theory should be utilized to allow DES plaintiffs to avoid the identification requirement.

B. *The Alternative Liability Theory in DES Cases.*

Unlike the theory of concerted action, the alternative liability theory was developed precisely to address situations in which the plaintiff is faultlessly unable to identify which member of a group of tortfeasor actually caused him harm.¹⁰⁷ The theory was first recognized in the case of *Summers v. Tice*.¹⁰⁸ In *Summers*, two hunters negligently and simultaneously shot in the plaintiff's direction, leaving him with an eye injury that could have been caused¹⁰⁹ by only one of the two hunters.¹¹⁰ Because of the nature of the defendants' conduct, however, neither the defendants nor the plaintiff could determine which hunter had done the damage.¹¹¹ In response to the plaintiff's predicament, the Supreme Court of California ruled that where the plaintiff's harm is the result of the independent acts of one of two negligent tortfeasors, and where, through no fault of his own, the plaintiff cannot prove which tortfeasor caused the injury, the burden of proof on the issue of causation shifts to the defendants.¹¹² Once the burden of proof on the issue of causation shifts, both of the defendants will be held jointly and severally liable unless one of them can prove that

¹⁰⁵ See Michigan equal division contribution statute contained in note 100 *supra*.

¹⁰⁶ See text at note 101 *supra*. Of course, this argument is in part a criticism of contribution rules which divide liability equally among judgment debtors rather than an objection to the theory of concerted action. In those states permitting contribution on a comparative fault or causation basis, *see, e.g.*, ARK. STAT. ANN. § 34-1002(4) (1947), imposition of joint and several liability upon defendant DES makers is less inequitable since, presumably, liability in such states will be apportioned between DES makers roughly according to their respective market shares. *See, e.g.*, *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super. 551, ___, 420 A.2d 1305, 1316 (1980) (court held that each defendant's market share would determine its contribution rights and liabilities under New Jersey's comparative negligence contribution statute). The imposition of joint and several liability, however, raises the possibility that solvent DES manufacturers will pay more than their fair share of liability in the event that any of their codefendants default on their judgment obligation. See text at note 57 *supra*. In this respect, imposition of joint and several liability in DES cases is undesirable and unfair regardless of the manner in which the governing contribution statute allocates liability between the defendants.

¹⁰⁷ See text at notes 108-14 *infra*.

¹⁰⁸ 33 Cal. 2d 80, 199 P.2d 1 (1948).

¹⁰⁹ "Caused" is here used in the logical sense of firing the shot that struck the plaintiff's eye, it is not used in the technical sense of factual or legal (proximate) cause. As to the distinction between factual and legal cause, *see* W. PROSSER, LAW OF TORTS §§ 41-42 (4th ed. 1971).

¹¹⁰ *Summers v. Tice*, 33 Cal. 2d 80, 84, 199 P.2d 1, 3 (1948).

¹¹¹ *Id.* at 84, 86, 199 P.2d at 3-4.

¹¹² *Id.* at 86, 199 P.2d at 4.

he did not cause the injury.¹¹³ The court justified placing this burden on the defendants by observing that both defendants were wrongdoers toward the plaintiff, and that by the nature of their tortious conduct, they made it impossible for the plaintiff to identify which of them actually caused his injury.¹¹⁴ *Summers*, therefore, reflects a policy determination that where a plaintiff has suffered harm as a result of the tortious conduct of two or more members of a group of tortfeasors, but is faultlessly unable to pinpoint the culpable party, the burden of proof on the question of which tortfeasor in fact caused that harm should be placed upon the tortfeasors rather than upon the blameless plaintiff.

An analogous situation was presented in *Anderson v. Somborg*,¹¹⁵ wherein the Supreme Court of New Jersey formulated a theory that is similar to the *Summers* alternative liability theory. In *Anderson*, the plaintiff was harmed when part of a surgical tool broke off and lodged in his spine during an operation. The plaintiff sued the surgeon and the hospital where the surgery was performed for negligence, the distributor of the tool for breach of warranty, and the maker of the tool on a theory of strict liability in tort.¹¹⁶ The jury returned verdicts in favor of all four defendants.¹¹⁷

The Supreme Court of New Jersey reversed and ordered a new trial.¹¹⁸ The court ruled that where an unconscious plaintiff suffers an injury that was not a foreseeable risk of competently performed surgery, all those who either had custody of the unconscious plaintiff, or for other reasons owed him a duty of care, must prove their non-culpability or suffer the imposition of liability.¹¹⁹ Since, in the New Jersey Supreme Court's view, all of the parties that might have been responsible for the plaintiff's injury had been joined,¹²⁰ the court reasoned that at least one of the defendants could not absolve itself of liability.¹²¹ The court therefore ruled that at the new trial which it had ordered, the plaintiff would be entitled to an instruction that would require the jury to return a verdict against at least one of the defendants.¹²² In reaching this result, the *Anderson* court did not employ the theory of alternative liability, rather it applied a theory "akin" to *res ipsa loquitur*.¹²³

¹¹³ *Id.* at 86-88, 199 P.2d at 4-5.

¹¹⁴ *Id.* at 86, 199 P.2d at 4.

¹¹⁵ 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975).

¹¹⁶ *Id.* at 295, 338 A.2d at 3.

¹¹⁷ *Id.* at 297, 338 A.2d at 4.

¹¹⁸ *Id.* at 305, 338 A.2d at 8.

¹¹⁹ *Id.* at 298, 338 A.2d at 5.

¹²⁰ *Id.* at 296, 338 A.2d at 4.

¹²¹ *Id.* at 303, 338 A.2d at 7.

¹²² *Id.* at 304, 338 A.2d at 8.

¹²³ *Id.* at 299, 338 A.2d at 5. The theory of *res ipsa loquitur* can, in appropriate cases, support an inference that the plaintiff was injured because the defendant acted negligently, although the plaintiff cannot directly prove such negligence. Generally, the plaintiff, in order to invoke the theory, must demonstrate that: (1) the event or injury complained of is of a kind that usually does not occur in the absence of someone's negligence; (2) the event or injury was caused by an agency or instrumentality within the (exclusive) control of the defendant; and (3) the event or injury was not due to any voluntary action on the part of the plaintiff. *See, e.g.,* W. PROSSER,

The *Anderson* and *Summers* theories are different in an important respect. Under the *Anderson* theory, the defendants labor under a presumption of both tortious conduct and causation of the plaintiff's injury that, if not rebutted, supports the imposition of liability.¹²⁴ Contrariwise, under the alternative liability theory of *Summers*, the plaintiff is relieved only of the burden of proving who in fact caused his injury. Before the shifting of the burden of proof on the causation question, the plaintiff under the *Summers* theory must prove that each of the defendants acted tortiously.¹²⁵

The *Anderson* and *Summers* theories, while different in this one respect, are similar in two others. First, both *Anderson* and *Summers* rest on an implicit recognition and endorsement of the principle that the placement of the burden of proof on any given issue is a matter of policy and fairness.¹²⁶ Both cases and theories thus stand as authority for the proposition that while, as a general rule, a plaintiff bears the burden of identifying the party that caused him harm, this rule is not without exceptions. Second, both cases present instances where it was certain that one of the defendants caused the plaintiff's injury.¹²⁷ For reasons that will be presented below,¹²⁸ it is unlikely that most DES plaintiffs will be able to join in one action all of the firms that might have supplied the DES that caused their injuries. It is doubtful, therefore, that many DES plaintiffs will be able to utilize the *Summers* alternative liability theory.

