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PUNITIVE DAMAGES IN DES MARKET SHARE LITIGATION

I. INTRODUCTION

Consumer products, seemingly innocuous when used by the public years ago, have come to haunt twentieth century society. "Indeed, certain products have achieved such national notoriety due to their tremendous impact on the consuming public that the mere mention of their names—Agent Orange, Asbestos, DES, MER/29, Dalkon Shield—conjures images of massive litigation. . . ."\(^1\) As a consuming public we are dependent upon product manufacturers to look to our safety and well-being. A product manufacturer’s misconduct quickly ignites public outrage. Thus, mass products liability torts create another vivid image—one of “infrequent, yet prevalent, ‘big money’ punitive awards.”\(^2\) Outraged by a product manufacturer’s misconduct, consumers injured by defective products seek revenge through punitive damage awards.

California’s liberal rules governing the award of punitive damages support the notion that the manufacturer of a defective product should be severely punished. In recent years, however, two major problems have arisen which complicate punitive awards against manufacturers of mass produced goods. First, is the ever-increasing phenomenon in which plaintiffs are unable to identify the manufacturer of the product which caused their injuries. Consumers injured by a fungible good which cannot be traced to a specific manufacturer are unable to protect themselves against manufacturer misconduct. Unless these plaintiffs are relieved of the burden of

\(^1\) In re Dalkon Shield, No. C 80-2213 SW, slip op. at 1 (N.D. Cal. Nov. 5, 1981).
\(^2\) Id.
proving causation, punitive damage recovery becomes literally impossible.

Second, the punitive damage doctrine, created in an era of single-plaintiff versus single-defendant disputes, does not easily adapt to the complexities of mass tort litigation. Defects in a product manufactured on a national level may subject a defendant manufacturer to duplicative punitive damage claims. Duplicative punitive awards can threaten the financial solvency of a defendant thereby denying any redress to subsequent plaintiffs.

California statutory and case law unequivocally establish a plaintiff's right to seek punitive redress against a defendant guilty of willful or malicious conduct. On the other hand, protections under the United States Constitution guarantee to a defendant the right to be protected from repeated punishment for the same wrongful conduct. These constitutional rights, however, conflict with those of each plaintiff injured by a mass produced good.

Both of these problems—the inability of injured consumers to identify defendant manufacturers and the implications of multiple punitive damage claims—arise in litigation concerning diethylstilbestrol (DES). The California Supreme Court, in Sindell v. Abbott Laboratories, left unanswered the vital issue of whether punitive damages are recoverable under a market share theory. This comment maintains that eliminating plaintiff's proof of causation for punitive damages claims would disturb apportionment of compensatory damages in market share suits as well as deny defendants their due process rights by subjecting them to multiple punitive

3. Id. at 16.
4. The conflict is a frustrating one, inextricably bound to a complex, industrial society which few of us wish to abandon. R. Heilbroner, IN THE NAME OF PROFIT 191-200 (1973).
5. Hundreds of products liability suits have been filed across the nation by women alleging injuries to genital tracts as a result of in utero exposure within the past twenty years to diethylstilbestrol (DES), a synthetic hormone prescribed to women to prevent miscarriage. See S. Fenchell, Daughters At Risk (1981); Herbst, Ulfelder & Poskanzer, Adenocarcinoma of the Vagina, Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women, 284 New Eng. J. Med. 390 (1971); Karnaky, Prolonged Administration of Diethylstilbestrol, 5 J. Clin. Endocrinol. 279-84 (1945); Smith, Prophylactic Hormone Therapy: Relation to Complications of Pregnancy, 4 Obst. & Gyn. 129 (1954).
damage judgments. The comment will further demonstrate that the rationale behind applying punitive damages has already been fulfilled by the Sindell decision without adding punitive damage recovery.

II. THE SINDELL DECISION

A. Background of Diethylstilbestrol

A revolutionary breakthrough in estrogen research took place in 1937 when British scientists first synthesized diethylstilbestrol, a synthetic estrogen. Diethylstilbestrol could be administered orally, effectively, and inexpensively to treat women suffering from low natural levels of estrogen. By 1941, after clinical testing in the United States, the Food and Drug Administration (FDA) had approved applications by numerous pharmaceutical companies to market the drug for various medical treatments, none involving pregnancy. When medical studies at Harvard University revealed that pregnancy miscarriages could be successfully avoided by the administration of estrogen, pharmaceutical companies sought to manufacture diethylstilbestrol for such purposes. In 1947, the FDA


10. Drug manufacturers independently prepared and filed new drug applications (NDA's). Among those filing during 1947 and 1948 were E.S. Miller Laborato-
approved DES for the prevention of miscarriages; this authorized manufacturers to market DES on an experimental basis with the requirement of a warning.\textsuperscript{11}

In 1952, the FDA removed the "new drug" status of DES,\textsuperscript{12} thus allowing any drug company to manufacture it without a license. Between 1947 and 1971, hundreds of drug companies across the United States manufactured DES which was prescribed to millions of women.\textsuperscript{13} In 1972, the FDA banned DES for miscarriage treatment after research revealed a high correlation between synthetic estrogens used by pregnant women during 1947-1971 and a rare form of vaginal and cervical cancer in the daughters of those women.\textsuperscript{14}

\textsuperscript{11} See Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 355 (1976) (label requirements for experimental drugs). The FDA now requires the following warning in the sale of DES: "Vaginal adenosis has been reported in 30\% to 90\% of post-pubertal girls . . . whose mothers received diethylstilbestrol or a closely related congener during pregnancy. . . . The significance of this finding with respect to potential for development of adenocarcinoma is unknown. Periodic examination of such patients is recommended." 40 Fed. Reg. 32, 773 (1975).

