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EMERGING TRENDS FOR PRODUCTS LIABILITY: MARKET SHARE LIABILITY, ITS HISTORY AND FUTURE

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INTRODUCTION[m]

Traditionally, product liability actions require that the plaintiff identify a particular defendant as the manufacturer, distributor or seller of a product and also prove that the defendant's product caused the plaintiff's injury. In the absence of evidence identifying a specific defendant to the particular product in issue, the traditional products liability action is subject to dismissal for failure to set forth a *prima facie* claim.[1] In product cases involving drugs, which often are fungible products, this may be an insurmountable hurdle since it is very difficult, or even impossible for a plaintiff to prove that a particular manufacturer's product caused his or her injury.

Courts have developed different legal theories to help plaintiffs state causes of action where the defendant cannot be readily identified. Historically, these theories included concert of action, alternative liability and enterprise liability. These three theories enable a plaintiff to state a cause of action even though they cannot specify which, of perhaps several defendants, caused the actual harm, but is at least able to positively identify all the tortfeasors potentially responsible. Thus, these theories enable a plaintiff to state all of the elements of a traditional product liability cause of action: (i) identity of the defendant; (ii) injury to

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[1] Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 504, 539 N.E.2d 1069, 1073, 541 N.Y.S.2d 941, 945 (1989). "In a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required." *Id.*

person/property; (iii) caused by a defective product manufactured by the defendant.[2]

The most recent development is in the area of market share liability, which permits a products liability cause of action to be stated where the plaintiff cannot identify either one or a small group of defendants potentially responsible for the harm and cannot join all or substantially all of the defendants in the action. Market share liability grew out of the particular problems of identifying manufacturers of a drug developed in the late 1930s, namely Diethylstilbestrol, commonly known as DES. DES is a synthetic estrogen that was created in England and ultimately marketed in the United States from the late 1940s until approximately 1971 as an anti-miscarriage drug. It was administered to pregnant women with a history of miscarriage or threatened miscarriage. In the 1970s, claims arose that the drug crossed the placenta of the *in utero* child, causing various medical problems including uterine cancer, infertility and pregnancy outcome problems as adults or adolescents. In 1971, the FDA banned the use of DES as a miscarriage preventative.

The hurdle that early DES plaintiffs faced, and still face in many cases, concerns the inability to identify the particular manufacturer of the DES that the mother allegedly ingested. This problem arose for many reasons, very often because the drug was fungible and often marketed generically, compounded by the fact that it was usually dispensed by pharmacies, in pharmacy containers, without product information. Additionally, due to the passage of time, many DES mothers simply do not recall much, if anything, about the name or other identifying characteristics of the DES they ingested.

Market share liability is the most progressive theory towards assisting plaintiffs because it completely eliminates the basic requirement of identifying a specific defendant or group of defendants as the manufacturer of the actual pill or tablet ingested. For this reason it is also one of the most controversial theories and has been limited in its application. In *Hymowitz v.*

[2] Enright v. Eli Lilly & Co., 141 Misc. 2d 194, 200, 533 N.Y.S.2d 224, 228 (Sup. Ct. Chenango County 1988).

Eli Lilly and Company,[3] the New York Court of Appeals adopted market share liability theory in DES cases for New York plaintiffs whose claims arose in New York. However, many states still refuse to adopt market share liability, even in DES cases, perhaps in view of the mass litigation it has created in the states that have adopted it such as New York.[4]

Set forth below is a discussion of market share liability as applied in New York, how it differs from other alternative tort theories, and an overview of its application to other products liability actions.