In *Abel v. Eli Lilly and Company*,¹²⁹ the plaintiffs claimed to have joined all known manufacturers of the DES that was distributed in Michigan during the period in which they were exposed to the drug.¹³⁰ While not explicitly indicating what, if any, significance it attached to the plaintiffs' claim of comprehensive joinder, the *Abel* court ruled that while the plaintiffs bear the burden of proof on three elements of their claim,¹³¹ they do not bear the burden of

LAW OF TORTS § 39 (4th ed. 1971). The theory in *Anderson* was termed "akin" to *res ipsa loquitur* because some of the defendants to which it was applied were not alleged to be negligent, but were being sued on theories of breach of warranty or strict liability in tort. *Anderson v. Sornberg*, 67 N.J. 291, 299-300, 338 A.2d 1, 5, cert. denied, 423 U.S. 929 (1975).

¹²⁴ *Id.* at 301, 338 A.2d at 6. The *Anderson* court endorsed the view that each of the defendants, in order to escape liability, would have to make an affirmative showing of: (1) a definite cause for the plaintiff's harm in which no element of negligence, or otherwise tortious conduct, on its part was involved; or (2) such care in all respects that the plaintiff's harm must have been due to an unpreventable, albeit unknown cause. Since, in order to avoid liability, each of the *Anderson* defendants was required to make a positive showing that: (1) its tortious conduct did not cause the plaintiff's harm; or (2) its conduct was not tortious, the *Anderson* court clearly was establishing a presumption that each defendant had acted tortiously and, in so doing, had caused the plaintiff's injury.

¹²⁵ See text at note 114 *supra*. See also RESTATEMENT (SECOND) OF TORTS § 433B, Comment f (1965).

¹²⁶ See, e.g., C. MCCORMICK, LAW OF EVIDENCE § 337 (2d ed. 1972); 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940).

¹²⁷ See text at notes 110, 120 *supra*.

¹²⁸ See text and notes at notes 160-64 *infra*.

¹²⁹ 94 Mich. App. 59, 289 N.W.2d 20 (1979).

¹³⁰ *Id.* at 67, 289 N.W.2d at 22.

¹³¹ *Id.* at 76-77, 289 N.W.2d at 26-27. The *Abel* court listed the elements on which DES

proving which specific firms made the units of DES to which they were exposed.¹³² Rather, each defendant manufacturer is left free to avoid liability as to some or all of the plaintiffs by proving that it did not make the DES to which the plaintiff in question was exposed.¹³³ The defendants also are allowed to implead third parties for purposes of contribution or indemnification.¹³⁴

While noting that there were no Michigan decisions directly supporting its decision to allow DES plaintiffs to utilize the alternative liability theory, the *Abel* court viewed the Michigan case of *Snider v. Bob Thibodeau Ford, Inc.*,¹³⁵ as supporting the relevant, albeit general, proposition that the burden of proof on the issue of causation may be shifted to defendants that have acted wrongfully.¹³⁶ In *Snider*, the plaintiff was injured when the brakes on his truck failed.¹³⁷ Prior to the brake failure, the plaintiff on numerous occasions had reported brake trouble to, and had his brakes serviced by, the dealer from whom he had purchased the truck.¹³⁸ The plaintiff sued both the truck's manufacturer, Ford, and the dealer, Thibodeau.¹³⁹ The court directed a verdict for Ford and the jury returned a verdict in favor of Thibodeau.¹⁴⁰

The court of appeals reversed the directed verdict in favor of Ford but affirmed the jury verdict for Thibodeau, ordering a new trial of the plaintiff's claims against Ford.¹⁴¹ In dictum, the court of appeals, hypothecating the presence of both defendants at retrial rather than just Ford, stated that if the jury were to conclude that the plaintiff had been injured as a result of defective brakes, the burden of "negating individual responsibility for the brake failure" would be on both of the defendants.¹⁴² If neither defendant could meet that burden, the *Snider* court's dictum seemed to indicate that both would be held liable.

The shifting of the burden of proof hypothetically envisioned by the *Snider*

plaintiffs still bear the burden of proof as: (1) showing that each defendant breached his duty of care in producing DES (or other, similar synthetic estrogens); (2) showing that plaintiff's harm was caused by her mother's ingestion of DES; and (3) showing that one or more of the named defendants manufactured the DES ingested. *Id.*

¹³² *Id.* at 77, 289 N.W.2d at 27.

¹³³ *Id.* at 76, 289 N.W.2d at 26.

¹³⁴ *Id.* The *Abel* court's allowance for the impleading of third parties would seem to indicate that not all possible sources of the offending DES must be joined in order for plaintiffs to make use of the alternative liability theory. If all possible sources of the drug must be joined in order for plaintiffs to utilize the alternative liability theory, there presumably would be no parties left to implead. The ability to implead third parties, extended by the *Abel* court, would therefore be of value only if the court was willing to shift the burden of proof even in the absence of a comprehensive joinder of defendants.

¹³⁵ 42 Mich. App. 708, 202 N.W.2d 727 (1972).

¹³⁶ *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 74, 289 N.W.2d 20, 25 (1979).

¹³⁷ *Snider v. Bob Thibodeau Ford, Inc.*, 42 Mich. App. 708, 711-12, 202 N.W.2d 727, 729 (1972).

¹³⁸ *Id.* at 715, 202 N.W.2d at 731.

¹³⁹ *Id.* at 712, 202 N.W.2d at 729.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 721, 202 N.W.2d at 734.

¹⁴² *Id.* at 719, 202 N.W.2d at 733.

court was more drastic, and rested on less compelling grounds, than that approved in *Abel*. First, the *Snider* court's dictum approved shifting to each of the defendants the burden of proof on both the question of whether it had acted tortiously and whether it had caused the plaintiff's harm.¹⁴³ The burden-shifting approved in *Abel*, by contrast, was less far-reaching as it involved only the question of causation. The plaintiffs in *Abel* still bore the burden of proving that each of the defendants acted tortiously in producing or selling DES.¹⁴⁴ Second, in *Abel* it was alleged that all of the defendants had acted tortiously in making and marketing DES without adequately testing the drug or warning of its dangers.¹⁴⁵ In *Snider*, contrariwise, the court was willing, in dictum, to shift the burden of proof to both defendants despite the fact that only one of the defendants, apparently, had acted tortiously toward the plaintiff.¹⁴⁶ Where, as in *Snider*, one of the defendants is presumably not a wrongdoer, the equitable considerations favoring a shifting of the burden of proof to the defendants are much less compelling than in cases such as *Abel*, where all of the defendants are apparently wrongdoers and the only uncertainty is which wrongdoer actually caused the plaintiff's injury. The shifting of the burden of proof authorized in *Abel* was therefore in a sense supported by dictum in *Snider*, in that the burden-shifting hypothesized in the latter case was more far-reaching, and rested on less persuasive equitable grounds, than that in *Abel*.

