

Summer 1991

Presumed Innocent: Illinois' Rejection of Market Share Liability in Smith v. Eli Lilly & (and) Company Is Cause in Fact to Celebrate, 24 J. Marshall L. Rev. 869 (1991)

Steven Bonanno

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Recommended Citation

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CASENOTES

PRESUMED INNOCENT: ILLINOIS' REJECTION OF MARKET SHARE LIABILITY IN *SMITH v. ELI LILLY & COMPANY** IS "CAUSE IN FACT" TO CELEBRATE.

Proponents of market share theories of tort liability¹ have re-

* *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

1. There are four current forms of market share theory which the supreme courts of five states have accepted. The California Supreme Court was the first to develop a market share theory. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). The court created the theory as a modification of the alternative liability theory embodied in RESTATEMENT (SECOND) OF TORTS § 433(B)(3) (1965) which provides:

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.

Comment h to that section adds that "cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time." RESTATEMENT (SECOND) OF TORTS § 433B comment h (1965). The *Sindell* court interpreted the comment as a license to modify alternative liability into a separate theory of recovery. *Sindell*, 26 Cal. 3d at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139. *Sindell* requires that a plaintiff must first prove all the elements of the tort except the tortfeasor's identity. *Id.* at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. Then, after the plaintiff joins a "substantial share" of the manufacturers of DES, the defendants may try to disprove their identity as the manufacturer who sold the DES to the plaintiff's mother. *Id.* However, the *Sindell* court failed to define "substantial share." The *Sindell* theory utilizes a national market and imposes only several liability on the defendants. *Brown v. Superior Court*, 44 Cal. 3d 1049, 1072-75, 245 P.2d 470, 485-87, 245 Cal. Rptr. 412, 426-28 (1988).

The *Sindell* court based its decision on three policies. *Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. First, it felt that as between an innocent victim of a dangerous drug and a manufacturer of a defective product, the manufacturer should bear the cost of the injury. *Id.* Second, the *Sindell* court asserted that the manufacturer was in a better position to bear the cost of the injury than the plaintiff. *Id.* Third, it maintained that since the manufacturer could discover and prevent defects more easily than consumers, placing increased liability upon manufacturers acts as an incentive for product safety. *Id.* See also W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 271-72, § 103, at 713-14 (5th ed. 1984) for a discussion of *Sindell*.

Four years later, the Washington Supreme Court rejected the *Sindell* approach and adopted a modified approach commonly referred to as "market

share alternative liability." *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 604-07, 689 P.2d 368, 382-83 (1984). Under *Martin*, the plaintiff may sue only one defendant, who may then elect to implead third party defendants. *Id.* Each defendant is presumed to have an equal market share until it establishes its actual share of the relevant market. *Id.* at 605-06, 689 P.2d at 383. If any defendant fails to establish its respective market share, then its presumed market share will be shifted upward so that 100% of the market is represented by the cumulative defendants' market shares. *Id.* However, if all defendants can establish their respective shares, the plaintiff's recovery is limited to the cumulative market shares of those defendants present in the suit. *Id.* Also, all settlements between the plaintiff and the defendants are ignored when determining the defendants' actual and presumptive shares. *George v. Parke-Davis*, 107 Wash. 2d 584, 599-601, 733 P.2d 507, 516 (1987). However, the shares of bankrupt corporations may be included in market share calculations if information of their actual shares exists. *Id.* at 594-97, 733 P.2d at 513-15.

Under *Martin*, market shares are based on a local market. *George v. Parke-Davis*, 107 Wash. 2d at 592-993, 733 P.2d at 512. The court determines the local market by considering the following factors: geographic market area, time of ingestion, and type of DES taken. *Id.* If such evidence is non-existent, the market is on a county, state or national level. *Id.* The *Martin* theory requires the plaintiff to prove that her mother took DES, that it injured her, that the defendant made that type of DES, and that the defendant's manufacturing of DES breached a duty owed to her. *Martin*, 102 Wash. 2d at 604-07, 689 P.2d at 382-83. A defendant may exculpate itself only by proving that it did not produce that type of DES, or that it did not produce or market DES at that time. *Id.*

The Florida Supreme Court recently adopted the *Martin* theory with two variations. See *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990). The first variation was that Florida added a requirement that a plaintiff seeking to rely on market share theory must make a showing that she "made a genuine attempt to locate and to identify the manufacturer responsible for her injury." *Id.* at 286. The second variation with the *Martin* theory was that it was limited to recovery only for actions sounding in negligence. *Id.*

Also, in 1984, the Wisconsin Supreme Court created the "risk contribution theory", a third variation of market share theory. *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826 (1984). Like *Sindell*, *Collins* requires that the plaintiff must first prove all the elements of the tort except the tortfeasor's identity. *Id.* at 193, 342 N.W.2d at 50. Like *Martin*, *Collins* permits suit against as few as one defendant and does not require a "substantial share" of the market to be present. *Id.* If the plaintiff sues only one manufacturer who does not implead others, that defendant is liable for 100% of the damages. *Id.* When there are two or more defendants, the damages are divided under Wisconsin's comparative negligence statute. *Collins*, 116 Wis. 2d at 199, 342 N.W.2d at 53. The defendants may exculpate themselves by proving that they did not produce DES at the time or did not distribute DES to the place where it was purchased. *Id.* at 197-98, 342 N.W.2d at 52.

The New York Court of Appeals introduced the most recent of the market share theories. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 S. Ct. 350 (1989). The New York approach, like the others, requires the plaintiff to prove all the elements of the tort except the defendant's identity before shifting the burden of proof to the defendants. *Id.* at 508-14, 539 N.E.2d at 1075-78, 541 N.Y.S.2d at 947-950. *Hymowitz* limits recovery under the theory exclusively to DES cases, uses a national market, allows several liability only, and does not provide for inflation of market shares when less than the entire market is present. *Id.* To exculpate themselves, defendants may prove that they did not produce DES for use during the pregnancy. *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. However, defendants may not exculpate themselves by claiming that they did not manufacture the type of DES the plaintiff took. *Id.* The reason for this is that the *Hymowitz* theory's basic policy is to "apportion liability so as to correspond to the over-all culpability of

cently waged numerous attacks² on the necessity of defendant iden-

each defendant, measured by the amount of risk of injury each defendant created to the public-at-large." *Id.* New York has, however, limited the application of *Hymowitz* to DES cases where the plaintiff is the daughter of the woman who ingested DES. *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S. 2d 550 (1991). *Hymowitz* will not apply to cases in which the plaintiff is the granddaughter of the woman who ingested the DES. *Id.*

2. Plaintiffs have attempted to assert market share theory in a variety of contexts. Representative examples and cases include:

ASBESTOS: *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 554 N.E.2d 468 (1990), *cert. denied*, 555 N.E.2d 377 (1990) (distinguishing *Smith* on the ground that asbestos is not fungible like DES, and, therefore, Illinois appellate court's adoption of market share liability did not apply). See *infra* this note for a definition of "fungible."

AUTOMOBILE PARTS: *York v. Lunkes*, 189 Ill. App. 3d 689, 545 N.E.2d 478 (1989) (market share theory is not applicable to car batteries since they are "readily distinguishable from one another" and not all car batteries are defective).

COSMETIC BREAST IMPLANTS: *Lee v. Baxter Healthcare Corp.*, 721 F Supp. 89 (D. Md. 1989), *aff'd*, 898 F.2d 146 (4th Cir. 1990) (Maryland law does not recognize market share liability, and even if it did, plaintiff failed to join a substantial share of the breast implant market).

DES: See *supra* note 1 for five cases accepting market share liability in DES cases. See also *McCormack v. Abbott Laboratories*, 617 F Supp. 1521 (D.C. Mass. 1985) (adopting *Martin* theory in DES case based on state supreme court dicta that it might recognize some form of market share theory). The supreme courts of Iowa, Missouri and Illinois have rejected market share theory in DES cases. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 246-47, 560 N.E.2d 324, 334-35 (1990) (market share theory unworkable and against public policy); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986) (market share theory is contrary to Iowa public policy); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (identification element serves strong social policy and should not be rejected in order to adopt market share theory).

TOBACCO: *Phillips v. R. J. Reynolds Indus.*, 769 S.W.2d 488 (Tenn. App. 1988) (plaintiff's market share products liability action against cigarette manufacturer was preempted by the Federal Cigarette Labeling and Advertising Act).