PRECURSORS TO MARKET SHARE LIABILITY

A. *Alternative Liability*

Alternative liability was first applied in *Summers v. Tice*,[5] the famous hunting accident case. When two or more defendants act in a tortious manner, but only one of the defendants actually injures the plaintiff; and the defendants are in a better position of knowledge as to the facts, alternative liability shifts the burden of proof, requiring that each defendant prove that his own tortious conduct was not the cause of the plaintiff's injuries. This burden shifting provides each defendant with an incentive to exculpate himself at the expense of the remaining defendant. It also provides the plaintiff with a device to combat silence between the defendants, which could preclude the plaintiff from identifying the tortious party. Alternative liability also requires a small number of defendants; that evidence exists that at least one of

[3] 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

[4] The issue of whether market share liability applies turns on the question of the State of exposure. If the claim arose in a State that has not adopted market share liability, the case is subject to dismissal unless identification is made. *See* Braune v. Abbott Laboratories, 895 F. Supp. 530 (E.D.N.Y. 1995) (Market share liability is not recognized under Georgia law) and numerous other cases decided by Justice Ira Gammerman in N.Y. County Supreme Court.

[5] 199 P.2d 1 (Cal. 1948).

defendants joined has actually caused the injury, and that all-possible defendants are joined.[6]

B. *Concert of Action*

The concert of action theory has been applied in situations where defendants engage in a common plan or scheme in an effort to commit a tortious act. Historically, it was applied in drag racing cases, but is now commonly alleged in toxic tort cases involving multiple defendants. Concerted action liability requires an agreement, tacit or otherwise, to conceal product risks despite the defendants' knowledge that the product is dangerous.[7] Mere parallel activity, such as conduct in developing and marketing a particular product, is insufficient to impose liability. The defendants must take affirmative steps, in a joint effort, to conceal the product's dangers. Implicit is the fact that all of the defendants are alleged to be tortfeasors who caused the actual harm to the plaintiff.[8]

C. *Enterprise Liability*

Enterprise liability is similar to concerted action liability except it imposes liability on an entire industry. Such liability, however, is deemed inappropriate where the industry is large in size.[9] Again, all of the defendants are before the court and each is alleged to be an actual tortfeasor causing the damage. In general,

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[6] *See* New York Telephone Co. v. AAER Sprayed Insulations, 173 Misc. 2d 602, 607, 661 N.Y.S.2d 701, 705 (Sup. Ct. New York County 1997) (discussing requirements of alternative liability theory); 210 East 86th Street Corp. v. Combustion Eng., Inc., 821 F. Supp. 125, 149 (S.D.N.Y. 1993).

[7] City of New York v. Lead Industries Ass'n, Inc., 190 A.D.2d 173, 597 N.Y.S.2d 698 (1st Dep't 1993).

[8] *Hymowitz*, 73 N.Y.2d at 506, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946.

[9] Hall v. E.I. DuPont de Nemours & Co, Inc., 345 F. Supp. 353, 378 (E.D.N.Y. 1972) Enterprise liability cause of action stated where industry was made up of only six defendants and facts demonstrated that the defendants, as a group, through their trade association, committed tortious acts with respect to design and labeling of blasting caps.

enterprise liability is not widely applied due to the specific factual allegations required.

MARKET SHARE LIABILITY

Market share liability was endorsed by the New York Court of Appeals in *Hymowitz v. Eli Lilly & Company*,[10] which involved appeals on motions to dismiss DES claims for failure to identify the specific manufacturer of the DES ingested by the plaintiffs' mother. The text of the decision clearly states that market share liability was adopted to permit cases to proceed that could not otherwise survive under a traditional products liability theory or because other more traditional alternate theories, including alternative liability and concert of action, also did not permit DES plaintiffs to state a cause of action.

The Court noted that plaintiffs in DES cases have particular difficulty identifying the manufacturers of the DES alleged to have been ingested as a direct result of the marketing strategies allegedly engaged in by the manufacturers. Many times the drug itself was not labeled or was dispensed generically by pharmacists, making it virtually impossible to determine the manufacturer.[11] The court noted:

> All DES was of identical chemical composition. Druggists usually filled prescriptions from whatever was on hand. Approximately 300 manufacturers produced the drug with companies entering and leaving the market continuously during the 24 years that DES was sold for pregnancy use. The long latency period of a DES injury compounds the identification problem; memories fade, records are lost or destroyed, and witnesses die. Thus, the pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to

[10] 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).
[11] *Id.* at 504-14, 539 N.E.2d at 1073-1079, 541 N.Y.S.2d at 945-50.