\textsuperscript{12} See 21 U.S.C. § 321 (1976) (the term "not a new drug" means that the drug is generally recognized among experts as safe under the conditions prescribed); Weinberger v. Hynson, Wescott & Dunning, 412 U.S. 609, 612-14 (1973). This status allowed manufacturers to market DES without performing additional testing or submitting additional data to the FDA on the drug's safety. See Petitioner's Writ for Cert. at 4, Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

\textsuperscript{13} Comment, \textit{supra} note 7, at 964 n.3. The estimated number of pharmaceutical companies which manufactured DES for use in pregnancy is between 94 and 300. \textit{Id.}

\textsuperscript{14} The form of cancer from which these daughters suffer is known as adenocarcinoma which manifests itself after a minimum latent period of ten to twelve years. It is a fast spreading and deadly disease, requiring radical surgery to prevent it from spreading. DES also causes adenosis and precancerous vaginal and cervical growths, which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year; a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug. Sindell v. Abbott Labs., 26 Cal. 3d 588, 595, 607 P.2d 924, 930, 163 Cal. Rptr. 132, 138 (1980).

"Scientists discovered the link between DES and cancer by noting a sudden increase in incidence of a rare form of cancer and then by taking highly detailed histories of the women exhibiting this disease, including maternal ingestion of drugs." Comment, \textit{supra} note 7, at 964 n.5. \textit{See also} Greenwald, Barlow, Nasca & Burnett,
Today, one-half million "DES daughters" suffer from clear cell adenocarcinoma of the vagina and uterus and other abnormalities. Among the DES daughters is Judith Sindell, who in 1980 sought the right to sue eleven major California manufacturers of DES for $1 million compensatory and $10 million punitive damages.

B. Sindell v. Abbott Laboratories

Generally, the imposition of liability upon a defendant rests upon plaintiff's showing that his or her injuries were caused by defendant's act or by an instrument under defendant's control. Due to the lapse of time and destruction of concrete evidence, Judith Sindell could not identify which defendant drug company manufactured the drug ingested by her mother. Nevertheless, the California Supreme Court held that each defendant's liability for plaintiff's injuries would be approximately equivalent to the percentage of DES it manufactured. Once a plaintiff joins a "substantial share" of the DES market, each defendant is liable for "the proportion of the judgment represented by its share of the market" unless it can demonstrate that it could not have made the drug.
fendants, in turn, can cross complain against other DES manufacturers not joined in the suit. It is unclear, however, whether apportionment of the damages under the market share theory strictly limits defendant's liability to its determined market share or subjects defendants to joint and several liability for 100% of plaintiff's damages. 19

In creating the market share theory, the court adapted the rules of causation and liability to meet the "changing needs" of our "complex industrialized society." 20 The court reasoned that defendant manufacturers should bear the risk of any loss to innocent consumers from fungible products that cannot be traced to any one manufacturer. 21 According to the court, not only are defendants in a better position to bear the cost of injury, 22 but public policy mandates such liability to promote product safety. 23

The creation of market share liability established a major victory for the hundreds of DES daughters in California who could not meet the traditional threshold showing of causation. Yet the market share theory stands subject to criticism. 24 The

under the concert of action doctrine developed in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) and prescribed in section 876 of the RESTATEMENT (SECOND) OF TORTS. The court found no "tacit understanding or common plan" among defendants in the production of DES as required under the concert of action doctrine. See Sindell v. Abbott Labs., 26 Cal. 3d at 604-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.

The court also rejected the argument that defendants were liable under the theory of "enterprise" or "industry-wide" liability as proposed by a Fordham Law Review Comment and argued by plaintiffs. See Comment, supra note 7, at 1002-07. Industry-wide liability arose in Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353 (N.Y. 1972), where the court held the entire blasting cap industry in the United States liable for injuries caused by exploding caps. The court distinguished Hall, which involved six defendant manufacturers who jointly controlled the safety standards within their trade associations, from the Sindell facts, which involved at least 200 DES manufacturers who were closely regulated by government FDA standards. See Sindell v. Abbott Labs., 26 Cal. 3d at 607-10, 607 P.2d at 933-35, 163 Cal. Rptr. at 141-43. See generally Note, Market Share Liability Adopted to Overcome Defendant Identification Requirement in DES Litigation, 59 Wash. U.L.Q. 571 (1981).

19. See infra notes 83-87 and accompanying text.
20. Sindell v. Abbott Labs., 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.
21. Id. at 610-11, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.
court refused to define a "substantial share of the market" and failed to address such issues as the statute of limitations, multiplicity of judgments, and disproportionate shares of liability. With these and other issues still unresolved, plaintiffs are regrouping at the trial court level to seek damage judgments against joined defendants who will be liable in accordance with their share of the DES market.

