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Sindell and Beyond: A Case for Imposing Punitive Damages in Market Share Litigation

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In an age of mass production of complex goods about which consumers have little understanding, society relies heavily on manufacturers to provide an adequate and safe product. The societal interest in requiring manufacturers to provide safe products is reflected in modern strict products liability law. During the last century, manufacturer liability has increased tremendously as the courts have lessened some elements of proof traditionally required to state a cause of action.

Early products liability cases required privity of contract between the plaintiff and defendant as well as proof of defendant's fault. In 1916, however, the New York Court of Appeals held that the privity requirement should be removed in suits involving products which, when negligently made, would endanger life and limb. Within the last twenty-five years all states have abandoned the privity requirement in products liability cases and now include many non-manufacturers as possible defendants. The fault requirement has also been eliminated.


2. See infra notes 3-12 and accompanying text.

3. The origin of the privity requirement was the English case of Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex.1842). The Winterbottom court held that since a coach passenger was not in privity of contract with the defendant, the plaintiff had no cause of action for breach of a contract to keep the coach in good repair. Id. at 405. Although Winterbottom was an action in contract, the decision was interpreted to mean that privity would also be required in tort actions. See W. KEETON, D. DOBBS, R. KEETON, AND D. OVEN, PROSSER & KEETON ON THE LAW OF TORTS, 357 (5th ed. 1984) [hereinafter cited PROSSER & KEETON].

4. Plaintiffs were required to show that defendant was at least negligent in tort actions. See Comment, Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification, 76 N.W. U.L. REV. 300, 306.

5. See MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (Judge Cardozo eliminated the privity requirement in any negligence action in which it was reasonably foreseeable that a product could cause substantial harm if defective).

6. The numerous exceptions to the privity requirement that have evolved in recent years illustrate that lack of privity hardly hinders products liability suits today. See, e.g., Kosters v. Seven-Up Co., 595 F.2d 347, 351 (6th Cir. 1979) (franchisor held liable); Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 51, 46 Cal. Rptr. 552, 556-57 (1965) (wholesaler held
in modern strict products liability law. Plaintiffs in early products liability actions were required to prove that a manufacturer was at least negligent. In 1980, the California Supreme Court removed yet another element of proof required in certain strict products liability actions. In *Sindell v. Abbott Laboratories,* the court held that when the plaintiff names a substantial percentage of the manufacturers of a fungible good as defendants in an action, the plaintiff need not prove which defendant actually manufactured the good that caused the plaintiff's injury. Once the plaintiff proves that the fungible good caused the injury, the burden of disproving causation falls upon each defendant. This doctrine represents a drastic departure from the traditional rule that plaintiffs must show which particular defendant caused their injuries. The market share doctrine could have enormous implications. Many products today are produced by different manufacturers using iden-

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7. See Comment, *supra* note 4, at 306.

8. Nearly every court today has adopted some form of strict liability in tort. See W. *PROSSER, HANDBOOK OF THE LAW OF TORTS 657-58 (4th ed. 1971). In those jurisdictions that adopt strict liability, a plaintiff may still sue a defendant on a negligence theory in the alternative. In strict liability, however, the plaintiff need not prove the manufacturer was negligent in producing the good. *Prosser & Keeton, supra* note 3, at 694. The first case imposing strict liability in tort was *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The *Greenman* doctrine was subsequently adopted in the Second Restatement Of Torts section 402A. Section 402A states:

   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

   (2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

   

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10. *Id.*

11. *Id.*


13. *Id.* at 1623; Comment, *supra* note 4, at 302-03.
tical formulas. Victims injured by these "generic" products may frequently be unable to identify which manufacturer produced the specific good that caused the harm. Conceivably, thousands of people could be affected by this relaxation of the causation requirement.

Modern California courts often uphold the right of plaintiffs to recover punitive damages in products liability actions. A question remains, however, as to whether the doctrine of punitive damages can appropriately be implemented within the market share liability context. In at least some market share cases, the imposition of punitive damages would seem appropriate. As some have suggested, however, the threat of bankrupting the defendant, and therefore leaving no assets available for latecomers seeking compensatory awards, may be a pertinent concern in this area of potentially mass liability. The Sindell decision did not address the applicability of punitive damages in the market share context.