Another case relied on by the *Abel* court in allowing the plaintiffs to avail themselves of the alternative liability theory was *Maddux v. Donaldson*.¹⁴⁷ In *Maddux*, the plaintiffs were injured when the automobile in which they were riding was struck in rapid succession by two other vehicles.¹⁴⁸ The plaintiffs sued the drivers of both vehicles.¹⁴⁹ Later, however, they discontinued the case against the driver of the automobile that first struck them,¹⁵⁰ apparently because his insurance carrier was insolvent.¹⁵¹ The trial court subsequently

¹⁴³ *Id.* The phrase "burden of negating individual responsibility for the brake failure" appears to encompass both the question of tortious conduct and the question of causation. Thus, the *Snider* court appeared to be indulging in the same kind of two-pronged presumption that was employed by the *Anderson* court. See text and note at note 124 *supra*. That is, the *Snider* court's dictum seemed to be approving a presumption that would cast upon each of the defendants the burden of proving either that it did not act tortiously in manufacturing, installing, or servicing the plaintiff's brakes, or that any such tortious conduct was not a cause of the subsequent brake failure. In the absence of such an affirmative exculpatory showing, the *Snider* court appeared ready to presume that each of the defendants had acted tortiously and, as a result of that tortious conduct, had caused the plaintiff's injuries. *Id.*

¹⁴⁴ See text and note at note 131 *supra*.

¹⁴⁵ See text at note 79 *supra*.

¹⁴⁶ *Snider v. Bob Thibodeau Ford, Inc.*, 42 Mich. App. 708, 718, 202 N.W.2d 727, 732 (1972). The *Snider* court considered this a case of "proving which of two possible wrongdoers" was responsible for the plaintiffs' injuries. This indicates that it was, in the court's view, likely that only one of the two defendants had acted wrongfully or tortiously toward the plaintiff. Thus, one of the defendants in *Snider* was in all likelihood not a wrongdoer at all.

¹⁴⁷ 362 Mich. 425, 108 N.W.2d 33 (1961).

¹⁴⁸ *Id.* at 427, 108 N.W.2d at 34.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 437, 108 N.W.2d at 39.

dismissed the plaintiffs' claims against the driver of the second automobile because it found the driver of the plaintiffs' automobile to be guilty of contributory negligence as a matter of law and because the portion of the plaintiffs' damages caused by the second defendant driver could not be determined.¹⁵²

The Michigan Supreme Court reversed the dismissal and remanded the case for a new trial.¹⁵³ The court rejected the trial court's conclusion that the second driver was entitled to a dismissal because his causal contribution to the plaintiffs' damages, if any, could not be isolated from the damages caused by the first driver.¹⁵⁴ The *Maddux* court ruled that in order to recover, the plaintiffs did not have to prove how much of their damages were caused by each of the two collisions.¹⁵⁵ The *Maddux* court more generally held that where a plaintiff's injuries, although caused by two or more independent tortfeasors, are of an indivisible nature, all those contributing to such injuries are jointly and severally liable for all the damage done.¹⁵⁶

The majority in *Abel* justified their reliance on *Maddux* by declaring that *Abel*, like *Maddux*, essentially was concerned with apportioning damages among proven wrongdoers.¹⁵⁷ The *Abel* dissent pointed out, however, that this conclusion ignored the question of causation.¹⁵⁸ In *Maddux*, the plaintiffs identified the tortfeasors that caused them harm, whereas many of the plaintiffs in *Abel* did not make such an identification.¹⁵⁹ Thus, the only uncertainty in *Maddux* was the correct apportionment of liability among defendants who had definitely contributed to the plaintiffs' harm. The situation in *Abel*, however, was quite different. Many of the *Abel* plaintiffs were unable to identify which defendants had actually caused them harm, a step that precedes the need to determine the correct apportionment of liability among multiple causes of one's harm. Therefore, *Maddux*, concerned as it was with a very different issue than that presented to the *Abel* court, is of little relevance to the question that was central to *Abel*: when and if the burden of proof on the causation issue should be shifted to the defendants in DES suits.

The plaintiffs' claim in *Abel* that they had joined all possible sources of the DES to which they were exposed¹⁶⁰ would, if in fact true, make *Abel* a seeming-

¹⁵² *Id.* at 427, 108 N.W.2d at 34.

¹⁵³ *Id.* at 436, 108 N.W.2d at 38.

¹⁵⁴ *Id.* at 429-35, 108 N.W.2d at 35-38.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 432-34, 108 N.W.2d at 37.

¹⁵⁷ *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 76, 289 N.W.2d 20, 26 (1979).

¹⁵⁸ *Id.* at 87, 289 N.W.2d at 31 (Moore, J., dissenting). The dissent in *Abel* stated that cases such as *Maddux*,

which shift the burden of proof to the defendant[s] do not involve the problem of identifying the party who is liable, but rather, they involve the apportionment of damages after liability is proven. . . . In the case at bar [*Abel*], the basic issue has to do with *establishing liability* by identifying the particular wrongdoer(s), rather than with apportioning the damages among the tortfeasors. [emphasis in the original.]

Id.

¹⁵⁹ See text at note 79 *supra*.

¹⁶⁰ See text at note 130 *supra*.

ly appropriate case to which to apply the alternative liability theory. *Abel* is unusual, however, in its putatively comprehensive joinder of defendants. It will likely prove to be impossible for plaintiffs in most DES cases to achieve the kind of exhaustive joinder apparently present in *Abel*. There are three principal reasons for this difficulty. First, the number of possibly culpable DES producers in any given case is potentially enormous. It has been estimated that at one time or another between 94 and 300 companies made DES for use in pregnancy.¹⁶¹ Second, some of the original manufacturers of the drug are no longer in existence, having been liquidated, reorganized under new names, or merged with other concerns.¹⁶² It is not clear, furthermore, in the case of the mergers, that the surviving corporations are liable for the defective products of the merged corporations.¹⁶³ Third, in some cases, not all of the firms that might have supplied the DES in question will be amenable to suit in the forum state.¹⁶⁴

As one commentator has observed, the alternative liability theory rests upon a policy determination that there are times when the usual requirement that the plaintiff show at least a greater-than-fifty percent likelihood that a particular defendant caused him harm may be relaxed in favor of a one hundred percent chance that one or more members of a group of tortfeasors caused that harm.¹⁶⁵ If it will not be possible for most DES plaintiffs to join in one action all possible sources of the DES that harmed them, and if courts continue to insist upon such comprehensive joinder as a prerequisite to the invocation of the alternative liability theory,¹⁶⁶ the theory will be of no help to most DES plaintiffs.

