PLAINTIFF'S EXHIBIT

FD-555

"Market Share Liability"

The *Sindell* decision and its disturbing implications for defendants.

Between 1941 and 1971 various drug companies promoted and marketed DES (diethylstilbesterol) — a synthetic compound of estrogen. The drug was administered to pregnant women to prevent miscarriages. It is estimated that up to three million women took DES during pregnancy. In 1971 the FDA ordered the drug companies to cease marketing DES to prevent miscarriages and to warn that the drug should not be used by pregnant women. It has been alleged that DES may cause pre-cancerous vaginal and cervical growths in female children exposed to DES before birth. These may manifest themselves after a minimum latent period of ten to twelve years.

In *Sindell v. Abbott Laboratories*, the plaintiff alleged that, as a result of her mother's ingestion of DES during pregnancy, she developed a malignant bladder tumor. Unable to identify which company manufactured the drug claimed to be responsible for her injuries, the plaintiff nevertheless brought an action against eleven drug companies and a number of other parties, on behalf of herself and other women similarly situated. The trial court dismissed the action, brought under several theories of liability, on the grounds that the plaintiff could not identify which defendant had manufactured the DES her mother had ingested.

Bases of Liability

On appeal, the California Supreme Court, at 607 P2d 624 (Cal 1980), CCH Prod Liab Rptr §8648, reversed the previous judgment of dismissal. Until *Sindell*, generally, plaintiffs were required to prove that their injuries were caused by an act of the defendant. The court evaluated each of the following exceptions that the plaintiff proposed as a basis for holding the defendant liable.

The *first exception*, known as alternative liability, is embodied in §433B, subsection 3 of the *Restatement (Second) of Torts*, which states:

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

This theory is best illustrated by the case of *Summers v. Tice*, 199 P2d 1 (Cal 1948). Two hunters,

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shown to be negligent in firing guns, were held jointly liable because it could not be determined which hunter had fired the shot which hit the plaintiff. The court concluded that the rule in *Summers* was not applicable here. In *Summers*, all the parties who could have been responsible for the harm to the plaintiff were joined as defendants. Here, only five out of 200 DES manufacturers were defendants in the suit.

The *second exception* is the "concert of action" theory, as embodied in §876 of *Restatement (Second) of Torts*:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
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> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
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> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The plaintiff's complaint alleged that, by relying upon each other's testing and promotion methods, the defendants acted in pursuance of a common plan or design to commit a tortious act. The court concluded that such reliance is common practice in the industry.

The problem with this theory is that applying the "concert of action" to this situation would render almost any manufacturer liable for the defective product of an entire industry. Furthermore — as the court recognized in rejecting this theory there was no allegation that each defendant knew the other defendant's conduct was tortious and that they encouraged one another to test and warn inadequately with regard to use of DES.

The *third exception* is the theory which the plaintiffs called enterprise liability. The court, however, more accurately referred to it throughout as "*industry-wide liability.*" *The former is really* a policy argument to impose liability; the latter states the theory or cause of action itself. The theory was suggested in *Hall v. E. I. du Pont de Nemours & Co., Inc.*, 345 FSupp 353 (ED NY 1972), in which substantially the entire blasting cap industry plus its trade association were joined in an action involving twelve separate blasting cap incidents which occurred in ten different states. In *Hall*, the court followed this line of reasoning: since there was evidence that the defendants had adhered to an industry-wide standard concerning the safety features, manufacture and design of the caps, if the plaintiffs could establish that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all of the defendants. The industry-wide standard itself, therefore, became the cause of the plaintiff's injury. Since each industry member had adhered to the standard, according to *Hall*, each member had contributed to the plaintiff's injury.

This critique of *Sindell* was edited by DRI Acting Research Director Donald J. Hirsch, with editorial comments by Assistant Research Director Susan M. Danielski. It is based upon research memoranda by Kay Ann Hunt and Mary L. Schuette, DRI Student Research Assistants.

The *Sindell* court rejected the application of industry-wide liability by distinguishing this case from *Hall*. The court in *Hall* had cautioned that this theory of liability applied to industries composed of a small number of producers, such as the blasting cap industry within the United States, which was composed of six manufacturers. In contrast, there were at least 200 manufacturers of DES. Furthermore, there were no allegations, as in *Hall*, that DES producers had delegated some functions relating to safety to a trade association and, therefore, had jointly controlled the risk. Finally, since the drug industry is so closely regulated by the FDA, the court concluded it would be unfair to impose on a manufacturer liability for injuries resulting from the use of a drug which it did not supply, simply because it followed standards suggested or compelled by the government.