Two courts in California have ruled on the issue of the imposition of punitive damages in actions tried under the market share theory of liability. A federal district court in California held that an assessment of punitive damages was feasible in a market share context. After considering the same issue, a California appellate court held that punitive damages could be imposed in market share cases.

15. See Sindell, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.
16. Numerous products on the market today may cause injury to many or all of that product’s consumers. See, e.g., infra note 69. See also, Comment, DES and a Proposed Theory of Recovery, 46 FORDHAM L. REV. 963 (1978) “The DES cases are only the tip of an iceberg.” Id. at 1007.
18. See infra notes 123-84 and accompanying text.
19. See infra notes 123-84 and accompanying text.
21. The Sindell court acknowledged that Judith Sindell was seeking punitive, as well as compensatory damages. Sindell, 26 Cal. 3d at 590, 607 P.2d at 926, 163 Cal. Rptr. at 13. The decision, however, is framed in terms of compensatory liability, and does not discuss the punitive damages issue raised in the complaint. Therefore, the question of whether punitive damages are allowable in a market share liability action is open for speculation.
23. Id. at 1320.
that exemplary damages were inappropriate in market share cases.\textsuperscript{23}

This comment will first discuss the theory of \textit{Sindell} and the implications of that decision.\textsuperscript{24} Next, the doctrine of punitive damages as it has evolved in California will be outlined.\textsuperscript{27} The conflicting decisions of the California appellate court and the federal district court in California as to whether punitive damages are appropriate in a market share context will follow.\textsuperscript{28} This comment will then show that the better reasoned view favors the imposition of punitive damages in market share litigation.\textsuperscript{29} Finally, an approach to overcoming the procedural difficulties inherent in adopting punitive damages in market share litigation will be suggested.\textsuperscript{30}

\textbf{Market Share Liability Doctrine}

As a general rule, tort plaintiffs are required to prove that their injuries were caused by the defendant or an instrumentality within the defendant's control.\textsuperscript{31} In products liability, however, when the plaintiff is able to prove all elements of the cause of action except the identity of the wrongdoer, some exceptions to the identification requirement are recognized.\textsuperscript{32} Perhaps the most radical of these

\begin{itemize}
\item \textsuperscript{25} \textit{Id.} at 890, 213 Cal.Rptr. at 554.
\item \textsuperscript{26} See infra notes 31-77 and accompanying text.
\item \textsuperscript{27} See infra notes 78-122 and accompanying text.
\item \textsuperscript{28} See infra notes 123-155 and accompanying text.
\item \textsuperscript{29} See infra notes 156-184 and accompanying text.
\item \textsuperscript{30} See infra notes 185-236 and accompanying text.
\item \textsuperscript{31} See PROSSER \& KEETON, supra note 3, at 712-13.
\item \textsuperscript{32} One exception originated in the renowned case of Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). This exception provides that when the conduct of two or more actors is tortious, and the plaintiff proves that the harm has been caused by only one of the defendants, but is uncertain as to which one, the burden is upon each defendant to prove that defendant has not caused the harm. \textit{Id.} at 88, 199 P.2d at 5. The doctrine of alternative liability was subsequently embodied in the Second Restatement Of Torts section 433B (1965).
\item Another exception to the identification requirement is contained in the Second Restatement Of Torts section 876 (1965). Under this doctrine, a defendant is subject to liability for the harm of a third person if that defendant does an act in concert with another or pursuant to a common design with another, or knowingly gives substantial assistance to one whose conduct is in breach of a duty, or substantially assists the other in accomplishing a tortious result with the defendant's own conduct constituting a breach of duty to a third person. See Bichler v. Eli Lilly, 436 N.E. 2d 182 (N.Y 1982).
\item The final exception was deemed industry-wide liability. This doctrine was created in Hall v. E.I. DuPont de Nemours & Co., Inc., 345 F. Supp 353, (E.D. N.Y. 1972). That case held that defendants, by adhering to a deficient industry-wide standard, maintained joint control of the risk of defective products, and this was sufficient to hold any member of the industry liable when the particular manufacturer responsible for the harm could not be identified. \textit{Id.} According to \textit{Sindell}, however, \textit{Hall}'s strength as authority is uncertain. \textit{Sindell}, 26 Cal. 3d at 607 n.22, 607 P.2d at 934 n.22, 163 Cal. Rptr. at 142 n.22. The \textit{Hall} court discussed enterprise liability, but then severed the claims at defendants' requests before concluding. \textit{Id.} The status of the severed cases is unknown except for some decided in favor of defendants for other reasons. \textit{Id.}
\end{itemize}
exceptions is the market share theory first recognized in *Sindell v. Abbott Laboratories*. The creation of the market share doctrine in *Sindell* resulted from the marketing of a drug known as diethylstilbestrol (DES), which is a synthetic form of the female hormone estrogen. DES was first synthesized in 1937. By 1941, the Food and Drug Administration (FDA) had approved applications by many pharmaceutical companies to market the drug. None of the reasons for which approval was first given related to pregnancy. In 1947, the FDA approved the use of the drug for preventing miscarriage. This use was on an experimental basis, and required a warning. Between 1947 and 1971, the drug was widely used for the prevention of miscarriage.