As between the two joint liability theories considered, however, the alternative liability theory is for two reasons more appropriate for use in DES litigation than is the concerted action theory. First, under the theory of concerted action, DES plaintiffs must prove some degree of cooperation, understanding, or agreement between the defendant drug makers.¹⁶⁷ Often, plaintiffs will be

¹⁶¹ FORDHAM COMMENT, *supra* note 3, at 964 n.3.

¹⁶² *Id.* at 984 n.114.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 49 U.S.L.W. 3270 (1980).

¹⁶⁵ FORDHAM COMMENT, *supra* note 3, at 986.

¹⁶⁶ At least two courts have explicitly ruled on the question whether the alternative liability theory is available to DES plaintiffs only where all possible sources of the DES in question are before the court. In *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 49 U.S.L.W. 3270 (1980), the Supreme Court of California ruled that the alternative liability theory was not available to the plaintiff because she had failed to join all of the possible sources of the DES to which she had been exposed. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39. By contrast, in *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super 551, 420 A.2d 1305 (1980), a New Jersey trial court ruled that the alternative liability theory was available to DES plaintiffs, even in situations in which not all possible sources of the drug are joined by the plaintiff. *Id.* at —, 420 A.2d at 1314-15.

¹⁶⁷ See text at notes 53-67.

unable to supply such evidence of agreement or collaboration.¹⁶⁸ The alternative liability theory, by contrast, is founded upon the assumption that the tortfeasors acted independently of each other, and therefore requires no proof of cooperation or agreement among the defendants.¹⁶⁹ Second, the concerted action theory was not designed to aid plaintiffs that are unable to satisfy the identification requirement. The theory was instead meant to discourage dangerous or otherwise undesirable group behavior.¹⁷⁰ This distinguishes the concerted action theory from the alternative liability theory, which was developed precisely to address situations in which a plaintiff is unable to identify the tortfeasor who caused him harm.¹⁷¹ For these reasons, the theory of alternative liability is preferable to the theory of concerted action in the context of those DES cases in which the plaintiff cannot satisfy the identification requirement. Both theories, however, are deficient for use in DES litigation insofar as they will, in those states providing for equal contribution,¹⁷² apportion liability equally among defendant manufacturers with widely differing shares of the relevant DES market. In this regard, the Supreme Court of California has engaged in some salutary innovation, which shall be explored in the following section.

III. THE CALIFORNIA APPROACH: THE MARKET SHARE THEORY

When the Supreme Court of California first considered the DES identification problem, in *Sindell v. Abbott Laboratories*,¹⁷³ it had the benefit of being able to consider both the *Gray* and *Abel* responses to the problem. The *Sindell* court rejected the approaches adopted in *Gray* and *Abel*, concluding that while insistence on plaintiff's satisfaction of the identification requirement was too harsh,¹⁷⁴ neither the concerted action¹⁷⁵ nor the alternative liability¹⁷⁶ theory was a proper vehicle by which DES plaintiffs could avoid that requirement. Instead, the California Supreme Court formulated a new theory for use in the DES cases: the market share theory. Under the market share theory, a plaintiff can avoid the identification requirement without having to prove that the defendants cooperated in testing and marketing DES, and without having to join every last possible source of the DES to which she was exposed.

In *Sindell*, the plaintiff, unable to satisfy the identification requirement,

¹⁶⁸ See note 99 *supra*.

¹⁶⁹ For a lucid and instructive contrast of the theories of concerted action and alternative liability in this regard, see *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 73-74, 289 N.W.2d 20, 25 (1979).

¹⁷⁰ See text and notes at notes 93-97 *supra*.

¹⁷¹ See text at notes 108-14 *supra*.

¹⁷² See collection of equal division contribution statutes at note 100 *supra*.

¹⁷³ 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 49 U.S.L.W. 3270 (1980).

¹⁷⁴ *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

¹⁷⁵ *Id.* at 603-06, 607 P.2d at 931-33, 163 Cal. Rptr. at 139-41.

¹⁷⁶ *Id.* at 598-603, 607 P.2d at 928-31, 163 Cal. Rptr. at 136-39.

brought suit against eleven named drug companies and one hundred John Does on behalf of herself and other women similarly situated.¹⁷⁷ The defendants demurred to the complaint, apparently on the ground that the plaintiff could not identify which defendant had manufactured the drug responsible for her injuries.¹⁷⁸ The trial court granted the demurrers and dismissed the complaint with prejudice because of the plaintiff's inability to satisfy the identification requirement.¹⁷⁹

The California Supreme Court reversed the trial court's ruling that the plaintiff's failure to satisfy the identification requirement necessarily denied her an opportunity to recover for her harm.¹⁸⁰ After concluding that Sindell could not state a claim based upon the theories of concerted action,¹⁸¹ alternative liability,¹⁸² or "industry-wide liability,"¹⁸³ a narrowly and bitterly divided court fashioned a new theory under which the plaintiff might prevail, the market share theory.

The market share theory provided that if a plaintiff, unable to identify the source of her mother's DES, joined as defendants manufacturers that together accounted for a "substantial" share of the DES that her mother might have taken, the burden of proof on the issue of which firm actually produced the offending DES would be lifted from the plaintiff and placed upon the defendants.¹⁸⁴ The defendants would be allowed to implead other manufacturers that might have supplied some or all of the DES in question.¹⁸⁵ Any one or more of the defendants could satisfy their burden of proof on the causation question by proving that they could not have produced the DES to which the plaintiff was exposed.¹⁸⁶ Each defendant manufacturer that failed to meet this burden of proof, however, would become liable for that portion of the plaintiff's judgment corresponding to its share of the market.¹⁸⁷ The market share theory thus substituted liability based upon market share in place of the joint and several liability imposed by *Summers*.¹⁸⁸

¹⁷⁷ *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

¹⁷⁸ *Id.* at 595-96, 607 P.2d at 926, 163 Cal. Rptr. at 134.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.

¹⁸¹ See text at note 175 *supra*.

¹⁸² See text at note 176 *supra*.

¹⁸³ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607-10, 607 P.2d 924, 933-35, 163 Cal. Rptr. 132, 141-43, *cert. denied*, 49 U.S.L.W. 3270 (1980). The theory of industry-wide liability was expounded in *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). The *Hall* theory is outlined and distinguished from the theory of concerted action at note 97, *supra*.

¹⁸⁴ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980). The *Sindell* court, apparently to afford trial courts a measure of discretion when judging the adequacy of the plaintiff's joinder of defendant manufacturers, refused to define what it considered to be substantial. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *Sindell*, Plaintiff's United States Supreme Court Brief, *supra* note 18, at 14-16 (explanation of the difference between the *Sindell*, market share approach to liability allocation, and the *Summers*, joint and several approach to liability allocation).

In fashioning what it termed a "modification" of the *Summers* alternative liability theory,¹⁸⁹ the *Sindell* court referred to section 433B of the Restatement (Second) of Torts, which recognizes that situations may arise in which it would be unfair to require joinder of all possibly responsible parties as a prerequisite to shifting the burden of proof on the causation issue.¹⁹⁰ In a sense, therefore, the market share theory can be viewed as simply the alternative liability theory shorn of its requirement that all possible sources of the DES complained of be joined as defendants.¹⁹¹ Such analysis, however, would fail to recognize another significant difference between the market share and alternative liability theories. This second difference involves the manner in which each theory apportions liability.

