TORTS

McCORMACK V. ABBOTT LABORATORIES: APPLICATION OF MARKET SHARE LIABILITY TO RESOLVE THE DES DILEMMA*

Diethylstilbestrol (DES) drug litigation presents a unique identification problem in the products liability context. All parties agree that the plaintiff is seriously injured and that all the defendants manufactured or produced the type of drug causing the injury. Yet, matching a particular plaintiff with a particular drug manufacturer is practically impossible. Although a modification of traditional tort law, market share liability suggests an equitable solution to the identification dilemma.

Doctors prescribed DES for the prevention of miscarriage from 1947 until 1971 when researchers discovered that use of the drug by pregnant women caused cancer in female offspring.[1] Manufacturers produced the drug in generic form, and it's adverse effects did not appear for some 10-20 years after birth.[2] As a result, most DES plaintiffs are unable to identify the specific manufacturer of the DES which caused their injury. Under traditional tort law principles, inability to establish a defendant's responsibility

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* On certified question from the U.S. District Court, the Supreme Court of Arizona heard oral argument on July 29, 1987 concerning whether or not Arizona should adopt a modified form of market share liability in a DES case. Menard v. Eli Lilly & Co., No. CV-86-0242-CQ (Supreme Ct. of Arizona filed April 21, 1986).

1. DES is a snythetic estrogen first developed in England in 1937. Although successfully used in the treatment of metastatic prostate cancer in men, scientists unquestionably link DES with cancerous and pre-cancerous abnormalities of vagina and cervix in the daughters of the 1.5 to 3 million women who took DES while pregnant. A complete history is included in Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978). *Id.* at 963 n.2 gives a list of other uses of DES. A good historical discussion can be found in Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1009-11 (D.S.C. 1981); *see also* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265, 267 (D.S.D. 1983); Abel v. Eli Lilly and Co., 418 Mich. 311, 317-18, 343 N.W.2d 164, 166-67 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 769 U.S. 833 (1984); Namm v. Charles E. Frosst and Co., 178 N.J. Super. 19, 27, 427 A.2d 1121, 1125 (1981); Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, 561-65, 420 A.2d 1305, 1310-12 (1980); Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 576, 436 N.E.2d 182, 183-84, 450 N.Y.S.2d 776, 777-78 (1982); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 587 n.2, 689 P.2d 368, 373 n.2 (1984). *See generally* Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); PHYSICIAN'S DESK REFERENCE 1141 (39th ed. 1985). DES may also cause infertility in the sons of women who took DES during pregnancy. Boston Sunday Globe, Oct. 12, 1980, at 5, col. I; Gill, Schumacher & Bibbo, *Structural and Functional Abnormalities in the Sex Organs of Male Offspring of Mothers treated with Diethylstilbestrol (DES)*, 16 J. REPRODUCTIVE MED. 147, 152-53 (1976).

2. Cancer may take up to 20 years to develop. Cancers caused by DES do not appear until the second generation. Note, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300 n.2 (1981). The type of cancer associated with DES carries a minimum latent period of 10-12 years. Sindell v. Abbott Laboratories, 26 Cal.3d 588, 589, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133 (1978), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 912 (1980); Comment, *supra* note 1, at 964-67.

for the manufacture of the product precludes a plaintiff's cause of action.[3] However, a number of courts, troubled by the fact that plaintiffs could prove serious injury and negligence and yet fail to recover, sought a solution to the DES causation problem by applying a variety of liability theories, including market share liability.[4]

Market Share Liability is a relatively new concept. It allows plaintiffs a cause of action in spite of their inability to establish causation and apportions liability based on a defendant's percentage share of the market. In theory, no defendant is liable for damages beyond that which the defendant statistically could have caused.[5]

It is important to realize that the market share approach does not expose the defendant drug companies to any liability beyond that imposed under traditional tort analysis. If all plaintiffs sued and each could identify the proper manufacturer, then each defendant would be liable for the DES it produced: its statistical share of the market.

