12-1-1995

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COMMENTS

Santiago v. Sherwin-Williams Co.: Rejection of Market Share Liability in Lead-Based Paint Litigation

SHIRLEY H. FANG†

INTRODUCTION

In 1988, the United States Department of Health and Human Services issued a report documenting the pervasive problem of lead poisoning among the nation’s children. Although lead in adults is of concern, and has been associated with increases in blood pressure and other abnormalities, infants and young children are more at risk from exposure to lead than adults. In fact, severe childhood lead poisoning has been known to cause kidney failure,

† J.D., 1995, State University of New York at Buffalo School of Law. The author would like to thank Professor David M. Engel for his helpful comments and encouragement in the writing of this comment.

1. AGENCY FOR TOXIC SUBSTANCE AND DISEASE, PUBLIC HEALTH SERVICE, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS (1988) [hereinafter HEALTH AND HUMAN SERVICES REPORT]. Lead poisoning disproportionately affects young children and infants because of the differences between their metabolic rates and excretory capability as compared to adults. Id. at I-5. Pregnant women also expose their unborn children to lead poisoning because the lead they absorb can cross the placenta and impair brain development in the fetus. Id. at 8-9.

2. Infants and young children are more at risk from exposure to lead than adults because of the following factors:

(1) their neurological systems are developing and are more vulnerable to damage;
(2) their frequent hand-to-mouth activity brings them into greater contact with lead in the environment, especially in dust and soil; (3) their bodies absorb and retain a larger percentage of ingested lead per unit of body weight than adults, and more of the lead in the body is available in the blood and soft tissues to exert toxic effects; and (4) children often experience nutritional deficiencies (especially of iron, calcium, and other metals) that enhance uptake, absorption, and retention of lead in the body.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, COMPREHENSIVE AND WORKABLE PLAN FOR THE ABATEMENT OF LEAD-BASED PAINT IN PRIVATELY OWNED HOUSING, 2-1 to 2-2, 1990 [hereinafter HUD PLAN].

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gastrointestinal problems, seizures, coma, and pronounced mental retardation. Additionally, the report estimated that twelve million children under the age of seven reside in housing with dangerously toxic levels of lead.\(^3\)

Not surprisingly, injuries involving lead exposure have given rise to a number of lawsuits brought against the lead industry in the 1980s. Initially, the victims of lead-based paint poisoning focused their efforts primarily on landlords as their defendants. Landlords, however, often lacked sufficient assets or insurance to pay damage awards to plaintiffs.\(^4\) More recently, lead pigment manufacturers and the lead industry have been the focus of numerous cases alleging that their products have caused a variety of injuries to young children.\(^5\) Plaintiffs have brought suit against these manufacturers on various products liability theories such as negligent product design, negligent failure to warn, and breach of warranty.\(^6\)

In *Santiago v. Sherwin-Williams Co.*,\(^7\) a victim of lead-based paint poisoning brought a claim against the manufacturers of white lead used in lead-based paints.\(^8\) In a matter of first impression, the United States District Court for the District of Massachusetts dismissed the plaintiff's claims, holding that the theory of market share liability would not be extended to cases of lead-based paint poisoning. The court stated that its interest in separating "wrongdoers from innocent actors" necessitated the rejection of market share liability in the context of lead-based paint.\(^9\) On appeal, the First Circuit affirmed the district court's grant of summary judg-

3. *Health and Human Services Report, supra* note 1, at 7. The Report to Congress also estimated that the number of children (under age seven) who were exposed to lead from dust and soil ranged from 5.9 to 11.7 million. The number of children exposed to lead from leaded gasoline was 5.8 million. Another 3.8 million children were exposed to lead from drinking water. *Id.* at 7-8. See generally Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 46 (1990).


8. Although most of the defendants in *Santiago* are paint manufacturers, "the gravamen of Santiago's complaint against them relates to their role as manufacturer of lead pigment and bulk supplier to other paint producers." 782 F. Supp. at 188.

9. *Id.* at 191 (quoting Payton v. Abbott Lab., 437 N.E.2d 171, 188 (Mass. 1982)).
ment to the defendants, reasoning that to hold otherwise would "create a substantial possibility that tortfeasors and innocent actors would be impermissibly intermingled."^{10}

This Article contends that the Santiago decision is significant in two respects: (1) Santiago represents one of the most recent cases limiting market share liability to diethylstilbestrol (DES) cases; and (2) Santiago is a serious setback for plaintiffs seeking to recover for lead-based paint poisoning. Essentially, this article explores the implications of Santiago for other lead-based paint lawsuits and discusses the future of market share liability in this area of products liability law.

The first part of this Article discusses the DES litigation and the inception of the market share theory of liability in the landmark decision of Sindell v. Abbott Laboratories.\(^{11}\) Next, this Article reviews the treatment of market share liability by courts both within and outside the DES context. The next part focuses on the problem of product identification and the future of market share liability in lead-based paint litigation in light of the recent Santiago decision. Finally, this Article concludes that the Santiago court's reasoning is fundamentally flawed because the court failed to appreciate the flexibility of market share liability, particularly the version of the doctrine that was adopted by the United States District Court for the District of Massachusetts.\(^{12}\) Consequently, this Article concludes that despite the rationale articulated by Santiago, it is clear that the First Circuit, like most courts, is reluctant to apply market share liability simply because the doctrine represents too radical of a departure from the fundamentals of traditional tort law. This Article takes the position that although market share liability arose solely within the context of DES, the social and economic ramifications behind lead poisoning demand courts to apply this theory to more than a single product.

I. Development of Market Share Liability

Traditional tort theory requires a plaintiff to establish a specific link between the causal agent and the injury before a plaintiff may recover damages.\(^{13}\) In some products liability cases, however, a plaintiff may not be able to identify the specific agent that caused

the injury because of the long latency period between the incident that gave rise to the injury or disease and the manifestation of the injury. In response to this identification problem, the California Supreme Court created the market share theory of liability.14

A. DES Litigation

From the 1940s to the 1970s, the drug DES was prescribed for pregnant women to prevent miscarriages.15 In 1971, the Food and Drug Administration (FDA) banned the marketing of DES to pregnant women after medical studies suggested "a statistically significant association between the outbreak in young women of clear cell adenocarcinoma16 with the maternal ingestion of DES during pregnancy."17 These DES injuries have generally been limited to women whose mothers used DES during their pregnancies. By the time the FDA prohibited the use of DES for pregnancy-related complications, about three million pregnant women had already ingested the drug.18 After the FDA ban, a large number of lawsuits were filed against DES manufacturers by the daughters of women who took the drug during their pregnancies.

Under traditional products liability doctrine, three essential requirements must be satisfied before an injured plaintiff may recover against the manufacturer of an injurious product. First, the

14. See generally Sindell v. Abbott Lab., 607 P.2d 924, 936-37 (Cal.) (holding that a plaintiff's inability to identify a specific manufacturer of an allegedly defective product did not require dismissal of the action against the defendant drug companies), cert. denied, 449 U.S. 912 (1980).


17. David M. Schultz, Market Share Liability in DES Cases: The Unwarranted Erosion of Causation in Fact, 40 DePaul L. Rev. 771, 775 (1991). Although DES is no longer used as a miscarriage preventative, it is still prescribed as an estrogen replacement for women. Id.

plaintiff must show that the product is defective. Second, the plaintiff must show that the defective product is attributable to the party to be held responsible. Finally, the plaintiff must show that the defect in the product caused the plaintiff's injury. It is the second requirement, the identification requirement, that has proven to be most problematic to DES plaintiffs. Plaintiffs encountered significant difficulties when trying to prove which manufacturer supplied the particular DES used by their mothers when they were in utero because the latency period of adenocarcinoma is about ten to twenty years. By the time the plaintiffs discovered their injuries and brought lawsuits against DES manufacturers, many physicians, pharmacies, and manufacturers had discarded most of their records. As a result of the lack of records, the large number of DES manufacturers, the generic appearance of the drug, and the latency period between exposure and injury, the plaintiff's burden of identifying the culpable manufacturer was extremely difficult to satisfy.

B. Sindell v. Abbott Laboratories

In Sindell v. Abbott Laboratories, plaintiff Judith Sindell brought a class action suit against Abbott Laboratories and ten other drug companies, alleging that she had suffered personal injuries as a result of her mother's ingestion of the prescription drug DES, a miscarriage preventative. Since she was unable to identify


20. In addition to the identification requirement plaintiffs in DES lawsuits face a number of other legal problems: (1) class action certification; (2) possible running of the statute of limitations; and (3) denial of a cause of action because the injury was prenatal or before viability. Roberts, supra note 15, at 450-51. The most significant obstacle, however, is clearly the problem of identifying the culpable defendant. The failure of the plaintiff to establish a link between the causal agent and the alleged injury usually results in a grant of summary judgment for the defendant. See also Payton v. Abbott Lab., 437 N.E.2d 171 (Mass. 1982) (holding that a threshold requirement in any products liability action is the identification of the injury-causing product and its manufacturer); Garside v. Osco Drug, Inc., 895 F.2d 46, 49 (1st Cir. 1990) (supporting the general rule that if a plaintiff cannot establish who or what caused her injury, summary judgment for the defendant is appropriate).