> discover this fact until many years after ingestion, at which time the information is not available.[12]

In adopting market share liability,[13] the court first rejected alternative liability and distinguished the famous case of *Summers v. Tice*.[14] As noted above, *Summers* endorsed burden shifting to the defendants to exonerate themselves when *all* possible tortfeasors are before the court, where their numbers are small, and when they are in a better position to explain how the injury occurred. The Court of Appeals also rejected concert of action as inapplicable to DES, noting its application in drag racing cases, where *all* defendants have an understanding, express or tacit, to participate in a common plan or design to commit a tortious act.[15]

In DES cases, by contrast, it was not possible to have *all* of the tortfeasors before the court because the industry was too large and many of the manufacturers were no longer in existence. Additionally, due to the passage of time, lack of records, and marketing practices, the defendants were in no better position to have knowledge of the actual manufacturer than the plaintiff. Moreover, no common plan or scheme existed and only evidence of parallel activity amongst the manufacturers was shown. The court noted: "In short, extant common law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturers of the drug that impaired her."[16] The court further noted that "DES . . . is a singular case."[17]

In adopting market share liability, the Court examined various approaches employed by other states and adopted a national

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[12] *Id.* at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944.

[13] Other states had already adopted market share (California, Washington) and others rejected it (Missouri, Iowa). This issue reared itself most recently in Ohio in 1998, where the Ohio Supreme Court rejected it, thus possibly shutting down hundreds of DES cases there. Sutowski v. Eli Lilly & Co., 696 N.E.2d 187 (1998).

[14] 199 P.2d 1 (1948).

[15] *Id.* at 3; *see* State v. Newberg, 278 P. 568 (Or. 1929).

[16] Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 507, 539 N.E.2d 1069, 1075, 541 N.Y.S.2d 941, 947 (1989).

[17] *Id.* at 508, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.

market theory based upon the model used in *Sindell v. Abbott Laboratories*.[18] The reason for using a national market was to "apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[19] Indeed, use of a non-national market was deemed unreliable.[20]

Exculpation is based solely upon proof that a manufacturer did not participate in the marketing of DES for pregnancy use -- no exculpation is permitted by proof that the pill manufactured by a particular defendant did not resemble the one described by the plaintiff. The Court's decision to limit exculpation required the balancing of the equities, thus making liability several and limiting the recovery against each defendant to the actual percentage of the market that each named manufacturer possessed.[21] This often results in less than 100% recovery for plaintiffs because, as a practical matter, the entire market can never be joined in the case.

APPLICABILITY OF MARKET SHARE LIABILITY TO OTHER PRODUCT LIABILITY CASES

Even though the *Hymowitz* Court stated that the "DES situation is a singular case with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later,"[22] plaintiffs in New York have argued that market share liability should be extended to embrace other products liability cases, including asbestos, handguns, silicone breast implants and lead paint.[23] All attempts to extend the doctrine in New York to products other than DES, however, have failed or met with inconclusive results.

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[18] 607 P.2d 924 (1980).
[19] *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 508, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.
[23] *Id.* at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.