The *Sindell* court explicitly viewed the likelihood that any given DES manufacturer produced the dosage that harmed the plaintiff as a function of that firm's share of the relevant DES market.¹⁹² Thus, if the plaintiff were to join as defendants two manufacturers that together produced seventy-five percent of the DES that the plaintiff's mother might have taken, the *Sindell* court would take the view that there is a seventy-five percent chance that one of the two defendants is responsible for the plaintiff's injury and only a twenty-five percent chance that some other manufacturer is culpable. Since the only evidence bearing on the likelihood that any given firm produced the relevant DES typically is going to be that firm's share of the market, the court in *Sindell* concluded that market share data present a ready and fair way of apportioning liability.¹⁹³ In reaching this conclusion, the *Sindell* court decided that while a firm's share of liability in practice may not correlate perfectly with its market share, this disparity is not sufficient to deny plaintiffs recovery.¹⁹⁴

The court in *Sindell* was narrowly divided, with three of the court's seven Justices dissenting.¹⁹⁵ The dissent vigorously protested what it viewed as the majority's effective elimination of the element of factual causation from a DES cause of action.¹⁹⁶ Arguing that the defendant manufacturers "are no more capable of disproving factual causation than plaintiffs are of proving it,"¹⁹⁷ the dissent maintained that under the market share theory, the plaintiffs will in every case prevail on the causation issue.¹⁹⁸

The dissent also decried the fact that under the market share theory an individual manufacturer that enjoyed only a small share of the relevant market and that therefore most likely did not supply the DES complained of, may

¹⁸⁹ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, cert. denied, 49 U.S.L.W. 3270 (1980).

¹⁹⁰ RESTATEMENT (SECOND) OF TORTS § 433B, Comment h (1965).

¹⁹¹ See text and notes at notes 165-66 *supra*.

¹⁹² *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 611-12, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, cert. denied, 49 U.S.L.W. 3270 (1980).

¹⁹³ *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

¹⁹⁴ *Id.* at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

¹⁹⁵ *Id.* at 614-22, 607 P.2d at 938-43, 163 Cal. Rptr. at 146-51.

¹⁹⁶ *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

nevertheless be held proportionately liable if its market share — when added to the shares of its co-defendants — becomes substantial in the aggregate.¹⁹⁹ The dissent believed that the plaintiffs should bear the burden of proving causation in DES cases,²⁰⁰ and, apparently, that they should be held to have satisfied that burden only when they can, at a minimum, show that a single defendant manufacturer probably supplied the DES at issue because it was alone responsible for a majority of the DES that the plaintiff's mother might have taken.²⁰¹

The dissent further objected to the market share theory because, unless it is adopted generally throughout the nation, it will result in disproportionate aggregate liability for those firms subject to suit in California.²⁰² In other words, if only a few other states adopt the market share theory or otherwise relieve DES plaintiffs of the identification requirement, the dissent feared that DES makers solvent and amenable to suit in California would bear more than their rightful share of nationwide liability.

Considering the dissent's last point first, the dissent was clearly correct in maintaining that the market share theory may cause DES makers within the jurisdiction of the courts of California to bear more than their fair share of nationwide liability. The failure of other states to follow the lead of California in adopting the market share approach effectively will shield from liability those DES makers not amenable to suit in California or in states that otherwise dispense with the need for plaintiffs to pinpoint the source of the DES that harmed them. Yet, if the market share theory is desirable in all other respects, the refusal of other states to embrace it hardly seems to be a legitimate reason for California to reject it as well.

The *Sindell* dissent indulged in overstatement in claiming that the market share theory will allow the plaintiffs to prevail on the issue of causation in every case.²⁰³ In *Sindell* itself, one defendant manufacturer was dismissed from the suit after establishing that it did not produce DES until after the plaintiff was born and that it therefore could not be the source of the DES to which she had been exposed.²⁰⁴ The dissenters were, nevertheless, essentially correct in their contention that the market share theory effectively dispenses with the element of factual causation in DES suits. In most cases the defendants will indeed be as ignorant as the plaintiff as to the source of the DES at issue. Consequently, individual DES makers seldom will be able to disprove their responsibility for the DES to which a given plaintiff was exposed. The dissent did not, however, explain why in situations where neither the plaintiff nor the defendants have

¹⁹⁹ *Id.* at 615-16, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).

²⁰⁰ *Id.* at 614-17, 607 P.2d at 938-40, 163 Cal. Rptr. at 146-48 (Richardson, J., dissenting).

²⁰¹ *Id.* at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

²⁰² *Id.* at 617-18, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

²⁰³ See text at notes 196-98 *supra*.

²⁰⁴ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980).

reason to know whether any given defendant has actually caused the plaintiff's injury, the burden of proving causation always should be upon the plaintiff. Indeed, *Summers* stands as established California precedent that in certain situations the burden of proof on the question of factual causation should be placed on the defendants, even though they have no realistic ability to meet that burden.²⁰⁵

The dissent also was correct in asserting that, under the market share theory, it will often be true in particular cases that not all and possibly even none of the defendants held liable actually produced the DES to which the particular plaintiff was exposed. The dissent, however, accorded inadequate recognition to the ability of the market share theory, if applied to all or most DES cases, to roughly equate each manufacturer's aggregate liability with its actual responsibility for all of the injuries caused by its DES. This matching of aggregate liability and actual responsibility for all DES-related injuries is illustrated by the following example. If firm X sold twenty percent of all the DES prescribed for use by pregnant women, and if identification could be made in all cases, X would be liable for all of the damages recovered in about twenty percent of the cases. Of course, the identification requirement cannot be satisfied in most cases.²⁰⁶ The market share theory, however, provides an alternative method of liability allocation under which, using the preceding example, firm X would be joined in most of the DES cases and, where found liable, would pay approximately twenty percent of the damages recovered in each case. Firm X, consequently, would pay about the same total amount of damages whether or not identification could be made.²⁰⁷ In practice the correlation between any firm's total responsibility and its aggregate liability will not be perfect,²⁰⁸ but the market share theory has the potential — if widely adopted by the states — to achieve a reasonably accurate matching of each firm's actual responsibility for DES-related injuries with its total liability.

The market share theory, while achieving a more or less precise matching of each manufacturer's liability and actual responsibility in the aggregate of DES cases, cannot begin to achieve such precision in each individual case. To equate precisely tort responsibility and liability in individual cases, the identification requirement must be satisfied, and that, unfortunately, is simply not possible in most DES cases.²⁰⁹ The majority and the dissent in *Sindell* differed on the question whether the market share theory's failure to equate accurately liability and responsibility in each individual DES case was a fatal flaw. The dissent thought it was such a flaw,²¹⁰ but in rejecting the market share ap-

²⁰⁵ See text at notes 108-13 *supra*.

²⁰⁶ See text and notes at notes 8-14 *supra*.