24. Judith Sindell brought a class action suit seeking to represent "'girls and women who are residents of California and who have been exposed to DES before birth and who may not know that fact or the dangers' to which they were exposed." Id. at 925 n.1.
the manufacturer of the pills that her mother ingested, she advanced theories of alternative liability,\(^2\) concert of action,\(^2\) and enterprise liability.\(^2\)

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25. The theory of alternative liability was developed to address problems confronted by a plaintiff injured by only one of two or more independent tortfeasors and where plaintiff is unable to identify which defendant caused her injury. Alternative liability shifts the burden of proof onto each defendant to show that it did not cause the plaintiff's injury. Failure to do so results in joint and several liability for all defendants brought before the court. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 270-71 (5th ed. 1984). This doctrine has also been adopted by the Restatement (Second) of Torts § 433:

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). See also Summers v. Tice, 199 P.2d 1 (Cal. 1949) (holding that where there is uncertainty as to which defendant actually injured the plaintiff, and relative certainty that one of the defendants did injure the plaintiff, it is inequitable to require the plaintiff to prove causation because defendants have greater access to such evidence).

In Sindell, the California Supreme Court stated that liability in the DES context could not be based on Summers for two reasons: (1) DES defendants faced problems of tracing fungible products after a substantial period of time; and (2) where both parties who could have caused the plaintiff's injuries were before the court in Summers, only five of the approximately two hundred manufacturers of DES were joined as defendants in Sindell. 607 P.2d at 924, 929-31.

26. A cause of action for concert of action exists when one defendant either acts with others pursuant to a common plan to commit a tort or otherwise assists or encourages another to carry out tortious activity. Under these circumstances, each defendant will be held jointly and severally liable with those whom he has encouraged or with whom he has acted, regardless of whether his own acts actually contributed to plaintiff's injury. See Keeton et al., supra note 25, § 46, at 322-24. The Restatement (Second) of Torts sets forth the following elements for an action to be based upon concert of action:

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

Restatement (Second) of Torts § 876 (1979).

The Sindell court rejected the concert of action theory because reliance upon competitors' marketing and testing methods was a prevalent and acceptable business practice, not a tortious group conduct. Sindell, 607 P.2d at 932-33.

27. Id. at 927-28. The theory of enterprise liability was developed especially for the DES problem in a 1978 student comment published in the Fordham Law Review. See Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 933 (1978). In general, the term enterprise liability is used broadly to refer to the theory that losses caused by an enterprise should be borne by that enterprise. Howard C. Klemme, The Enterprise Liability Theory of Torts, 47 U. Colo. L. Rev. 153, 158 (1976). The Sindell court, however, rejected enterprise liability for three reasons: (1) the court found that the application of the doctrine to an industry composed of at least two hundred producers is "mani-
The trial court dismissed Sindell's action because she could not identify the manufacturer of the DES in question. The California Court of Appeals reversed the lower court, finding that Sindell's complaint stated a cause of action under the alternative liability and concert of action theories. The California Supreme Court, however, expressly rejected all the proposed theories for manufacturer identification advanced by Sindell. The court vacated the holding of the court of appeals and found for the plaintiff on its own theory of recovery based on market shares.

Although the California Supreme Court stated that they were merely modifying the alternative liability theory of *Summers v. Tice*, the court clearly created a new theory of "market share liability." Under the market share theory of liability, the plaintiff is required to join a "substantial share" of DES manufacturers and prove that each was negligent. Once the plaintiff established industry-wide negligence and joined as defendants the manufacturers of a substantial share of the market, each defendant must prove that it did not manufacture the DES that the plaintiff alleged caused the injury. If the defendants are unable to rebut this presumption of causation, each defendant will be held liable "by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug by all for that purpose."

A plaintiff may successfully avail herself of the theory of market share liability if the following four requirements are satisfied:

1. Injury or illness occasioned by a fungible product (identical-type product) made by all of the defendants joined in the lawsuit;
2. Injury or illness due to a design hazard, with each defendant having sold

festly unreasonable"; (2) DES manufacturers did not relate safety standards to their trade association whereas in cases where defendants had been held liable under this theory the defendants had; and (3) the court reviewed the role of the Food and Drug Association and noted that it would be unfair to impose liability on a manufacturer "for injuries resulting from the use of a drug which [manufacturer] did not supply simply because it followed the standards of the industry." *Sindell*, 607 P.2d at 934, 935.

28. Id. at 926.
31. 199 P.2d 1 (Cal. 1948); *Sindell*, 607 P.2d at 936. The first modern theory of alternative liability was judicially created in *Summers*. See supra note 25.
32. *Sindell*, 607 P.2d at 937. The decision in *Sindell* did not state what would constitute a "substantial share" other than to reject a suggestion that it should be 75-80% of the market. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
the same type of product in a manner that made it unreasonably dangerous; (3) inability to identify the specific manufacturer of the product that brought about the plaintiff's injury or illness; and (4) joinder of enough of the manufacturers of the fungible or identical product to represent a substantial share of the market. 38

If these four requirements are satisfied, each defendant will be liable for the plaintiff's damages in an amount determined by its share of the relevant market, unless a defendant can prove that it could not have manufactured the product that caused the plaintiff's injury.

The Sindell court premised its support of market share liability on three fundamental principles of tort law. First, the manufacturer of a defective product, not the plaintiff, should bear the cost of injury. 37 Second, the defendant manufacturer is better able than the injured plaintiff to bear the cost of injury resulting from the manufacturing of a defective product. 38 Finally, because the manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects, holding the manufacturer liable for defects and failure to warn will provide an incentive to ensure product safety. 39 In essence, the California Supreme Court created market share liability because the available tort remedies were simply inadequate. The court attempted to link liability with culpability while dispensing with the identification requirement.

C. Limitations of the Sindell Approach

Although theoretically innovative, the Sindell approach contains several practical shortcomings. First, the court failed to define "substantial share" 40 or "appropriate market." 41 Second, the Sindell approach assumes that if there is a substantial share of the market represented in the case, there is a substantial likelihood that the culpable defendant is actually before the court. The fact remains that the defendants that happen to be before the court may be no more responsible for the plaintiff's injury than manufacturers not joined as defendants. Third, although a particular defendant may be negligent, he may not have acted in a negligent manner toward this particular plaintiff. Finally, the Sindell deci-

36. Keeton et al., supra note 25, § 103, at 714.
37. Sindell, 607 P.2d at 936.
38. Id.
39. Id.
40. See Keeton et al., supra note 25.
41. Id.
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sion did not address the question of whether the defendants would be held jointly and severally liable. This issue remained unanswered until Brown v. Superior Court, where the California Supreme Court held that DES manufacturers would be held severally but not jointly liable.

D. Variations On Market Share Liability

The landmark Sindell decision has been widely criticized, and most jurisdictions have rejected market share liability in the form as it was first adopted in California. Consequently, Washington, New York, and Wisconsin have developed their own form of market share liability to address the DES problem. These versions of market share liability demonstrate the flexibility of the doctrine and the willingness of some courts to reevaluate traditional tort law in order to hold defendants liable for the injuries caused by their products.

1. Washington: Market Share Alternate Liability. In Martin v. Abbott Laboratories, the Washington Supreme Court was called upon to address the DES dilemma. In Martin, Washington's highest court created its own "market share alternate liability." Although the court found the Sindell market-share theory to be "conceptually attractive," the court rejected the Sindell approach because it interpreted Sindell as requiring joint and several liabil-

42. 751 P.2d 470 (Cal. 1988).
43. Id. at 484-87. Brown was an action involving approximately 70 plaintiffs who had been exposed to DES while in utero. The plaintiffs brought the action under the theories of strict liability, breach of express and implied warranty, fraud, and negligence. Id. at 472.

For a more extensive discussion of joint and several liability, see Keele et al., supra note 25, § 47, at 327-28 ("When joinder is permitted, it is not compelled, and each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it...").

44. The Sindell decision has been criticized as adversely affecting consumers. Although the theory encourages industries to devote more time to testing and guaranteeing the safety of their products, consumers will be hurt in the short-term because they will be denied the availability of potentially life-saving products. Richard P. Murray, Note, Sindell v. Abbott Laboratories: A Market Share Approach To DES Causation, 69 Cal. L. Rev. 1179, 1201 (1981). Moreover, it has been argued that market share liability will have the effect of reducing or delaying efforts to develop new drugs. See Sindell v. Abbott Lab., 607 P.2d 924, 941 (Cal.) (Richardson, J., dissenting), cert. denied, 449 U.S. 912 (1980). The most pervasive criticism of the theory, however, concerns the practical applicability of the theory. It has been argued that the theory cannot practically be applied because the Sindell decision fails to define the relevant market and what constitutes a substantial share of that market. Id. at 939.

45. 689 P.2d 368 (Wash. 1984).
46. Id. at 381.
The Martin court stated that "[n]ot 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."48

After the Martin court rejected the Sindell approach, the court proceeded to fashion a theory of recovery which combined elements of both the Sindell market share approach and alternate liability.49 For instance, under Sindell, a plaintiff is required to "join a 'substantial share' of the market."50 Under market share alternative liability, a plaintiff needs only commence a suit against one defendant.51 Furthermore, under the Martin approach, a plaintiff does not need to "prove that a defendant produced or marketed the precise DES taken by the plaintiff's mother."52 Instead, the plaintiff needs only to establish, by a preponderance of the evidence, the following four elements:

[1] that the plaintiff's mother took DES; [2] that DES caused the plaintiff's subsequent injuries; [3] that the defendant produced or marketed the type of DES taken by the plaintiff's mother; and [4] that the defendant's conduct in producing or marketing the DES constituted a breach of a legally recognized duty to the plaintiff.53

Moreover, the Martin approach provides defendants with an opportunity to exculpate themselves from liability.54 A defendant may avoid liability by proving one of the following circumstances:

[1] that [the defendant] did not produce or market the particular type [of] DES taken by plaintiff's mother; [2] that [the defendant] did not market the DES in the geographic market area of plaintiff mother's obtaining the drug; or [3] that [the defendant] did not distribute DES in the time period of plaintiff's mother's ingestion of the drug.55

Additionally, if the plaintiff is unable to produce sufficient evidence to determine accurate market share figures in the plaintiff's particular geographic market, the plaintiff may rely on countywide,
statewide, or nationwide figures. According to the Martin court, however, the relevant market for determining liability should be as narrowly defined as the evidence in a given case allows.