A. *ASBESTOS*

Attempts to extend market share liability to asbestos cases have generally failed to date, with the cases citing great differences in the qualities of asbestos and DES. In *210 East 86th Street Corp. v. Combustion Engineering, Incorporated*,[24] for example, the court specifically rejected market share theory in asbestos litigation. In so deciding, the court cited numerous cases from other jurisdictions, focusing on the fact that asbestos was not a fungible product in the same sense as DES. It was also noted that while all DES had identical physical properties and chemical compositions, asbestos products had wide variations in toxicities, composition and harmful effect.[25] The court also discussed the fact that since asbestos products had varied uses, forms and functions it was difficult to define a market for the products, unlike DES.[26]

A case of interest is *New York Telephone Co. v. AAER Sprayed Insulations*,[27] where market share liability was alleged against a number of asbestos product manufacturers, but the claim was precluded for failure to make appropriate disclosure during discovery. Thus, the ultimate merits of the market share liability claim, both factually and legally, may never be determined. However, in discussing the claim, the court stated: "A successful market share claim would impose liability proportional to the market share which each defendant's productions of a particular type occupied relative to the New York market for such product at the time of sale and installation in plaintiff's buildings."[28]

It is interesting to note, however, that notwithstanding the fact that the application of market share theory of liability is doubtful in New York, the theory was adopted as a method of apportionment for settlement in the case of *In re Joint Eastern and Southern Districts Asbestos Litigation.*[29] In an earlier

[24] 821 F. Supp. 125 (S.D.N.Y. 1993).
[25] *Id.* at 146.
[26] *Id.*
[27] 173 Misc. 2d 602, 661 N.Y.S.2d 701 (Sup. Ct. New York County 1997).
[28] *Id.* at 605 n.3, 661 N.Y.S.2d at 704 n.3.
[29] 878 F. Supp. 473 (E.D.N.Y. & S.D.N.Y. 1995).

decision in this case,[30] the court considered post-verdict motions which claimed that the court had effectively charged the jury in a manner that encouraged consideration of market share liability. The court rejected the motion, indicating the evidence linked particular defendants to particular sites, and that the product was not fungible.[31]

In contrast, market share theory was permitted in a California case upon a finding that the particular asbestos product, brake pads, met the fungibility test. In *Wheeler v. Raybestos-Manhattan,*[32] workers who had been exposed to asbestos fibers in their work with brake pads filed a products liability action. The court held that brake pads were sufficiently fungible to permit workers to attempt to prove a market share theory of liability.[33] Further, the workers' ability to identify one or more manufacturers of brake pads with which they had come in contact during the course of their work did not prevent the assertion of market share liability.[34] The court explained that "while brake pads are absolutely interchangeable [ ] [with] one another . . . they contain[ed] roughly comparable quantities of the single asbestos fiber chrysotile."[35]

B. *HANDGUNS*

One of the more creative and novel products liability cases to arise in recent years is *Hamilton v. Accu-Tek*,[36] which was a case brought by the representatives of individuals who were shot and killed by illegally obtained handguns. The suit alleges negligent marketing of handguns that fostered growth of the underground handgun market, design defect, and fraud on federal officers with respect to regulation of the product. In denying summary judgment to the defendants, the court suggested that liability

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[30] 798 F. Supp. 925 (1992).
[31] *Id.* at 935.
[32] 8 Cal. App. 4th 1152, 11 Cal. Rptr. 2d 109 (1992).
[33] *Id.* at 1156, 11 Cal. Rptr. 2d 111.
[34] *Id.*
[35] *Id.*
[36] 935 F. Supp. 1307 (E.D.N.Y. 1996).

might ultimately rest on a type of market share liability. Senior District Judge Weinstein stated the following:

> If the underlying cause of the injuries is the unchecked growth of the underground handgun market, and not an individual negligent sale of a particular gun by a particular defendant to a particular licensed dealer, then the New York Court of Appeals might find a market share theory or some variant to be viable even if the manufacturer of the gun used to commit the killing were known.[37]

The New York Court of Appeals well might, for policy reasons, adopt a *Hymowitz*-type theory, or one of the theories espoused by other state courts such as those in *Sindell* or *Shackil* that would allow for exculpation or adjustments for risk contribution at variance with actual market share.[38]

If negligence lies not in the creation and fostering of the underground gun market, but in the individual sale of a handgun, market share liability might still be a viable theory where the defendant is unknown. It is the nature of illegal handgun use that the shooter is likely to dispose of the gun so as to minimize the chances of being caught. Depending upon what is available to law enforcement investigators where the gun is not retrieved, it will be possible only in some instances, and then to varying degrees, to narrow the field of possible handgun manufacturers. On much different facts and for different reasons than those in the DES cases, difficulties in defendant identification unique to the product and to manufacturer may arise. The New York Court of Appeals might choose to adopt, for reasons of public policy, a

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[37] *Id.* at 1331.