²⁰⁷ FORDHAM COMMENT, *supra* note 3, at 994 (presenting this hypothetical example in the course of explaining and advocating its proposed theory of liability).

²⁰⁸ See Section IV. A. *infra*.

²⁰⁹ See text and notes at notes 8-14 *supra*.

²¹⁰ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 614-17, 607 P.2d 924, 938-40, 163 Cal. Rptr. 132, 146-48, *cert. denied*, 49 U.S.L.W. 3270 (1980).

proach failed to explain how placing the rigors of the identification requirement on DES plaintiffs would do anything but allow culpable producers to escape liability altogether.

While the market share theory's rejection of joint and several liability²¹¹ and its effective elimination of the element of factual causation²¹² in an entire class of tort cases represents a significant departure from existing law, it is a departure approved by the California Supreme Court only after a careful consideration of the interests involved in DES litigation. The theory rests upon several specific and explicit policy judgments. For example, the market share theory, described by the *Sindell* court as a modification of the *Summers* alternative liability theory,²¹³ rests upon a policy judgment that is substantially the same as that underlying *Summers*. As between an innocent plaintiff, unable to identify the specific tortfeasor that harmed him, and a group of tortfeasors, one or more members of which most likely caused that harm, any injustice associated with the determination or apportionment of liability should fall upon the tortfeasors.²¹⁴

In justifying its decision to depart from existing law, the court in *Sindell* noted that advances in science and technology often result in the creation of potentially dangerous fungible goods that, for one reason or another, cannot be traced back through the chain of distribution to the manufacturer.²¹⁵ Faced with this fact of modern industrial life, courts can elect either to cling dogmatically to established legal doctrines that will — in these new industrial contexts — work inequitable results, or, instead, they may creatively fashion new remedies better suited to changed times and circumstances.²¹⁶ Concerning the need for occasional judicial innovation, the *Sindell* court referred to Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Company*.²¹⁷ In *Escola*, Justice Traynor expressed the view that a law of products liability grounded solely upon concepts of manufacturer negligence or privity between the seller and the injured party, provided inadequate protection to consumers in an era of complex mass marketing.²¹⁸ The *Sindell* court expressed a similar belief in the occasional need to alter tort law, in this case the rules of causation and liability, in order to do justice in a particular case or class of cases.²¹⁹ Consequently, a second policy underlying the *Sindell* decision is a belief in the occasional desirability and necessity of judicial innovation.

²¹¹ See text and note at note 188 *supra*.

²¹² See text at notes 196-98 and 203-05 *supra*.

²¹³ See text at notes 189-91 *supra*.

²¹⁴ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 49 U.S.L.W. 3270 (1980).

²¹⁵ *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

²¹⁶ *Id.*

²¹⁷ 24 Cal. 2d 453, 150 P.2d 436 (1944).

²¹⁸ *Id.* at 461-68, 150 P.2d at 440-44 (Traynor, J., concurring).

²¹⁹ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 49 U.S.L.W. 3270 (1980).

A further policy explaining the market share theory is that of allocating the cost of an injury to the party that is better able to bear it. The court in *Sindell* was of the opinion that DES manufacturers are better able to absorb the costs associated with DES-related injuries than are DES plaintiffs.²²⁰ The market share theory, therefore, represents a rather careful balancing of many of the competing interests and equities present in the DES cases.²²¹ For instance, the *Sindell* court considered the ability of the plaintiff to identify the source of the specific DES to which she was exposed before birth, and the degree to which she could be considered at fault in not being able to make such an identification.²²² The court also weighed the relative ability of the parties to bear the costs allegedly associated with DES use.²²³ Finally, the court attempted to construct a theory that would protect the legitimate desire of each DES maker to not have to pay for harm caused by another firm's DES.²²⁴

²²⁰ *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. In another of its criticisms of the market share theory, however, the dissent pointed out that the theory may — insofar as it leads to the imposition of substantial additional liability upon the pharmaceutical industry — discourage the development of new and useful drugs. *Id.* at 619-21, 607 P.2d at 941-43, 163 Cal. Rptr. at 149-51 (Richardson, J. dissenting). While the dissent's concern with encouraging the development and dissemination of new and needed drugs is quite valid from the point of view of public policy, that public policy should not be indirectly effectuated by placing upon DES plaintiffs the identification requirement. Rather, if the public policy of fostering drug development and distribution is sufficiently compelling, courts forthrightly should deny DES plaintiffs recovery on the grounds of that policy, and should not rely on the plaintiff's failure to satisfy the identification requirement.

²²¹ See *Sindell*, Plaintiff's United States Supreme Court Brief, *supra* note 18, at 13 n.19, where *Sindell*'s counsel listed the interests, factors, and equities explicitly considered by the *Sindell* court as:

- (1) The difficult problems created by a complex industrialized society, advances in science and technology which produce fungible goods which may harm innocent consumers and which cannot be traced to any specific producer.
- (2) The inability of the consumer "to protect himself from serious, sometimes permanent, sometimes fatal injuries caused by deleterious drugs."
- (3) The availability of evidence of causation.
- (4) The ability of the parties to bear the cost of injury resulting from the manufacture of a defective product.
- (5) The ability of the parties to discover, warn, guard against, and insure for risk of such injuries.
- (6) The need to distribute the costs of such injuries to the manufacturer of the product and among the public as a cost of doing business.
- (7) The possibility of holding a group of defendants liable for the injury, none of which was the actual manufacturer of the DES that the plaintiff's mother ingested.
- (8) The possibility that each manufacturer's liability may not precisely conform to the injuries caused by its own products.
- (9) The problems of determining market share with mathematical exactitude.
- (10) The propriety of using market share as opposed to joint and several liability as a method of cost-spreading. [Citations omitted.]

Id.

²²² *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied*, 49 U.S.L.W. 3270 (1980).

²²³ *Id.*

²²⁴ *Id.* at 612-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

In addition to representing a careful balancing and reconciliation of conflicting interests, the market share theory also signifies a recognition that the factual circumstances of the typical DES case present new problems that traditional tort theories and principles cannot equitably address. To deny relief because of the plaintiff's inability to identify the source of the DES that harmed her seems unacceptably harsh. Yet, traditional tort theories and principles would, if strictly applied, in most cases do precisely that. Courts determined to relieve DES plaintiffs of their identification burden face a choice. Those courts can either stretch existing theories beyond their established and seemingly proper bounds, or they can honestly admit the "gap in tort law"²²⁵ that the DES cases present and creatively and forthrightly formulate a new rule of law tailored to do justice in those cases. The *Sindell* court chose the latter route.

While the market share theory therefore stands as the best approach to the DES identification problem yet devised by the courts, it has yet to be fully developed. Some of the questions concerning the theory that were not explicitly answered by the *Sindell* court are considered in the following section.

