

panies 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.

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

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ity. 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.

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.

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. Δ