

"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,