In *Sindell v. Abbott Laboratories*,[6] California pioneered the application of market share liability to DES related injuries. Under *Sindell*, the plaintiff must join a "substantial share" of DES manufacturers; liability is then apportioned among defendants based on their relative share of the DES market.[7] The *Sindell* solution, however, is ambiguous in a number of respects. The primary concern is whether the plaintiff may recover 100% of her judgment if less than 100% of the relevant market is joined. For example, if a plaintiff joins 75% of the relevant market must that 75% pay 100% of the judgment? Also, it is unclear under *Sindell* exactly how the relevant market is to be determined and how a "substantial share" is measured.[8]

In an attempt to clarify and improve on the *Sindell* version of market share liability, the Washington Supreme Court, in *Martin v. Abbott Laboratories*,[9] posed a modified version of market share[10] which was later adopted by the Massachusetts Federal District Court in *McCormack v. Abbott Laboratories*.[11] The *Martin-McCormack* version of market share does not require

3. PROSSER & KEETON ON THE LAW OF TORTS, § 103, at 712-15, and § 41, at 271 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON].

4. *See infra* note 24 and accompanying text.

5. *See, e.g.*, Note, *supra* note 1; Martin v. Abbott Laboratories, 102 Wash. 2d 581, 600-08, 689 P.2d 368, 380-84 (1984).

6. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1978), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 912 (1980).

7. *Sindell*, 26 Cal. 3d at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

8. *See infra* notes 10 and 45 and accompanying text. For clarification of "relevant market" see George v. Parke-Davis, 107 Wash. 2d 584, 733 P.2d 507 (1987). The *George* court held the appropriate measurement of relevant market to include the number of DES pills of the pertinent dosage and type sold within as narrow a market as possible so that local or regional market data is favored over national distribution records with bankruptcy, insolvency and successor non-liability having no effect in determining actual market share.

9. 102 Wash.2d 581, 689 P.2d 368 (1984).

10. The *Martin* court stated: "We reject the *Sindell* market-share theory of liability. Not only does the *Sindell* court fail to define 'substantial' share of the relevant market, the theory distorts market liability by providing that the 'substantial' market share bears joint responsibility for 100 percent of plaintiff's injuries." *Id.* at 602, 689 P.2d at 381. "We believe that a modification of the alternate liability theory somewhat along the lines of the *Sindell* market-share approach is warranted." *Id.* at 603, 689 P.2d at 381.

11. 617 F. Supp. 1521 (D.C. Mass. 1985).

a minimum number of defendants, and although a plaintiff may not always collect 100% of her judgment, doubts as to the percentage of a plaintiff's recovery are eliminated.[12]

The essential distinction between the *Sindell* and *Martin-McCormack* versions is reduced to a decision as to who should bear the risk of the litigation. *Sindell* places the risk of having to pay more than its actual percentage of the market on the defendant,[13] whereas *Martin-McCormack* places the risk of not collecting 100% of a judgment on the plaintiff.[14] For example, assume each of three defendants represents 25% of the relevant market and no other defendants are joined. Under the *Sindell* version, although each defendant's actual percentage is only 25%, if plaintiff is to collect 100% of the judgment, each defendant must pay 1/3 or 33% of the judgment. In contrast, under these circumstances, the *Martin-McCormack* version of market share liability each defendant pays a 25% share limiting the plaintiff's recovery to 75% of the entire claim.

McCormack's concurrence in the *Martin* version of market share liability supports the view that the risk of litigation is more appropriately placed on the plaintiff and indicates how courts may resolve the DES causation problem in the future.

The scope of this Comment will include a discussion of the *Sindell* version of market share liability and an explanation of the modifications posed by *Martin-McCormack*. The analysis reflects this writer's opinion that application of the *Martin-McCormack* version of market share liability is appropriate to the DES context.

THE *MCCORMACK* FACTS

Plaintiff, Shelley McCormack, was born April 27, 1955. To prevent miscarriage, her mother took DES during her pregnancy. In April, 1974 Shelley McCormack developed vaginal adenosis allegedly as a result of her mother's ingestion of DES during pregnancy.[15]

Since the plaintiff could not identify the specific manufacturer of the DES taken by her mother, she sought recovery under a market share theory of liability.[16] The complaint named six drug companies as defendants, alleging that they represented a substantial share of the DES market in the relevant geographic area and time period.[17] The court allowed the plaintiff to proceed under a market share theory of products liability.[18] The *McCor-*

12. *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383.

13. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1978), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 912 (1980).

14. *Martin*, 102 Wash. 2d at 607, 689 P.2d at 383.

15. Adenosis (tissue placed abnormally on the cervix or vagina) is the most common abnormality associated with DES injuries. Comment, *supra* note 1, at 965 n.10.

16. McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1524 (1985).

17. *Id.* at 1523 n.1.

18. Plaintiff asserted that the defendant drug companies negligently designed, manufactured and distributed the drug, failed to adequately warn physicians and the general public of health risks of which the defendants knew or should have known, and negligently misrepresented that the drugs were safe and effective for use by pregnant women for the prevention of miscarriage. *Id.* at 1523. Considering the magnitude of injury and the unique circumstances involved in a DES case, the court felt a remedy under a market share liability was appropriate. *Id.* at 1526.

mack court adopted the *Martin* version of market share both in form and content, stating that it believed the *Martin* version offered the most useful framework for fashioning a market share theory of liability in Massachusetts.[19] The *McCormack* court stated that the plaintiff need not have joined a substantial share of defendants. Once the plaintiff had established the requisite elements of injury,[20] the court would apportion liability among defendants based on a percentage share of the relevant market.[21]

The *McCormack* court granted summary judgment to Upjohn Co. and Dart Industries, Inc. when each established that they did not manufacture or distribute the DES that caused the plaintiff's injury.[22] The court remanded the case, thus entitling Shelley McCormack to proceed with her cause of action under market share theory of liability against all remaining defendants, including Abbott Laboratories, Merck & Co., Eli Lilly & Co., and E.R. Squibb & Sons.[23]

BACKGROUND TO THE *McCORMACK* DECISION

The unique circumstances of DES litigation result in a variety of decisions by the courts, ranging from denial of recovery to application of diverse theories of liability.[24] Primarily, courts rely on concert of action,[25] alterna-

19. *Id.*

20. *See infra* text accompanying note 36.

21. *McCormack*, 617 F. Supp. at 1527.

22. *Id.* at 1530, 1531.

23. *Id.* at 1529.

24. Morton v. Abbott Laboratories, 538 F. Supp. 593, 599 (M.D. Fla. 1982) (court refused to depart from traditional tort principles and denied plaintiff a cause of action based on plaintiff's failure to identify specific drug manufacturer causing injury); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1008 (D.S.C. 1981) (court refused to allow plaintiff who is unable to identify specific manufacturer causing injury a cause of action based on traditional principles of tort law and notions of public policy); Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (cause of action denied based on traditional principles of tort recovery and plaintiff's failure of identification); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 31-35, 427 A.2d 1121, 1127-29 (1981) (court defered to the legislature and supreme court for any departure from traditional principles of tort recovery and denies plaintiff a cause of action based on failure to identify the specific manufacturer causing injury). *But cf.* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265, 271 (D.S.D. 1983) (application of alternative liability to allow a cause of action); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 912 (1980) (application of market share liability to enable plaintiffs to maintain a cause of action); Abel v. Eli Lilly and Company, 418 Mich. 311, 334-36, 343 N.W.2d 164, 174-75 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984) (application of alternative liability to enable plaintiffs to maintain a cause of action); Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, 569, 420 A.2d 1305, 1314 (1980) (adoption of alternative liability and a form of *Sindell* market share liability to allow plaintiffs to maintain a cause of action); Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 584, 436 N.E.2d 182, 188, 450 N.Y.S.2d 776, 782 (1982) (application of a concert of action theory of liability in order to allow plaintiffs to maintain a cause of action); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 603, 689 P.2d 368, 381 (1984) (application of market share liability to enable plaintiffs to maintain a cause of action); Collins v. Eli Lilly Co., 116 Wis.2d 166, 191-200, 342 N.W.2d 37, 49-54 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 826 (1984) (court fashioned a flexible variation of a comparative negligence theory of liability in order to enable plaintiffs to maintain a cause of action).