IV. QUESTIONS AND PROPOSALS CONCERNING THE MARKET SHARE THEORY

The market share theory is the best approach to the DES identification problem yet devised. It relieves DES plaintiffs of the need to satisfy the identification requirement in those cases where it appears that there is a substantial likelihood that one of the joined defendants did in fact manufacture the DES that harmed the plaintiff. The theory, however, does not require the plaintiff to prove that the manufacturers actively cooperated in producing and marketing DES. Nor does the market share theory demand that the plaintiff join every possible supplier of the DES to which she was exposed in order to benefit from a shift in the burden of proof on the causation question. Finally, the theory allocates liability among defendant manufacturers more precisely and equitably than do contribution rules that divide liability equally among defendants held jointly and severally liable. Despite the many enumerated strengths of the market share theory, however, ambiguities and questions remain about some aspects of the theory. It will be, therefore, the aim of this section to explore some of these questions and ambiguities and to make proposals concerning the practical operation of the theory.

A. *Should the Plaintiff be Entitled to Recover only that Percentage of her Damages that Corresponds to the Percentage of the Relevant Market Joined in her Suit?*

In outlining the contours of the market share theory, the *Sindell* court did not express an intention to limit a plaintiff to recovery of the percentage of her damages that corresponds to the percentage of the market accounted for by the defendants joined to her lawsuit. It appears, therefore, that a plaintiff who is

²²⁵ FORDHAM COMMENT, *supra* note 3, at 1007.

successful under the market share theory can recover one hundred percent of her damages from defendants that together account for less than one hundred percent of the DES that her mother might have taken.

Allowing the plaintiff to recover in full, however, may not be the most prudent approach. Such a rule may cause a very few DES manufacturers to bear all of the damages awarded in DES suits. For example, assume that a plaintiff, unable to satisfy the identification requirement, sues two DES makers whose respective shares of the relevant DES market were fifty percent (firm A) and twenty-five percent (firm B). If the court deemed seventy-five percent of the market sufficiently substantial to shift the burden of proof on the issue of causation to the defendants, and if neither defendant could sustain that burden, the plaintiff apparently would be able to recover one hundred percent of her damages from defendants that together were responsible for only seventy-five percent of the DES that might have done the damage. Two conclusions follow from this example. First, each defendant bears a portion of the plaintiff's damage award that substantially exceeds its market share. Firm A, with a market share that is twice that of firm B, presumably bears twice as much of the plaintiff's damages as does firm B. Thus, firm A, while responsible for only fifty percent of the DES that might have reached and harmed the plaintiff, is liable for about sixty-seven percent of her damages, while firm B, with a market share of twenty-five percent, must shoulder roughly thirty-three percent of those damages. Second, if the facts of the hypothetical case were replicated in three other lawsuits, it would be statistically likely that in one of the four cases neither of the defendants would have produced the DES that caused the injury for which they were being held liable. These two conclusions raise serious doubts about the wisdom and fairness of allowing a full recovery in those cases in which less than the entire market has been joined to the suit.

Three arguments support the proposition that DES plaintiffs should in every case recover one hundred percent of their damages, regardless of the percentage of the market joined. First, an underlying premise of the market share theory is that between an innocent plaintiff and a group of tortfeasors, one or more members of which have most likely caused the plaintiff harm, hardship associated with the determination and division of liability should fall upon the defendants.²²⁶ Second, in practice, a high percentage of the relevant market will be accounted for by the joined defendants, minimizing the disparity between market shares and damage shares.²²⁷ Third, defendants can always

²²⁶ See text at notes 213-14 *supra*.

²²⁷ For example, the plaintiff in *Sindell* claimed that it had been estimated that six or seven DES makers together accounted for ninety percent "of the market for this drug." *Sindell*, Plaintiff's California Supreme Court Brief, *supra* note 4, at 5. Dr. Don Fraser, Director of New England Drug Information Consultation Services, however, doubts that such a small number of manufacturers accounted for so large a proportion of pregnancy-related DES sales throughout the nation. Interview at the Massachusetts College of Pharmacy and Allied Health Sciences, Boston (January 5, 1981).

implead other manufacturers that supplied DES to the relevant market, thus reducing each defendant's proportionate share of any damages recovered by the plaintiff.²²⁸ The arguments that favor allowing DES plaintiffs to recover one hundred percent of their damages in every case have some merit. On balance, however, it is preferable to restrict a successful DES plaintiff to recovery of only that percentage of her damages that corresponds to the percentage of the relevant DES market accounted for by those manufacturers joined as defendants. Such an approach recommends itself for two reasons.

First, such a limit on plaintiffs' recoveries would encourage DES plaintiffs to select a forum in which they could join as many possible sources of the drug as practicable, so as to recover the maximum possible percentage of their damages. Second, and more importantly, by limiting a plaintiff's damages to the portion of the relevant market joined, maximum precision in correlating the defendants' aggregate liability with their actual responsibility for harm caused by their DES would be achieved.²²⁹ This can be demonstrated by referring to a previous hypothetical example.²³⁰ If firms A and B together produced seventy-five percent of the DES used in pregnancy, they presumably are responsible for approximately seventy-five percent of the DES-related injuries suffered by those plaintiffs who were exposed to the drug while in utero. Firms A and B should pay, therefore, seventy-five percent of the damages recovered in those cases in which the source of the DES is unknown. Requiring instead that firms A and B pay one hundred percent of the plaintiffs' damages would mean that in roughly one of every four cases A and B would be paying for injuries that neither of them actually caused. Such a result would seem to be at odds with the *Sindell* court's assurance that under the market share theory, "each manufacturer's liability . . . would approximate its responsibility for the injuries caused by its own products."²³¹

Consequently, while the *Sindell* market share theory appears to allow a successful plaintiff to recover all of her damages from defendants that together account for less than all of the DES that might have done the damage, the better rule is to limit the plaintiff to recovery of the percentage of her damages that corresponds to the percentage of the relevant market joined in her suit.

B. Questions and Proposals Concerning Market Share Data

The *Sindell* court left for future consideration any problems of proof associated with the determination of market shares.²³² Indeed, the question of

²²⁸ See text at note 185 *supra*.

²²⁹ See text at notes 206-08 *supra*, for an example of how the market share theory, ideally, can equate each manufacturer's aggregate liability with its actual responsibility for all of the injuries caused by its DES.

²³⁰ See the hypothetical example involving firms A and B contained in text between notes 225 and 226 *supra*.

²³¹ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980).

²³² *Id.* at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

precisely what market share a given firm enjoyed at a particular time will often be a matter of dispute at trial, as it will determine the extent of each defendant's liability to the plaintiff.²³³ Determination of market shares will be difficult for various reasons. First, not all of the DES made during the past three decades was produced and marketed as a treatment to prevent miscarriage. Among other things, DES also was used as a treatment for menopausal problems, a lactation suppressant during the post-partum period, and as a treatment for prostate cancer.²³⁴ Thus, while a particular firm may have produced and sold a great deal of DES, it may be quite difficult to ascertain what portion of its total DES output was sold for use by pregnant women. Second, before market shares may be ascertained, the scope of the relevant market must be defined, and as to this problem, the *Sindell* opinion offered little guidance.