Finally, the Martin court stated that the joined defendants are all initially presumed to have equal market shares and so they are equally liable for plaintiff's injuries. They can, however, reduce potential liability by rebutting this presumption through the establishment of their true market share of the relevant geographic market. If, however, a joined defendant is unable to demonstrate that its market share is less than its presumptive share, that defendant's percentage of liability will be increased to fully account for 100% of plaintiff's judgment.

In turn, if a defendant demonstrates that its share of the market is less than its presumptive share, that defendant's percentage of liability will be reduced accordingly. In the event that all the joined defendants are able to carry the burden of proving that their share of the market was less than their presumptive share, the plaintiff will be unable to recover 100% of her damages. The court reasoned that by allowing each defendant to reduce its liability, "the dilution of causal blame that is attributable to a given defendant may be counterbalanced by the corresponding dilution of liability."

2. Wisconsin: Risk Contribution Theory. In Collins v. Eli Lilly & Co., the Wisconsin Supreme Court rejected the Sindell approach to market share liability because of "the practical difficulty of defining and proving market share." The Collins court noted that drug manufacturers may not have access to the records that will allow a jury to reconstruct the relevant market of a given defendant. Even assuming that such records are available,
the court reasoned that the nature of the DES market also prevents jurors from fairly and accurately defining the relevant market. For instance, the court noted factors such as the fluidity of the DES market, the fact that many DES companies are no longer in existence, and the lack of nationwide records concerning the overall marketing and production of DES. 67

Notwithstanding the practical difficulties of defining and proving the market share of the DES defendants, the Collins court concluded that it would not completely reject the market share theory of liability. Instead, the court based its version of market share liability on the risk of injury each manufacturer contributed to each individual plaintiff. 68 Under this “risk contribution” theory, “the critical point is the creation of a risk that society deems to be unreasonable, not whether anyone was injured by it.” 69 Therefore, since all DES manufacturers produced or marketed a defective product, they may all be held liable because “they all contributed to the risk of injury, even though they may not have contributed to the actual injury of a given plaintiff.” 70

A plaintiff bringing an action under the risk contribution theory is not required to join a substantial share of the producers and manufacturers of DES. 71 Under the risk contribution theory, a plaintiff may sue only one defendant. In order to establish a prima facie case, the injured plaintiff does not need to prove that a defendant produced or marketed the precise DES taken by the plaintiff’s mother. Rather, the plaintiff need only establish by a preponderance of the evidence that a defendant produced or marketed the type (e.g., color, shape, markings, size, or other identifiable characteristics) of DES taken by the plaintiff’s mother; the plaintiff need not allege or prove any facts related to the time or geographic distribution of the subject DES. 72

Moreover, a plaintiff may recover all damages from just one defendant. 73 If more than one defendant is joined, damages are apportioned among the defendants under Wisconsin’s comparative negligence laws. 74 Once a plaintiff has successfully proven its prima facie case, the burden of proof shifts to the defendant. The defendant is provided with an opportunity to prove that “it did not pro-

67. Id.
68. Id. at 49.
69. Id. at 50 n.10 (quoting Glen O. Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 Va. L. Rev. 713, 739 (1982)).
70. Id. (quoting Robinson, supra note 69, at 739-40).
71. Id. at 50.
72. Id. (emphasis added).
73. Id.
74. Id.
duce or market the subject DES either during the time period the plaintiff was exposed to DES or in the relevant geographical market area in which the plaintiff's mother acquired the DES.\textsuperscript{75}

In determining each defendant's percentage of liability, the court enumerated a number of factors the trier of fact may consider when apportioning damages. For instance, the jury may consider whether the market share of the defendant is large or small; whether the defendant conducted safety tests on DES; whether the defendant issued warnings; and the role the defendant played in seeking FDA approval of the drug.\textsuperscript{76} Wisconsin's approach has been criticized as expanding liability beyond Sindell because a defendant can be held liable for merely creating a risk of harm, as opposed to a probability of harm.\textsuperscript{77}

3. New York: The Hymowitz Approach. In 1986, the New York State legislature revived many DES claims by enacting a law that "provided a one year window for the filing of previously barred DES claims."\textsuperscript{78} Although this New York statute opened the New York courts to many DES lawsuits that were previously barred by the statute of limitations, DES plaintiffs were still confronted with the problem of the unidentifiable manufacturer.\textsuperscript{79}

In \textit{Hymowitz v. Eli Lilly \& Co.},\textsuperscript{80} the New York Court of Appeals chose not to adopt any one of the existing forms of market share liability. Instead, the court decided to fashion its own version of the doctrine based upon a national market.\textsuperscript{81} The court explained: "[W]e choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."\textsuperscript{82} In New York, a manufacturer of DES can exculpate itself from liability only by proving that it did not market DES for pregnancy use during the relevant period.\textsuperscript{83} Furthermore, since liability is several and not joint, the liability of a particular manufacturer will not be inflated if all manufacturers are not before the court.\textsuperscript{84}

The distinctive features of the New York approach are as fol-
lows: (1) a national DES market shall be used for determining the proportional market share of each manufacturer of DES; (2) the liability of each manufacturer of DES shall be several and not joint; and (3) a manufacturer of DES cannot exculpate itself from liability in a particular case by proving that its product did not cause injury to the plaintiff. With respect to the final element, the court reasoned that since a defendant's liability is "based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury.”

In contrast to the Washington and Wisconsin approaches, the New York version of market share liability differs in several respects. First, whereas Washington courts will attempt to define a market as narrowly as possible, New York courts employ a national market. Unlike Wisconsin's risk contribution approach, the New York approach does not measure the risk of injury to a particular plaintiff. Instead, New York measures the risk of injury to the public at large.

In Smith v. Eli Lilly & Co., the Illinois court criticized the New York approach for failing to equate liability to the actual harm caused. More specifically, the court rejected New York's use of a national market because a particular defendant cannot escape liability even if it produces evidence showing that it did not market the drug in the geographical market where the plaintiff's mother bought the drug.

II. Market Share Liability Outside the DES Context

After Sindell, there have been numerous attempts by injured plaintiffs to apply market share liability to products other than DES. However, courts across the nation have generally refused to extend market share liability to products other than DES. Interestingly, instead of explicitly declaring that the doctrine is only suited for the product DES, courts have decided to the limit the scope of the doctrine on a product-by-product basis. Therefore, in litigation involving products such as vaccines, pharmaceuticals, breast implants, blood products, and asbestos, courts have ad-

85. Id.
86. 560 N.E.2d 324 (Ill. 1990).
87. Id. at 334.
88. Id.
89. See Andrew R. Klein, Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation, 68 Tul. L. Rev. 883, 888 (1994) (asserting that the theory of market share liability should not be extended to blood products because the the-
hered to traditional legal principles, declining to recognize any market share theory. Recently, in Florida and Hawaii, however, market share liability has been extended to cases involving hemophiliacs allegedly infected with AIDS from Factor VIII blood products. But as this discussion will reveal, courts have already begun to retreat from this recent trend.

A. Rejection in Asbestos Cases

Overall, the application of market share liability beyond DES cases has been quite limited. For instance, although asbestos exposure litigation parallels some of the characteristics in the DES cases that gave rise to the development of market share liability, most courts have refused to extend market share theories to asbestos victims.

DES and asbestos litigation share a great number of similarities. First, like clear cell-adenocarcinoma, asbestos-related diseases have a latency period of about twenty years. Additionally, like DES defendants, a large number of companies manufactured asbestos at one time or another. In fact, there are more than 165 companies that have produced or supplied asbestos products. Finally, asbestos plaintiffs have also had difficulty identifying the particular manufacturer responsible for their injuries. Despite these similarities, courts have not allowed asbestos victims to use the market share approach.

In rejecting market share liability in the asbestos context, courts have reasoned that asbestos does not satisfy the "fungibility" requirement. Unlike DES, which was produced pursuant to a single formula, "asbestos fibers are of several varieties, each used
in varying quantities by defendants in their products, and each differing in its harmful effects.\textsuperscript{96} Additionally, courts have also refused to extend the theory because plaintiffs have failed to define the asbestos market adequately.\textsuperscript{97} In attempting to define the asbestos market, plaintiffs encountered two major obstacles: (1) the large variety of uses of asbestos; and (2) the fact that some plaintiffs were exposed to asbestos over many years during which time some defendants began or discontinued making asbestos products.\textsuperscript{98}

Hence, despite the obvious parallels in both DES and asbestos litigation, courts have declined to recognize the applicability of market share liability to asbestos injury litigation, concluding that

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\text{[s]uch an application would impose on the individual members of the asbestos industry a program of compensation for injuries potentially caused by any member of the industry devoid of considerations of actual causation by the individual named defendant. The creation of a program of compensation for victims of asbestos related injuries as a matter of policy is a matter for the legislative body and not for the courts.}\textsuperscript{99}
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\textbf{B. Rejection in Blood Product Cases}

Courts have generally denied attempts to apply market share liability to cases involving blood products. For instance, in Poole v. Alpha Therapeutic Corp.,\textsuperscript{100} an Illinois federal district court refused to extend market share in an action where a hemophiliac allegedly contracted Acquired Immune Deficiency Syndrome (AIDS) from an injection of a blood product.\textsuperscript{101} Although the plaintiff in Poole identified and joined all the manufacturers that supplied the blood product, she was unable to prove that any of the specific defendants were liable.\textsuperscript{102} The court refused to follow Smith v. Eli Lilly & Co.,\textsuperscript{103} another Illinois decision which allowed market share liability for a DES case. The Poole court noted that Smith expressly limited its holding to DES cases.\textsuperscript{104} The court held that it would not expand tort law unjustifiably beyond precedent\textsuperscript{105} and

\textsuperscript{96} In re Related Asbestos Cases, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).
\textsuperscript{98} Id. at 700-01.
\textsuperscript{99} Case, 743 P.2d at 1067.
\textsuperscript{100} 696 F. Supp. 351 (N.D. Ill. 1988).
\textsuperscript{101} Id. at 354.
\textsuperscript{102} Id.
\textsuperscript{104} Poole, 696 F. Supp. at 353-54.
\textsuperscript{105} Id. at 354.
that market share liability is inappropriate when the plaintiff has identified all potentially negligent defendants. The court stated that a plaintiff's inability to identify the wrongdoer was one of the principal rationales for the use of market share liability in Sindell, and the absence of such a rationale precludes a plaintiff from proceeding on a market share cause of action.