25. Concert of action theory of liability has been defined as "[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable." PROSSER AND KEETON, *supra* note 3, § 46, at 323 (footnotes omitted). Although many have considered it, only two courts have accepted this theory as appropriate to DES litigation. Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 581-85, 436 N.E.2d

tive liability,[26] enterprise liability[27] or market share liability in allowing a cause of action to plaintiffs who, through no fault of their own, are unable to identify the specific manufacturer of the DES causing their injury.[28] Other courts refuse to stray from traditional guidelines of tort recovery and simply grant defendants a summary judgment outright.[29]

Traditional guidelines of recovery for injuries suffered as a result of an unsafe product require the plaintiff to establish that the claimant's injury or illness was attributable to a dangerous condition of a product identified as being one that was supplied by the target defendant, either as a manufacturer or some other seller or supplier in the marketing chain; the product was defectively dangerous at the time of the damaging event out of which the claimant's injury or illness arose; the defective condition was a cause of the damaging event; the defective condition was in existence at the time possession was surrendered by the defendant; and the defective condition was a proximate legal cause of the damaging event.[30]

In spite of tradition, many courts view refusal to allow recovery for DES plaintiffs as an offense to our fundamental sense of fairness and jus-

182, 186-89, 450 N.Y.S.2d 776, 780-83 (1982); Abel v. Eli Lilly and Co., 418 Mich. 311, 336-39, 343 N.W.2d 164, 175-76 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984).

26. The leading case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948), illustrates the alternative liability theory. "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 such actor to prove that he has not caused the harm." RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). The theory has not been completely rejected in DES litigation. *See* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265, 271 (D.S.C. 1983); Abel v. Eli Lilly and Co., 418 Mich. 311, 334, 343 N.W.2d 164, 174 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984).

27. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), established the theory of enterprise liability. Individual manufacturers of blasting caps were held liable based on industry-wide cooperation in the manufacture and design of the caps. Under this theory, the question of which defendant actually caused the harm is subordinated to the fact that the industry as a whole engaged in hazardous conduct. Thus, each defendant is held liable based on industry-wide standards. Although considered, a number of DES courts rejected this theory as either inappropriate or too drastic a shift from traditional tort principles. Morton v. Abbott Laboratories, 538 F. Supp. 593, 598 (M.D. Fla. 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017-18 (D.S.C. 1981); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 34-35, 427 A.2d 1121, 1128-29 (1981); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 599-600, 689 P.2d 368, 379-80 (1984).

28. The injury to the plaintiff occurs in utero. The plaintiff in most cases has little if any access to information regarding the specific DES that caused her injury, nor for that matter does she have any responsibility for the injury itself. *See supra* note 2. Although there is some hint to the contrary, McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 84, 150 Cal. Rptr. 730, 734 (1978), the vast majority of DES cases recognize the plaintiff as innocent and without fault. McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1525 (D.C. Mass. 1985); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 600-01, 607 P.2d 924, 930, 163 Cal. Rptr. 132, 138 (1980), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 826 (1984); Ferrigno v. Eli Lilly, 175 N.J. Super. 551, 568, 420 A.2d 1305, 1313 (1980); Bichler v. Eli Lilly, 55 N.Y.2d 571, 579, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982); Abel v. Eli Lilly, 418 Mich. 311, 326, 343 N.W.2d 164, 173 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 190, 342 N.W.2d 37, 49 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 826 (1984).

29. *See* Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1019 (D.S.C. 1981); Morton v. Abbott Laboratories, 538 F. Supp. 593, 600 (M.D. Fla. 1982); McCreery v. Eli Lilly and Co., 87 Cal. App. 3d 77, 81, 150 Cal. Rptr. 730, 733 (1978) Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 35, 427 A.2d 1121, 1129 (1981).

30. PROSSER AND KEETON, *supra* note 3, § 103, at 713.

tice.[31] Moreover, strong policy arguments suggest that as between the innocent plaintiff and the tortfeasors, the tortfeasors should bear the cost of injury.[32] In any event, some modification of tort theory is needed to resolve this dilemma and provide a useful framework for future DES litigation.[33]

Courts are initially faced with the threshold decision of whether or not to depart from traditional tort principles and allow DES plaintiffs a cause of action in spite of identification problems.[34] However, once that threshold is crossed, the court must then decide where to place the risks and burdens of the litigation.[35] Under *Martin-McCormack*, the plaintiff need bring suit against only one defendant and prove that the mother took DES; the DES caused subsequent injuries; the defendant produced or marketed the type of DES taken by plaintiff's mother; and the production and marketing of DES breached a legally recognized duty to the plaintiff.[36] The plaintiff need not prove the defendant marketed the *precise* DES taken by her mother—only the type of DES, for example, dosage, color, shape, markings, size, or other identifiable characteristics.[37] The defendant then has the opportunity to prove by a preponderance of evidence that it did not produce or market the type of DES taken by their mother; did not produce or market DES in that geographical area; or did not produce or market DES at that time.[38]

The court in *Martin v. Abbott Laboratories* recognized the counterbalancing effect of the application of market share liability.[39] The fact that the plaintiff is relieved of the burden of establishing causation in fact is balanced

31. *See, e.g.*, Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, 569, 420 A.2d 1305, 1314 (1980); Collins v. Eli Lilly and Co., 116 Wis. 2d 166, 191, 342 N.W.2d 37, 49 (1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 876 (1984).