In 1971, the FDA withdrew approval of the drug for the purpose of preventing miscarriages after receiving evidence that the use of DES was causally connected with the development of vaginal and cervical clear cell adenocarcinoma in the daughters of DES users. Today at least 500,000 DES daughters suffer from clear cell adenocarcinoma of the vagina and uterus and other conditions caused by their mothers' ingestion of DES. Judith Sindell was one of these victims.

Sindell sued eleven California DES manufacturers for compensatory and punitive damages. Sindell, however, faced what could have been an insurmountable hurdle under traditional tort doctrines because she could not identify the particular manufacturer that produced the drug

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34. See Comment, supra note 16, at 963.
35. See Comment, supra note 20, at 187.
36. Id. DES provided an effective and inexpensive remedy for various ailments suffered by women with low levels of natural estrogen. Id.
37. Id.
38. Id. at 187-88.
39. Id.
40. Id. at 188. Between 94 and 300 pharmaceutical companies are estimated to have manufactured DES for pregnancy purposes. See Comment, supra note 16, at 964 n.3.
41. Adenocarcinoma is a rare form of cancer. Comment, supra note 20, at 188 n.14.
42. See Comment, supra note 20, at 188. Herbst, Cole, Norusis, Welch & Scully, *Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix*, 135 AM. J. OBSTET. GYNECOL. 876 (1979). A recent case indicates at least one DES son also exists. A jury verdict was given to a man who claimed his defective genito-urinary system was the result of his mother's ingestion of DES during her pregnancy with him. Doe v. Eli Lilly & Co., No. 82-3515 (D. D.C., filed June 28, 1985).
43. See Comment, supra note 20, at 189; Comment, supra note 16, at 965.
44. One defendant proved that DES was not manufactured by that company during the period plaintiff's mother had taken the drug. See Sindell, 26 Cal. 3d at 596 n.4, 607 P.2d at 927 n.4, 163 Cal. Rptr. at 135 n.4. All but five other defendants named in the complaint were either dismissed or their appeals were abandoned for various reasons. Id. The respondents in the action at the California Supreme Court were Abbott Laboratories, Eli Lilly & Co., E.R. Squibb and Sons, The Upjohn Company, and Rexall Drug Company. Id.
her mother took.\textsuperscript{45} When Sindell's case reached the California Supreme Court, the court indicated a willingness to provide a remedy despite Sindell's inability to prove causation.\textsuperscript{46} The court, however, rejected as inappropriate the established exceptions to the proof requirement\textsuperscript{47} in favor of creating a new doctrine.\textsuperscript{48}

The \textit{Sindell} court stated that in contemporary society, scientific and technological advances have created many goods that harm consumers and cannot be traced to any specific manufacturer.\textsuperscript{49} The decision recognized that courts today could either adhere to established tort doctrines, thereby denying recovery to many victims of harmful generic products, or could fashion new remedies to meet the needs of contemporary society.\textsuperscript{50} In creating a new remedy, the court held that the plaintiff need not prove which defendant actually manufactured the product that caused the injury if a substantial percentage\textsuperscript{51} of the manufacturers in the relevant market are named as defendants.\textsuperscript{52} Once the plaintiff establishes that the product caused that plaintiff's injury, the burden shifts to the individual defendants to show that they could not have been responsible for the injury.\textsuperscript{53} Absent this showing, each defendant would be held liable for that percentage of the plaintiff's damages which represented the defendant's share in the market at the time the harm occurred.\textsuperscript{54}