In addition to compensatory damages, DES plaintiffs invariably seek punitive damages. Although the Sindell court recognized the dollar figure of plaintiff's punitive damage claim, it remained silent as to whether the market share theory would alter plaintiff's burden of proving causation for punitive damages. In the current proceedings at the trial level, DES plaintiffs are arguing that the Sindell holding does extend to punitive damage recovery. Thus, if a plaintiff can prove malicious or fraudulent conduct on the part of any defendant, punitive damage liability will automatically attach unless the defendant can prove it was not the manufacturer of


Several legislative proposals have attempted to undermine the market share theory. See, e.g., S.B. 228, Cal. Leg., 1981-82 Regular Session (legislation introduced by Sen. Ed Davis, D. L.A., on Feb. 5, 1981, which would eliminate liability for latent product defects unless plaintiff could identify the manufacturer and would establish a committee to study alternatives to the market share theory) (was voted down in committee on Jan. 19, 1982).

25. Plaintiffs in Sindell asserted that Eli Lilly and five or six other companies produced 90% of the DES marketed. The court declined to comment on whether plaintiffs had joined a "substantial share," preferring instead to leave trial judges the discretion to determine this issue. The court stated: "While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment, we hold only that a substantial percentage is required." Sindell v. Abbott Labs., 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

26. See infra note 30.

27. In addition to Sindell, over 100 DES suits are currently filed in California with plaintiffs seeking compensatory and punitive damages (letter from David L. Bacon, counsel for defendant Rexall Drug Co. (Feb. 8, 1982)).

28. Plaintiff Judith Sindell seeks compensatory damages of $1 million and punitive damages of $10 million for herself. She alleges that defendants knew or should have known DES was a carcinogenic substance; they failed to test DES for efficacy and safety and the tests performed by others, upon which they relied, indicated that the drug was not safe or effective. Plaintiff also contends that in violation of the FDA requirements, defendants marketed DES on an unlimited basis rather than as an experimental drug and failed to warn of its potential danger. Sindell v. Abbott Labs., 26 Cal. 3d at 601-02, 607 P.2d at 930, 163 Cal. Rptr. at 138.

29. Id.
the particular drug ingested by the plaintiff's mother.30

The recovery of punitive damages is one particularly troublesome aspect of the practical application of Sindell. The punitive damage doctrine, despite its acknowledged place in the law, has been a target for substantial criticism.31 Any expansion of its application—especially a reduction of plaintiff's burden of proving causation—is certain to raise strong objections.32

III. THE DOCTRINE OF PUNITIVE DAMAGES

Many states assess punitive damages in addition to compensatory damages to serve four major purposes: deterrence,33 punishment,34 additional compensation,35 and retribution.36 California first codified the doctrine of punitive damages in 1872 under section 3294 of the Civil Code.37 The modern ver-

30. Several defendants have filed demurrers arguing that punitive damages are not recoverable under a market share theory unless plaintiff can identify the manufacturer of the drug. In Callish v. Eli Lilly, defendant's demurrer was granted on the basis that plaintiff's allegations were insufficient with respect to intentional acts of defendants. The court granted 20 days leave to amend. Motion to Strike, Callish v. Eli Lilly, No. 291765 (Super. Ct. Sac., Cal., May 18, 1982) (on file at the office of the Santa Clara Law Review).


32. See generally Owens, supra note 31.


35. See Fay v. Parker, 53 N.H. 342, (1873) (reimbursement for certain non-compensable damages); Stuart v. Western Union Tel. Co., 18 S.W. 351 (1885).

36. See generally Owens, supra note 31, at 1270.

37. Section 3294 reads in part: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the
sion of section 3294 allows punitive damages by way of example and punishment when a defendant has been guilty of malice, fraud, or oppression. Retribution is no longer a valid justification in California. In applying section 3294, a jury must consider the financial condition of the defendant and assess the degree of reprehensibility of the defendant’s conduct. In doing so, it is not bound by any fixed ratio to determine the proportion between punitive and compensatory damages. Juries are not required to assess the ramifications of multiple punitive awards for the same act, and appellate reversal of punitive awards is granted only if the judgment indicated passion and prejudice by the jury.

Product liability suits accent the three major purposes behind punitive damage awards in California. We live in an age where consumers have little ability to protect themselves against the threats of defective products which are often invisible to the human eye. Victims may be ignorant of their legal rights to redress or incapable of meeting the high costs of litigating against well-financed defense leagues.

Deterrence against the manufacturing and distribution of defective products serves as one of the principle purposes be-
hind section 3294 of the California Civil Code. Product safety measures often decrease a manufacturer's profit margin. Unlike traditional non-commercial torts, compensatory damages alone may not serve to deter against future wrongful conduct since treating these damages as part of the cost of doing business may be more profitable than remedying the defect.

Punitive damages as a form of punishment vent public and private outrage over a defendant's willful or reckless disregard for the safety of others. Government regulations and the criminal law have failed to provide adequate consumer protection against the manufacturers of defective or dangerous products. The elusive nature and the remoteness of a manufacturer's misconduct might make any offense "appear as mere error in judgment hardly deserving of punishment or condemnation." Punishment may serve as a necessary and effective reformatory tool to educate the offender as to society's legal and moral values in the safety and well-being of its citizens. Furthermore, it allows the manufacturer to "atone for [its] misdeeds through suffering" additional financial loss.

Many courts refuse to recognize punitive damages as a form of compensation since compensatory damages are assessed to "make the plaintiff whole again." Compensatory


45. Owens, supra note 31, at 1279.


47. See generally Owens, supra note 31, at 1282.

48. Id. at 1281.

49. Id.

damages may not compensate, however, for the "enormous
diligence, imagination and financial outlay required of initial
plaintiffs to uncover and to prove the flagrant misconduct of a
product manufacturer." Punitive damages provide a motive
for private individuals to enforce product safety standards
and enable them to recoup the expenses of doing so.