[38] *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989) (no exculpation); Shackil v. Lederle Lab., 530 A.2d 1287 (N.J. App. Div. 1987), *rev'd*, 561 A.2d 511 (1989) (modification for risk contribution); Sindell v. Abbott Laboratories, 607 P.2d 924, 931 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980) (allowing exculpation).

theory of collective liability. Most appropriate might be a form of market share liability that provided for exculpation.[39]

In opining that concerted activity or enterprise liability would not apply, the court said:

> It does not appear that the New York Court of Appeals would make use of either concerted activity or enterprise liability theories. The former, as *Hymowitz* makes clear, requires evidence of a tacit agreement as to the tortious conduct. Plaintiffs have not produced any facts suggesting the existence of an agreement among the defendants as to how to market the guns. The latter theory requires joint control of the risk through use of a trade association or some other method of standard setting. Plaintiffs allege joint coordination of policy positions but that relates to lobbying activities, not to actual marketing. Given the facts as thus far developed, the theories the New York Court of Appeals would most likely adopt, if it were to adopt any, are some form of either market share or alternative liability.[40]

C. *BREAST IMPLANTS*

New York courts have declined to apply market share liability to breast implant cases. For instance, in *Matter of New York State Silicone Breast Implant Litigation*,[41] market share liability was rejected, as was a claim of concert of action (on the facts alleged). The Court stated as to market share:

> This Court finds that market share liability should not be applied to breast implants because such products are not fungible and the manufacturers of the implants can often be identified. There are differences in the design and composition of the implants; the warning inserts in each of

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[39] *Hamilton*, 935 F. Supp. at 1331.

[40] *Id.*

[41] 166 Misc. 2d 85, 631 N.Y.S.2d 491 (Sup. Ct. New York County 1995).

> the products vary; and the products are not generically marketed. Most importantly, the majority of women involved in the breast implant litigation have been able to identify all or some of the manufacturers of their implants. This ability to identify most of the manufacturers is important since both market share and concert of action liability theories came into play so plaintiffs could have recourse to the courts where product identification was impossible. The rationale of the Court of Appeals decision in *Hymowitz* was that market share liability was necessary because the DES was an identical generically marketed product, as a result of which the manufacturers of the product could not be identified.
>
> In the present case, silicone breast implant manufacturers make identifiable products, marketed under specific manufacturer names. The reality of a plaintiff's plight when product identification cannot be made is like any other plaintiff who claims injury from a product that has been lost or destroyed. So drastic a departure from traditional tort law is not warranted here. Based on the foregoing, this court holds that plaintiffs' claim for market share liability is dismissed.[42]

D. *LEAD PAINT*

The applicability of market share liability to lead paint poisoning cases has also been generally unsuccessful. No New York cases have been reported to our knowledge where the issue has arisen. In *City of New York v. Lead Industries Associations Inc.*,[43] it does not appear that market share liability was raised, but manufacturers of lead paint were subject to concerted action liability because:

> [the] manufacturing defendants allegedly coordinated their efforts to conceal the hazard, to mislead the public and the

[42] *Id.* at 89, 631 N.Y.S.2d at 494.

[43] 190 A.D.2d 173, 597 N.Y.S.2d 698 (1st Dep't 1993).

