MARKET SHARE LIABILITY, INDUSTRY-WIDE LIABILITY, ALTERNATIVE LIABILITY AND CONCERT OF ACTION: MODERN LEGAL CONCEPTS PRESERVING LIABILITY FOR DEFECTIVE BUT UNIDENTIFIABLE PRODUCTS*

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I. INTRODUCTION

Notwithstanding the debate concerning whether a product must also be unreasonably dangerous,[1] it is uncontestable legal doctrine that a manufacturer of a defective product is liable for the harm from such products.[2] Morally and logically it is difficult to contest this principle. The cases giving practical life to section 402A of the Restatement (Second) of Torts are now

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1. *See* Comment, *Elimination of "Unreasonably Dangerous" from 402A—The Price of Consumer Safety,* 14 DUQ. L. REV. 25 (1975).

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

legendary.[3] However, in the modern marketplace, factual situations often arise that challenge the fair application of the principles enunciated by these cases.

Traditional legal concepts imposing liability for faulty products require the injured party to identify the product with its manufacturer and thus, "as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control."[4] In all cases the product must be proven legally defective, and the defect must be a proximate cause of the alleged damages.[5]

II. The Problem

The impossibility of product identification is a fact of commercial life in the modern marketplace. The makers of today's wigdets no longer barter with their customers on the town square. Today's marketplace is flooded with fungible, non-identifiable defective products. If this is true, how fair are principles of products liability law requiring injured parties to first identify one of several manufacturers of the same type of unidentifiable, yet defective product before they can be compensated for its resulting damages?

The first guarantee of every court is that for "every wrong there shall be a remedy." Thus, if this guarantee is solid, the complexity of the wrong can never be a rationale for the denial of its remedy.

In order to insure that the manufacturer of a faulty product does not escape liability because of the impracticality or impossibility of identifying the product with its manufacturer, courts must design equitable but realistic legal remedies to meet the challenges of the modern market place. This is consistent with the historical development of products liability law that has been " 'essentially a judicial development which the courts should be free to develop further.' "[6]

The midwife to section 402A of the Restatement (Second) of Torts was warranty law. The public policy underlying warranty law as now codified by the Uniform Commercial Code, was the protection of the reasonable expectations of mismatched consumers by providing a remedy for their oppres-

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3. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

4. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 597, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (1980), *cert. denied*, ___ U.S. ___ (1981); *see also* R. Hursh & H. Bailey, American Law of Products Liability, § 1:41, at 125-26 (2d ed. 1974); Restatement (Second) of Torts § 402A (1965); Annot., 51 A.L.R.3d 1344 (1973).

5. Restatement (Second) of Torts § 402A (1965).

6. Abel v. Eli Lilly & Co., 94 Mich. App. 59, ___, 289 N.W.2d 20, 23 (1979)(quoting Parrish v. B. F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (1975)).

sion and unfair surprise.[7] However, not only did warranty law require product identification with the product's maker or seller, it also required privity between the purchaser and the product's maker or seller.[8] As the complex marketplace unfolded, the inherent unfairness of requiring privity was soon recognized. The doctrine of privity was destroyed by various judicial ideas, the basis of which ranged from legal fictions to outright rejections of the doctrine. The same judicial challenge exists today from those remedies which require manufacturer identification in factual situations where such precise identification is either factually impossible or economically impractical.

The problem of identification is not one that can be discussed apart from various facts of the business environment. One fact that contributes to the problem of identification is that industry trade associations, consisting of many manufacturers selling the same type of product, are often a primary vehicle of concerted tort activity.[9] Additionally, more than one manufacturer may influence the standards or regulations pursuant to which the same product is manufactured and sold. For example, in *In Re The Society of the Plastics Industry, Inc.*, agreement on a consent order was reached in the face of allegations that The Society of the Plastics Industry, Inc., "through members' collective action . . ., hundreds of codes and regulations of all kinds have been modified or rewritten by numerous regulatory bodies or officials, thus opening or expanding market opportunities for plastics."[10]

Another organization cited in the FTC order was the American Society For Testing and Materials (ASTM). It was alleged that the ASTM formulated and disseminated standards and test methods by which the physical properties and performance characteristics of a wide range of products were determined, evaluated, predicted or described. It was further alleged that this organization was influenced by, and actively participated with, the manufacturers of these products in its testing and implementation of product specifications.[11]

Another complicating factor of product identification is that it is the

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7. U.C.C. § 2-313, comment 4; § 2-316, comment 1.

8. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

9. *See, e.g.*, Hall v. E. I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); *In re* The Soc'y of the Plastics Indus., Inc., 84 F.T.C. 1253 (1974). There, the Commission entered a:

> [c]onsent order requiring a trade association and 25 manufacturers of certain plastic products . . . to alert users of cellular (or foamed) plastics products to the serious hazard these products may present in case of fire; to cease using descriptive terms which could mislead users as to the performance of the products under actual fire conditions; and to establish a 5 million dollar public research program into the flammability of these products.

Id. at 1253.

10. *In re* The Soc. of the Plastics Indus., Inc., 84 F.T.C. at 1258 (1974).

11. *Id.* at 1259.

practice of many industries not to directly market to the ultimate consumer. Note that while the early public policy behind privity (which overtly protected manufacturers) was to prevent suits from persons with whom the manufacturer had not dealt, today, manufacturers of many products, particularly pharmaceuticals and plastics, have no intent to deal directly with the ultimate consumer.[12] As pointed out by the drug manufacturers in *Sindell v. Abbott Laboratories:*

> [D]rug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer.[13]

A descriptive and perhaps prophetically common marketplace dilemma was aptly framed recently by the California Supreme Court in *Sindell* as follows: "[M]ay a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?"[14] The California court answered "yes" in attempting to reach an equitable solution to this dilemma. To determine how and why it so answered requires a journey through the annals of both old and new tort law.