In Gombos v. Ashe, the California Supreme Court stated
that punitive damages "are not a favorite of the law" and
should be granted with the greatest of caution. The growing
frequency of high punitive damage verdicts, especially in
products liability actions, casts doubts on whether Gombos is
an accurate description of current judicial philosophy. It is
clear, however, that California imposes stringent proof and
causation requirements upon a plaintiff seeking punitive dam-
ages. To apply the market share theory for punitive damage
recovery would eliminate California's requirement that a
plaintiff prove causation. It would not, however, eliminate
plaintiff's burden of proof under section 3294 of the Civil
Code.

A. Punitive Damage Proof Requirements

Under section 3294, a plaintiff must find and introduce
evidence to demonstrate that the defendant is guilty of mal-
lice, fraud or oppression. The court in Davis v. Hearst, defined "malice," the first of the section 3294 proof require-
ments, as "animus malus" or "evil motive." Numerous cases
following Davis have interpreted malice to include only a ma-
laciously intention to injure the one harmed, but also conduct

Rptr. at 384.
52. 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 383.
may be awarded only if plaintiff pleads and proves that defendant with malice, fraud
or oppression committed a tortious act against plaintiff. James v. Public Fin. Corp.,
47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670, 673 (1975). See also Hale v. Farmers
App. 3d 891, 99 Cal. Rptr. 706 (1972). "To establish that there was a 'tortious act,'
plaintiff must, of course, prove not only the existence of an actionable wrong, but also
that damages resulted therefrom." 47 Cal. App. 3d at 1000, 121 Cal. Rptr. at 673
(emphasis added).
55. 160 Cal. 143, 116 P. 350 (1911).
56. Id. at 164, 116 P. at 540.
evincing "a conscious disregard of the safety of others." 57

Courts define fraud in the context of section 3294 to include intentional misrepresentation, deceit, or concealment of a material fact with an intention to cause injury. 58 "Of all the civil liabilities, fraud is the most difficult to establish." 59 Fraudulent misrepresentations are "made with intent to induce action by some particular person or persons in reliance on it; defendant is liable only to those persons to whom the representation was made with such intent." 60

Section 3294 also permits punitive damages in cases where proof of oppression is established. Courts find oppression to exist when a person consciously disregards the rights of another so as to place him under cruel and unjust hardship. 61

DES plaintiffs seek to recover punitive damages by showing that defendant drug companies acted with malice and fraud in the testing, marketing, and distribution of the drug. California courts have awarded punitive damages against pharmaceutical companies found guilty of fraud and malice. In Toole v. Richardson-Merrell, 62 the court awarded $175,000 compensatory and $500,000 punitive damages against the manufacturer of MER/29, a drug designed to lower blood cholesterol. Evidence existed that defendant concealed testing results and fabricated other test data to obtain FDA approval to


59. Owens, supra note 31, at 1279.

60. 4 B. WITKIN, SUMMARY OF CAL. LAW § 467 (8th ed. 1973).


market MER/29. The Toole court held that defendant’s conduct exhibited the requisite malice and fraud under section 3294 to warrant the punitive award.

California courts would require that DES plaintiffs support their complaints for punitive damages with facts which are not simply “opaque, unstable and compound averments.” In Searle v. Superior Court, plaintiff sued for injuries allegedly resulting from use of an oral contraceptive manufactured and sold by two drug firms. Plaintiff claimed punitive damages, alleging that defendants placed the product on the market with knowledge of its hazards in complete disregard of the safety of others. The court sustained a demurrer to the punitive damage claim and held that plaintiffs failed to plead facts sufficient to show fraud, malice, or oppression. The court emphasized that conclusory allegations of fraud, malice, or oppression cannot be sustained by liberal rules of construction.

Given California’s strict proof requirements for punitive damages, DES plaintiffs face serious evidence gathering problems to prove that defendant manufacturers acted maliciously or fraudulently. Because a DES plaintiff cannot usually isolate the one manufacturer of the drug ingested by her mother, she faces the enormous expense and difficulty of gathering evidence to meet section 3294 requirements for each joined market share defendant. Plaintiffs cannot simply allege that all defendants acted maliciously by adhering to an industry-wide standard for manufacturing and distributing DES. In fact, the Sindell court rejected the notion that defendants acted under a common plan or scheme in marketing DES. Thus, plaintiff must prove fraud, malice, or oppression as to each individual defendant.

Discovery, calculated to reveal fraud, malice, or oppres-

63. Id. at 711-15, 60 Cal. Rptr. at 414-16. Defendant Richardson-Merrell had conducted experiments for several years with MER/29. These tests revealed unfavorable data on blood and eye changes in the test animals including eye opities and blindness. Defendant concealed these tests’ results, even after first reports of eye cataracts in humans were received.

64. Id.


66. Id.

67. Id. at 27, 122 Cal. Rptr. at 221.

68. Id. at 29, 122 Cal. Rptr. at 222-23.

69. 26 Cal. 3d at 604-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.
sion, would require tracing the history of each manufacturer's marketing activities including initial testings, clinical research, labeling techniques, compliance with FDA standards, and distribution procedures. Proving fraud or malice may be difficult, as the FDA strictly monitored the drug companies until 1952, at which point DES was no longer considered a "new drug."  