The *Sindell* court only obliquely stated what it considered to be the scope of the relevant market: that DES which a plaintiff's mother "might have taken."²³⁵ The court recognized that definition of the appropriate market would present practical problems.²³⁶ Adopting *Sindell*'s definition, the relevant market might be a single pharmacy, a group of pharmacies, and so on, depending upon where the plaintiff's mother purchased her DES. The problems of proof in establishing the relevant market, under *Sindell*'s rather cryptic guidelines, seem enormous. First, *Sindell* gave no indication whether plaintiffs or defendants bear the burden of proof on the issue of the appropriate scope of the market. Second, the opinion does not suggest what the consequences are of a party's failure to meet this burden. Third, the case does not disclose how, in an attempt to define the relevant market, either party might prove that the plaintiff's mother bought DES from a particular pharmacy when, as will often be the case, the purchases occurred twenty-five or thirty years ago and pertinent records and witnesses have long since disappeared.²³⁷ It appears, therefore, that trial courts may be forced to devote an inordinate amount of time merely to the determination of the scope of the relevant DES market.

Rather than engage a court in laborious, time-consuming, and confusing factfinding on the issue of what the appropriate market should be in any given case, it seems preferable to presume in every case that the appropriate market is the United States as a whole. Such a rule will strike a compromise between precision and practicality. On the one hand, such a presumption will allow for apportionment of liability according to the manufacturers' nationwide market

²³³ *Id.* at 612, 607 P.2d at 937-38, 163 Cal. Rptr. at 145.

²³⁴ Physician's Desk Reference 951 (31st ed. 1977).

²³⁵ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 49 U.S.L.W. 3270 (1980).

²³⁶ *Id.* at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

²³⁷ For example, Judith Sindell's mother ingested the DES to which Judith was exposed in 1950, *Sindell*, Plaintiff's California Supreme Court Brief, *supra* note 4, at 26. In *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978), records and testimony (recollections) needed to enable the plaintiff to satisfy the identification requirement were destroyed or otherwise lost because of the passage of time. *Id.* at 338.

shares rather than on an equal basis, and thus will be a step toward greater precision and fairness in the allocation of liability for DES-related injuries. On the other hand, while further narrowing the scope of the market to a few pharmacies would yield even greater precision in liability allocation, it surely would also magnify the problems of proof faced by the trial court. Therefore, by presumptively fixing the United States as a whole as the relevant market, a reasonable compromise between precision in liability allocation and judicial efficiency will be reached. Since the nation as a whole should be presumed to be the relevant market, nationwide market share data should be presumed as well. If such data does not now exist,²³⁸ some agency of the federal government should begin the process of constructing such data.

In any case in which the market share theory is utilized, the court should therefore adopt as a rebuttable presumption nationwide market share data. If either the plaintiff or the defendants object to this presumption, it should be up to the objecting party to demonstrate why another market unit or other market share data should be relied upon by the court in judging the adequacy of the plaintiff's joinder or in determining the liability of each of the defendants. For example, if a DES firm with a nationwide market share of eight percent can establish that it sold no DES during the relevant time period in the state where the plaintiff's mother purchased her DES, that firm will have met its burden of demonstrating the inapplicability of nationwide market share data to it and will be dismissed from the suit. Likewise, if the plaintiff can show that firm A, while enjoying only a two percent share of nationwide DES sales, in fact supplied one half of the pregnancy-related DES sold by the pharmacy from which the plaintiff's mother obtained her DES, the plaintiff will have rebutted the presumption of firm A's two percent market share. In any case, while apportioning liability among DES producers according to their respective market shares is a sound idea insofar as it promises a more equitable division of liability than do contribution rules that divide liability equally, the need to conserve the courts' time argues in favor of adopting as presumptions what are admittedly only rough approximations of actual market shares in any given case, leaving it to dissatisfied litigants to show that justice in a particular case requires adoption of different data than those presumed.

If reliable market share data relating to individual states are now available, or become available, those data, rather than national market share statistics, should be adopted by the courts in the interest of achieving greater precision in equating each manufacturer's total liability with its actual responsibility for the harm caused by its DES.

It is submitted, therefore, that while the *Sindell* market share theory is the best approach to the DES identification problem yet sanctioned by the courts,

²³⁸ Defendants in *Sindell* claimed that no such data were available. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 613 n.29, 607 P.2d 924, 937 n.29, 163 Cal. Rptr. 132, 145 n.29, cert. denied, 49 U.S.L.W. 3270 (1980). Dr. Don Fraser, Director of New England Drug Information Consultation Services, also doubts that any reliable DES market share data are available for most pharmaceutical companies. Interview at the Massachusetts College of Pharmacy and Allied Health Sciences, Boston (January 5, 1981).

certain modifications can make it even better. First, a successful plaintiff should recover only that percentage of her damages corresponding to the portion of the relevant DES market represented by the producers joined to her suit. Such a rule will insure that the market share theory achieves the most accurate matching of each manufacturer's total liability and actual tort responsibility that is possible in the absence of the ability of the plaintiffs to satisfy the identification requirement. Second, as a compromise between the precision of allocating liability on the basis of market shares and the need to conserve the courts' time, national or, preferably, state market share data should be presumed in every case. Those parties that object to the use of such presumed data should bear the burden of demonstrating that other data should be used in their particular case.

CONCLUSION

The DES cases present the courts with a choice as to how the law shall respond to a novel situation.²³⁹ This note has surveyed and scrutinized the range of current judicial responses to this choice. It has been seen that there is authority to the effect that if a plaintiff cannot identify the source of the DES to which she was exposed before birth, she cannot recover for her harm.²⁴⁰ It has also been held that a plaintiff may circumvent the identification requirement by employing theories developed in other contexts, such as the alternative liability theory,²⁴¹ some for entirely different purposes, such as the concerted action theory.²⁴² Yet another court has ruled that the DES cases' new and fundamentally different fact pattern justifies the formulation of an entirely new theory, the market share theory,²⁴³ to do justice in those cases.

It is submitted that of the three approaches outlined above and surveyed in this note, the market share theory of California, while it has yet to be fully developed and would benefit from certain alterations, combines the merits of achieving a just and carefully considered result with a refusal to do violence to existing legal theories by stretching them to govern extraordinary new fact patterns. The market share theory, therefore, stands as the best response to the DES identification problem yet devised. It must be recognized that carefully considered and crafted forthright judicial innovation is at times preferable to no innovation, or to innovation concealed in the garb of traditional legal theories.

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²³⁹ See text and notes at notes 8-14 *supra*.

²⁴⁰ *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978). See text at notes 24-41 *supra*.

²⁴¹ *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 73-77, 289 N.W.2d 20, 25-27 (1979); *Accord*, *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super. 551, —, 420 A.2d 1305, 1312-16 (1980). See text at notes 129-59 *supra*.

²⁴² *Abel v. Eli Lilly and Co.*, 94 Mich. App. 59, 72-73, 289 N.W.2d 20, 24-25 (1979). See text at notes 78-92 *supra*.

²⁴³ *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46, *cert. denied*, 49 U.S.L.W. 3270 (1980).