32. The *McCormack* court stated: "some relaxation of the traditional identification requirement in appropriate circumstances [may be necessary] so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant time period." *McCormack*, 617 F. Supp. at 1525. The *Summers* court and the *Sindell* court, for reasons of policy and justice, discussed additional policy arguments why the innocent wronged party should not be deprived of his right to redress. Summers v. Tice, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell, 449 U.S. 912 (1980). Furthermore, "[t]he manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety." *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citations omitted).

33. Flexibility and adaptation of traditional tort theories of recovery may be necessary to accommodate the risks created by modern technology. Citing the landmark case of Escola v. Coca Cola Bottling Company, 24 Cal. 2d 453, 150 P.2d 436 (1944), the *Sindell*, court aptly stated: "in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances." *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. *See also* McCormack v. Abbott Laboratories, 617 F. Supp. at 1525.

34. *Ferrigno*, 175 N.J. Super. at 577, 420 A.2d at 1319; Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins*, 116 Wis. 2d at 191, 342 N.W.2d at 49. *But cf.* Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1007 (D.S.C. 1981); Morton v. Abbott Laboratories, 538 F. Supp. 593, 595 (M.D. Fla. 1982); Namm v. Charles E. Frosst and Co., 178 N.J. Super. 19, 27, 35 427 A.2d 1121, 1125, 1129 (1981).

35. *Sindell*, 26 Cal. 3d at 611-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45; *Martin*, 102 Wash. 2d at 604-06, 689 P.2d at 382-83.

36. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984).

37. *Id.* at 605, 689 P.2d at 382.

38. *Id.*

39. *Id.* at 606, 689 P.2d at 383.

against the defendants' ability to apportion liability according to their respective market share.[40] Those defendants who fail to exculpate themselves from liability are held equally liable unless they establish an actual percentage of market share.[41] Thus, under *Martin-McCormack*, the plaintiff assumes the risk that recovery of the entire amount of her damages is not possible in the event that each defendant establishes its actual percentage of the market and 100% of the market is not joined.[42]

In contrast, *Sindell* requires that the plaintiff join a substantial share of defendants who produced and marketed the DES that her mother might have taken.[43] The requirement of joining a substantial share is justified as a means to overcome the injustice of shifting the burden to the defendants to prove that they could not have made the particular DES which injured the plaintiff.[44]

Whatever the reasons behind the reasoning of *Sindell*, its application has not been without criticism.[45] In fact, this failing influenced the *Martin* court to reject the requirement altogether.[46]

Under *Sindell*, the defendants are given the opportunity to prove they could not have made the DES taken by the plaintiff's mother. Those unable to establish their innocence are held equally liable for the plaintiff's damages unless they can establish the actual percentage of their share of the market, in which case they are held liable for that percentage of the judgment.[47]

Martin-McCormack eliminates the substantial share requirement of *Sindell* and explicitly states that the plaintiff may not collect her entire judgment if less than the entire relevant market is joined in the action.[48] The *Sindell* court was unclear on this point. The majority opinion stated "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market. . . ."[49] The *Sindell* dissent interpreted this statement to mean that the defendants pay 100% of the judgment and that liability is apportioned among defendants based on their relative share of the market.[50] Subsequent critics of *Sindell* regard this interpretation as the

40. *Id.*

41. *Id.* at 605, 689 P.2d at 683.

42. *Id. See also* Note, *supra* note 1, at 673-75 where it is suggested that "[w]hile it would be unfortunate if plaintiffs were not compensated for the full extent of their injuries, holding each manufacturer severally liable according to its absolute market percentage makes sense from the standpoint of judicial administration."