VACCINES: *Compare Poole v. Alpha Therapeutic Corp.*, 696 F Supp. 351 (N.D. Ill. 1988) (court refused to impose market share liability upon manufacturers of an antihemophilic factor from which the plaintiff contracted AIDS with *Ray v. Cutter Laboratories*, 754 F Supp. 193 (M.D. Fla. 1991) (liability imposed against manufacturer of blood plasma containing AIDS virus); *Shackil v. Lederle Laboratories*, 116 N.J. 155, 561 A.2d 511 (1989) (when the plaintiff became retarded after being injected with a diphtheria, pertussis and tetanus (DPT) vaccine, the court rejected market share theory because such theory would inevitably reduce the availability and development of drugs and vaccines). *Contra Morris v. Parke, Davis & Co.*, 667 F Supp. 1332 (C.D. Cal. 1987) (market share theory utilized against DPT manufacturer).

See also *Wood v. Eli Lilly Co.*, 723 F. Supp. 1456, 1460 (S.D. Fla. 1989), *rev'd on other grounds*, 933 F.2d 1020 (11th Cir. 1991) for a typical example of a federal court's refusal to act on this issue absent approval from the state's supreme court. *But see McCormack, supra*, at 1521 (adopting *Martin* theory based on Massachusetts Supreme Court dicta that it might recognize a market share theory).

A common strand among the above cases is the importance of "fungibility" in determining when market share liability will be permitted. The Uniform Commercial Code defines "fungible" as "goods of which any unit is, by nature or usage of trade, the equivalent of any other unit." U.C.C. § 201(17)

tification as a common law element of cause in fact in products liability suits.³ In *Smith v. Eli Lilly & Company*,⁴ the Illinois Supreme Court addressed the issue of whether a market share theory of liability should be applicable in diethylstilbestrol ("DES") cases.⁵ The court determined that market share liability is an unsound theory which diverged too far from fundamental tort concepts,⁶ and rejected its application in DES cases.⁷ Thus, despite several Illinois trial courts' use of market share theory over the past six years, this decision marks Illinois' return to a firm adherence to the common law requirement of defendant identification in prod-

(1991). This is pertinent to market share theory since fungibility provides the uniformity among different manufacturers' products which would make it theoretically consistent to impose industry-wide liability for an industry-wide defect. Fischer, *Products Liability — an Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1652-54 (1981).

3. The general rule in products liability cases is that the plaintiff, in order to maintain a cause of action, must identify a defendant whose conduct was a substantial factor in causing the plaintiff's injury. *Schmidt v. Archer Iron Works*, 44 Ill. 2d 401, 404-05, 256 N.E.2d 6, 8, cert. denied, 398 U.S. 959 (1970). See also Annotation, *Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R.3d 1344, 1349-58 (1973) (compilation on the requirement of defendant identification in products liability cases). A plaintiff must show evidence of "reasonable probative force" that the defendant was the manufacturer of the product in question. *Kramer v. Weedhopper of Utah, Inc.*, 141 Ill. App. 3d 217, 221, 490 N.E.2d 104, 107 (1985). "Reasonable probative force" is a question of probability which will be resolved in favor of defendant identification if the inference of identification is "more probable than not." *Id.* at 222, 490 N.E.2d at 107. Mere possible identification is insufficient to raise an inference of defendant identification. *Id.* See also *Sutton v. Washington Rubber Parts & Supply Co.*, 176 Ill. App. 3d 85, 88, 530 N.E.2d 1055, 1057-58 (1988).

4. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

5. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325. "DES" is the common name for the synthetic hormone diethylstilbestrol which mimics the functioning of the natural female hormone, estrogen. *Id.* at 229-30, 560 N.E.2d at 327. The Food and Drug Administration initially approved the use of DES in 1947 to prevent miscarriages after which many drug manufacturers initiated production of the drug. *Id.* at 229-33, 560 N.E.2d at 327-28. Doctors regularly prescribed DES in the 1950's and 1960's to prevent miscarriages, and DES continues to be used today to a lesser degree to treat problems associated with menopause, prostate cancer, and several disorders of the female reproductive system. PHYSICIAN'S DESK REFERENCE 1126 (38th ed. 1984).

In 1971, two medical studies revealed a link between maternal ingestion of DES during pregnancy and their children's elevated incidence of cancer. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964 n.5 (1978). Thereafter, the Food and Drug Administration withdrew its approval of the drug. *Id.* at 963 n.2. See *infra* note 13 for a discussion of the contemporary medical view of the correlation between DES exposure and the incidence of cancer.

6. *Smith*, 137 Ill. 2d at 250-51, 560 N.E.2d at 336-37. See *infra* notes 69-71 and accompanying text for a discussion of the essential tort concept of defendant identification.

7. *Id.*

ucts liability cases.⁸

In 1953, Sandra Smith's mother sought medical assistance with her pregnancy because she experienced problems with previous pregnancies.⁹ Her doctor prescribed DES in hopes of assuring a safe pregnancy.¹⁰ In July 1953, she gave birth to Sandra Smith.¹¹

Twenty-five years later, Sandra Smith underwent hospital tests¹² which revealed that she had clear cell adenocarcinoma¹³ of

8. The trial court adopted the *Sindell* theory in 1984. Memorandum of Opinion, Smith v. Eli Lilly & Co., No. 80 L 20473 (1984), *aff'd in part, rev'd in part*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990). Although the theory had received little application in Illinois, it has been plead in a number of cases. See *infra* note 72 for a summary of these attempts.

9. Smith v. Eli Lilly & Co., 137 Ill. 2d 222, 227-28, 560 N.E.2d 324, 326 (1990).

10. *Id.* Elizabeth Smith's doctor prescribed DES to her as "Tab 98", a name assigned to the drug by the doctor's clinic. *Id.* The regular practice of the clinic was to designate particular drugs by a number, rather than the drug's name. *Id.* "Tab 98" designated 25 milligram tablets of DES. *Id.* See *supra* note 5 for a discussion of DES and its history.

11. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325-26.

12. *Id.* A key problem of most DES cases is that the injury tends not to be revealed for at least two decades after the original prenatal exposure to DES. *The Problem of the Indeterminate Defendant: Market Share Liability Theory*, 55 BROOKLYN L. REV. 863, 865 (1989). Some jurisdictions have rejected their statutes of repose to allow DES plaintiffs to maintain a cause of action which was commenced long after the DES exposure. See, e.g., *Wood v. Eli Lilly Co.*, 723 F. Supp. 1456, 1457-59 (S.D. Fla. 1989), *rev'd on other grounds*, 933 F.2d 1020 (11th Cir. 1991). In *Wood*, the Florida statute of repose required products liability actions to be brought no later than "12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date of the defect in the product . . . was or should have been discovered." *Id.* at 1457. See also FLA. STAT. § 95.031(2) (1985) (repealed in 1986). The plaintiffs were exposed to DES *in utero* and discovered their injuries 23 to 31 years later. *Wood*, 723 F. Supp. at 1457 nn.2,3. The court held that the statute of repose barred a plaintiff's cause of action before it even existed and, thus, violated Florida's constitutional guarantee that "[t]he courts shall be open to every person for redress of any injury." *Wood*, 723 F. Supp. at 1458-59 n.4. See FLA. CONST. art. 1, § 21.

13. Clear cell adenocarcinoma is a type of cancer which is characterized by a "malignant neoplasm of epithelial cells in glandular or gland-like pattern." Comment, *The DES Manufacturer Identification Problem: A Florida Public Policy Approach*, 40 U. MIAMI L. REV. 857 n.1 (1986). The Illinois Appellate Court in *Smith* claimed that there are currently 500,000 reported cases of DES related cancer. *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 10, 527 N.E.2d 333, 339 n.7 (1989), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990). However, recent studies indicate that the appellate court's estimation is highly inaccurate and the actual estimates are closer to 500 reported cases of DES related cancer. Melnick, Cole, Anderson & Herbst, *Rates and Risks of Diethylstilbestrol-Related Clear Cell Adenocarcinoma of the Vagina and Cervix: An Update*, 316 NEW ENG. J. MED. 514-16 (1987) (also estimating the risk that a DES exposed female developing the cancer by age 34 is 1/1000). See also Vessey, *Epidemiological Studies of the Effects of Diethylstilbestrol*, 96 I.A.R.C. SCI. PUBLICATION. 335-48 (1989) (adding that although there was a slightly higher incidence of cancer in DES exposed women than in control groups, "the findings, however, are not conclusive").

the vagina.¹⁴ Sandra believed that her cancer resulted from her mother's consumption of DES.¹⁵ Since she was unable to identify which drug manufacturer produced the DES her mother had taken,¹⁶ Sandra subsequently brought suit against 138 drug companies.¹⁷ Her complaint alleged various theories of liability, some of which invoked market share theory.¹⁸ After the pretrial stage, the eight remaining defendants¹⁹ jointly motioned for, and received, summary judgment on all of the counts, except the strict products liability count which invoked the market share theory.²⁰ The trial court adopted the *Sindell v. Abbott Laboratories*²¹ market share theory to support the strict products liability count.²²

The *Sindell* theory allows one who cannot identify the maker of the injury causing product, in this case DES, to shift the burden

14. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325-26.