> government as to the hazard, and to market and promote the use of the product despite their knowledge of the hazard . . . . The manufacturing defendants accomplished this plan by allegedly having it propounded by their trade association, defendant Lead Industries Association. Each of the manufacturers, thus became a principal, chargeable with the knowledge and conduct of its agent.[44]

Pennsylvania courts have rejected market share theory in lead paint litigation. In *Skipworth v. Lead Industries Association, Incorporated,*[45] parents of a minor who was allegedly injured due to ingestion of lead paint in the home, which had been built around 1870, brought a personal injury action against manufacturers of lead pigment or their alleged successors. The court held that the doctrines of market share liability and alternative liability were inapplicable and plaintiff could not recover under civil conspiracy or concert of action theories.[46] As to market share liability, the court compared lead paint to DES and found it inapplicable because (i) the relevant time period in question was far more extensive than with DES and (ii) no specific application(s) of lead paint could be identified as having caused the alleged injury, leaving an almost 100 year period in issue, which (iii) assured that many of the defendants most likely had no liability in fact.[47] Finally, lead paint was found not to be a fungible product.[48] In Ohio, however, market share liability was approved in *Jackson v. Glidden Company.*[49] This decision, however, is clearly not good law in light of the Ohio Supreme Court's recent rejection of market share liability in DES in *Sutowski.*[50]

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[44] *Id.* at 178, 597 N.Y.S.2d at 700.
[45] 690 A.2d 169 (1997).
[46] *Id.* at 173.
[47] *Id.* at 172.
[48] *Id.*
[49] 647 N.E.2d 879 (1995).
[50] 696 N.E.2d 187 (1998).

E. *TOBACCO*

No market share liability would appear appropriate or necessary in tobacco cases, since most persons are aware of the brand of cigarette that they have smoked. In *DaSilva v. American Tobacco Company*,[51] the complaint alleged that each of the plaintiff smokers purchased and smoked cigarettes, became addicted to the product, and have been afflicted with cancer as a result of their cigarette habit. The court held that even though plaintiffs alleged a concerted action claim against defendant, they are required to identify the brands of cigarettes they smoked, thus enabling the manufacturer to respond. Similarly *Cresser v. American Tobacco Company*[52] found a complaint deficient for failure to specify brands smoked.

The court held a concerted action theory viable in *Sackman v. Liggett Group, Incorporated.*[53] In *Sackman*, a smoker who suffered from lung cancer brought a products liability action against a cigarette manufacturer. The court ruled that allegations that a cigarette manufacturer had, as member of the tobacco industry, been in possession of scientific and medical evidence regarding the dangers of smoking cigarettes, and that despite the knowledge, the manufacturer had, along with other manufacturers, conspired to repress information and misrepresent health risks at issue, were sufficient to state claim under concerted action theory.[54]

F. *LATEX GLOVES*

In the case of *Boggs v. Allegiance Corporation*,[55] a New York plaintiff asserted market share and enterprise liability against latex glove manufacturers. No disposition or status is available to report at this time.

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[51] 175 Misc. 2d 424, 667 N.Y.S.2d 653 (Sup. Ct. New York County 1997).

[52] 174 Misc. 2d 1, 662 N.Y.S.2d 374 (Sup. Ct. Kings County 1997).

[53] 965 F. Supp. 391 (E.D.N.Y. 1997).

[54] *Id.* at 396.

[55] 97-4276 (S.D.N.Y.), as reported in *Mealey's Litig. Rep. Latex* (June 1997).

G. *TAINTED BLOOD PRODUCTS*

Market share liability has been adopted for litigation involving tainted blood products, which are alleged to have been a source of HIV infections. *Doe v. Cutter Biological, Incorporated*,[56] and *Smith v. Cutter Biological, Incorporated.*[57]

CONCLUSION

Market share liability to date has been a dramatic departure from traditional tort liability theories for product liability actions. While its application has been limited to DES for the most part, creative lawyers and judges will undoubtedly pursue new applications and modifications to its "traditional" *Hymowitz* elements.

[56] 971 F.2d 375 (9th Cir. 1992).
[57] 823 P.2d 717 (Haw. 1991).