43. *See supra* notes 7 and 10 and accompanying text. For further clarification as to what constitutes a "substantial share" percentage see Murphy v. E.R. Squibb & Sons, Inc., 40 Cal. 3d 672, 683, 710 P.2d 247, 254, 221 Cal. Rptr. 447, 454 (1985), and authorities cited therein. In spite of Squibb's alleged position as the second largest DES manufacturer in the country, the California Supreme Court in *Murphy* rejected plaintiff's contention that Squibb's 10% market share constituted a "substantial share" under the *Sindell* formula. *Id.* at 684, 710 P.2d at 254, 221 Cal. Rptr. at 455.

44. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Sindell 449 U.S. 912 (1980).

45. Fischer, *supra* note 1 at 1639; Dworkin & Zollers, *Market Share Liability—Proposals for Application*, 19 AM. BUS. L.J. 523, 525 (1982).

46. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 602, 689 P.2d 368, 381 (1984).

47. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

48. *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383.

49. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

50. *Sindell*, 26 Cal. 3d at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

clearest articulation of the rule that the *Sindell* court intended to adopt.[51] The difference between *Sindell* and *Martin-McCormack* is well illustrated by the following example.

Under the *Sindell* version of market share liability, assume a plaintiff's damages are $100,000, and she joins enough DES manufacturers to represent 60% of the relevant market. Defendant *X* occupies 20% of the relevant market that all joined defendants represent. If defendant *X* is liable only for its share of the relevant market it would be liable for 20% of the damages or $20,000. If defendants are required to pay 100% of the judgment,[52] however, then defendant *X* must pay one third of the judgment, or $33,333, which is equivalent to one third of the market that all the joined defendants represent. In other words, defendant *X* would have to pay 67% or $13,333 more than its share of the relevant market.[53]

In contrast, the *Martin-McCormack* version allows suit against only one defendant, although it is to the plaintiff's advantage to include as many defendants as possible.[54] Defendants are charged with their proven market share. If defendants are unable to establish their actual market share, their presumed market share is adjusted so that 100% of the market is accounted for.[55]

For example, assume the plaintiff's damages are again $100,000 and defendants *X* and *Y* remain subject to liability after other named defendants exculpate themselves. If neither establishes its market share then they are presumed to have equal shares of the market and are liable respectively for 50% of the total judgment: *X*, $50,000 and *Y*, $50,000. If instead, *X* establishes 20% of the market share and *Y* fails to prove its market share then *X* pays 20% of the judgment or $20,000 and *Y* pays the remaining 80% or $80,000. But if *X* establishes 20% of the market share and *Y* establishes 60% then *X* must pay 20% or $20,000 and *Y* pays 60% or $60,000—the result: plaintiff does not collect her entire judgment since the remaining 20% is the responsibility of the unnamed defendants.[56]

THE *McCORMACK* DECISION

To determine whether Massachusetts would adopt market share liability as a resolution to the DES causation problem, the *McCormack* court reviewed existing case law in conjunction with the guidelines set forth by the Massachusetts Supreme Court.[57] The Massachusetts Supreme Court previously indicated that, on adequate record, it might recognize some relaxation of the traditional identification requirements to allow recovery in appropriate circumstances against a negligent defendant.[58] Once the appropriate cir-

51. *See* Fischer, *supra* note 1, at 1645 and authorities cited therein.
52. *See supra* notes 49-51 and accompanying text.
53. *See* Fischer, *supra* note 1, at 1646.
54. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 604, 689 P.2d 368, 382 (1984).
55. *See* McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1527 (1985); *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383.
56. *Martin*, 102 Wash. 2d at 606, 689 P.2d at 383.
57. Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982).
58. *Id.* at 574, 437 N.E.2d at 190.

cumstances were met, each defendant would be responsible for that portion of a plaintiff's damages represented by that defendant's share of the relevant DES market.[59] Additionally, the *McCormack* court recognized the drastic changes in the field of product's liability due to the advent of mass production of fungible goods and complex marketing methods.[60] With these principles in mind, the *McCormack* court readily made the threshold decision to modify traditional rules of causation and liability to allow Shelley McCormack a cause of action under the *Martin* version of market share liability[61] in spite of her failure to identify the specific DES manufacturer that caused her injury.[62]