15. *Id.* at 225-28, 560 N.E.2d at 325-26.

16. Sandra was only able to identify the DES her mother had ingested by its size, color, and dosage. *Smith*, 137 Ill. 2d at 227-28, 560 N.E.2d at 326. Her efforts to identify the manufacturer were further frustrated because both the prescribing doctor and the person who ordered drugs at the doctor's clinic were deceased by the time she discovered that she had cancer. *Id.* In addition, the records at the clinic were inadequate to identify which company manufactured the DES which caused Sandra Smith's injuries, although they did identify some of the clinic's DES suppliers. *Id.*

17. Although plaintiff filed suit against 138 drug companies, only 81 companies actually manufactured the dosage of DES which her mother had taken between 1952 and 1953. *Smith*, 137 Ill. 2d at 227, 560 N.E.2d at 326. Of these, only 18 were named in plaintiff's second amended complaint. *Id.* at 227-28, 560 N.E.2d at 326.

18. The counts in the plaintiff's second amended complaint were based on the following theories: count one — negligence; count two — strict liability; count three — breach of express warranty; count four — fraud; count five — breach of implied warranty; count six — Federal Food, Drug and Cosmetics Act violations; counts seven and eight — civil conspiracy; count nine — negligence; count ten — strict liability; count eleven — tort action against the clinic which sold the DES in question. *Smith*, 137 Ill. 2d at 228-29, 560 N.E.2d at 326. Counts nine and ten invoked market share. *Id.*

19. Only 70 defendants filed appearances. *Id.* at 228, 560 N.E.2d at 326. Of these, 50 escaped from the suit on motions which attacked personal jurisdiction, denied successor liability, and claimed erroneous identification. *Id.* Eventually, only 20 defendants remained in the suit. *Id.* Twelve of these defendants obtained favorable summary judgments on the grounds that they did not sell DES to the field clinic, or that their product did not match the color, size or dosage which plaintiff's mother used. *Id.* at 228, 560 N.E.2d at 326. By the end of the pretrial stage of the suit, only the following eight defendants remained: Abbott Laboratories, Boyle & Company, Carroll Dunham Smith Pharmaceutical Co., Eli Lilly & Co., Harvey Laboratories, Inc., Premo Pharmaceutical Laboratories, S.E. Massengill Co., and William H. Rorer, Inc. *Id.*

20. *Smith*, 137 Ill. 2d at 229, 560 N.E.2d at 327. See *supra* note 18 for a description of each count in plaintiff's second amended complaint.

21. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

22. See *Sindell*, 26 Cal. 3d at 588, 607 P.2d at 924, 163 Cal. Rptr. at 132. See also *supra* note 1 for an indepth discussion of the *Sindell* theory.

of proving tortfeasor indemnity to the defendants.²³ The plaintiff must also join as defendants a "substantial percentage"²⁴ of the producers who sold their product in the "relevant market."²⁵ To do so, the plaintiff must first prove all of the elements of the tort except the tortfeasor's identity.²⁶ After the plaintiff has fulfilled these basic requirements, the burden shifts to the defendants to disprove that they sold the injury-causing drug.

The appellate court affirmed the trial court's denial of the defendants' summary judgment motion as to the strict product liability count, but reversed the trial court's summary judgment for defendants as to the negligence count.²⁷ Furthermore, the appellate court rejected the *Sindell* theory²⁸ of market share liability and, instead, adopted the *Martin v. Abbott Laboratories*²⁹ theory of market share liability.³⁰ The *Martin* theory is similar to the *Sindell* theory in that the plaintiff must prove all the elements of the tort except the tortfeasor's identity.³¹ However, unlike the *Sindell* theory, the *Martin* theory permits a plaintiff to sue as few as one defendant, does not impose joint and several liability on defendants, and favors a local DES market over a national one.³²

23. *Sindell*, 26 Cal. 3d at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

24. *Id.*

25. One attempt to define "substantial percentage" estimated the figure at "75% to 80%." Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 996 (1978). The *Sindell* court, however, rejected that figure stating that "[w]hile 75 to 80 percent is suggested as the requirement . . . we hold only that a substantial percentage is required." *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The *Sindell* court, however, left the term "substantial percentage" undefined. *Id.*

26. See *infra* notes 32, 45, 85-88 and accompanying text for a discussion of the problems associated with defining "relevant market" and recent attempts at solving this problem.

27. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 229, 560 N.E.2d 324, 327 (1990). The appellate court affirmed the trial court's dismissal of the other theories of liability. See *supra* note 18 for a summary of those counts.

28. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325.

29. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984).

30. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984). The Illinois appellate court adopted the *Martin* theory as applied to both the strict liability and negligence counts. *Smith*, 137 Ill. 2d at 226, 560 N.E.2d at 325.

31. *Martin*, 102 Wash. 2d at 604-05, 689 P.2d at 382. See *supra* note 1 for a discussion of the elements a plaintiff must prove under the *Martin* theory.

32. *Martin*, 102 Wash. 2d at 604-05, 689 P.2d at 382-83. The *Martin* theory defined the relevant DES market through "the specificity of the evidence as to geographic market area, time of ingestion, and type of DES." *Id.* at 605-06, 689 P.2d at 383. In 1987, the Washington Supreme Court defined the relevant market as being a local one. *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987). If such evidence is non-existent, then the relevant market is based on county, state, or national data. *Id.*

These definitions of "relevant market", however, remain quite unworkable. See *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 189-90, 342 N.W.2d 37, 48-49 (1984) (discussing the difficulty of defining and proving market share). Although a

The Illinois Supreme Court granted the defendants' petition for leave to appeal.³³ At issue was the appellate court's denial of the defendants' joint summary judgment motion on the negligence and strict products liability counts,³⁴ as well as the appellate court's adoption of the *Martin* theory in DES cases.³⁵

The court, with two justices dissenting,³⁶ concluded that each of the existing market share theories of liability were fundamentally flawed and diverged too far from traditional common law principles of tort liability.³⁷ Consequently, the court refused to apply either the *Sindell* or *Martin* theories to DES cases in which the plaintiff could not identify the tortfeasor.³⁸ The court further noted that the problem of defendant identification in DES cases was one for the legislature to resolve.³⁹

greater number of defendants will be able to establish at least some sales figures based on these definitions, there is no assurance that this data will correspond to sales data of the other defendants. For example, one defendant may have kept only local sales figures while another merely kept national or state sales figures. Similarly, a defendant may have sold DES only to wholesale drug warehouses for redistribution while others may have sold their products directly to doctors and pharmacies.

33. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 226, 560 N.E.2d 324, 325 (1990). In Illinois, appeals to the supreme court are granted as a matter of discretion which is generally based on "the general importance of the question presented, . . . a conflict between the decision sought to be reviewed and a decision of the supreme court, . . . the need for the exercise of the supreme court's supervisory authority, and the final or interlocutory character of the judgement sought to be reviewed." ILL. REV. STAT. ch. 110A, para. 315(a) (1989).

34. *Smith*, 137 Ill. 2d at 229, 560 N.E.2d at 327. These were counts 9 and 10 of plaintiff's second amended complaint. *Id.* See *supra* note 18 for a summary of the counts in the plaintiff's amended complaint.

35. *Id.* The Illinois appellate court adopted the market share theory which the Washington Supreme Court had established in *Martin v. Abbott Laboratories*. *Id.* at 222, 560 N.E.2d at 324. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984). See *supra* note 1 and accompanying text for a discussion of *Martin*.

36. The dissent argued that Illinois should adopt the market share theory established by the New York Court of Appeals in *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989). *Smith*, 137 Ill. 2d at 268, 560 N.E.2d at 345 (Clark, J., dissenting). The dissent justified its position by stating that when the legislature fails to "remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society." *Smith*, 137 Ill. 2d at 269, 560 N.E.2d at 345 (emphasis in original) (quoting *Alvis v. Ribar*, 85 Ill. 2d 1, 23-24, 421 N.E.2d 886, 896 (1981)).

37. *Smith*, 137 Ill. 2d at 251, 560 N.E.2d at 337.

38. *Id.* at 251, 560 N.E.2d at 337.