Furthermore, in the recent decision in Doe v. Cutter Biological, Inc., the Federal District Court for the District of Idaho also determined that market share liability should not be applied to anti-hemophilic blood products. The district court found that unlike DES, Factor VIII, a blood protein used by hemophiliacs for proper blood coagulation, was not a fungible product. Additionally, the court reasoned that unlike DES, Factor VIII could be traced to the specific producer had the plaintiff kept such records. The court concluded that “even if the Idaho Supreme Court had ever sanctioned the use of such a theory—and it has not—it is not clear that the market share theory should be applied in the context of Factor VIII litigation.”

C. Rejection in Breast Implant Cases

From 1962 to 1991, approximately two million women received breast implants. In 1991, the FDA reported the following risks associated with breast implants: fibrous capsular contracture, silicone gel leakage and migration, infection, early tumor detection difficulties, degradation of polyurethane foam-covered breast prosthesis, cancer, birth defects, autoimmune disease, and calcification. As a result, breast implant victims have brought suit against doctors and manufacturers for personal injuries sustained.

In Lee v. Baxter Healthcare Corp., a breast implant victim brought a products liability action against the manufacturer of medical supplies for the injuries she sustained as a result of a ruptured breast prosthesis. Confronted with the difficulty of identifying

106. Id.
107. Id. at 353.
109. Id. at 913-14.
110. Id. at 913.
111. Id.
112. Id.
114. Id. at 166.
116. 721 F. Supp. at 90.
the specific manufacturer of the prosthesis, the plaintiff in Lee employed a theory of market share liability in an attempt to hold the defendant liable. In her complaint, the plaintiff stated: "'defendants do not attach any identifying marks to their breast implant prosthetic devices and it is, therefore, impossible for the patient to identify which defendant is the manufacturer and/or distributor of the product in question.'"\footnote{117}

The district court, however, granted the defendant's motion for summary judgment. The court held that the plaintiff failed to establish that the "defendant Baxter manufactured the prosthesis which allegedly caused her injury."\footnote{118} In light of the fact that Maryland courts apply traditional products liability law, the court determined that it was "axiomatic that the plaintiff prove by a preponderance of evidence at trial that the product which allegedly caused" the plaintiff's injury could be traced to the named defendant.\footnote{119} Furthermore, the court stated that even if Maryland did recognize the market share approach, it would not apply the theory to breast implants because there was no showing that the defendant had a substantial share of the breast implant market.\footnote{120} Finally, the court stated that breast implants, unlike DES, are not inherently dangerous products.\footnote{121}

D. Acceptance of Market Share Liability in Products Outside DES

Outside of DES, the only two products liability areas in which the courts have relaxed the causation identification are in the realm of vaccines and blood products. In Sheffield v. Eli Lilly & Co.,\footnote{122} a California appellate court rejected market share liability where a plaintiff was injured by a defective antipolio vaccine. Several years after Sheffield, however, a federal district court in California allowed a market share action in Morris v. Parke, Davis & Co.\footnote{123} The plaintiff in Morris also alleged that a vaccine caused his injuries and that he was unable to identify the precise manufacturer of the drug.\footnote{124} The Morris court found that the diphtheria-pertussis-tetanus (DPT) vaccine differed enough from the polio

\footnotesize{117. Id. at 92.}  
\footnotesize{118. Id. at 94.}  
\footnotesize{119. Id. at 92 (citing Ellis v. Int'l Playtex, 745 F.2d 292, 296-97 (4th Cir. 1984)).}  
\footnotesize{120. Id. at 93.}  
\footnotesize{121. Id. at 93-94.}  
\footnotesize{122. 192 Cal. Rptr. 870 (Ct. App. 1983).}  
\footnotesize{123. 667 F. Supp. 1332 (C.D. Cal. 1987).}  
\footnotesize{124. Id. at 1334.}
vaccine in Sheffield to justify relaxing the standard of causation.\textsuperscript{125} In Sheffield, the court dismissed a market share solution largely because the polio vaccine was manufactured defectively by only one company. In contrast, Morris held that all of the defendant's DPT vaccines were defective and that the defendants were collectively negligent in manufacturing, testing, storing, and marketing the vaccine.\textsuperscript{126}

Despite the Morris court's decision to liberally apply the market share theory of liability, the decision has not been extended beyond California. In fact, in Senn v. Merrell-Dow Pharmaceuticals,\textsuperscript{127} another decision addressing a market share claim for DPT injuries, the Oregon court did not follow Morris.\textsuperscript{128} Instead, the Senn court held that alternate liability represented a significant change in traditional tort law causation and that it was the task of the legislature to effect a change of this magnitude.\textsuperscript{129} Similarly, in Shackil v. Lederle Laboratories,\textsuperscript{130} the New Jersey court refused to apply market share liability to a case involving injuries allegedly caused by the DPT vaccine. The Shackil court held that imposing "market share liability in this case would cut against the societal goals of maintaining an adequate supply of life-saving vaccines and of developing safer alternatives to current methods of vaccinations."\textsuperscript{131}

The only other area that courts have adopted market share liability outside the DES context is in cases involving hemophiliacs allegedly infected with the HIV virus from the use of Factor VIII.\textsuperscript{132} In Smith v. Cutter Biological Inc.,\textsuperscript{133} the Supreme Court of Hawaii concluded that market share liability was appropriate in a case involving a hemophiliac allegedly infected with AIDS from a blood product.\textsuperscript{134} As cases such as Poole v. Alpha Therapeutic Corp. and Doe v. Cutter Biological Inc. illustrate, however, this is not the trend in Factor VIII litigation. In fact, in a recent case addressing this issue, the approach taken by the Smith court was rejected.\textsuperscript{135}

Despite the Morris and Smith decisions, courts are still reluc-

\textsuperscript{125} Id. at 1340-43.
\textsuperscript{126} Id. at 1342.
\textsuperscript{127} 751 P.2d 215 (Or. 1988).
\textsuperscript{128} Id. at 219-23.
\textsuperscript{129} Id. at 223.
\textsuperscript{130} 561 A.2d 511 (N.J. 1989).
\textsuperscript{131} Id. at 529.
\textsuperscript{132} Doe v. Cutter Biological Inc., 971 F.2d 375 (9th Cir. 1992).
\textsuperscript{133} 823 P.2d 717 (Haw. 1991).
\textsuperscript{134} Id. at 728.
tant to apply market share liability to other torts with latent manifestation of injury. Further, *Morris* and *Smith* have neither reflected nor signaled a trend toward the use of market share liability with respect to DPT and blood products in other jurisdictions.

E. Summary

Few products liability decisions have been more controversial than *Sindell*. In fact, no case has so clearly cast aside the causal link between the plaintiff's injury and the defendant's wrongful conduct. Consequently, courts are sharply divided on whether to adopt the market share theory in DES cases, and few courts have extended it at all beyond the DES context. Theoretically, however, market share liability may be applicable if three conditions are satisfied by the plaintiff: (1) the plaintiff is unable to identify the manufacturer of the product that caused the injury; (2) the plaintiff has joined the manufacturers of a substantial share of the injury-causing product; and (3) the defective product is generic, and thus each manufacturer's product shares the same defective qualities. As these decisions reveal, few jurisdictions have actually adopted market share liability. Those jurisdictions that have adopted market share liability have done so almost exclusively within the factual context of DES cases. In fact, it appears that only one federal district court has adopted market share liability in the same form as California. While market share liability has been extended to non-DES cases involving vaccines and blood products, these decisions have not been followed. Courts simply refuse to adopt any theory of nonidentification liability, reasoning that to do so would result in a distortion of traditional concepts of liability. In sum, market share liability does not play a significant role in traditional products liability actions.