Market Share Liability

Having ruled out all three exceptions upon which the plaintiff based her cause of action, the majority admitted that, under traditional tort law, the plaintiff (being unable to identify the specific manufacturer of the DES used by her mother) would be "precluded from any recovery."

The court did not stop there, but went on to deal with this situation — one involving fungible goods which can harm consumers but cannot be traced to the specific producer — by fashioning an entirely new theory of liability, "market share liability." In the words of dissenting Justice Richardson, the majority adopted

> a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue generations later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiff's injuries. 607 P2d at 938.

No sound academic analysis justified this major innovation in strict tort liability. In a scant column and one-half, the court set forth its "forceful arguments in favor of holding that the plaintiff has a cause of action," which may be summarized as follows: In light of an increasingly complex industrialized society, it is virtually impossible to trace fungible goods harmful to consumers to a specific producer. Rather than adhering rigidly to prior doctrine the majority felt compelled to fashion a remedy to meet these changing needs by "some adaptation of the rules of causation and liability."

The only two justifications for so major a change involved the "deep pockets" of corporate defendants. The court's "most persuasive reason," based on *Summers*, was that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." The second justification was the broader policy argument that defendants are better able to bear the cost of injury. Justice Richardson argued that a defendant's wealth is surely not a reliable indicator of fault and should play no conscious part in the legal analysis of the problem. In applying this new theory of market share liability, the court concluded that it would be reasonable

> to measure the likelihood that any of the defendants supplied the product which allegedly injured the plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriages bears to the entire production of the drug sold by all for that purpose. 607 P2d at 937

Market share liability imposes only several liability upon the defendants. Each defendant will be held liable for a percentage of the judgment, as determined by that defendant's market share, unless a particular defendant can demonstrate that it could not have made the DES which injured the plaintiff. The plaintiff has the burden of joining in one action the manufacturers of a substantial market share of DES. Once the plaintiff has met her burden, the defendants may cross-complain against other manufacturers not joined in the action. Unfortunately, this is of little consolation. As one commentator has stated: "Since no other state has recognized such a theory, if a defendant in California cannot secure jurisdiction over another manufacturer of DES in that state, there will be no basis for contribution or indemnity against those other producers of DES." Kroll, Intra-Industry Joint Liability, Ins L J 185, 194 (Apr 1980).

Basic Unfairness Of Theory

Justice Richardson's dissenting opinion further highlighted some of the problems inherent in the *Sindell* majority opinion. He viewed the market share theory as basically unfair to some defendants who may have had nothing whatsoever to do with causing an alleged injury. Not only did the majority's theory shift the burden of proof to the defendant, but it effectively guaranteed that the plaintiffs would prevail on the causation issue because the defendants are no more capable of disproving causation than plaintiffs are of proving it. Furthermore, the plaintiff can recover from a small number of defendants — each of whom individually may account for only a small share of the market — so long as the aggregate business of those defendants is substantial. According to the dissent's analysis of this point:

> In other words, a particular defendant may be held proportionately liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiff's injuries. 607 P2d at 939

The majority give no guidance as to what constitutes a "substantial" share of the relevant market, although it indicates that the percentage need not be as great as 75 per cent.

The dissent criticized the violence done to traditional tort principles by the drastic expansion of liability:

> The majority now expressly abandons the . . . traditional requirement of some causal connection between defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship. 607 P2d at 939

Under the majority's new theory, a defendant may be held liable if he happens to be involved in a similar business and if causation is possible, even though remote.

Furthermore, under market share liability, an unwarranted preference is created for a particular class of plaintiffs. In the ordinary tort case the defendant may be either insolvent or not amenable to process. Under the majority's theory, plaintiffs who wholly fail to prove any causation are rewarded by being offered a wider selection of defendants and a greater opportunity for recovery. Not only are the plaintiffs relieved of matching the conduct of a particular defendant to their injury, but the majority "sprinkles the rain of liability upon all the joined defendants." 607 P2d at 939 Additionally, market share liability will fall disproportionately on those defendants amenable to suit in California.