39. *Id.* at 262-63, 560 N.E.2d at 342. The court noted that since the legislature had greater "ability to hold hearings and determine public policy," it was a more appropriate forum to create a remedy for individuals who were injured by drugs but could not identify the drug's manufacturer. *Id.* The dissent in *Smith* agreed "that a legislative response to the problems of DES daughters might provide a more efficient remedy than litigation." *Id.* at 284, 560 N.E.2d at 352. See *infra* note 102 for a discussion of the need for a legislative solution.

Following a discussion of the history of DES,⁴⁰ the court emphasized the importance of defendant identification⁴¹ in products liability actions. The court noted that the identification element served several essential functions. In particular, the court emphasized the importance of imposing liability only on faulty defendants, and of avoiding "over-deterrence" of manufacturers' socially beneficial activities.⁴² Next, after analyzing other states' acceptance and rejection of various market share theories,⁴³ the court concluded

40. *Smith*, 137 Ill. 2d at 229, 232, 560 N.E.2d at 327-28. See *supra* note 5 for a discussion of the history of DES.

41. *Smith*, 137 Ill. 2d at 233, 560 N.E.2d at 329. The court relied on *Schmidt v. Archer Iron Works*, 44 Ill. 2d 401, 256 N.E.2d 6, *cert. denied*, 398 U.S. 959 (1970). In *Schmidt*, a plaintiff was injured when an "eye pin" snapped causing a cement chute to fall on him. *Schmidt*, 44 Ill. 2d at 401, 256 N.E.2d at 6. The court held that a judgment notwithstanding the verdict was appropriate since the plaintiff could not conclusively establish that the defendant manufactured the "eye pin." *Id.* at 405-06, 256 N.E.2d at 8-9. See also Fischer, *supra* note 2, at 1628-30 (arguing that the identification element prevents over-deterrence and limits liability to only those at fault).

42. *Smith*, 137 Ill. 2d at 233, 560 N.E.2d at 329. See *infra* note 91 and accompanying text for a discussion of "over-deterrence."

43. The court discussed the types of market share theory adopted by California, Wisconsin, Washington and New York. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 236-46, 560 N.E.2d 324, 330-34 (1990). See generally note 1 for a review of these various state market share theories. The court found the California approach in *Sindell* flawed since it failed to identify the relevant market, neglected to define what a substantial share was, has been rejected by several other courts, and was theoretically unsound. *Smith*, 137 Ill. 2d at 236-39, 560 N.E.2d at 330-32. See generally *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). See *supra* note 1 for a discussion of *Sindell*.

The *Smith* court also rejected Washington's *Martin* theory because it permitted producers of small amounts of DES to bear large "presumptive shares" if they could not establish their actual shares. *Smith*, 137 Ill. 2d at 240-42, 560 N.E.2d at 332-33. See generally *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984). See *supra* note 1 for a discussion of *Martin*.

The court also found fault in Wisconsin's market share theory since it imposes liability for merely creating a risk of injury and grossly distorts manufacturers' liability. *Smith*, 137 Ill. 2d at 242-44, 560 N.E.2d at 333-34. See generally *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984). See *supra* note 1 for a discussion of *Collins*.

Also, without analysis, the court found the New York theory unacceptable calling the theory "the most radical departure from established tort principles" and "flawed in that it cannot equate liability with actual harm caused." *Smith*, 137 Ill. 2d at 245, 560 N.E.2d at 334. See generally *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 110 S. Ct. 350 (1989) (explaining New York's market share theory). See *supra* note 1 for a discussion of *Hymowitz*.

The *Smith* majority then noted that both the Iowa and Missouri Supreme Courts have completely rejected market share liability. *Smith*, 137 Ill. 2d at 246-47, 560 N.E.2d at 334-35. See *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984). The court also cited to federal court decisions evincing a general reluctance to adopt market share theory absent acceptance by the state's highest court. *Id.* In addition, the court cited a number of cases rejecting the application of market share theory in areas other than DES litigation. *Smith*, 137 Ill. 2d at 248-51, 560 N.E.2d at

that Illinois would not adopt any market share theory and asserted several reasons in support of its holding.

First, the court noted that market share theory is not always feasible since, in many instances, little or no information exists⁴⁴ upon which the court may determine the relevant market shares.⁴⁵ Second, the court determined that there was a likelihood that the actual manufacturer of the DES was not a defendant in the suit because market share theories do not require a plaintiff to sue all of the possible manufacturers of the DES.⁴⁶ Third, the *Smith* court expressed concern that market share liability would make manu-

335-37. See *supra* note 2 for a collection of cases in other areas of products liability law in which courts have considered market share liability.

44. *Smith*, 137 Ill. 2d at 251-52, 560 N.E.2d at 337. The *Smith* court attributed lack of market share information to inadequate drug record keeping laws, the long period of time between DES exposure to discovery of resultant injuries, and the fact that many manufacturers are either out of business or are not subject to the court's jurisdiction. *Id.* The court also noted that the inception of market share theory would not encourage manufacturers to keep better records since the drug's fungible nature makes it impossible to track the ultimate market and user. *Id.* at 263, 560 N.E.2d at 343. Further, the *Smith* court expressed concern that futile searches for market shares would waste judicial resources and create unexplainable variations in judgments. *Id.* at 253, 560 N.E.2d at 338. See *infra* note 84 and accompanying text for discussion of this problem.

The court illustrated the unworkable and impractical nature of market share theory through the complaints of a California Superior Court judge's "exasperation" at attempting to formulate market shares from sparse data. *Smith*, 137 Ill. 2d at 252-53, 560 N.E.2d at 337 (citing *Stapp v. Abbott Laboratories*, No. C-344407 (Superior Court, Los Angeles, Ca., October 11, 1985)).

45. The *Smith* court briefly examined the problem of defining the "relevant market." *Smith*, 137 Ill. 2d at 252-53, 560 N.E.2d at 337. Courts primarily are concerned with determining whether the relevant market should be based on local, county, state, or national data. *Hymowitz v. Eli Lilly Co.*, 73 N.Y.2d 487, 511-12, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, 110 S. Ct. 350 (1989). Several jurisdictions have attempted to resolve this problem. See, e.g., *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 20-21, 527 N.E.2d 333, 345-46 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) (factors used in determining the relevant market on a case by case basis include the geographic area of purchase of the DES, time of ingestion, and physical characteristics of the DES); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 248 (Mo. 1984) (Gunn, J., dissenting) (The relevant market is the area between the DES purchaser's residence, drugstore and pharmacist); *Hymowitz*, 73 N.Y. 2d at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950 (adopting a national market to approximate the risk DES creates to the general public); *George v. Parke-Davis*, 107 Wash. 2d 584, 592, 733 P.2d 507, 512 (1987) (favoring a local market, yet suggesting that a larger market may be used if no information exists on a local scale).

46. *Smith*, 137 Ill. 2d at 253-54, 560 N.E.2d at 338. This is particularly true in *Smith* since there were 81 producers of 25 milligram DES tablets between 1952 and 1953, the same period in which the plaintiff's mother took the DES. *Id.* at 227-28, 560 N.E.2d at 326. Only 18 of these companies were initially brought before the court, and only eight of these defendants remained as defendants at trial. *Id.* at 228, 254, 560 N.E.2d at 326, 338. However, at no point did the court identify the actual market shares of the eight defendants who remained in the suit. Thus, it is impossible to estimate the likelihood that the seller of the injury-causing DES was before the court.

facturers insurers of their entire industry.⁴⁷ By placing this heavy burden on manufacturers, the court was concerned that it would have socially undesirable effects, such as reduced drug availability,⁴⁸ slowed research and development of new drugs and vaccines,⁴⁹ increased retail drug prices to consumers,⁵⁰ and speculative individual liability.⁵¹ Fourth, the court noted that the market share theory treats plaintiffs who are unable to identify the DES manufacturer better than the fortunate plaintiffs who can do so.⁵² The court reasoned that plaintiffs who are able to identify the maker of the DES run the risk of a reduced recovery in the event the culpable manufacturer is unable to pay the judgment.⁵³ In contrast to traditional theories of recovery, market share theories disperse the judgment among several manufacturers, some of whom played no role in the sale of the injury-causing DES, making the plaintiff's full recovery far more likely.⁵⁴

After advancing these arguments, the *Smith* court rejected the appellate court's argument that market share theory properly shifts the burden of proving identification to the defendants.⁵⁵ The appellate court claimed that since the Illinois courts had shifted the bur-

47. *Smith*, 137 Ill. 2d at 260-63, 267-68, 560 N.E.2d at 341-42, 344-45. Since a manufacturer could be held liable for other manufacturers' defective products, it effectively would become an insurer of its industry. *Id.* See also Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 Nw. U.L. REV. 300, 322-23 (1981) (market share theory makes manufacturers industry-wide insurers).

48. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 261-63, 560 N.E.2d 324, 341-42 (1990). See *infra* note 95 and accompanying text for a discussion of the impact market share theories have on drug availability.

49. *Id.* See *infra* note 92 and accompanying text for a discussion of the impact of market share theory on drug research and development.

50. *Id.* See *infra* note 93 and accompanying text for a discussion of market share theory's impact on drug prices.

51. *Smith*, 137 Ill. 2d at 253-54, 560 N.E.2d at 338. See also Fischer, *supra* note 2, at 1645-47 (arguing that the *Sindell* approach would result in joint and several liability of all defendants before the court for 100% of plaintiff's damages even though the cumulative defendants represent less than 100% of the market). *But see* *Brown v. Superior Court*, 44 Cal. 3d 1049, 1072-76, 751 P.2d 470, 485-86, 245 Cal. Rptr. 412, 426-28 (1988) (liability held to be several only and limited to the percentage of the market represented by defendants before the court). See *supra* note 1 for a discussion of Washington State's attempt to limit this problem through modifications of the market share theory.

52. *Smith*, 137 Ill. 2d at 255-56, 560 N.E.2d at 338-39. The court also noted that each existing market share theory failed to impose a requirement on plaintiffs to use diligence in ascertaining the true manufacturer before invoking market share theory. *Id.* at 257, 560 N.E.2d at 339-41. See *infra* note 82 and accompanying text for a discussion of the diligence requirement.

53. *Smith*, 137 Ill. 2d at 255-56, 560 N.E.2d 338-39.

54. *Id.*

55. *Id.* at 256-58, 560 N.E.2d at 339-40. See *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 23-24, 527 N.E.2d 333, 347 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) for the appellate court's attempt to draw an analogy between market share theory and the concepts of alternative liability and *res ipsa loquitur*

den in instances of *res ipsa loquitur*⁵⁶ and alternative liability,⁵⁷ the adoption of market share liability was analogous and, therefore, permissible.⁵⁸ The *Smith* court, however, distinguished market share liability from *res ipsa loquitur* and alternative liability cases.⁵⁹

The court reasoned that, in the other burden shifting theories, all of the possible defendants who could have caused the plaintiff's injury were already before the court, while in market share theory there is no such requirement.⁶⁰ Furthermore, the defendants in those cases are typically in a better position than the plaintiffs to prove who caused the injury because the defendants exerted a high degree of control over the injury causing instrumentalities. Also, those defendants had more information as to the culpable defendant. However, in market share cases, defendants are often likely to have as little information as plaintiffs since most of the pertinent records have been destroyed.⁶¹ Finally, unlike market share cases, *res ipsa loquitur* and alternative liability require that each defendant actually be negligent toward each plaintiff.⁶²

Lastly, the *Smith* Court noted that its adoption of market share liability would not further the societal goal of increasing product safety since no evidence existed that the drug industry needed fur-

56. The appellate court drew an analogy between the burden shifting characteristics of market share liability and *res ipsa loquitur* using *Kolakowski v. Vorns*, 83 Ill. 2d 388, 415 N.E.2d 397 (1980). *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d at 23-24, 527 N.E.2d at 347. In *Kolakowski*, a patient admitted himself to a hospital and was injured during surgery while unconscious. *Kolakowski*, 83 Ill. 2d at 391-94, 415 N.E.2d at 398-400. The plaintiff subsequently filed suit to recover damages but was unable to determine the cause of his injuries. *Id.* The court held that although only one defendant may have caused the patient's injury, all defendants were bound by a duty to ensure that no unreasonable harm came to the patient. *Id.* See also *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (similar *res ipsa loquitur* approach to *Kolakowski*).

57. The appellate court also drew an analogy between the burden shifting characteristics of market share liability and the theory of alternative liability in *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d at 23, 527 N.E.2d at 347. In *Summers*, the California Supreme Court shifted the burden of proof of causation to two defendants, both of whom had negligently shot towards plaintiff, though only one shot hit the plaintiff. *Summers*, 33 Cal. 2d at 83-83, 199 P.2d at 4-5.

58. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d at 256-58, 560 N.E.2d at 339-40.

59. *Id.* at 257-58, 560 N.E.2d at 339-40.

60. *Id.*

61. *Id.* at 257-58, 560 N.E.2d at 340. Information regarding the actual manufacturer is especially lacking in DES cases since the injury usually does not manifest itself for twenty to thirty years. See *supra* note 12 for a discussion on the delay in detecting injuries due to DES ingestion. Within that time period, records are frequently destroyed, or unaccessible, and witnesses have often long since died. Cf. *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 189-90, 342 N.W.2d 37, 48-49, cert. demed., 469 U.S. 826 (1984).

62. *Smith*, 137 Ill. 2d at 257-58, 560 N.E.2d at 339-40.

ther pressure to manufacture drugs more safely.⁶³ The court believed that it would be unlikely that a punishment inflicted on defendants approximately forty years after the negligent act would effectively deter against future acts.⁶⁴ Furthermore, market share theory would produce no deterrent effect since each manufacturer could rely on others in the industry to insure against its negligence and, inversely, would not be insulated from the negligence of others in the industry.⁶⁵

The court concluded that market share liability was theoretically flawed and deviated too far from the traditional tort principle of cause in fact.⁶⁶ Accordingly, the court rejected its application in Illinois,⁶⁷ and stated that a legislative solution would be more

63. *Id.* at 263-64, 560 N.E.2d at 342-43.

64. *Id.*

65. *Id.* The *Smith* court added that since this theory has been accepted in only a few states, Illinois' adoption of the theory would do little to add to the goal of warning drug producers to make safe products. *Id.*

66. *Smith*, 137 Ill. 2d at 268, 560 N.E.2d at 355. The supreme court also analyzed the issue of whether the defendants owed the plaintiff a duty in this case. *Id.* at 265-66, 560 N.E.2d at 343-44. However, the court had stated that "[t]he issue is whether, in a negligence and strict liability cause of action, Illinois should substitute for the element of causation a theory of market share liability when identification of the manufacturer of the drug that injured the plaintiff is not possible." *Id.* at 226, 560 N.E.2d at 325. The element of the cause of action which was in question was not the existence of a duty, but rather the necessity of cause in fact in DES cases. Thus, the court's analysis of the issue of whether a duty existed was dicta since that issue was not before the court.

67. *Smith*, 137 Ill. 2d at 251, 560 N.E.2d at 337. The Illinois Supreme Court appears to have intended its holding to bar the application of market share theory not only in DES cases, but rather in all contexts. This intent is evident in the court's statement that "market share liability is a not a sound theory, is too great a deviation from our existing tort principles, and should not be applied in cases brought by plaintiffs who were exposed to DES *in utero*." *Id.*

The court also expounded on the inapplicability of enterprise liability, alternative liability, concert of action, and civil conspiracy to DES cases. *Id.* at 234-36, 560 N.E.2d at 339-40. However, the court narrowly limited its review to the validity of market share theory in DES cases since the plaintiff chose not to cross appeal the dismissal of the counts containing other theories of liability. *Id.* at 236, 560 N.E.2d at 330. See *supra* note 18 for a summary of plaintiff's other theories at trial. Therefore, the court's discussion of the invalidity of the above theories of liability is dicta, and the issue of whether a purely alternative liability theory in a DES case is a valid cause of action in Illinois remains unanswered.

There is some authority which supports the proposition that a pure alternative liability theory might be applied against manufacturers in a DES case. See, e.g., *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 73 (Iowa 1986) (expressly reserving issue of applicability of alternative liability for future decision); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 331-34, 343 N.W.2d 164, 173-74, cert. denied, 469 U.S. 833 (1984) (applying an alternative liability theory in DES cases, but adding a diligence requirement); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 71 (Tex. 1989) (rejecting market share theory in an asbestos case, but reserving issue of applicability of alternative liability for future decision on appropriate set of facts). But see *Smith*, 137 Ill. 2d at 235-36, 560 N.E.2d at 330 (stating in dicta that other

appropriate.⁶⁸

The majority's reasoning in *Smith* is justified for three reasons. First, it adheres to the fundamental common law requirement of identification of the tortfeasor as a necessary element of cause in fact in products liability cases. Second, market share theory, when applied in the trial courts, heavily taxes judicial resources and is conceptually unworkable because market share information is extremely difficult to compile and is often non-existent. Third, it is grossly unfair and against social policy to impose the extreme degree of liability on an industry which market share theories do. Thus, the court properly rejected market share theory in favor of retaining the established requirement of defendant identification as an element of cause in fact in tort actions.