Several potential theories of common liability were advanced by the plaintiffs in the *Sindell* case. The court rejected "concert of action,"[15] alternative liability,"[16] and "industry-wide (enterprise) liability"[17] before judicially adopting an innovative theory it designated "market share liability."[18] A rejection of all common liability theories would have forced upon the unfortunate DES victims the impossible burden of tracing back to the manufacturer of the specific dose which caused the injury. Effectively, these victims would have been required to bear the costs, thus adding to the profits of another's wrongdoing.

Any common liability theory will most likely be limited to complaints alleging inadequate design or failure to warn. Unique manufacturing or material defects are insufficient to legally and logically generate common liability. However, this is not to make light of the moral and legal dilemma created by uniquely defective but unidentifiable products. The solutions

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12. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 601, 606 P.2d 924, 930, 163 Cal. Rptr. 132, 138 (1980).
13. *Id.*
14. *Id.* at 593, 606 P.2d at 925, 163 Cal. Rptr. at 133.
15. *Id.* at 603-06, 607 P.2d at 931-33, 163 Cal. Rptr. at 139-41.
16. *Id.* at 598-603, 607 P.2d at 928-31, 163 Cal. Rptr. at 136-39.
17. *Id.* at 607-10, 607 P.2d at 933-35, 163 Cal. Rptr. at 141-43.
18. *Id.* at 611-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46.

discussed below are only available for generic products defective due to insufficient design or warning, and the market for such a product was to some extent shared by more than one manufacturer, all of whom were directly or indirectly in developing and exploiting the common product.

III. The Solutions

A. *Concert of Action*

The liability of each person commiting a tort in concert, but who do not each directly cause the complained of damages, is not new. The American Law Institute enshrined the principle as follows:

> 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 the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so 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.[19]

Applying this Restatement principle, the Michigan[20] and New York[21] courts allowed the victims of a cancer-linked drug (diethylstilbestrol or DES) to sue the drug's makers who acted in concert to market and promote DES even though the victims were unable to identify the specific manufacturer of the DES they ingested. The most significant aspect of the Michigan case is that it was factually proven in the trial court that the defendant, Eli Lilly and Company, did not manufacture the specific DES that caused the injury to the multiple plaintiffs.[22] However, the court held Eli Lilly and Company liable because the company tortiously acted in concert with the other manufacturers of DES and, thus, the actual maker of that drug which injured the plaintiff. Pivotal to the decision was finding the "tortious act" by Eli Lilly and Company in concert with others. As the Michigan Court of Appeals noted: "In the case before us . . ., the problem is essentially one of apportionment of damages among *proven wrongdoers*. Plaintiffs must establish that they suffered a certain amount of damages at the hands of defendants, *all of whom are tortfeasors.*"[23] The factual scenario of this concerted action was expressed briefly in the court's opinion wherein it noted that

> original cooperation by twelve manufacturers in the pooling of information, agreement of the same basic chemical formula and adoption of Lilly's literature as a model for package inserts with joint submission to

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19. Restatement (Second) of Torts § 876 (1965).
20. Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979).
21. Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).
22. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 23.
23. *Id.* at ___, 289 N.W.2d at 26 (emphasis added).

> the FDA in 1941 can rationally be construed as an express agreement for purposes of finding concerted action.[24]

Thus, the plaintiffs alleged that the defendants should be held liable for their contribution to the development and enhancement of the market for the sale of a drug proven to be not only ineffective for its represented use, the prevention of miscarriages, but also a drug proven to cause precancerous lesions in the vaginas of females whose mothers consumed DES while pregnant.[25] Clearly, this decision goes beyond the much heralded *Sindell* decision. A successful concert of action theory allows a person to sue any one manufacturer of the subject product without regard to direct identification of that particular defendant as the maker of the injury producing product, and without regard to that particular defendant's share of the market as required in *Sindell*. Also, unlike traditional remedies for defective products, a concert of action theory would allow joining defendants who neither manufactured the complained-of product nor who were involved in its chain of distribution, such as testing laboratories, trade associations and code making bodies whose tortious activities aided the marketability of an unsafe product.

A variety of legal commentators have cited section 876 of the Restatement (Second) of Torts as establishing that the concept of "joint tortfeasors" applies not only to those who act in concert to accomplish some common goal or plan and thereby cause injury, but also to "those who order, direct or permit others to do the act, *and who give assistance or encouragement.*"[26] Additionally, all "joint tortfeasors" also include

> those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.[27]

An express agreement is not necessary. All that is needed is a tacit understanding.[28] However, the *Sindell* court suggested that when manufacturers regularly share test data and other information, concert of action may require more assistance and agreement than merely the common, everyday practice of the industry.[29]

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24. Bichler v. Eli Lilly & Co., 79 A.D.2d at ___, 436 N.Y.S.2d at 633. *See* Bus. Ins., Mar. 2, 1981, at 1.

25. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 22.

26. Witkin, Summary of California Law, Torts § 30, at 2329-30 (8th ed. 1974)(emphasis added).

27. W. Prosser, Law of Torts, § 46 at 292 (4th ed. 1971). *See also* Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 429-30 (1937) [hereinafter cited as Prosser, *Joint Torts*].

28. *Id.* (both authorities).