139. Examples of jurisdictions which have rejected market share liability include Illinois, Iowa, and Missouri. *See*, e.g., Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984).
MARKET SHARE LIABILITY

III. LEAD-BASED PAINT LITIGATION

A. The Scope of the Problem

Lead is a known toxicant that acts primarily to disrupt the functioning of the central nervous system.\(^{140}\) At high levels, however, virtually all parts of the body can be seriously injured by lead exposure.\(^{141}\) Lower levels of lead exposure are particularly dangerous for young children and can result in neurological damage with long-lasting effects on intelligence, motor control, hearing, and emotional development.\(^{142}\) Moreover, in 1985, the Environmental Protection Agency classified lead as a probable human carcinogen.\(^{143}\)

Additionally, lead is a poisonous element that may accumulate in the body through exposure from air, food, soil, and dust.\(^{144}\) Lead-based paint contaminates soil and dust and can be ingested directly as paint chips. Although lead from gasoline combustion and lead solder poses a significant health risk to human beings,\(^{145}\) lead-based paint remains the most pervasive source of lead exposure among children living in poorly maintained homes.\(^{146}\) Children are more susceptible to lead poisoning because they ingest and absorb a greater amount of lead per unit body measure than do adults.\(^{147}\) In households where lead paint is peeling off the walls, and lead is found in the form of household dust and chips, a child’s normal hand-to-mouth behavior is sufficient to expose that child to dangerously toxic levels of lead.\(^{148}\) Pica, a severe manifestation of the childhood tendency to put things in one’s mouth,

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140. HUD PLAN, supra note 2, at 2-1. There is no known beneficial purpose for lead in the human body. Id.
141. Id.
142. Id.
143. Id. at 2-2. Studies conducted on animals have linked lead with cancer and reproductive abnormalities. Id.
144. Id.
145. Id. at 2-10.
147. HEALTH AND HUMAN SERVICES REPORT, supra note 1, at I-5; see also HUD PLAN, supra note 2.
148. See Evan Charney, Lead Poisoning in Children: The Case Against Household Lead Dust, in LEAD ABSORPTION IN CHILDREN: MANAGEMENT, CLINICAL, AND ENVIRONMENTAL ASPECTS 79 (J. Julian Chisolm, Jr. & David M. O’Hara eds., 1982); see also HEALTH AND HUMAN SERVICES REPORT, supra note 1, at I-44 (stating that dust and soil remain major sources of lead exposure because of young children’s mouthing behavior and ingestion of non-food items).
places many children in aggravated danger.\textsuperscript{149}

Until 1940, lead was the prime additive in both interior and exterior house paints.\textsuperscript{150} Since lead is impervious to corrosion, it was regarded as an ideal element for use in paint.\textsuperscript{151} In 1955, some manufacturers of interior paint voluntarily lowered the amount of lead in their paints to as low as one percent.\textsuperscript{152} Despite this initiative on the part of paint manufacturers, their voluntary actions did little to reduce the lead-based paint hazard.\textsuperscript{153} A recent Department of Housing and Urban Development (HUD) survey revealed that of the seventy-seven million privately owned homes built before 1980, fifty-seven million contained some degree of lead paint.\textsuperscript{154}

Federal legislative response to the hazards of lead paint has been inadequate. The Lead-Based Paint Poisoning Prevention Act of 1971 (LPPPA) authorized HUD to eliminate existing lead paint in public and other federally assisted housing.\textsuperscript{155} Because HUD’s jurisdiction is limited to federally constructed or funded housing,\textsuperscript{156} HUD could not direct federal action at the private-housing level aside from mandating the permissible amount of lead content in paint sold in stores. Consequently, while the LPPPA addresses the problem of future lead abatement in publicly owned housing, it fails to provide for either the abatement of pre-existing lead paint in the private sector or remedial, compensatory mechanisms for victims of lead paint poisoning.\textsuperscript{157} Additionally, state lead paint

\begin{enumerate}
\item \textsuperscript{149} Pica has been described as a “perverted appetite for non-food items,” Jane S. Lin-Fu, \textit{The Evolution of Childhood Lead Poisoning as a Public Health Problem, in Lead Absorption in Children: Management, Clinical, and Environmental Aspects} 3 (J. Julian Chisolm, Jr. & David M. O’Hara eds., 1982).
\item \textsuperscript{150} See Michele Gilligan & Deborah A. Ford, \textit{Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations}, 12 COLUM. J. ENVTL. L. 243, 246 (1987). Lead paint manufactured before 1940 contained dry solids composed of as much as 40% lead. After 1940, however, lead was gradually replaced by alternative compounds such as zinc. \textit{Id.}
\item \textsuperscript{151} Frederick R. Anderson et al., \textit{Environmental Protection: Law and Policy} 172 (2d ed. 1990).
\item \textsuperscript{152} Gilligan & Ford, \textit{supra} note 150, at 246.
\item \textsuperscript{153} See id. The voluntary action of certain manufacturers to lower the amount of lead contained in their paint products did little to abate the lead paint poisoning problem because not all companies lowered their standards. \textit{Id.} at 246-47.
\item \textsuperscript{154} HUD Plan, \textit{supra} note 2, at xvii.
\item \textsuperscript{155} 42 U.S.C. § 4822 (1982).
\item \textsuperscript{156} See id. Although Congress ordered HUD to eliminate the dangers associated with lead paint, of the 21 million homes which contain lead paint at hazardous levels, only 2.2 million fall within the jurisdiction of HUD. Edmund J. Ferdinand, III, \textit{Asbestos Revisited: Lead-Based Toxic Tort Litigation in the 1990s}, 5 TUL. ENVTL. L.J. 581, 601 n.62 (1992).
\item \textsuperscript{157} See Diane Cabo Freiere, \textit{Private Causes of Action Against Manufacturers of Lead-Based Paint: A Response to the Lead Paint Manufacturers’ Attempt to Limit Their
prevention statutes are severely limited because they usually contain limitations on fines for nonabatement which have the effect of alleviating the landlord's incentive to abate the existing lead hazard.\textsuperscript{158}

B. Lead-Based Paint Litigation

In the 1990s, civil lawsuits were filed, not against property owners who use lead paint, but against the manufacturers of the paint itself.\textsuperscript{159} These suits, filed in Massachusetts and federal courts, were the first attempt to hold the lead industry responsible for the poisonings associated with their products. The defendants - Glidden, Sherwin Williams, Eagle Picher, and other familiar brand names - were charged with breach of warranty, defective product design, and negligence.\textsuperscript{160} Regardless of the plaintiff's legal theory, however, the identification requirement has proven to be a significant obstacle.

C. The Identification Requirement

Plaintiffs targeting manufacturers of lead pigments are confronted with the problem of the "unidentifiable defendant."\textsuperscript{161} Under traditional tort principles, the plaintiff has the burden of proving, by a preponderance of the evidence, that the named defendant caused the alleged harm.\textsuperscript{162} This rule of tort law is known


\textsuperscript{160} These victims of lead poisoning have also brought actions against the Lead Industries Association (LIA). The LIA, which is a trade association for manufacturers and processors of lead products, is accused of concealing the poisonous qualities of lead paint from the public. See Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 188 (D. Mass. 1992), aff'd, 3 F.3d 546 (1st Cir. 1993).

\textsuperscript{161} See Annotation, Product Liability: Necessity and Sufficiency of Identification of Defendants as Manufacturers or Seller of Product Alleged to Have Caused Injury, 51 A.L.R.3d 1344, 1349 (1973) (discussing the requirement that an injured plaintiff in a products liability action must supply "proof that the defendant produced, manufactured, sold, or was in some way responsible for the product."); 63 AM. JUR. 2D Products Liability § 163 (1984) (discussing the requirement that it must actually be shown that the manufacturer-defendant did in fact manufacture the product which caused injury).

\textsuperscript{162} KEETON ET AL., supra note 25, § 41, at 269-72 (discussing the burden of proof the plaintiff must satisfy in a negligence action in order to satisfy the requirement of causation in fact).
as the identification requirement.163

Plaintiffs in products liability lawsuits usually do not need to litigate the issue of identification because they generally know the identity of the manufacturer or seller of the product that caused their injury.164 In lead-based paint cases, however, the plaintiffs cannot definitively prove which manufacturer's product caused the alleged harm to the lead poisoned victim because the injury-causing product usually consists of many layers of paint.165 These plaintiffs are confronted with the problem of trying to identify a particular manufacturer of lead-based pigment as the supplier of the lead-based paint that caused their injuries.166 Since plaintiffs cannot trace the paint on their walls to a particular defendant, they are unable to satisfy the cause-in-fact requirement of their case. In turn, courts are confronted with deciding whether to impose liability on the manufacturers of lead paint for the damage collectively, but anonymously, caused by their products.

In an attempt to overcome this causation problem, plaintiffs have brought suit under a market share theory of liability.167 Under this judicially-created exception to the requirement of proof of causation, defendants may be held liable even though the plaintiff cannot prove which defendant manufactured the injury-causing product.168 Under this theory, every lead pigment manufacturer would be liable for damages in proportion to its share of the lead paint market.


The recent Santiago decision demonstrates the fundamental difficulties encountered by plaintiffs who bring lawsuits against the

163. Id. § 103, at 712-15; see generally Victor E. Schwartz & Liberty Mahshigan, Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution, 73 CAL. L. REV. 941, 974 (asserting that "[t]he case in which a person injured by a product can prove that his or her injuries result from culpable conduct of the manufacturer but is unable to identify the manufacturer is a peculiar problem requiring a unique legislative solution.").


166. Id.


168. See KEETON ET AL., supra note 25, § 104, at 714. Market share theory of liability allows a plaintiff to bypass the traditional requirement of identifying the defendant that caused the plaintiff's alleged injury. Id § 104, at 713-15; see also supra pp. 6-13.
lead industry under the market share theory of liability. In 1987, Monica Santiago initiated an action against several manufacturers of lead pigment contained in lead-based paint, charging them with negligent product design, negligent failure to warn, breach of warranty, and concert of action. Specifically, she alleged that "defendants, by and through defendant Lead Industry Association (LIA), 'mislead retailers, users, applicators, and parents of young children . . . with respect to the unreasonable risks and hazards posed to young children by the lead produced and marketed by them and by the paint containing such lead.'"

From the time of her birth in 1972, until 1978, Santiago and her family resided in an apartment in Boston, Massachusetts. The walls and woodwork of their apartment contained several layers of paint that had been applied during various times beginning in 1917. Initially, Santiago displayed no symptoms of lead poisoning. At the age of four, however, her teachers noticed that she was hyperactive, dreamy, and that she lacked perceptual and motor skills. Specialists at Children's Hospital and the Dorchester Mental Health Center diagnosed Santiago "as having severe and permanent cognitive and developmental disabilities." In 1976, Santiago was diagnosed with lead poisoning and as a result, had to undergo chelation therapy in order to remove the lead from her body.