The Illinois Supreme Court correctly retained the identification requirement in products liability cases. The identification re-

courts have "soundly rejected" alternative liability in DES cases "in nearly every instance").

It appears that the plaintiff may have had a viable action based on the theory of alternative liability. She could have named every supplier to the clinic as a defendant. One of the defendants must have manufactured the DES in question, provided that the clinic's list of suppliers was complete. Thus, a proper application of alternative liability could have shifted the burden of proving causation to the defendants who had supplied DES to the field clinic. See, e.g., *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). See also RESTATEMENT (SECOND) OF TORTS § 433(B)(3) (1965).

Such a suit, however, would likely be infeasible since it would require the joinder of all possible defendants who manufactured or supplied the DES. It is rare for a plaintiff to be able to join all of the possible defendants in a DES suit for the following four reasons. First, it would be infeasible for the plaintiff to join all of the approximately three hundred manufacturers of DES. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 589, 689 P.2d 368, 374 (1984). *But cf.* Brief for Plaintiff-Appellees at 20-24, *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984) (No. 64712) (arguing that the number of tortfeasors has no bearing on an alternative liability claim and disputing that 300 producers could be "all possible defendants"). Second, due to the long lapse in time from DES exposure to the manifestation of the injury, little information can be obtained to identify all of the possible defendants. See, e.g., *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 189-90, 342 N.W.2d 37, 48, cert. denied, 469 U.S. 826 (1984) (manufacturing and sales records often no longer exist 10 to 20 years after DES exposure). Third, many of the manufacturers which produced DES are no longer in business or have been purchased, and their successor corporations frequently avoid liability for the prior acts of the acquired corporation. See *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 609-17, 689 P.2d 368, 384-89 (1984) (noting that successor corporations generally do not inherit liability for acquired companies' products, and adopting an exception to this rule in its market share theory).

68. *Smith*, 137 Ill. 2d at 262-63, 560 N.E.2d at 342. The court stressed that the legislature was empowered to hold hearings and determine Illinois' public policy and was, therefore, a more proper forum for forging a remedy to the DES manufacturer identification problem. *Id.* The dissent agreed with the majority that a legislative solution could "provide a more efficient remedy than litigation," but contended that the court should provide a common law solution until the legislature takes appropriate action. *Id.* at 284, 560 N.E.2d at 352. See *infra* note 102 discussing the need for a legislative solution.

quirement serves the dual purposes of separating tortfeasors from innocent actors and ensuring that only culpable parties are found liable only for those injuries which they actually caused.⁶⁹ Thus, identification is a needed element of cause in fact⁷⁰ which the court was justifiably reluctant to deviate from.⁷¹ The tendency of other Illinois courts to narrow the various market share theories⁷² supports the Smith Court's reluctance. Although there has been some recent support in Illinois for theories relaxing proof of causation

69. *Smith*, 137 Ill. 2d at 233, 560 N.E.2d at 329 (identification element serves the essential functions of holding only faulty defendants liable and avoids over-deterrence of manufacturers); *Payton v. Abbott Laboratories*, 386 Mass. 540, 571, 437 N.E.2d 171, 188 (1982) (historically, identification of the tortfeasor has been a prerequisite to negligence suits for two policy reasons: to separate faulty parties from innocent actors, and to ensure that faulty parties are held accountable only for that harm which they have caused). See also Fischer, *supra* note 2, at 1628-30 (the identification element prevents over-deterrence and only assigns liability to culpable parties).

70. Dean Prosser defines cause in fact as "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 41, at 263 (5th ed. 1984). The defendant's conduct need not be the only cause of the plaintiff's injuries, but it must at the very least be a substantial factor in bringing about the injury. *Id.* § 41, at 267-68. See also RESTATEMENT (SECOND) OF TORTS § 431 A (1965) (legal causation requires that the defendant's conduct was a "substantial factor in bringing about the harm").

"Regardless of the theory which liability is predicated on it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product." Annotation, *supra* note 3, at 1349.

71. Courts are generally reluctant to stray from the common law requirement of identification in products liability cases. See, e.g., *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589, 596 (D. S.C. 1981) (applying a choice of law exception to avoid applying California's *Sindell* theory where South Carolina's public policy and cases provided no exceptions for the requirement of identification in products liability cases); *Schmidt v. Archer Iron Works*, 44 Ill. 2d 401, 402-406, 256 N.E.2d 6, 7-8, *cert. denied*, 398 U.S. 959 (1970); (in products cases, plaintiffs must prove a causal relationship between the defendant's product and the plaintiff's injury); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) ("There is insufficient justification to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury").

72. Other Illinois courts have uniformly narrowed the market share theories which the trial and appellate courts adopted in *Smith*. See, e.g., *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351, 353-54 (N.D. Ill. 1988) (refusing to apply the *Martin* theory to industry which produced a blood extract product for hemophiliacs); *Coerper v. Dayton-Walther*, No. 85 C 6887, slip op. at 1-2 (N.D. Ill. March 27, 1986) (refusing to accept trial court's decision in *Smith* as controlling precedent in market share case); *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 554 N.E.2d 468, *cert. denied*, 555 N.E.2d 377 (1990) (declining to extend *Martin* to asbestos cases since manufacturer of asbestos product could not be identified); *York v. Lunkes*, 189 Ill. App. 3d 689, 545 N.E.2d 478 (1989) (refusing to use market share theory after finding that batteries made by different battery manufacturers are distinguishable and, unlike DES, all batteries were not defective).

requirements in seemingly similar contexts,⁷³ they are distinguishable from the market share theory which the lower Illinois courts proposed in *Smith*.⁷⁴

Another critical reason, which the court should have used to support its position, is that the rejection of the identification element in market share cases violates the constitutional guarantees of procedural due process by creating an irrational presumption of fact.⁷⁵ Market share theories create a presumption⁷⁶ that each defendants' product caused the plaintiff's injury. The United States

73. See, e.g., *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (Illinois rejected contributory negligence to adopt a system of comparative fault); *Kolakowski v. Voris*, 83 Ill. 2d 388, 415 N.E.2d 397 (1980) (the doctrine of *res ipsa loquitur* shifts the burden of proving causation to the defendants when a patient submits to the care of a hospital and is injured while unconscious, even though only one defendant may have caused the patient's injury). But see *Morton v. Abbott Laboratories*, 538 F Supp. 593, 599 (M.D. Fla. 1982) (comparative negligence is a recent trend in products liability law which should not be construed as abandonment of the element of causation).

74. See text accompanying *supra* note 59-62 for a discussion of the *Smith* court's distinction between market share theories and other recent innovations in tort law.

75. The due process clause of the fourteenth amendment states "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Similarly, the due process clause of the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." ILL. CONST. art. I, § 2.

Several defendants, courts, and commentators have raised the issue of whether market share liability violates defendants' fourteenth amendment due process rights. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 602-03, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139, cert. denied, 449 U.S. 912 (1980) (The *Sindell* court acknowledged, but dismissed, the defendants' argument that market share theory raised a presumption which violated due process guarantees); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 92, 289 N.W.2d 20, 33 (1979) (Moore, J., dissenting) ("The collective liability theory violates due process guarantees of the [U.S.] Constitution. The courts cannot create a remedy which is in violation of constitutional law."); *Tigue v. E.R. Squibb & Sons*, 136 Misc. 2d 467, 518 N.Y.S.2d 891 (1987) (defendant in DES case argued that market share theory violated the due process clauses of the 5th and 14th amendment of the U.S. Constitution); Joint Appellants' Brief at 39-44, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) (No. 67732) (arguing that market share theory creates an irrational, unreasonable, and effectively irrebuttable presumption of defendant identification in violation of the due process clauses of the 5th and 14th amendment of the U.S. Constitution and article 1, section 2 of the Illinois Constitution); Comment, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003, 1021-22 (arguing that market share theory effectively imposes liability on the basis of wrongful conduct without causal connection between the conduct and the injury, thus, violating the due process clause of the 14th amendment).

76. *Sindell*, 26 Cal. 3d at 603-04, 607 P.2d at 931, 163 Cal. Rptr. at 139. This presumption is effectively irrebuttable because a common factor in market share cases is that neither the plaintiff nor the defendants possesses the information needed to identify the tortfeasor. See Joint Appellants' Brief at 40, *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) (No. 67732) (arguing that market share theory creates an effectively irrebuttable presumption of defendant identification since manufacturers do not possess the necessary information to do so).