29. Sindell v. Abbott Laboratories, 26 Cal. 3d at 605, 607 P.2d at 633, 163 Cal. Rptr. at 141.

Notwithstanding the "hue and cry" for free enterprise from American industry, it has a poor track record of "rugged individualism." Besides acquiring the rights to competitors' products, and the responsibility for their defects, by mergers, acquisitions and tender offers, there have been documented cases of concerted industry wrongs to put defective products in the hands of the public. The range of products subject to these concerted torts span from building products[30] to flammable fabrics[31] to dynamite blasting caps.[32]

It should be noted that "[o]ne who innocently, and carefully, does an act which furthers the tortious purpose of another is not acting in concert with him."[33] Often, however, the members of an industry may have knowledge that certain tests are unreliable or that testing has been incomplete, but nevertheless remain silent so as to enhance the marketability of their product. This, according to Prosser, would be actionable conduct under a concert of action theory.[34] Under these circumstances, to remain silent would itself constitute acquiescence and thus an adoption of the activity of the others.

A concert of action theory provides the injured plaintiff with the option to proceed against any tort-feasor who has acted in concert. It alleviates the injured party from the formidable task of facing the entire industry in a single court battle. Of course, those tort-feasors who have been singled out can in turn pursue contribution and perhaps indemnification remedies against other manufacturers engaged in the market of the same product.[35] These proven tort-feasors are not only in a better investigative position to identify viable defendants, but they also are in a better financial position to pursue the actual wrongdoer. While contribution is normally available among joint tort-feasors,[36] yet undeveloped is whether a concerted action defendant who did not market the complained of product must identify its actual manufacturer, or whether it can merely proceed to obtain contribution from those who make up the balance of the market. Essentially, then, assuming equitable contribution, those manufacturers who market an identical product and share in the profits from that market, will also share in providing compensation for the tortious harm caused by marketing that product.

In a products liability action, uncertain product identification creates uncertain causation. Consequently, proximate cause, generally considered an

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30. *In re* The Soc'y of the Plastics Indus., Inc., 84 F.T.C. 1253 (1974).

31. Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 IND. L. REV. 395 (1976).

32. Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

33. W. PROSSER, LAW OF TORTS, *supra* note 27, § 46, at 292; Prosser, *Joint Torts*, *supra* note 27, at 429-30.

34. *Id.* (both authorities).

35. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 25-26.

36. *See* Prosser, *Joint Torts*, *supra* note 27, at 427-30.

element of proof distinct from identification, becomes an evidentiary knot unable to be tied without identification.

B. *Alternative Liability*

While the concert of action theory involves a true joint tort (but for the act of each there would be no injury), alternative liability does not involve joint activity combining to produce harm, but "involves independent wrongful acts by two or more tort-feasors, all of whom have acted wrongfully, but only one of whom" actually produced the injury.[37]

Under the alternative liability theory, where it is uncertain which actor caused the injury, the burden is upon each such actor to prove that he did not cause the harm.[38] Thus, if each tortfeasor acted to conceal the actual cause of the harm, rather than to actually cause the harm, an exception arises to the general rule requiring the plaintiff to prove causation. The *Sindell* ruling also allows a shift in the burden of proof when the plaintiff has joined in the action a "substantial" market share of the manufacturers.[39]

In contrast, market share liability only shifts the burden of proof as to product identification, but still requires the plaintiff to prove that the product defect, attributable to the named defendants, actually caused the injury.[40] While being a manufacturer of the same type of defective product (but not the one which injured the plaintiff) is deemed to be the proximate cause of the injury under the market share theory, a wrongdoer in an alternative liability action can escape liability by showing that his wrong did not cause the injury in an operative context.[41] Under the concert of action and enterprise liability theories, it is the common development, promotion and sale of the same type of defective product that are deemed to be the operative facts in determining the proximate cause of any injury arising from the defect,[42] and thus manufacture of the specific complained-of product is not necessary to establish the tort.

Courts applying the alternative liability theory have traditionally held liable less than all of the persons who had the potential for causing harm to the plaintiff since whether they did cause the harm actually is only known by each member of the group and cannot reasonably be ascertained by the plaintiff. Alternative liability is useful and equitable only when a limited number of identifiable defendants are involved and can be joined in a single action.[43] A classic example of this situation is the two drag racers forcing the

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37. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 25.
38. RESTATEMENT (SECOND) OF TORTS § 433B (1965).
39. Sindell v. Abbott Laboratories, 26 Cal. 3d at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.
40. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
41. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 25.
42. *Id.*
43. *See*, RESTATEMENT (SECOND) OF TORTS § 433, comment h (1965).

plaintiff off the road,[44] with only one of them being apprehended. Another example is the two hunters both negligently shooting at the same time, with the same type of gun and bullet, but with only one of the shots striking the plaintiff.[45] Although alternative liability is usually applicable when the plaintiff is unable to identify the actual wrongdoer, at least one court has allowed the plaintiff to sue all manufacturers even though the actual wrongdoer was known.[46] This has been regarded as an aberration rather than an evolution in alternative liability by other courts.[47]

Under the theory of alternative liability, when each of the defendants behaved tortiously, but only one caused the injury, joinder of all tort-feasors shifts the burden of proof on the issue of causation from the plaintiffs to the defendants. Joinder of all tort-feasors is a necessary prerequisite to a successful alternative liability action.[48]

The *Sindell* court refused to apply the theory of alternative liability. The *Sindell* court distinguished its facts from those in *Summers v. Tice*, noting that in *Summers* there was a 50% chance that one of the two defendants was responsible for the plaintiff's injuries, while in *Sindell* any one of 200 companies might have made the product: "[T]he possibility that any of the five defendants [out of nearly 200 possible defendants] supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself."[49] Thus, under alternative liability, plaintiffs are not likely to recover unless they can demonstrate the probability that one of the defendant manufacturers was responsible for the injuries. Puristically, to follow the logic and the pattern of defendants' conduct in *Summers* would require that plaintiffs include 100% of the industry as defendants, and show that at least fifty percent of the defendants sold the complained of product. This is not a feasible approach when there are more than two manufacturers involved.