Since Santiago was unable to identify which manufacturer of lead pigment was the source of lead-based paint used in her apartment, her attorney sought to dispense with the identification requirement and hold the defendants liable under a market share theory of liability. In support of a market share theory, Santiago's counsel based her argument on the following evidence: (1) expert testimony stating that lead paint "was at minimum a substantial contributing factor of her poisoning;" (2) all of the defendants produced significant amounts of white lead between the years 1917 and 1978.

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169. 782 F. Supp. at 187. The defendants in this action are Sherwin-Williams Company, NL Industries, Inc., Eagle-Picher Industries, Inc., Atlantic Richfield Corporation, and SCM Corporation. Id. at 188. Additionally, the defendants are all members of the LIA. Id.

170. Id. at 188.

171. Id.


173. Id. Chelation treatment involves administering chelating agents by injection. Chelating agents work to remove lead atoms from the tissues of a child's body for excretion through the kidney and liver. Chelation treatment allows high levels of lead in tissue to be rapidly reduced to normal levels. See J. Julian Chisolm, Jr., Lead Poisoning, 224 SCI. AM., Feb. 1971, at 15, 22.

174. Santiago, 782 F. Supp. at 188.
1917 and 1970; (3) the defendants manufactured practically all of the white lead produced for paint between the years 1917 and 1970; and (4) all the defendants were members of the LIA, which "coordinat[ed] promotional campaigns to increase white lead consumption in paint and . . . work[ed] to neutralize the growing public concern about lead paint poisoning."

1. The District Court Decision. The United States District Court for the District of Massachusetts rejected the market share theory as a matter of Massachusetts law and granted summary judgment to defendants on the plaintiff’s market share claim. Chief District Judge Joseph Tauro stated that "[s]ummary judgment for defendant is appropriate where a plaintiff cannot show 'that there [i]s a greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause,'" Consequently, in order for the plaintiff to succeed on her claim, the district court required her to produce evidence "from which the jury may conclude that is more probable than not" that the defendants’ product caused the injury. Thus, the district court held that the plaintiff could not maintain her products liability action against the manufacturers of lead pigment on the market share theory. The district court articulated two reasons in support of its decision: (1) evidence existed that factors other than lead pigment in paint caused her injuries; and (2) evidence existed that the defendants did not actively participate in the market for lead-based paint during the period of time encompassed by the plaintiff’s theory.

177. Id. at 193 (quoting Lynch v. Merrell-National Lab., 830 F.2d 1190, 1197 (1st Cir. 1987)).
179. Id.
180. Id. at 194-95. Although plaintiff's counsel asserted that the defendants manufactured practically all the white lead produced during the years the lead paint had been applied to the walls and woodwork of the plaintiff's home, the court found that several factors made it impossible for the court to calculate the defendants' market share during the relevant period. During the fifty-four year period that the plaintiff sought to hold the defendants liable, the defendants offered evidence that showed that they moved in and out of the market during that time. In fact, by 1954, three of the five defendants had stopped producing white lead pigments. Id. at 194. Additionally, one defendant "did not begin producing white pigment until 1924, and it stopped in the late 1950's," and the "[d]efendant Sherwin-Williams has shown, moreover, that by the mid-1930's its lead pigment was used primarily for commercial and industrial applications." Id.
2. The First Circuit Decision. Subsequently, Santiago brought her case to the United States Court of Appeals for the First Circuit. Santiago's principal argument on appeal was that the district court had erroneously interpreted *Payton v. Abbott Laboratories*. In *Payton*, the Supreme Judicial Court of Massachusetts (SJC) addressed the question of whether DES manufacturers should be held liable under a market share theory of liability. The *Payton* court rejected market share liability as advanced by the plaintiffs in that class action. The court reasoned that if it were to accept the plaintiffs' arguments, the traditional identification requirement would be severely undermined because wrongdoers would no longer "be held liable only for the harm they have caused, and . . . tortfeasors would [not] be separated from innocent actors."

Santiago argued, however, that the *Payton* court sought only to reject the particular form of market share liability advanced by the DES plaintiffs, and that the court did not intend to create a complete bar to recovery based on the theory. In support of her claim, Santiago based her argument on dicta in the *Payton* opinion. After rejecting the form of market share liability sought by the plaintiffs, the *Payton* court stated:

That is not to say that on an adequate record this court would not recognize some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by the defendant's contribution . . . to the market in the relevant period of time.

The First Circuit, however, concluded that Santiago's reliance on *Payton* was unwarranted. Instead the court, quoting *Payton*,

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183. The highest court in the state of Massachusetts is the Supreme Judicial Court of Massachusetts.
184. *Payton*, 437 N.E.2d at 188.
185. Id. at 171. *Payton* was a class action brought by daughters of women who ingested DES while pregnant. The United States District Court for the District of Massachusetts certified the case to the SJC. *Id.* at 173.
186. *Id.* at 188.
187. In *Payton*, the SJC refused to permit recovery because the plaintiffs wanted market share liability to be applied with two important variations: (1) the plaintiffs would be allowed to proceed against and recover 100% of the damages from only six named DES manufacturers when there was a larger number of potential tortfeasors that may have been negligent toward the plaintiffs; and (2) that defendants would be prohibited from presenting exculpatory proof. *Id.*
stated that "[i]dentification of the party responsible for causing injury to another is a longstanding prerequisite to a successful negligence action."\textsuperscript{190} The First Circuit interpreted \textit{Payton} narrowly as a case which considered market share liability only in the context of DES and rejected the theory as proffered by the plaintiffs.\textsuperscript{191}

Moreover, the First Circuit reasoned that even if it were to accept the plaintiff's assertions that the SJC would relax the identification requirement in some situations, the SJC would not do so in the instant case.\textsuperscript{192} Federal Circuit Judge Stahl held that the "SJC[']s] professed interest in both holding wrongdoers liable only for the harm they have caused and in separating tortfeasors from innocent actors" would prevent the plaintiff from proceeding on her market share claim.\textsuperscript{193} Hence, both the district court and the First Circuit expressed concerns over the danger of holding tortfeasors and innocent actors similarly liable.

In refusing to apply market share liability, the First Circuit found that the circumstances surrounding Santiago's case were simply too far removed from those of the DES plaintiffs. First, the court was not convinced that the plaintiff's injuries resulted solely from lead poisoning. The court noted the absence of any direct evidence that the plaintiff actually ingested the lead paint present in her home.\textsuperscript{194} The court also pointed to evidence that suggested that in addition to lead paint, it was possible that the plaintiff was exposed to other sources of lead. Because there was evidence that the plaintiff's neighborhood was heavily contaminated with lead, the court found it possible that the plaintiff could have been exposed to lead from air, food, water, soil, and/or dust.\textsuperscript{195} Accordingly, the court found that there was insufficient evidence for a reasonable fact finder to infer that lead paint was "a substantial contributing factor" to the plaintiff's injuries.\textsuperscript{196}

Finally, the First Circuit found that it was clear from the record that the defendants' contributions to the lead paint market fluctuated significantly during the fifty-three year period that the layers of lead paint were applied to the walls of the plaintiff's apartment.\textsuperscript{197} Since it was impossible for the court to determine the contribution each defendant made to the risk of harm, the

\textsuperscript{190} \textit{Santiago}, 3 F.3d at 550 (quoting \textit{Payton} v. Abbott Lab., 437 N.E.2d 171, 188 (Mass. 1982)).
\textsuperscript{191} \textit{Id}.
\textsuperscript{192} \textit{Id. at} 551.
\textsuperscript{193} \textit{Id. at} 550.
\textsuperscript{194} \textit{Id. at} 547 n.3.
\textsuperscript{195} \textit{Id}.
\textsuperscript{196} \textit{Id. at} 550.
\textsuperscript{197} \textit{Id. at} 551.
court concluded that there was insufficient evidence to warrant a finding that all or any of the defendants actively participated in the lead pigment market during the relevant time period involved. Additionally, the court noted that the dicta relied upon by the plaintiff permitted recovery only on "that portion of a plaintiff's damages which is represented by that defendant's contribution . . . to the market in the relevant period of time." The First Circuit concluded that "[g]iven these facts, it is difficult to discern the basis upon which any market share determination would be premised."

IV. Lead-Based Paint Litigation After Santiago

A. Judicial Limitation of Market Share Liability

The Santiago decision is a substantial addition to the line of cases limiting market share liability to the DES context. Implicit in all of these decisions is the notion that boundaries must be set to limit liability for the consequences of one's actions. Strict adherence to this notion by the courts, however, will unduly limit the scope of market share liability to DES-related injuries. Santiago and its predecessors further represent a decision by the courts to affirmatively disallow recovery to plaintiffs who seek redress for a vast array of latent injuries. In modern society, where more consumers are confronted with an increasing risk of being injured by products that not only cause latent injuries but are difficult or impossible to trace to a specific manufacturer, one cannot help but question the prudence of limiting market share liability to the DES context.

B. Rejection of Market Share Liability in Santiago

In the wake of Santiago, it now appears that courts will continue to limit market share liability to DES claims. In Santiago, the court articulated three reasons for refusing to extend that market share liability to lead paint induced injuries: (1) the plaintiff lacked a unique signature injury; (2) the evidence produced by the defendants made it impossible for the court to determine the defendant's market share; and (3) market share liability has never been applied to defendants who were bulk suppliers of a harmful material.

198. Id. (quoting Payton v. Abbott Lab., 437 N.E.2d 171, 190 (Mass. 1982)).
199. Id.
200. For purposes of discussion, the district court's analysis of market share liability will be employed. The district court provided a more thorough account of market share liability than the circuit court.
ingredient in an injury-causing product.