The plaintiff established her cause of action under *Martin* market share liability by asserting that her mother ingested DES during pregnancy; that plaintiff is suffering from vaginal adenosis; that DES caused plaintiff's injury; that defendants produced or marketed the type of DES taken by plaintiff's mother; and that the defendant acted negligently in producing and marketing the drug.[63] The plaintiff also included allegations concerning time and geographics of the relevant market.[64] In short, the plaintiff satisfied the burden of proof required under *Martin* market share liability.[65] The *McCormack* court based its decision to impose market share liability on a number of considerations: the fact that DES was generically produced, the fact that drug companies failed to keep adequate records, the magnitude of the plaintiff's injury, and the complete lack of fault on the part of the plaintiff.[66]

IMPACT OF THE *MCCORMACK* DECISION

Under *Martin-McCormack*, the burden of the uncertainties created by the plaintiff's inability to identify the specific manufacturer is appropriately shifted to the defendants; yet the risk of not collecting an entire judgment always stays with the plaintiff.[67] This differed from the rules expressed earlier in *Sindell*. The *Sindell* court also recognized the appropriateness of shifting the burden of uncertainty in identification to the defendants, but did so with a twist. Once a plaintiff satisfies her burden of proof as required by *Sindell*, she is at no further risk: 100% of her judgment would be apportioned among the defendants. Therefore, under *Sindell*, it is the defendants

59. *McCormack*, 617 F. Supp. at 1525 (citing Payton v. Abbott Laboratories, 386 Mass. at 574, 437 N.E.2d at 190).

60. *Id.* at 1525-26.

61. *Id.*

62. *Id.* at 1524.

63. *Id.* at 1529.

64. *Id.*

65. *Id.*

66. *Id.* at 1525-26.

67. *Id.* at 1525-26. Assuming the requisite proof, the *Martin-McCormack* version of market share liability allows the plaintiff her cause of action. However, from the time she files her complaint until the time the defendants either establish or fail to establish their percentage of market share, the plaintiff is at risk of not collecting her entire judgment. Moreover, should each defendant prove its market share precentage and the total is less than 100% then it is guaranteed that the plaintiff will not recover 100% of her judgment. *See supra* notes 42 and 48 and accompanying text.

who are at risk of paying more than their percentage market share.[68] Consequently, the *McCormack* court made a policy decision in favor of placing the risk of partial recovery on the plaintiff.

The *McCormack* decision indicates acceptance of the premise of market share liability as appropriate to DES litigation. It is thus far the only DES case to follow an existing theory of liability without modification or hesitation. The *McCormack* decision stands for the proposition that market share liability, absent the *Sindell* substantial share requirement and its associated ambiguities, is the most appropriate modification of traditional tort principles in the DES context;[69] not only is each defendant who proves its actual percentage of the market assured that it will never pay more than that percentage of the judgment, but the plaintiff is also assured of receiving some measure of compensation for her injury.[70] In short, *Martin-McCormack* refines the landmark decision in *Sindell* by resolving a number of questions *Sindell* left behind.

Resolution of the uncertainties of *Sindell* may encourage the many states yet to address the DES issue to follow the *Martin-McCormack* line of cases. With 1.5 to 3 million potential plaintiffs affected by DES, and with approximately only 1,000 DES cases pending, the likelihood of future DES litigation is substantial.[71]

Market share liability is not without its critics.[72] Yet, the analysis of market share as presented in *Martin* and now followed by *McCormack* is well-reasoned and exemplifies a meaningful effort to reach an equitable result in a difficult and complex situation.

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68. *See supra* notes 13-14, 48-51 and accompanying text.

69. Application of market share liability to DES litigation offers a number of advantages: greater emphasis on the standard of care required of drug manufacturers, judicial economy in fashioning DES cases as class actions under a market share approach and finally, eliminating inconsistencies in DES decisions. *See supra* note 24; Note, *supra* note 1, at 674-75.

70. *See supra* notes 5, 12, 14, 21, 39 and accompanying text. Under *Martin-McCormack*, once the plaintiff has established the necessary elements for a cause of action, she is assured of recovery, albeit not always 100%.

71. Dworkin & Zollers, *supra* note 45 at 529.

72. *See* Note, *supra* note 2. Application of market share liability is recognized as "highly controversial." Goldberg, *Manufacturers Take Cover*, 72 A.B.A. J. 52, 53 (July 1986). In fact, the Iowa Supreme Court rejected market share liability in a recent DES case. Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 75 (Iowa 1986). *See also* Reidinger, *Trends in the Law*, 72 A.B.A. J. 70, 76-78 (Aug. 1986).