Supreme Court has held that in order to withstand procedural due process scrutiny, a presumption of fact must be rationally connected to the fact on which it is made to depend.⁷⁷ Thus, in order for market share theory to survive the Court's test, there must be a rational connection between the proof of the market shares and the defendant's actual status as the manufacturer of the injury causing product. Market share theory's presumption of manufacturer identification fails this "rational connection" test because manufacturers are forced to disprove their liability when there is almost always a very high likelihood that each manufacturer's product did not cause the plaintiff's injury.⁷⁸ Unfortunately, few of the courts⁷⁹

77. The United States Supreme Court's test for the validity of presumptions of fact under the 14th amendment due process clause requires that:

[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed. [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life, . . . it is not competent for the legislature to create it as a rule governing the procedure of the courts.

Tot v. United States, 319 U.S. 463, 467-68 (1943). See also *Leary v. United States*, 395 U.S. 6, 36 (1969) (holding that a "statutory presumption must be regarded as 'irrational' unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). This test also applies to presumptions which the courts create. *Wray v. Flosom*, 166 F. Supp. 390, 395 (W.D. Ark. 1958).

78. See *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332, 333 (D. D.C. 1982), *aff'd*, 851 F.2d 418 (D.C. Cir. 1988). The *Tidler* court stated that market share theories provide "no statistical or mathematical assurance" that the plaintiff ingested any of the DES produced by the defendant, thus raising "constitutional difficulties of taking property without due process of law." *Id.*

The presumption of manufacturer identification in market share cases is especially irrational under the *Martin* theory since that theory permits the suit to stand against as few as one defendant. Thus, a defendant could be held liable for an injury when it provided only 1% of the market, which means there is a 99% probability that it did not produce the injuring product. The fact that the damages will be subsequently lowered is irrelevant, since the presumption is unquestionably irrational, and is thus unconstitutional.

Therefore, the damages issue should not even be reached since "common sense dictates that it surely could not have distributed such a high percentage of the DES used in the market." *Smith*, 137 Ill. 2d at 242, 560 N.E.2d at 333. Justice Richardson, in his dissenting opinion in *Sindell*, succinctly and appropriately stated that under market share theory "a particular defendant may be held proportionally liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiff's injuries." *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 614, 607 P.2d 924, 939, 163 Cal. Rptr. 132, 146, *cert. denied*, 449 U.S. 912 (1980) (Richardson, J., dissenting) (emphasis in original).

79. *Sindell*, 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139 (claiming its theory passed constitutional muster since it imposed liability based on relevant market shares, contemplating that this would reflect the likelihood that a given manufacturer produced the product and thus fulfilled the "rational basis" test). See also *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 287 (Fla. 1990) (claiming that no defendant is prevented from presenting a defense and that market share theory does not impose liability in an arbitrary manner).

The *Hymowitz* court, however, practically bragged that it was immune from this constitutional guarantee when it stated that its theory "conceded the

which have adopted a market share theory even considered the constitutionality of the presumption of producer identification.⁸⁰

Another justification for the court's retention of the common law identification requirement is that the market share theory rewards plaintiffs' laziness, poor memory and poor record keeping. It also provides plaintiffs with an unfair tool to protect against the possibility of limited recovery from insolvent defendants.⁸¹ None of the various market share theories require plaintiffs to use diligence in ascertaining the proper defendant before bringing suit under a market share theory.⁸² Therefore, market share theories offer no incentive for a plaintiff to first make a thorough effort to attempt to identify the correct defendant. Absent such a requirement, market share theory effectively encourages the above problems since they impose no deterrent against them.⁸³

The second reason why the Illinois Supreme Court was justified in rejecting market share theory is that it is conceptually unworkable and is extremely expensive to apply in the trial courts. One such problem is that the existing market share theories require enormous expenditures of judicial resources to determine defendants' respective market shares.⁸⁴ The adoption of a market share

lack of a logical link between liability and causation in a single case." *Hymowitz v Eli Lilly & Co.*, 73 N.Y.2d 487, 514 n.3, 539 N.E.2d 1069, 1078 n.3, 541 N.Y.S.2d 941, 950 n.3, *cert. denied*, 110 S. Ct. 350 (1989) (emphasis added).

80. The Illinois Supreme Court, however, found ample non-constitutional grounds to reject market share theory and apparently did not find it necessary to reach the constitutional issue which the defendants had raised.

81. See, e.g., *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 254-56, 560 N.E.2d 324, 338-39 (1990). See *supra* note 52 and accompanying text for a discussion of market share theory as an unfair plaintiffs' tool.

82. Comment, *The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation*, 19 U. MICH. J.L. REF. 771, 780 (1986). The concept of a diligence requirement in market share cases has received little acceptance in the few states that have considered the issue. See, e.g., *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1528-29 (D.C. Mass. 1985) (arguing that a diligence requirement is unnecessary and contravenes the policy of market share theory).

The Supreme Court of Michigan did, however, adopt the burden shifting alternative liability theory as applied to DES cases, and added a "due diligence" prerequisite to assure that plaintiffs would make a "genuine attempt to locate and identify the tortfeasor responsible for the individual injury" before they could use the burden shifting theory. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 332, 343 N.W.2d 164, 173, *cert. denied*, 469 U.S. 833 (1984); See also *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (adopting due diligence requirement as prerequisite to reliance on Florida's variation of the *Martin* theory); *Bixler v. Avondale Mills*, 405 N.W.2d 428, 431-32 (Minn. App. 1987) (adopting a due diligence requirement similar to that in *Abel*).

83. Comment, *supra* note 82, at 782-83.

84. The Wisconsin Supreme Court noted "the waste of judicial resources which would be inherent in a 'mini trial' to determine market share[s]." *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 190, 342 N.W.2d 37, 49, *cert. denied*, 469 U.S. 826 (1984). See *supra* notes 32 & 45 and *infra* note 85 and accompanying text for a discussion of the sometimes insurmountable difficulties related to es-

theory would create an unwarranted strain on an already over-burdened judicial system, thereby making the application of the theory impractical.

Furthermore, in most DES cases, the information which is needed to establish market shares and the relevant market is often lacking.⁸⁵ When it is available, it is extremely time consuming and costly to determine.⁸⁶ The heart of the problem stems from the fact that the sale of the injury causing product has usually occurred many years prior to the injury. As a result, most of the records which the parties could use to establish market shares no longer exist.⁸⁷ This problem is compounded by the fact that many of the companies which manufactured the product are often no longer in existence.⁸⁸ This makes retrieving the defendants' sales records virtually impossible. Since market share theory is so economically infeasible and difficult to apply, the court wisely avoided it for efficiency reasons.

tablishing market shares. See also Fischer, *supra* note 2, at 1657 ("The legal fees and administrative costs resulting from litigation of this magnitude could easily rival the cost of the plaintiff's judgment."); Comment, *supra* note 47, at 323-26, (market share theory ensures "far higher administrative costs"); Schwartz and Mahshugian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941, 965 (1985) (determining the relevant market and market shares will "involve lengthy litigation and huge transaction costs for all parties").

85. There is a general lack of information which would establish market shares in DES cases. See *Stapp v. Abbott Laboratories*, No. C 344407 (Superior Court, Los Angeles County, Ca. 1984) (California trial court judge expressing extreme frustration with calculating market shares and criticizing market share theory as unworkable in practice); *Smith*, 137 Ill. 2d at 251-52, 560 N.E.2d at 337. ("A major flaw, in regards to DES cases, is that there is only a small amount of, or in some cases, no reliable information available to establish the defendants' percentages of the market."); *Collins*, 116 Wis. 2d at 188-89, 342 N.W.2d at 48 ("[M]any drug companies simply do not have records available from which a fact finder could determine how much DES a given defendant produced or marketed, or when and where the DES was produced or marketed.").

86. See *supra* note 84 and accompanying text for a discussion of the difficulty and high cost of determining market shares. See also *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 22, 527 N.E.2d 333, 346 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990) ("[J]uries may well find it impossible to accurately construct the DES market and determine each defendant's share of the market"); *Collins*, 116 Wis. 2d at 189-90, 342 N.W.2d at 48-49 (market share information is so unavailable, unworkable, and insufficient for the jury to use that the court "view[ed] defining the market and apportioning market share[s] as a near impossible task if it is to be done fairly and accurately").

87. One possible solution to the lack of market share information is to direct verdicts in favor of defendants in market share liability cases unless the plaintiff, not the defendants, can establish the market shares of each remaining defendant. Cf. *George v. Parke-Davis*, 107 Wash. 2d 584, 597, 733 P.2d 507, 514 (1987) (requiring defendants to establish other defendants' market shares before impleading them under *Martin* market share theory).