1. Absence of a Unique Signature Injury. First, the court rejected market share theory because the injuries resulting from the ingestion of lead paint could have been caused by many factors other than lead paint. In DES cases, the presence of a “signature” injury guaranteed that the injury was caused by the defendant manufacturers. In the absence of a signature injury, doubt existed as to whether Santiago's injury was actually attributable to the lead paint in her apartment or simply to the background risk. The Santiago court accepted the defendant's arguments that "hereditary, social and environmental factors, or lead in other products, could have caused, or at least contributed to, Santiago's injuries." In the absence of a signature injury, application of market share liability to lead paint simply became too speculative.

2. The Market Share of the Defendants. In the DES context, it was possible to limit the defendants to those manufacturers who sold the drug during the year in which it was taken by pregnant women. In Santiago, however, not all the defendants produced the product during the entire fifty-three year period when the paint was applied to the plaintiff's apartment. According to Payton, in order to hold the defendants liable under market share liability, each defendant must have "actively participated in the DES market during all or a substantial part of the relevant period of time in which the mothers of the plaintiffs ingested DES.” In contrast, the defendants in Santiago produced evidence that several of the named defendants ceased producing white lead pigments by 1954. Therefore, unlike in the DES context, there was no equitable manner to define the market share of the defendants in Santiago.

3. Defendants As Bulk Suppliers. Finally, the causal connection between the defendants' product and the plaintiff's injury in Santiago is further attenuated because the plaintiff sought to hold
the defendants liable as bulk suppliers of lead pigment.\textsuperscript{205} In the DES context, however, during the twenty-four years that DES remained on the market, approximately three hundred different companies manufactured and distributed the drug according to its generic formula, and many of these companies marketed DES generically.\textsuperscript{206} Unlike DES defendants, lead pigment manufacturers could not control all the risks their products posed to the public. As the court noted, "the paint manufacturers, not [the] defendants, were the ones that decided what amount of lead pigment to use, and whether to use any lead pigment at all."\textsuperscript{207} Therefore, Chief Judge Tauro stated that "[n]o other court has applied market share theory to a defendant that supplies an ingredient for a product packaged and sold by other others" and "[t]he facts of this case do not warrant a different result."\textsuperscript{208}

C. Critique of Santiago

1. McCormack v. Abbott Laboratories. The Santiago decision is flawed because the court failed to consider the form of market share approach that was adopted by the United States District Court for the District of Massachusetts in McCormack v. Abbott Laboratories. The Santiago court failed to recognize that the form of market share liability adopted by the McCormack court is flexible enough to overcome the obstacles that precluded recovery in Santiago. Instead, the First Circuit summarily addressed the implications of McCormack in a footnote, stating:

[we are aware that the United States District Court for the District of Massachusetts, relying on the dicta in Payton, approved a market share theory of recovery in a DES case. We note simply that the McCormack case was never appealed and that we have not had, nor do we now have, occasion to pass on the correctness of its holding.\textsuperscript{209}]

If the Santiago court had given more consideration to the McCormack decision, it would have realized that market share liability is indeed flexible enough to apply to the facts of Santiago's case.

In McCormack v. Abbott Laboratories,\textsuperscript{210} the district court adopted the form of market share liability advance by the Martin

\textsuperscript{205} Santiago, 782 F. Supp. at 194.
\textsuperscript{207} Santiago, 782 F. Supp. at 195.
\textsuperscript{208} Id.
\textsuperscript{209} Santiago v. Sherwin-Williams Co., 3 F.3d 546, 551 n.9 (1st Cir. 1993) (citations omitted).
court. The court concluded that of the then existing variations of market share liability, the framework established in Martin was most consistent with the concerns that the SJC expressed in Payton.\textsuperscript{211} The McCormack court held that under Massachusetts law, market share liability would be applied to the plaintiff's action against drug manufacturers for injuries resulting from their mother's ingestion of DES.\textsuperscript{212} Under McCormack, a plaintiff may avail herself of market share liability if she can prove by a preponderance of the evidence that:

(a) that plaintiff's mother ingested DES during the pregnancy which resulted in plaintiff's birth; (b) that DES caused plaintiff's subsequent injuries; (c) that the defendant or defendants produced or marketed the type of DES taken by plaintiff's mother; and (d) that the defendant or defendants acted negligently in producing or marketing the DES.\textsuperscript{213}

Furthermore, the court noted that the plaintiff does not need to allege or prove that a defendant produced or marketed the particular product that injured the plaintiff. Instead, the plaintiff only needs to prove that "a defendant produced or marketed the type of [product], as distinguished by color, shape, size or markings," used or consumed by the plaintiff.\textsuperscript{214} Most importantly, the court provided that:

\begin{quote}
[i]ndividual defendants may exculpate themselves from liability by proving by a preponderance of the evidence that they did not produce or market the particular type of [product] . . . or that they did not market [the product] in the relevant geographic market area; or that they did not distribute the [product] during the time period.\textsuperscript{215}
\end{quote}

Therefore, under McCormack, once the plaintiff satisfies her burden of proof, defendants are given an opportunity to exculpate themselves by proving that the product they produced or marketed could not have been consumed or used by the plaintiff. Those defendants that are unable to exculpate themselves are initially presumed to have equal market shares of the injury-causing product. These defendants, however, are permitted to rebut this presump-

\textsuperscript{211} Id. at 1526; see supra pp. 18-19. In Payton, the SJC refused to adopt market share liability in the DES context, but expressed its views on market share liability. The court favored a system that would not hold defendants jointly and severally liable and stated that all defendants should be given the opportunity to exculpate themselves to ensure that innocent defendants are not liable. Payton v. Abbott Lab., 437 N.E.2d 171, 189-90 (D. Mass. 1990).

\textsuperscript{212} McCormack, 617 F. Supp. at 1526.

\textsuperscript{213} Id.

\textsuperscript{214} Id.

\textsuperscript{215} Id. (footnote omitted).
tion “by establishing [through] a preponderance of the evidence their individual market share of [the product] in the plaintiff's particular geographic market during the time period in question.”\textsuperscript{216}

The McCormack court rejected the defendants' argument that market share liability would violate the “letter and spirit of the Payton decision.”\textsuperscript{217} Instead, the McCormack court found that a form of market share liability that permitted defendants to exculpate themselves, and to reduce their potential liability by presenting evidence that reveals their actual market, does not “create the risk of holding the named defendants liable in negligence for more harm than they caused.”\textsuperscript{218}

2. McCormack Applied to Santiago. In Santiago, the defendants produced evidence that made it possible to determine their individual market shares with more precision. For instance, defendant Glidden produced evidence that it did not begin producing white lead pigment until 1924. Defendant Sherwin-Williams was also successful in proving to the court that by the mid-1930s, the lead pigment it produced was used primarily for commercial and industrial applications. From this evidence, however, the Santiago court summarily rejected recovery under the market share theory. In light of McCormack, it is difficult to understand how such a conclusion was reached.

Although the defendants in Santiago did not produce exculpatory evidence, they did produce the type of evidence that had the effect of rebutting the presumption that all the negligent defendants brought before the court have equal market shares. Under McCormack and Martin, each defendant brought before the court is initially presumed to have equal shares of the market and are liable only for the percentage of the plaintiff's judgment that represents their presumptive market share. Each defendant is entitled to rebut this presumption with evidence that indicates that its actual share of the plaintiff's market is less than its presumptive share. This is precisely what the defendants in Santiago did, and yet the court found that this evidence made it impossible to determine the contribution of harm attributable to each defendant.

The court should have construed such evidence as narrowing the defendant's potential liability, and not as precluding recovery completely. For instance, in the case of defendant Glidden, it produced evidence which limited its potential liability to the years be-

\textsuperscript{216} Id. at 1527.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 1525.
between 1924 and the late 1950s. The plaintiff in Santiago attempted to hold the defendants liable for a market share that expands about five decades. Therefore, in light of the evidence it introduced, defendant Glidden's market share would be limited to approximately thirty-six years instead of fifty years. In the event that all the defendants in Santiago presented evidence that had the effect of reducing its market share, the plaintiff would collect less than 100% of the judgment.

Under the form of market share liability adopted in Massachusetts and Washington, the possibility of not collecting 100% of the judgment provides the plaintiff with an incentive to join as many defendants as possible. By allowing the defendant to produce evidence regarding its actual market share, the defendant is able to reduce its liability in proportion to the probability that the defendant caused the plaintiff's injury.

3. Analysis of the Santiago Court's Other Arguments. The next obstacle precluding recovery on the market share theory of liability is the fact that the plaintiff's injuries were not attributable solely to lead paint exposure. Although lead paint is only one of a number of potential sources of lead in the environment that can contribute to lead-poisoning among the nation's children, according to the Agency for Toxic Substances and Disease Registry (ATSDR), "[i]n terms of both qualitative impact and persistence of hazard, as well as dispersal of the source into the population, leaded paint has been and remains the major source for childhood exposure and intoxication."219

Furthermore, "childhood blood lead levels [are] associated with race, family income, [and] residence inside or outside of a metropolitan central city."220 In fact, "[t]he lowest incidence [of childhood lead poisoning] was found among white children in the highest income group living outside central cities in metropolitan areas of less than [one] million."221 In terms of Santiago's race, family income, and the size and type of the residential area, she was a member of the group with one of the highest incidence of internal lead exposure.222

The ATSDR report also indicates that the higher blood lead

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219. HUD Plan, supra note 2 (quoting the U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, AGENCY FOR TOXIC SUBSTANCE & DISEASE REGISTRY, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS (1988)).
220. Id. at 2-7.
221. Id.
222. Id.
levels of children “in central cities can probably be explained by
more automobile and industrial emissions per capita than in sub-
urbs, and also by a greater proportion of old houses with lead-
based paint, often at higher lead paint concentrations [than homes
located in the suburbs].”223

Even though the Santiago court found that Santiago’s injuries
were not unique to lead-based paint exposure, the court disre-
garded the fact that lead paint is documented to be the leading
source of lead-poisoning in children, and that children in her race,
family income, and residential area, had one of the highest inci-
dences of elevated blood lead levels.