C. *Industry-Wide Liability*

Industry-wide liability has sometimes been inaccurately called "enterprise liability."[50] Industry-wide liability is best described as a "hybrid theory"; it has characteristics derived from both alternative liability and con-

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44. Agovino v. Kunze, 181 Cal. App. 2d 591, ___, 5 Cal. Rptr. 534, 538-39 (1960).
45. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).
46. Abel v. Eli Lilly & Co., 94 Mich. App. at ___, 289 N.W.2d at 26-27, n.6.
47. Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353, 386. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d at 610-11, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45; Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185 (App. Div. 1975).
48. Sindell v. Abbott Laboratories, 26 Cal. 3d at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39; *see* Annot., 5 A.L.R.2d 98, 100 (1949).
49. Sindell v. Abbott Laboratories, 26 Cal. 3d at 603, 607 P.2d at 931, 163 Cal. Rptr. at 141.
50. *See id.* at 607, 607 P.2d at 933, 163 Cal. Rptr. at 141.

cert of action.[51] When alleging industry-wide liability, "the plaintiff must [first] prove there is a high probability that the injury was caused by the tortious behavior of . . . one of the defendants—a modification of alternative liability"[52]—but that the precise manufacturer cannot be identified. Secondly, the plaintiff "must show that [each of the] defendants concertedly adhered to [an unreasonable or deficient] industry-wide safety standard in their manufacture of the injury-producing product. Evidence of these two elements will shift the burden of proof on causation to the defendants."[53] This is the essence of industry-wide liability.

While industry-wide liability has been given a great deal of attention because of the recent DES fertility drug cases, the leading case on industry-wide liability appears to have stemmed from a case involving dynamite blasting caps.[54] The defendants in *Hall v. E.I. DuPont De Nemours & Co.*, were six manufacturers and their trade association which had created industry-wide standards and practices with respect to the safety features and warnings given for blasting caps.[55] The court reasoned that in other cases, joint or vicarious liability had been imposed on owners, employers and manufacturers for injuries caused by others over whom they had direct or partial control.[56] The basis for this liability was that the owner, employer or manufacturer was "the most strategic point of foresight, precaution and risk distribution."[57] This futuristic court also pointed to other situations where "the only feasible method of ascertaining risks, imposing safeguards and spreading costs [was] through joint liability or other methods of joint risk control."[58] It stated further that it was "the entire blasting cap industry and its trade association [which] provide[d] the logical locus at which precautions should be taken and liability imposed."[59] The court went on to hold that the plaintiffs would have to establish the "defendants' joint awareness of the risks at issue and their joint capacity to reduce or affect those risks."[60] Once the plaintiffs establish that the blasting caps were the product of one of the unknown named defendants and that each named defendant, at substantially the same time and in a similar manner, breached the duty of care owed to the plaintiffs, then the burden of proof of causation would shift to

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51. Note, *Industry Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1006-09 (1979). *See also*, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 997-98 (1978) [hereinafter cited as *A Proposed Theory*].

52. *A Proposed Theory*, *supra* note 51, at 974.

53. *Id.*

54. *See* Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

55. *Id.* at 359.

56. *Id.* at 376-77.

57. *Id.* at 377.

58. *Id.*

59. *Id.* at 378.

60. *Id.*

the defendants.[61] Trade associations, "independent" laboratories and code-making bodies are logical defendants under an industry-wide theory if they wrongfully enable the advancement of the product.

The *Sindell* court declined to impose industry-wide liability because of three "equally important" reasons.[62] The first reason was that *Hall*, which involved six manufacturers representing the entire industry, cautioned against application of the theory to a large number of producers.[63] Secondly, in *Hall*, the defendants had delegated safety functions to the association and so jointly controlled the risk, (or created the harm), but the *Sindell* plaintiffs did not allege any such delegation.[64] Finally, *Sindell* held that since the government, through the FDA, plays such a pervasive role in testing and marketing drugs, it would be unfair to hold a manufacturer liable simply because it followed industry standards over which it had no control.[65] This would not be true where the industry itself was responsible for the development of a standard that later became law, as is typical with many OSHA standards, electrical codes and building codes.[66]

If industry-wide liability were established, each manufacturer would be jointly and severally liable for all injuries.[67] Although the *Sindell* court declined to apply enterprise liability, the court acknowledged the existence of the theory and identified its elements as follows:

> 1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product.
> 2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct.
> 3. A generically similar defective product was manufactured by all the defendants.
> 4. Plaintiff's injury was caused by this defect.

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61. *Id.* at 379-80.

62. Sindell v. Abbott Laboratories, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

63. *Id.*

64. *Id.*

65. *Id.* at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 143.