88. Many of those companies which produced DES no longer exist. *Collins*, 116 Wis. 2d at 188-89, 342 N.W.2d at 48.

The third reason why the Illinois Supreme Court was justified in its holding is that it is contrary to social policy, and is grossly unfair to impose the extreme degree of liability of market share theories on industries susceptible to the theories. Market share theory's imposition of massive liability exposure⁸⁹ violates social policy⁹⁰ by over-detering drug manufacturers from providing socially beneficial products.⁹¹ For instance, had the Illinois Supreme Court adopted a market share theory in DES cases, drug companies would have been effectively discouraged from researching, developing, and marketing new drugs and vaccines for fear of the resultant increased liability risks.⁹² Furthermore, applying the market share

89. Comment, *supra* note 47, at 322 (market share theories would greatly increase the liability exposure of pharmaceutical companies since victims of other companies' drugs could then sue the other makers of the drug); Fine, *A Personal Perspective From the "Manufacturer"*, 55 BROOKLYN L. REV. 899, 902 (1989) (acknowledging vastly increased liability exposure and costs of extensive litigation and judgments against pharmaceutical companies under market share theories).

90. See, e.g., *Woodill v. Parke-Davis & Co.*, 79 Ill. 2d 26, 37, 402 N.E.2d 194, 199 (1980) ("This court is acutely aware of the social desirability of encouraging the research and development of beneficial drugs."); *Payton v. Abbott Laboratories*, 386 Mass. 540, 573, 437 N.E.2d 171, 189 (1982) ("Public policy favors the development and marketing of new and more efficacious pharmaceutical drugs.").

91. In a tort liability system, it is necessary to avoid "over-deterrence" of manufacturers' socially useful activities. See Fischer, *supra* note 2, at 1628-30, 1650-58 (arguing that market share theories impose such a high degree of liability on drug companies, that they are no longer able to afford to insure against that risk and are, thus, "over-deterred" and cease to produce socially useful products). See also Note, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. REV. 939, 965 (1987) (arguing that the *Collins* theory especially threatens over-deterrence). But see *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 192 n.11, 342 N.W.2d 37, 49-50 n.11, cert. denied, 469 U.S. 826 (1984) (finding that its market share theory will not cause drug companies to stop producing drugs, but rather will cause them to produce safer drugs).

92. It would be a social disaster if scientists developed a useful new drug or vaccine and drug companies refused to market it to avoid the level of liability which market share theories impose. See, e.g., *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351 (N.D. Ill. 1988) (federal court refused to recognize market share liability in suit against manufacturers of an antihemophilic blood factor from which plaintiff contracted AIDS); *Payton v. Abbott Laboratories*, 386 Mass. 540, 573, 437 N.E.2d 171, 189-90 (1982) ("Imposition of such broad liability could have a deleterious effect on the development and marketing of new drugs."); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (market share liability "will discourage desired pharmaceutical research and development while adding little incentive to production of safe products, for all companies face potential liability regardless of their efforts.") (citing *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978)); *Shackil v. Lederle Laboratories*, 116 N.J. 155, 561 A.2d 511 (1989) (refusing to apply market share theory to DPT vaccine industry since doing so would decrease the availability and development of drugs and vaccines). See also Fischer, *supra* note 2, at 1654 ("[T]he manufacturer might decide against marketing the product at all, which-if the product is worthwhile-will thwart the goal of not discouraging socially desirable activity"). But see *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987) (market share theory imposed against DPT manufacturer).

theory in DES cases would likely cause a rise in drug prices⁹³ reflecting resulting insurance cost increases.⁹⁴ Such an application would likewise limit the current availability of existing drugs.⁹⁵

An excellent example of the gross unfairness which manufacturers may suffer when market share liability is applied is found in *Martin v. Abbott Laboratories*,⁹⁶ the market share theory which the Illinois appellate court adopted in *Smith*.⁹⁷ Under the *Martin* theory, a plaintiff may sue as few as one defendant, who is then allowed to implead as many third party defendants as the defendant deems necessary.⁹⁸ The burden then shifts to the defendant to prove or disprove their market share. This burden-shifting characteristic theoretically allows a plaintiff to sue only one defendant who may then be unable to establish its market share. This would place an unfair burden on that defendant to implead other defendants, or risk facing the responsibility for paying 100% of the judgment, rather than just its percentage of liability based on its market share.⁹⁹ Even if the defendant did implead other defendants to reduce its presumptive share, the situation is equally undesirable. The entire burden of proving the remaining elements of the cause of action against all impleaded defendants, except identification, is shifted from the plaintiff to the original named defendant.¹⁰⁰ This

93. Comment, *supra* note 47, at 321-23 (noting that manufacturers will spread the costs of product liability suits by increasing the product's cost and that market share liability will increase prices of manufacturers' other products since they will still want to spread suit costs even though they may no longer make the product). See also Comment, *The DES Manufacturer Identification Problem*, 40 U. MIAMI L. REV. 857, 871 (1986) (also noting the "risk spreading" phenomenon).

94. Comment, *supra* note 47, at 322-23 (drug companies will experience even greater insurance cost increases due to the fact that, under market share theories, they must insure both their own and their competitors' products). But cf. Comment, *The DES Manufacturer Identification Problem*, 40 U. MIAMI L. REV. 857, 871-72 (acknowledging insurance cost increases, but arguing that manufacturers can afford them better than consumers can afford to insure against catastrophic injuries).

95. Two commentators recently argued that market share theory would increase insurance costs so greatly that drug companies could no longer afford to continue to produce their products. Kroll, *Intra-Industry Joint Liability: The Era of Absolute Products Liability*, 687 INS. L.J. 185, 194-97 (1980); Comment, *supra* note 47, at 321-23.

96. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984).

97. *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 18-19, 527 N.E.2d 333, 339 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

98. *Martin*, 102 Wash.2d at 604-07, 689 P.2d at 383.

99. *Id.*

100. Both the *Martin* theory and other market share theories share the additional flaw that the process of determining market shares and the relevant market is especially difficult. See *supra* notes 1, 32, 45, 85-87, and accompanying text for analysis of this problem.

is truly an inequitable result.¹⁰¹

In sum, the Illinois Supreme court justifiably rejected market share liability as a theory of recovery because it is an unnecessary deviation from the needed element of identification in products liability cases. Also, the existing market share theories are inefficient and unworkable and allocate an unreasonably high degree of liability on manufacturers of socially beneficial products. Thus, absent an acceptable solution¹⁰² to the problem of defendant identification, the Illinois Supreme Court justifiably refused to adopt the market share theories in favor of the traditional common law requirement of defendant identification.

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101. In spite of the court's justifiable decision, there is a possible draw-back which the court's holding, when introduced to the economically minded manufacturing sector, could have in the products liability arena. That draw-back is the added potential for manufacturers' reduction of product differentiation which could, thus, result in an increased incidence of the identification problem.

Natural market forces in a market system generally encourage manufacturers to differentiate their products to achieve a competitive advantage in their industry. E. MANSFIELD, *ECONOMICS* 583-84 (5th ed. 1986). However, the court's holding in *Smith* could encourage industries to make their products less identifiable since Illinois would not then permit a market share theory to be asserted against the product. Increased product uniformity would decrease the likelihood that plaintiffs could identify the maker of the injurious product. Thus, an industry could avoid the recent increases in products liability suits by the mere fact that many persons could not bring suit because of their inability to identify products' manufacturers.

The market share theory offers one solution to this dilemma by imposing liability on manufacturers who inadequately identify their product. However, the social need for continued product differentiation can be maintained through other solutions, such as labeling statutes and mandatory record-keeping laws, each of which would not undermine the system of tort liability like market share theory would.

102. Several courts and commentators have recently argued that the inception of a market share theory is a legislative, not a judicial problem. See, e.g., *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 262-63, 560 N.E.2d 324, 342, 352 (1990) (both majority and dissent arguing that the legislature is most able to develop an appropriate remedy since it may "hold hearings and determine public policy"); *Mulcahy v. Eli Lilly Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (placing liability on defendants without proving the identification element "involves social engineering more appropriately within the legislative domain"); *Case v. Fibreboard*, 743 P.2d 1062, 1067 (Okla. 1987) ("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 the courts") (emphasis in original). See also Schwartz and Mahshigian, *supra* note 84, at 964-975 (arguing for the legislatures to create a tort cause of action for plaintiffs who cannot identify the proper defendant in products liability cases); Comment, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003, 1029-42 (ad hoc social welfare legislative solutions are a more appropriate solution than market share theory).

Since the Illinois Supreme Court cannot, and should not, formulate a remedy for persons who reasonably cannot identify a product's manufacturer after an injury has occurred, it is properly a task for the legislature, one which demands prompt response.