Finally, the Santiago court found that the defendants should
not be held liable under a market share theory because as bulk
suppliers of lead pigment to paint manufacturers, they “could not
control all of the risks that their products may have presented to
the public.”224 The court reasoned that since these defendants
could not control the amount of lead to be added to a particular
brand of paint, they should not be held liable under the market
share theory of liability.

Under traditional products liability doctrine, actions against
bulk suppliers who sell their products to a manufacturer are typi-
cally governed by section 338 of the Restatement (Second) of
Torts which provides that:

[O]ne who supplies directly or through a third person a chattel for another
to use is subject to liability to those whom the supplier should expect to use
the chattel . . . if the supplier (a) knows or has reason to know that the
chattel is or is likely to be dangerous for the use for which it is supplied,
and . . . (c) fails to exercise reasonable care to inform them of its dangerous
condition or of the facts which make it likely to be dangerous.225

Furthermore, the comment to section 338 sets forth various factors
which a court should consider to determine what precautions the
manufacturer or supplier of a product must take to satisfy the re-
quirement of reasonable care.226 These factors include the form of
any warnings given, the magnitude of the risk involved, and the
purpose for which the product is used.227 This is known as the
learned intermediary defense.

223. Id. 2-7, 2-10.
F.3d 546 (1st Cir. 1995).
226. Id. § 388 cmt. n.
227. Id.
While the learned intermediary defense has been utilized in toxic tort cases, it has not met with universal acceptance. In Oman v. Johns-Manville Corp., the Fourth Circuit upheld the trial court's refusal to give a learned intermediary instruction that the defendants' asbestos-containing products were very dangerous, and that the burden of placing a warning on the package was not very great.

In light of Oman, it is clear that in a products liability lawsuit, a plaintiff cannot rely on the learned intermediary defense to impose liability on a bulk supplier of a toxic substance. Courts have not applied market share liability to the suppliers of toxic substances who sold their products to another manufacturer, simply because courts have been reluctant to extend market share liability outside of the DES context. Given the appropriate circumstances, the court should rely on section 338 to decide if the learned intermediary defense should be an effective defense. This determination should be made independent of any market share considerations.

Finally, the court should adapt market share liability to the unique facts of Santiago, namely, to defendants that are bulk suppliers of lead pigment. The decision in Shackil v. Lederle Laboratories demonstrates that courts have been willing to adopt the market share approach to fit the unique circumstances of a particular case. In Shackil, the Superior Court of New Jersey encountered a problem with applying market share liability to the manufacturers of the DPT vaccine. In the case of DPT, differences in the respective composition of the vaccines existed because some DPT vaccines contained more toxins than other DPT vaccines. As a result, the New Jersey court adopted "risk-modified market share liability." Under this approach, market share serves as an initial basis for allocation of damages among defendants. A defend-

228. The learned intermediary defense has been most successfully utilized in pharmaceutical cases. In such cases, the manufacturer's duty to warn has been limited to an obligation to advise the prescribing physician of any potential dangers from the use of the drug. See Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir.), cert. denied, 419 U.S. 1096 (1974). Because the prescribing physician can consider both the propensities of the drug and the susceptibilities of the individual patient, and weigh the benefits of medication against potential dangers, he acts as a learned intermediary between the manufacturer and the consumer and relieves the manufacturer of its duty to warn the physician's patient. Id.


230. Id. at 233.

231. Id.


233. Id.

234. Id. at 1293.

235. Id. at 1302.
ant, however, may present evidence that indicates a unit of its product engendered lower risk than a unit of another defendant's product. Therefore, if a defendant can present evidence that quantifies the extent to which its vaccine engendered a lower risk of harm than the vaccines of other manufacturers, its percentage of the damages is reduced accordingly. Although this appellate court ruling was overturned by the New Jersey Supreme Court, and was limited to vaccine cases, Shackil indicates that courts can modify market share liability to the facts of a particular case. The courts can devise a system for allocating damages such that the manufacturer's liability approximates the damages that it caused without being confined to the rigid set of facts that gave rise to the theory of market share liability.

VI. Conclusion

Courts generally refuse to apply market share liability to any product outside of DES even though several versions of the theory have been developed to address the shortcomings of the Sindell approach. Simply put, courts have consistently regarded market share liability as an inflexible, limited doctrine that only applies to a narrow class of plaintiffs and defendants. Notwithstanding judicial resistance, however, market share liability is an innovative and equitable doctrine with enormous potential. In fact, if courts were to recognize the doctrine's flexibility and great potential, commentators have suggested that the theory can even be applied to complex problems such as acid rain.

Despite the judicial limitation of the doctrine, the underlying premise for adopting a market share theory and applying it beyond DES remains the same: it is an attempt to seek justice for the innocent plaintiff who was injured by a product manufactured by an industry of tortious defendants. Fairness dictates that society not permit the injured plaintiff to go uncompensated while wrongdoers profit from tortious conduct. The use of a market share theory provides a remedy for this inequitable situation.

In the case of lead paint, the futures of millions of children are being jeopardized by the grave consequences of childhood lead poisoning. The problem has been commonly characterized as a

236. Id.
237. Id. at 1293-94.
239. Martha R. Mahoney, Four Million Children at Risk: Lead Paint Poisoning Vic-
"preventable 'silent epidemic'" that is sweeping across the nation, carrying with it major medical, social, and economic implications.\textsuperscript{240} The problem of childhood lead poisoning also becomes more complex once the poverty of its victims is taken into consideration. For instance, attorneys may be deterred from representing lead poisoned victims because the projected lifetime earnings of the impoverished victims are low.\textsuperscript{241} Hence, compensation for children injured by lead paint should be borne by those who are in a superior position to bear the loss. It is clear that the lead paint industry can bear the loss much better than the victims of lead-based paint poisoning. According to William Prosser:

The defendants in tort cases are to a large extent public utilities, industrial corporations, commercial enterprises, automobile owners, and others who by means of rates, prices, taxes or insurance are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. Rather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants.\textsuperscript{242}

Prosser's rationale, which forms one of the fundamental principles of tort law, should not be ignored. In the case of lead poisoning, the bottom line is that the costs paid by the victims, and the costs paid by society as a whole, are simply too high to continue.

The concept of deterrence also demands that the market share theory of liability be applied to hold defendant industries liable.\textsuperscript{243} The deterrence argument was best articulated by the Sindell court when it stated: "The manufacturer is in the best position to discover and guard against defects in its products and warn of harmful effects; thus holding it liable for defects and failure to warn of

\textsuperscript{\textit{times and the Law}, 9 STAN. ENVTL. L.J. 46, 46 (1990).}
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 47.
\textsuperscript{242} KEETON ET AL., supra note 25, § 4, at 24-25.
\textsuperscript{243} But see Roger S. Fine, A Personal Perspective From the "Manufacturer," 65 BROOK. L. REV. 899 (1989). In response to the Hymowitz decision in New York State, Fine, an Associate General Counsel at Johnson & Johnson, Inc., argued that market share liability does not operate to deter the conduct of DES defendants. Fine argued that business decisions are generally based upon medical and scientific data, and FDA regulations, and not legal doctrines such as market share liability or the threat of punitive damages. Id. at 901-02. Fine also stated that the theory fails to punish or deter tortious conduct because those individuals who were responsible for the wrongdoing are usually no longer in business. In fact, Fine noted that the only real impact experienced by industries is an "administrative one." Id. at 902. That is, in terms of manufacturers, Fine stated that "[w]e now have to defend ourselves in a thousand lawsuits, even though it is highly unlikely that more than a small handful of the plaintiffs ever took our drug, much less were harmed by it." Id. (emphasis added).
harmful effects will provide an incentive to product safety. A tortious defendant should not be shielded from liability when the product it manufactures injures a vast number of consumers, simply because the product is non-traceable. The idea of a manufacturer being fully aware of the potential injuries that its product may cause, but deciding not to warn of its dangers simply because of the product's fungibility, is shocking and morally reprehensible. Market share liability creates industry incentives to ensure product safety.

Clearly, however, the rejection of market share liability in Santiago and the cases preceding it represents an unwillingness by courts to permit the doctrine to be used as a judicial remedy for cases involving defective products that cause latent diseases. At the same time, courts have neither adopted a single legal theory nor a consistent set of standards to apply in latent, mass-injury cases. Thus, it is probably safe to conclude that courts will continue to limit the application of market share liability to the DES context.

In modern society, however, the inability or unwillingness of courts to formulate a consistent standard will prove increasingly untenable in light of the technological advances made each day. As products become more complex, it will become more difficult to predict the long-term effects of exposure to substances with the potential to cause latent injury. Although courts are refusing to provide a consistent set of rules to apply to latent injury cases, the fact remains that latent diseases are occurring with greater numbers and will continue to grow in the future. Nearly fifteen years after Sindell, the words of Justice Mosk most accurately describe the dilemma at hand:

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in Escola v. Coca Cola Bottling Company . . . recognized that in a era of mass production and complex marketing methods that the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaption of the rules of causation liability may be appropriate in these recurring circumstances.

Accordingly, fairness and justice demand that a doctrine based on

245. Id. at 935 (emphasis added) (citations omitted).
the market share of culpable industries be applied to provide a remedy for the injured consumer who suffers from an injury that does not manifest itself until decades after exposure. The time has come to recognize the enormous potential of market share liability.