66. Often manufacturers themselves determine the standards they want the government to apply to their industry. For example, the Flammable Fabrics Act (Commercial Standard 191-53) was developed primarily by the American Association of Textile Chemists and Colorists and the National Retail Dry Goods Association with only the advice of the National Bureau of Standards. *See,* Campbell & Vargo, *supra* note 31, at 397 n.13. Standards developed by manufacturers can be worthless; ordinary toilet tissue has been shown to pass the Flammable Fabrics Act standards. *Id.* at 403. It may be argued that no standard would be safer than a fictitious standard which causes consumers to hold a false sense of security. *See, e.g.,* Fabricus v. Montgomery Elevator Co., 254 Iowa 1319, 1327, 121 N.W.2d 361, 366 (1963)(no inspection is better than a negligent inspection).

67. Sindell v. Abbott Laboratories, 26 Cal. 3d at 608, 607 P.2d at 934, 163 Cal. Rptr. at 142.

> 5. Defendants owed a duty to the class of which plaintiff was a member.
> 6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
> 7. All defendants were tort-feasors [under whichever cause of action was proposed: negligence, warranty, or strict liability].[68]

It is clear that when the above facts are proven, the development and exploitation of the industry-wide standard itself becomes a proximate cause of the plaintiff's injury.[69] Given proof of all the elements, even those manufacturers who did not make the very product causing injury should be held liable for its conduct which was a proximate cause of the product's demand, acceptance and utilization in the marketplace.

D. *Market Share Liability*

Under market share liability, once the required number of defendants are joined, each defendant is liable for its market share unless it demonstrates that it could not have made the defective product.[70] This demonstration would not relieve a manufacturer from liability under concert of action and industry-wide liability theories. "Market share" requires joinder of manufacturers representing "a substantial share" of the market,[71] while industry-wide liability requires that it be more probable than not that an injury was caused by the named defendants.[72] Both theories shift the burden of proof of identification to the defendant once it is shown that the plaintiff cannot identify specific manufacturers.

1. *Practice Tactics*

Once suit has been filed, discovery should be undertaken immediately by way of interrogatories to ask pointedly if the respective defendants manufactured the exact product in question, how they determined that they did or did not, and whether their investigation uncovered facts which would be relevant to the determination of which of the other defendants did or did not manufacture the subject product. Such an inquiry should be made both as to the overall market area and the more specific, relevant geographic area.

Where it can be proven that of the many manufacturers of a given

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68. *Id.* at 608 n.24, 607 P.2d at 935 n.24, 163 Cal. Rptr. at 143 n.24, citing *A Proposed Theory, supra* note 51, at 995.

69. *See* Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. at 372 (E.D.N.Y. 1972).

70. Sindell v. Abbott Laboratories, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

71. *Id.*

72. Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. at 379. *See also A Proposed Theory, supra* note 51, at 996-97 (suggesting that a plaintiff must join producers of 75 to 80 percent of the relevant market).

product, only a specified number sold the product in the geographical region which ultimately brought the product to the plaintiff, it would follow that joinder of all defendants marketing in that geographical region would be joinder of all relevant defendants in keeping with the reasoning in *Summers*. Obviously, in *Summers* there were many more hunters in the United States at the time, but only two in the woods where Summers was shot. Again, however, this creates practical problems in that the plaintiff should be allowed initially to name all manufacturers of the complained of product, and then, through formal discovery, narrow its case to only those defendants who actually supplied the complained of product in the relevant geographical region. Early dismissal of defendants marketing the same design or formulation of a defective product once the actual manufacturer identification had been made is not unreasonable. Proper labelling and good record keeping would minimize, and in many instances eliminate, the problem for these manufacturers who feel oppressed by common liability remedies.

2. *Rationale of Sindell.*

In creating the theory of market share liability, the *Sindell* court reasoned that the negligent defendants, rather than innocent plaintiffs, should bear the cost of injury.[73] This reasoning was the basis of finding alternative liability in *Summers v. Tice*, where the burden of proof of causation shifted to the defendants because defendants were in a far better position to offer evidence of the cause of injury.[74] The *Sindell* court specifically stated that the burden should shift to defendants because their conduct in marketing a drug with delayed effects was a significant cause of the unavailability of proof.[75] The shift of the burden of proof seems not to be punishment per se, but a recognition of the public policy that manufacturers should not escape responsibility for manufacturing defective products merely because they have also made the particular product which caused the injury impractical to identify. Nor did the *Sindell* court place an unreasonable burden on any defendant:

> We hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff 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 sold by all for that purpose. . . . Under this approach, each manufacturer's liability would approximate its responsibility for injuries caused by its own products.[76]

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73. Sindell v. Abbott Laboratories, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

74. *Id.* at 598-99, 610-11, 607 P.2d at 928, 936, 163 Cal. Rptr. at 136, 144.

75. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

76. *Id.* at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

In other words, market share liability merely apportions damages among proven tort-feasors, and as such is not a radical departure from traditional tort principles as some courts have carelessly suggested.

Perhaps in addition to the precedent found in the principles of other cases, *Sindell* is likely to gain acceptance because it is an inducement to industry-wide safety. Companies now are less likely to ignore some risks from which they might have thought they could hide. Previously, there was safety in numbers. Poor record keeping and the requirement of product identification lessened their responsibility to the public. Now, manufacturers are induced to identify their products with themselves or they may be liable for someone else's defective product. Furthermore, *Sindell* promotes increased group consciousness of a product's risks and, thus, cooperation and the spread of information are more likely. Common liability discourages the continued marketing of defective products. Independent and competitive product development would, on the other hand, be encouraged. Before *Sindell*, manufacturers might have thought, "we must hang together or we shall surely hang separately," but they knew that only one would hang at a time and they could hope it would be the other guy. Now they should know that "we must be responsible together or together we'll hang." Trade associations would thus be encouraged to work on product development as well as product promotion and profit.