Finally, the dissent recognized the injury threatened to the public's interest in continued basic medical research. The opinion noted that Comment k to §402A "implicitly recognizes the social policy behind the development of new pharmaceutical preparations." 607 P2d at 941 Justice Richardson asked:

> Must a drug manufacturer to escape this blanket liability wait for a generation of testing before it may disseminate drugs? If a drug has beneficial purposes for the majority of users but harmful side-effects are later revealed for a small fraction of consumers will the manufacturer be absolutely liable? If adverse medical consequences wholly unknown to the most careful and meticulous of present scientists, surface in two or three generations, will similar liability be imposed? 607 P2d at 942

The court has revised the requirements of a products liability action, leaving practical questions unanswered.

Justice Richardson concluded that the majority's decision effectively makes the drug industry an insurer of all injuries attributable to drugs of unprovable origin.

Economic and Practical Effects

Serious economic effects can also be anticipated. When a manufacturer prices a product, it may now have to consider the liability it may incur for a defective product manufactured by another. Insurers of product manufacturers will be faced with answering for the tortious conduct of companies that they "neither insure nor receive a premium from." Kroll, supra, at 196. At the same page of his article, Mr. Kroll further addresses the problems which pharmaceutical manufacturers having large self-insured retentions will face.

DES cases may represent only the "tip of the iceberg" with regard to cases in which a large number of plaintiffs — unable to recover in a traditional products liability case because they could not identify the specific manufacturer — would be able to recover under market share liability. Persons alleging injuries caused by food additives, for example, would have a greater chance of recovery under the new theory. The majority opinion fails to define what constitutes a "fungible product" — thus leaving the area's scope open to speculation.

When a manufacturer prices a product, it may now have to consider the liability it may incur for another manufacturer's "defective" product.

In espousing its new theory of "market share liability," the *Sindell* court essentially has revised the requirements of a products liability action, while leaving unanswered all of the practical problems concerning market share determination. Market share liability is to be determined by the percentage of DES sold by each manufacturer for the purpose of preventing miscarriages. What the majority ignores is that DES was provided for a number of uses, and it would be most difficult to ascertain what proportion was used as a miscarriage preventive. The court fails to discuss whether "relevant market" is restricted geographically to California — the state in which DES was administered to the plaintiff's mother — or if there are any time restrictions, such as relevant market prior to the plaintiff's birth.

In an article entitled, *Market Share Liability Under California's Sindell DES Decision*, National Law J at 26 (May 19, 1980), Sheila L. Birnbaum commented on the court's failure to address any of the ramifications of the procedural issues that may arise as a result of applying this new tort theory. She gives the following illustration:

> Assume a plaintiff joins D1, who enjoyed 80% of the relevant market, and D2, who enjoyed 10%. Having met her burden of joining defendants with a "substantial market share," plaintiff's action would proceed despite the lack of proof of causation. Assume further that as the action proceeds, D1 is able to demonstrate it did not produce the injury-causing product, and is accordingly dismissed from the action.
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> May plaintiff, having initially satisfied her burden, continue the action against D2? Does plaintiff's burden of joining defendants with a "substantial" aggregate share of the market continue throughout the litigation, thereby permitting D2 to move to dismiss the action?

Given the vast potential for litigation in which plaintiffs may advocate adoption of market share liability and the adverse effects the decision may have on other industries, the words of Justice Richardson are especially appropriate:

> Respectfully, I think this is [an] unreasonable overreaction for the purpose of achieving what is perceived to be a socially satisfying result. 607 P2d at 943

A legislative effort has been made in California to reverse the "unreasonable overreaction" of the *Sindell* majority opinion. Assembly Bill 3344 would (among other things): preclude liability in a products liability case, unless the plaintiff proves by a preponderance of the evidence that the product seller's own product was a proximate cause of the injury, death or damage; this limitation would apply to all pending claims and actions. Although unlikely to pass this session, the bill is likely to be re-introduced in the next session of the legislature.

As a sidelight to an analysis of *Sindell*, the reader may wish to consult the article beginning on page 27 of this issue. The author, examining another recent decision, analyzes another court's changing of the rules of products liability after a manufacturer has had its only turn at bat, "boxing a product seller into a 'no-win' position." The root problem is that:

> a product which was not "defective" in the legal sense when it was designed and manufactured can become "defective" in the same sense many years later without any actual change in the product. This occurs because a court has modified rules of products liability law between the time the product left the control of the manufacturer and the time the product is subjected to judicial scrutiny. Kircher, *Products Liability – Judicial "Catch 22"*, infra at page 28. ∆