If a plaintiff could show a DES manufacturer's intentional effort to conceal the dangers of the drug, as in Toole v. Richardson-Merrell, then this could establish malicious and fraudulent conduct. Similarly, a manufacturer's purposeful deviation from FDA standards, such as initially marketing DES on an unlimited basis rather than as an experimental drug, may suffice as proof of malice. Or, if a plaintiff could prove that the defendant failed to warn of the drug's potential dangers, fraudulent misrepresentation might be found. The issue would arise, however, as to whether the plaintiff, as a fetus in utero, actually relied upon any of the defendant's representations. It is questionable whether the plaintiff could claim the necessary reliance element of fraud through her mother.

Should a plaintiff be able to prove malice or fraud on the part of any employees of defendant drug companies, California law requires evidence that the employer-manufacturer participated in, or subsequently ratified, the wrongful acts with full knowledge.

70. See supra note 12.
71. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).
72. In Justus v. Atchison, the California Supreme Court held that for purposes of a wrongful death claim, a fetus in utero is not a human being. 19 Cal. 3d 564, 577-80, 565 P.2d 122, 130-33, 139 Cal. Rptr. 97, 105-08 (1977). Applying this rationale, the argument may be made that DES daughters, as fetuses in utero, could not have relied upon any fraudulent misrepresentations made by DES manufacturers. However, in Curlender v. Bio-Science Labs., a California appellate court recognized that punitive damages can be properly awarded against a defendant in a wrongful life action on behalf of a child born with genetic defects. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The Curlender court saw no reason in public policy or legal analysis for exempting a defendant from liability for punitive damages if defendant failed to provide proper genetic counseling to minor child's parents. Id. at 832, 165 Cal. Rptr. at 490. Under the Curlender rationale, DES plaintiffs may argue that neither public policy nor the fact that plaintiff was a fetus in utero at the time of defendant's wrongful acts can restrain a court from awarding punitive damages.
73. Cal. Civ. Code § 3294(b) (West Supp. 1982) reads:

An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed
DES plaintiffs who attempt to decipher corporate and managerial actions occurring as early as 1940.

Despite evidence gathering and proof problems, DES plaintiffs allege in their complaints that defendant manufacturers knew or should have known that DES is a carcinogenic substance and that there was a grave danger, after varying periods of latency, that it would cause cancerous growths in the daughters of women using the drug. Plaintiffs also allege that defendants failed to adequately test DES, meet FDA standards, and warn of the drug’s potential dangers. Yet, even if plaintiffs can unmask conduct evidencing malice and fraud under section 3294, DES plaintiffs still face the almost impossible burden of proving causation under section 3294.

B. Punitive Damage Causation Requirements

Normally, a defendant can only be held liable in a tort action if there was a causal connection between the plaintiff’s injuries and the defendant’s act. Because a punitive damage claim cannot even be brought unless a tort has occurred, causation has always been equally required for a punitive damage claim. “Evil thoughts or acts, barren of result, are not the

him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud or malice. With respect to a corporate employer, the advance knowledge, ratification or act of oppression, fraud or malice must be on the part of an officer, director or managing agent of the corporation.


75. Id. at 594, 607 P.2d at 926, 163 Cal. Rptr. at 134. Because defendants advertised assurances that DES was safe and effective to prevent miscarriages, plaintiffs allege fraudulent misrepresentation existed. Id.


77. Section 3294 requires actual damages before punitive damages can be assessed, which means that a tortious act committed against the plaintiff must be proven initially. Werschkull v. United Cal. Bank, 85 Cal. App. 3d 981, 1003, 149 Cal.
subject of exemplary damages."

In certain types of cases, punitive damages claims have required causation even when the underlying tort did not necessarily require it. For instance, in suits against the estate of a deceased tortfeasor, the estate is not liable for punitive damages unless the estate itself is guilty of malicious conduct which directly harmed plaintiff. Similarly, in cases where joint tortfeasors exist, no single tortfeasor may be held liable for punitive damages unless the plaintiff can isolate that particular tortfeasor's malicious conduct as the cause of his injuries.

A showing of a causal connection in any claim for punitive damages remains a stringent requirement for two reasons. First, the rationale behind punitive damages—deterrence, punishment, and compensation—is undermined unless the tortfeasor who actually caused the injury is held liable. Second, when a defendant must produce evidence in defense of a punitive damage claim, fairness demands that he receive adequate notice of the nature and effects of his wrongful conduct.

Traditional causation requirements mandate dismissal of a plaintiff's punitive damage claim at the pleading stage even if the plaintiff could prove fraud, malice, or oppression on the part of each defendant manufacturer. DES plaintiffs are not able to identify which defendant manufactured the specific drug ingested by their mothers. It would thus appear that plaintiffs are back to their starting point—unable to recover under a theory of law that requires strict adherence to the rules of causation.

Should plaintiffs be denied punitive redress? The fact that fungible goods used generations ago have threatened the health of millions of women sparks a desire to punish every
manufacturer who marketed the drug. Yet, punitive damage awards under a market share theory may not be the most effective way of channeling society's outrage.

IV. PUNITIVE DAMAGES IN MARKET SHARE LITIGATION

At the heart of the Sindell decision lies a recognition that unless courts fashion remedies to meet the changing needs of this era of mass production, consumers suffering permanent or fatal injuries caused by fungible goods go uncompensated. DES plaintiffs seek to extend this rationale to aid their claims for punitive damages in market share suits. Plaintiffs argue that punitive damages should be allowed despite lack of causation if plaintiff can prove fraud, malice, or oppression on the part of any one or more joined defendants. Thus, punitive damages would attach unless defendant demonstrated that it could not have caused plaintiff's injuries. Recovery of punitive damages under a market share theory, however, will detrimentally affect allocation of compensatory damages as well as cause constitutional violations of due process.