As stated before, the basic rationale behind *Sindell* was simply that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury."[77] The court added that the manufacturer is in the best position to guard against defects and provide warnings.[78] So, this decision provides an incentive to product safety.[79] Furthermore, the defendants are better able to bear the cost of injury through insurance or by passing the cost on to consumers.[80] The *Sindell* decision certainly does not depend upon this third reason, but general criticism of the decision seems to place a great deal of importance on it, suggesting that the decision is incorrect if there are problems with spreading costs via insurance or pricing. *Sindell* should withstand such attacks, because such arguments implicitly accept the major rationale of the case, and because the problems of spreading the cost are not overwhelming.

One attorney criticized *Sindell* because of the problems of insuring against market share liability risks, observing that "any insurance which could be purchased in 1980 to cover injuries which occurred since 1944, caused by a product manufactured over the 35 to 40 years prior, would be so costly as to be of little real value."[81] This "problem" really has no direct

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77. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
78. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.
79. *Id.*
80. *Id.*
81. T. Gillick, *The Essence of Enterprise Liability or the True Meaning of 'We're All in*

relation to the theory of market share liability, since market share liability does not expand the length of time during which injuries are held compensable. This time problem is a function of the nature of the product itself, and simply shows the need for product liability insurance purchased on the per occurrence basis which covers liability from prior manufacturing defects. Furthermore, it is illogical to criticize a theory of liability because of the high cost of damages paid to persons harmed by a defective product.

Sindell has also been criticized because the management of a company might pass the cost of its market share liability for one product onto another product. A hypothetical situation created to demonstrate such a horror was that a drug manufacturing company might raise the price of a diabetic's insulin to pay for its market share liability based upon DES.[82] Of course, the market share liability theory has nothing to do with how products are priced. Businesses have always been free to subsidize the cost of one product from the profits of another. This is how research and development of new products is financed, and such pricing manipulations occur every day. There is nothing sinister about such pricing manipulations, and *Sindell* will have no more effect on these techniques than any other judicial decision.

Despite the reasonableness of the market share liability theory, at least one court has rejected market share liability by saying that it is "pure and undisguised speculation to assume that any one of the defendants named actually manufactured the drug which caused plaintiff's harm."[83] How is this assertion possible if the plaintiff has joined a substantial share of the market? The same court also held that "there is nothing inherent in the conduct of the defendants or in the manufacture of DES which creates this complexity of identification."[84] This simplistic approach ignores the mechanism by which many defects become manifest and cause injury. As the court in *Sindell* noted, the problem of identification was largely a result of the delayed effects of the DES, and the burdens of such risks should be borne by a negligent defendant rather than an innocent plaintiff.[85] Similarly, a

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This Together', A.B.A. Section of Litigation (1980).

82. *Id.*

83. *See, e.g.*, Namm v. Eli Lilly & Co., No. 3021776, at 13-14 (N.J. Super. Ct. App. Div., filed Feb. 5, 1981)(discussion of market share liability in connection with alternative liability). *Contra*, Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981). In that case, the court did not make a final determination as to whether plaintiffs, injured by asbestos inhalation, could proceed on a *Sindell* theory of liability. *Id.* at 1357-60. The court concluded, however, that a preliminary determination on the status of the *Sindell* theory was required in order for the court to pass on defendants' motion to file cross-actions against other defendants based on market share apportionment. *Id.* The court also intimated that, in its view, market share liability should be applied. *Id.* at 1359-60.

84. *Id.* at 14.

85. Sindell v. Abbott Laboratories, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

product that explodes or burns as a result of its defect may have been aptly labeled, but when post-injury identification is sought, such identification is no longer possible.

3. *Limitations of Market Share Liability.*

Some circumstances may arise in which application of market share liability may be available but undesirable or desirable but unavailable to a plaintiff. As previously mentioned, a defendant not involved in a separate tort may escape liability if it can prove that it did not manufacture the defective product. This rule may indicate that market share liability may be appropriate only in a defective design or failure to warn case. Market share liability may also be limited when a case is complicated by a problem of partial identification of defendants. Furthermore, because market share liability is only partially developed as a theory, courts may be reluctant to take upon themselves the burden of answering difficult questions which are as yet unresolved. For that reason some courts may decline to apply market share liability or may limit its application to situations in which it has been previously applied. Some courts may simply fail to understand the problems of product identification in the modern marketplace, deny the principles underlying market share liability and reject market share liability altogether.[86]

One instance in which market share liability may be available as a theory of recovery but which is not as desirable as another theory occurs when a tort has been committed by concerted action of the defendants. In such a case, under the concerted action theory, the plaintiff may sue as few defendants as he cares to, and thereby avoid facing the entire industry in a court battle. Another advantage is the fact that the defendant need not have manufactured the defective product since it is liable only for its assistance to another tort-feasor;[87] it may not escape liability by showing that it did not manufacture the specific product. Similarly, trade associations and other organizations that do not manufacture the product, but advance its market acceptance, may also become liable.

When the *Sindell* court announced the rule that under market share liability a manufacturer may escape liability by showing that it did not manufacture the defective product, it did not explain its reasoning.[88] The reasons may be found, however, in the theories of alternative liability and enterprise liability. The *Sindell* court noted that under alternative liability, as in the *Summers* case, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants are responsible for the in-

86. *See* Namm v. Eli Lilly & Co., No. 3021776, at 14.

87. *See* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979).

88. Sindell v. Abbott Laboratories, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

jury.[89] Similarly, under the enterprise liability theory, one of the elements is that there must be evidence that all defendants were tort-feasors.[90]

These requirements may limit application of all common liability to suits for defective design or failure to warn. Indeed, the enterprise liability theory, upon which market share liability is partially based, seems to require that there was an inexcusably insufficient industry-wide standard of safety, and that a generically similar defective product was manufactured by all the defendants.[91] No court has stated that market share liability will be applied only where all defendants employed a similar defective design according to an industry-wide standard, but this seems to be a logical limitation on the application of market share liability. For example, in a situation such as that in *Sindell,* if the harm to the plaintiff was caused by a unique defect in the manufacturing process, the action should fail because (assuming proper care in manufacturing by other manufacturers) it cannot reasonably be held that all defendants acted tortiously if the product was otherwise merchantable. A similar situation may be found in *Garcia v. Joseph Vince Co.,*[92] in which a defectively manufactured fencing mask was pierced by a saber causing injury to a plaintiff who sued under alternative liability. Both defendants were held not liable because there was no proof that either violated a duty to the plaintiff.[93] As one commentator noted, application of market share liability to manufacturing defect cases "would entail use of probability to evaluate negligence as opposed to merely apportioning liability among proven wrongdoers, a clear step beyond *Sindell.*"[94]

No court has yet fashioned a remedy for a party injured by a unique manufacturing defect not common to all such products where the specific product is unidentifiable. Surely such situations are not uncommon. For example, an otherwise beneficial drug manufactured with an unintentional deleterious ingredient will not subject other makers of the same formulation to liability merely because they marketed the drug. There must be some tortious conduct related to the overall marketing of a product proven to be defective.

Under market share liability, "[a]n intermediate case would be one in which many, but not all, manufacturers breached a duty of care. If manufacturers representing a substantial share of the relevant market are negligent, market share liability could be applied after first excusing nonnegligent

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89. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39. *See also* RESTATEMENT (SECOND) OF TORTS 433B, comment g (1965).

90. *A Proposed Theory, supra* note 51, at 995.

91. *Id.*

92. 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978). *See also* Note, *Market Share Liability: An Answer to the DES Causation Problem,* 94 HARV. L. REV. 668, 678 (1981) [hereinafter cited as *Market Share Liability*].

93. Garcia v. Joseph Vince Co., 84 Cal. App. 3d at 879-80, 148 Cal. Rptr. at 850 (mask was held to have met and exceeded established specifications).

94. *Market Share Liability, supra* note 92, at 678.

defendants."[95]

The *Sindell* court imposed liability where fungible products were the cause of injury, and where the plaintiff's failure to identify the manufacturer was largely caused by the manufacturer's conduct.[96] If these characteristics of the case are held to be strict requirements, market share liability would probably not be available in suits such as one against drug manufacturers when drugs are labeled and the problem of identification is due to the fact the plaintiff used various brands but cannot recall or prove the specific brands.

4. *Problems.*

Despite the encouragement *Sindell* supposedly gives manufacturers to identify their products, double liability may be inflicted on some manufacturers who have made identification easier, either through better record keeping, labeling products or use of brand names. "[T]hese defendants may be exposed to double liability: to knowing plaintiffs who can trace specific injuries to them and to unknowing plaintiffs for their general percentage of the market."[97] Arguably, such defendants, if their product was adequately identified, should be able to escape liability under market share liability by showing that they did not make the product. However, if a manufacturer could show that he was doubly liable, an adjustment in its market share liability might be appropriate.[98]

Such an adjustment of liability under market share might be favored by manufacturers when problems of partial identification create double liability. This adjustment would be opposed by plaintiffs suing under market share liability if the adjustment merely reduced one manufacturer's liability without creating additional liability for another defendant in order to make up for the plaintiff's loss.

A different adjustment of liability could help certain plaintiffs and disadvantage certain manufacturers. For example, there would be problems of partial identification when a plaintiff could narrow potential defendants to a few because only they manufactured pills the size or shape of those that caused injury.[99] An adjustment of market share liability would be appropriate because plaintiffs in these circumstances would be precluded from recovering against an individual manufacturer, and might be precluded under market share liability if those identifiable manufacturers do not constitute a substantial share of those making similar defective products.[100] Perhaps this

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95. *Id.* at 678 n.52.

96. Sindell v. Abbott Laboratories, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

97. *Market Share Liability, supra* note 92, at 676.

98. *See id.*

99. *See id.* at 677 n.48.

100. *Id.* at 677.

would be no problem if the plaintiff sued a substantial share of the market, and those who did not manufacture pills of a certain size or shape could be dismissed. But, how could the plaintiff initially allege that such manufacturers are liable? One approach to this problem of identification of some manufacturers might be to define the suable market as those who manufactured defective products of the same type, including shape, size, etc. In class actions, it might be appropriate to let all plaintiffs sue under market share liability, even those who can narrow the possible tort-feasors to a few manufacturers; this involves holding some defendants liable even though they can show that their defective product did not cause injury to some members of the class.[101] The justification for this approach is to avoid the expense of case-by-case, as opposed to class action, litigation.[102] Additionally, since adjustments might be made to market share liability in favor of manufacturers, as in the case of double liability problems, this adjustment may be regarded as a factor when the overall equities are weighed.

Some courts have rejected market share liability perhaps out of misunderstanding or a strict view of products liability, rather than an unwillingness to take on the burden of molding market share liability to the facts. As champions of injured consumers, attorneys are ill-trained and ill-equipped to conduct pre-filing market share and distribution analysis of a given product.