A. The Effect of Punitive Damages on Allocation of Compensatory Damages

The Sindell court's discussion of how damages will be allocated under a market share theory could be interpreted in two ways. First, a defendant's liability in non-identification cases could be limited to its share of the DES market. Thus, if plaintiff Sindell were able to join 80% of the DES market with Company X making up 10% of that figure, X would be liable for no more than 10% of Sindell's damages. This would limit Sindell's recovery to 80% of her total damages as each defendant's liability could not exceed its own market share. This interpretation is supported by the Sindell court's desire to make "each manufacturer's liability . . . approximate its responsibility for the injuries caused by its own products." A second interpretation would make all defendants joined by plaintiff Sindell jointly and severally liable for 100% of her

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82. Sindell v. Abbott Labs., 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.
84. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
damages. Thus, if Sindell joined 80% of the DES market represented by Company X (with 10%), Company Y (with 30%), and Company Z (with 40%), each company would be liable for its own market share plus its pro-rata share (1:3:4) of the missing 20% market share. This interpretation explains why the Sindell court referred to a defendant’s ability to cross complain against other DES manufacturers not joined in the action. It is also supported by dissenting Justice Richardson’s comments that the market share theory makes defendants “bear effective joint responsibility for 100% of plaintiff’s injuries despite the fact that their market share may be considerably less.”

Regardless of which interpretation applies, extending the market share theory to punitive damage recovery would detrimentally affect the allocation of compensatory damages.

Under Thomson v. Catalina, there is no joint and several liability for punitive damage awards. Thus, if proof requirements for punitives are satisfied and causation requirements are eliminated under a market share theory, each drug company will be liable for punitive awards according to its degree of culpability.

A DES plaintiff joins several drug companies and presumably will not be able to show that each acted with fraud, malice, or oppression in the manufacturing and distribution of DES. The result is that those few defendants who acted maliciously or recklessly will be the subject of hundreds of punitive damage claims.

Multiple punitive damage claims against any one market share defendant, coupled with liability for compensatory damages, could threaten the immediate bankruptcy of that defen-


In Baxter v. Scottish Rite Temple Ass’n, 86 Cal. App. 3d 618, 150 Cal. Rptr. 511 (1978), a co-defendant with a smaller amount of damages assessed against it than the other co-defendant was held liable for the entire judgment assessed against both defendants under joint and several liability. Likewise, market share liability may result in drug companies with small market shares assuming liability for plaintiff’s entire claim. See Berns & Lykos, supra note 24, at 1034.

86. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. If liability could never exceed a defendant’s market share, no incentive would exist for cross-complaining against other DES manufacturers not joined in the suit.

87. Id. at 617, 607 P.2d at 904, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

Regardless of which interpretation of compensatory damage allocation is employed, the bankruptcy of a defendant drug company has serious implications.

Under the first interpretation of allocating compensatory damages, each defendant's market share of DES is the upper limit of liability in non-identification cases. Should a defendant go bankrupt from punitive damage awards, subsequent plaintiffs will not be able to collect the full amount of compensation due them. They will only receive the percentage of their award which will equal the percentage of financially solvent defendants joined in their action.

If the second interpretation of allocation applies, defendants are jointly and severally liable for compensatory damages. Thus, if one defendant is rendered bankrupt by punitive damage claims, the remaining defendants become subject to increased liability for compensatory damages.

Punitive damages under a market share theory may also violate due process rights to rational rules of procedure and evidence.90

B. Constitutionality of Punitive Damages Against Market Share Defendants

The United States Court of Appeals for the Second Circuit is among the few courts which have addressed the question of whether multiple punitive damage awards against a single defendant result in denial of due process. In Roginsky v. Richardson-Merrell,91 plaintiffs sued for compensatory and punitive damages for personal injuries arising from taking MER/29. Judge Friendly, realizing that the punitive damage claims against Richardson-Merrell ran into the tens of millions, wondered how they could be administered "so as to avoid overkill."92

Judge Friendly struck down the trial court's punitive damage judgment on grounds of insufficient evidence of man-

89. "The purpose of punitive damages is to sting, not to kill. Punitive damages should not be permitted to bankrupt a defendant." In re Dalkon Shield, No. 80-2213 SW, slip op. at 15 (N.D. Cal. Nov. 5, 1981) (quoting Wynn Oil Co. v. Purcolator Chemical Corp., 403 F. Supp. 226 (M.D. Fla. 1974)).
91. 378 F.2d 832 (2d Cir. 1967).
92. Id. at 839.
agement misconduct. He observed:

We know of no principle whereby the first punitive damage award exhausts all claims for punitive damages and would thus preclude future judgments; if there is, Toole's judgment in California . . . would bar Roginsky's. Neither does it seem fair or practical to limit punitive recoveries to an indeterminate number of first comers, leaving it to some unascertained court to cry, "Hold enough," in the hope that others would follow.

The California punitive damage award referred to by Judge Friendly was in Toole v. Richardson-Merrell. In Toole, defendant's final argument asserted that a punitive damage award would constitute double jeopardy since, in effect, it imposed a penalty without the constitutional safeguards accorded to those accused of a crime. The court, in rejecting this argument, stressed the civil nature of the action and pointed out that the constitutional guarantees defendant claimed were denied applied strictly to criminal proceedings.