A motion to dismiss on the pleadings is grossly unfair when the only matter not then sufficiently discovered is the actual, injury-causing defendant, and only formal discovery is the available "looking glass."

Until the law is settled in every state, attorneys should be well aware of the possibility that market share liability may not be accepted by the court hearing their case. Pleading other related causes of action such as concert of action or industry-wide liability may be the only prudent point of beginning until formal discovery enables the charting of a more definitive course.

IV. Summary

While seemingly alike, the concert of action, alternative liability, enterprise and market share theories discussed above are markedly different in one or more vital matters of proof and recovery. The appendix illustrates both similarities and differences.

Lest their fairness be obscured, remember that no common liability theory is viable until liability is established—where one of the common manufacturers is required to pay. The only beneficiaries of less practical identification requirements are guilty corporations. While pro rata damage payments may not always be exact, it is better than the cruel tax that would be imposed on the victims of defective but profitable products. Such profi-

101. *Id.*
102. *Id.* at 677 n.48.

teering is repugnant to both the logic and spirit of section 402A of the Restatement. Legislation is unreliable, and special interest intrusion into this developing area of the common law of products liability has occurred in some states.[103]

It must be remembered that common liability theories advanced over simpler processes are involuntary remedies when dealing with unidentifiable products. It is a victim-summoned line-up of all likely wrongdoers. Courts

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103. Conflicting bills are currently working their way from the respective judiciary committees of the California Senate and Assembly. *See* S.B. 463 (1981) and A.B. 3344 (1981). A.B. 3344 would overturn "*Sindell* and would require plaintiffs in any products liability claim to prove that the product seller's own product caused the alleged injury."

Under existing law, where there are multiple tortfeasors against whom judgment is entered, they are jointly and severally liable. Each, however, has a right of contribution from the others if he paid more than his *pro rata* share of the judgment.

This bill would provide a right of contribution among multiple tortfeasors whether a judgment had been recovered against any or all of them on the basis of each tortfeasor's *equitable* share of the obligation determined on the tortfeasor's comparative fault. The bill also specifies courtroom procedure for assessing comparative fault by presenting special interrogatories to a jury or by using findings of a court sitting as the trier of fact. *Id.*

The purposes of this bill are: (1) to overturn *Sindell*, and (2) to coordinate the rules governing contribution with the principle of comparative fault. The Association of Trial Lawyers of America (1981) (annual convention reference materials).

The bill would cast doubt on the validity of *Summers*. This rule could lead to excessive litigation relating to contribution. Present case law which allows third party defendants to be joined in the action would be preferable. *Id.*

Unanswered by A.B. 3344 is the question of whether the person from whom contribution is sought, and who was not a party to the main action, will or should be allowed to relitigate the prior award for the purpose of contribution. *Id.*

Senate Bill 463, on the other hand, provides that settlement with a defendant would discharge that defendant's comparative fault, regardless of the amount of settlement, and that the remaining defendants would be liable only for their own *pro rata* liability. This bill would codify existing case law in that only the settlement amount would be deducted from the total judgment against the non-settling tortfeasors. Any remaining defendants would be jointly and severally liable for the remainder of the judgment. *Id.*

Arne Werchich, President of the California Trial Lawyers Association, speaking on behalf of the association, vehemently opposes both bills. Particularly, he has noted that A.B. 3344 will *discourage settlements* by eliminating any certainty as to the amount of a settlement, since such amount is determined "after the fact" at the close of trial. *Id.*

Because A.B. 3344 will reduce the plaintiff's recovery by the equitable share of the settling party, it will place on the plaintiff the impossible task of making his case against the non-settling defendants while at the same time defending the absent defendant from the blame attributed to him by the other defendants. Faced with such a burden and the uncertainty of a settlement, the practical effect of A.B. 3344 will simply be to eliminate settlements in multiple party actions. *Id.*

The passage of this legislation will result in fewer settlements, more trials of increased length and complexity and greater costs to both litigants and the judicial system. *Id.*

In addition, California Superior Court Judges Benson of San Francisco and McClosky of Los Angeles have publicly stated that such legislation would have a devastating effect on the settlement conference programs conducted by the Superior Courts of California. *See id.* at 154-57.

can and should encourage the development of theories which equitably remove the generic blindfold from those occasionally summoned from their profitable market activities.

While these common liability theories have been discussed in the context of product liability, they may be adaptable to other areas of the law. For example, common air or water pollution may present tort-feasor identification problems in seeking environmental remedies and apportionment of damages among known polluters which may turn into "pollution share" problems.

APPENDIX

ELEMENTS	CONCERT	ALTERNATIVE	INDUSTRY-WIDE	MARKET SHARE
Which tortfeasors must be joined as defendants?	one or more	all (but theory applies only if there are a few tortfeasors)	all, or those responsible for at least 75% of the market (but theory applies only if there are a few tortfeasors)	those responsible for a substantial share of the market
Must plaintiff prove wrongful conduct by each defendant?	yes	yes	yes	yes
Burden of proving or disproving that the defective product was manufactured by each defendant	plaintiff	plaintiff	defendant	defendant
Burden of proving or disproving that the defendant's tort caused injury	plaintiff	defendant	defendant	defendant
Whether each defendant is liable if it did not manufacture the product which caused the injury	yes	no	no	no
Amount of damages recoverable	100% (contribution, indemnity)	100% (contribution, indemnity)	100% of damages are apportioned among defendants according to their relative share of the market (contribution, indemnity)	100% of damages are apportioned among defendants according to their relative share of the market (contribution, indemnity). *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980).