93. The trial court awarded $17,500 compensatory and $100,000 punitive damages. Judge Friendly reversed the punitive award notwithstanding evidence of carelessness, failure to exercise proper supervision, and possible bad judgment in failing to withdraw the drug from the market based on evidence of its cataractogenic qualities. Id. at 832.

Judge Friendly also noted the contrast between the potential million dollar liability for punitive damages and the maximum fine for violation of the Food, Drug and Cosmetic Act—a penalty of "imprisonment for not more than 3 years, or a fine of not more than $10,000 or both such imprisonment and fine." Id. at 839.

94. Id. at 839-40.

95. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). See supra note 63. The trial court granted defendant's motion for a new trial unless plaintiff consented to reduction of $500,000 punitive award to $250,000. Id. at 693-94, 60 Cal. Rptr. at 403.

96. Id. at 716-17, 60 Cal. Rptr. at 417-18. The principle of double jeopardy is to prohibit the defendant from the risk of being tried or punished twice for the same offense. Abney v. United States, 431 U.S. 651, 660-61 (1977).

Among the most recent pronouncements on duplicative punitive damage awards is Grimshaw v. Ford Motor Company. The Grimshaw court rejected defendant's argument that the possibility of other punitive damage awards would violate due process. Despite the court's willingness to award punitive damages, Grimshaw is significant in that it identifies the potential for abuse of due process rights arising from multiple punitive awards. Its dictum may be prophetic.

A California U.S. District Court, in In Re Dalkon Shield, recently took a first step toward amelioration of multiple punitive damage abuses. The Dalkon court certified a class action joining all California claims against A.H. Robbins, Inc., the manufacturer and distributor of an allegedly defective intrauterine device called the Dalkon Shield. The class action order attempts to coordinate some 1,573 suits involving claims for punitive damages.

The Dalkon court recognized that a defendant has a due process right to be protected against unlimited multiple punishment for the same act.

A defendant in a civil action has a right to be protected against double recovery not because they violate "double jeopardy" but simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process.

ishments for the same conduct violated due process).

98. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (suit against manufacturer of 1972 Ford Pinto by passenger who suffered severe burns and by heirs of driver, who suffered fatal burns in accident). At the trial court level, the jury awarded $2,516,000 compensatory and $125 million punitive damages based on automobile design defects.

99. Id. at 812, 174 Cal. Rptr. at 384.

We recognize the fact that multiplicity of awards may present a problem, but the mere possibility of a future award in a different case is not a ground for setting aside the award in this case. . . . If Ford should be confronted with the possibility of an award in another case for the same conduct, it may raise the issue in that case.

Id. (emphasis added).

100. Appellate court upheld punitive award which had been remitted from $125 million to $3.5 million. Id. at 812, 174 Cal. Rptr. at 348-49.

101. The court refused to be the judicial forum to cry "Hold enough!" due to Ford's particularly malicious conduct. Evidence existed that despite Ford management's knowledge that the fuel system could be made safe at a mere cost of four to eight dollars per car, it decided to defer corrective measures to save money and enhance profits. Id. at 777-78 n.2, 174 Cal. Rptr. at 361-62 n.2.


103. Id. slip op. at 3.
Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.104

The Dalkon court examined the total spectrum of securing punitive damages in mass tort litigation. The existence of a limited fund in most mass tort cases subjects defendants to bankruptcy threats and plaintiffs to "a serious risk of being told that the amount awarded in the first case represented an implied finding of the maximum amount the defendant should be punished."105 Class action certification ensures all plaintiffs of some proportionate share of any punitive damage recovery and avoids the risks of a disproportionately punished defendant.106

Reducing DES plaintiffs' causation requirements enhances the due process problem of multiple punitive damage awards against a particular defendant. Not only will it allow more duplicative punitive damage awards, but it will also allow many of them to be made to plaintiffs that were not harmed by the defendant's malicious conduct. The United States Supreme Court has recognized that limitations, up to and including elimination, may be placed on the power of courts to award punitive damages if there exists a strong countervailing interest.107 A defendant's right to fundamentally fair procedures as guaranteed by due process militates against the reduction of DES plaintiffs' burden of proving causation and the allowance of punitive damages in market share suits.

Two alternatives exist to solve this dilemma. First, courts can limit the right to recover punitive damages.108 Thus, a court could absolutely deny punitive damage recovery in DES cases. Second, as in the California Dalkon litigation, courts can utilize the class action device to prevent multiplicity of punitive damage claims.

A class action would be most effective where DES plain-
tiffs join suit against a single defendant who is identified as the manufacturer of the drug ingested. In these situations, a class action for punitive damages, as well as for compensatory damages, promotes equitable distribution of damages. The majority of DES plaintiffs, however, cannot isolate a single defendant. The potential constitutional violations under these circumstances may be too great to allow punitive damage recovery.

V. SOCIAL CONSIDERATIONS

A. The Risk to Progress

When diethylstilbestrol was first marketed for pregnancy uses, the drug's potential appeared revolutionary to medical societies, to the FDA, and to women who suffered from pregnancy difficulties. Today, some twenty years later, we seek to reduce causation requirements in order to impose punitive sanctions on manufacturers who tested, marketed, and distributed the drug. We want to punish and deter any malicious acts regardless of whether we can match defendant's conduct with plaintiff's injury.

Before traditional causation requirements can be eliminated for punitive damage recovery, certain social considerations must be weighed. On the one hand, society has a strong interest in imposing punitive sanctions upon a DES manufacturer guilty of wrongful conduct. On the other hand, society recognizes the social utility behind pharmaceutical research and development. This policy is evident in comments to the

109. Some plaintiffs, who recalled either the brand and strength of DES dosage or the appearance of the medication, have isolated the specific defendant manufacturer of the drug ingested. Similarly, some defendant manufacturers have exculpated themselves by demonstrating that they had not manufactured DES during the period plaintiff's mother took the drug. Sindell v. Abbott Labs., 26 Cal. 3d at 602, 607 P.2d at 930, 163 Cal. Rptr. at 138.

110. [T]he social and economic benefits from the mobilizing of the industry's resources in the war against disease and in reducing the costs of medical care are potentially enormous . . . . The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level industry investment in pharmaceutical research and development.

Restatement (Second) of Torts:

It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognized risk.\textsuperscript{111}

Extending the market share theory to punitive damage recovery may tip the balance sought between these social policies in favor of the imposition of punitive damages and against pharmaceutical development. Such an imbalance may risk gains from further medical and pharmaceutical advances.

The risk to progress in the pharmaceutical field suggests that perhaps punitive damages are not appropriate in cases involving drug-induced injuries. California courts, however, have awarded punitive damages in cases against drug companies. In \textit{Searle v. Superior Court},\textsuperscript{112} the court stated that “[a] products liability action may furnish the occasion for [punitive damage] award[s], provided that the suppliers’ conduct satisfies the exemplary damage criterion of the particular jurisdiction.”\textsuperscript{113} Market share liability, if applied to punitive damage recovery, would alleviate causation criterion under section 3294. This complicates the determination of whether DES actions are suited for punitive awards. Thus, instead of evaluating section 3294 criterion as suggested by \textit{Searle}, it might be more helpful to examine the reasons why society imposes punitive damages and whether they can be fulfilled in market share cases.

\footnotesize{\textsuperscript{111} Restatement (Second) of Torts § 402a, comment k, explanatory notes (Tent. Draft No. 4 1981) (recognizes drugs as “unavoidably unsafe products” so as to prohibit the imposition of strict liability for any “unfortunate circumstances”).}

\footnotesize{\textsuperscript{112} 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).}

B. Can Rationale Behind Punitive Damages Be Fulfilled by Compensatory Damages in Market Share Cases

Courts will not impose a punitive award unless the purposes behind these damages—punishment, deterrence, and compensation—will be effectuated. In DES litigation, it may be that the market share theory for compensatory damages already has fulfilled the purposes behind the punitive damage doctrine.

When Sindell adopted the market share theory, it, in effect, carried out the punishment and deterrence of defendant's conduct in the manufacturing of DES. This resulted from the economic ramifications of defendant's liability. If market share liability assesses joint and several liability against defendants in the entire amount of damages sustained, compensatory damages attributable to the market share of absent manufacturers will be added to the defendant's own share. A defendant's liability under this interpretation of Sindell will almost always exceed its market share, which alone can amount to astounding figures. By imposing market share liability, the Sindell court might have succeeded in punishing and deterring DES manufacturers from marketing potentially dangerous drugs without the need for punitive damages.

Sindell also implemented the compensatory aspect of punitive damages. Because punitive damages are based on the total net worth of the defendant rather than the actual damage suffered by the individual plaintiff they can compensate plaintiffs for costs not otherwise recoverable. The Sindell court, in creating market share liability, looked not only to the "actual damage suffered" by DES plaintiffs, but to the "total net worth" of defendant manufacturers. Of course, market share liability for compensatory damages may not compensate plaintiffs for litigation costs. Nonetheless, it is clear that the

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114. Justice Richardson, dissenting, assumed that no other state would adopt market share liability, and concluded that those defendant manufacturers brought to trial in California would ultimately bear joint responsibility for 100% of plaintiff's injuries rather than the percentage of their market share. This would result, according to Richardson, because only a certain number of manufacturers (five in Sindell) were amenable to suit in California. Sindell v. Abbott Labs., 26 Cal. 3d at 617-18, 607 P.2d at 940, 163 Cal. Rptr. at 148.

court stretched traditional boundary lines of tort law in order to compensate plaintiffs.  

VI. CONCLUSION

The California Supreme Court in Sindell created a revolutionary theory to solve some critical problems inherent in DES litigation. If Sindell is interpreted as having eliminated the causation requirement for punitive claims as well as for compensatory claims, it would not only significantly enhance existing problems with punitive damage awards, but it would also threaten the soundness and validity of the Sindell market share theory itself. Early punitive damage awards would bankrupt defendants and thereby disrupt later compensatory claims. Furthermore, the Sindell market share theory may already satisfy the main purposes behind punitive awards in California.

California courts should decide that they have gone far enough in DES litigation. Going further by reducing causation requirements for punitive damage claims may, in fact, be a step backward. It is an appropriate time for courts to say "Hold enough," thereby preserving the benefits of Sindell while guarding against its potential excesses.

Colleen T. Davies

116. Retribution is a function of punitive damages not fulfilled by Sindell, but retribution is not a valid justification for punitive damages in California. See supra note 38 and accompanying text.
117. See supra notes 91-113 and accompanying text.
118. See supra notes 83-90 and accompanying text.
119. See supra notes 114-16 and accompanying text.