45. DES is a generic drug. \textit{Sindell} 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141. The formula for DES is a scientific constant. The formula is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must utilize the formula set forth therein. 21 U.S.C. §351(b). \textit{Id.} An identical formula was used by as many as 300 different companies who manufactured DES. See Fischer, supra note 12, at 1625. While the drug was on the market, pharmacists used whatever brand of DES they happened to have on hand to fill prescriptions. \textit{Id.} Identification of the source of a particular drug was nearly impossible because of the inadequacy of records kept by the pharmacists. \textit{Id.}

46. See \textit{Sindell}, 26 Cal. 3d at 600, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court stated: "Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother... she would effectively be precluded from any recovery.... There are however, forceful arguments in favor of holding that plaintiff has a cause of action." \textit{Id.}

47. \textit{Sindell}, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. See supra note 32 (exceptions to requirement that plaintiff prove causation).


49. \textit{Id.} at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

50. \textit{Id.}

51. The court did not define "substantial percentage," but did reject the suggestion of seventy-five to eighty percent, which was proposed. \textit{Sindell} 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. This suggestion was proposed by the law review comment upon which the market share theory was based. See Comment, supra note 16, at 996.

52. \textit{Sindell}, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

53. \textit{Id.}

54. The \textit{Sindell} decision may require defendants to pay 100 percent of plaintiff's damages although less than 100 percent of the market is present. The \textit{Sindell} court declared that, "Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plain-
The court gave three policy reasons for the decision. First, as between an innocent plaintiff and a manufacturer of a defective product, the latter should bear the cost of the injury. In this situation, the plaintiff is not to blame for the failure to produce evidence of causation. The absence of such evidence is not attributable to the manufacturers either. The manufacturers’ conduct in marketing a product whose effects are delayed for a long period of time, however, played a significant role in the unavailability of the proof. Since this delayed effect is a significant factor in the unavailability of proof, the manufacturers are “more at fault” than the plaintiff.

The next policy reason supporting the Sindell decision was that the manufacturer is in a better position to bear the cost involved in an injury. The cost of injury is potentially devastating to an individual. The court reasoned that an individual need not bear this cost since the risk of injury can be insured against by the manufacturer and distributed among consumers as a cost of doing business.

Finally, the Sindell court reasoned that since the manufacturer is in the best position to recognize defects in products and to guard against them, holding the producer liable for these defects would provide an incentive to product safety. The significance of these considerations in the area of medication was also stressed.
sumer's general lack of knowledge about the contents of a particular medicine renders the consumer especially powerless to prevent serious harm. 63

DES daughters have been given a greater opportunity to recover for their injuries since the establishment of the market share doctrine. 64 Many other victims, who are similarly unable to identify the tortfeasor who caused their injuries because of the generic nature of the injurious product, may also be rewarded by the institution of the market share theory. 65 Nevertheless, the doctrine has been subject to much criticism. 66 Several other states have adopted at least a modified version of the Sindell doctrine, 67 but some have expressly rejected the application of the market share theory. 68

Manufacturer liability under the market share theory may be widespread since the doctrine seems to apply to any case in which a plaintiff cannot identify the actual manufacturer of a generic product that caused that plaintiff's injury. 69 For example, the doctrine may be applied in the more than 1,000 DES cases already being litigated in the United States. 70 Any number of similar drug suits could be litigated on the basis of this doctrine. 71 Also, many of the nearly

63. Id.

64. Before the market share theory was established to lessen identification requirements, DES victims in California had little hope of recovery if they could not identify which manufacturer caused their injuries, and they did not fit into any other established exceptions (discussed supra note 32). See Drayton v. Jiffee Chemical Corporation, 395 F. Supp. 1081 (1975).

65. See, e.g., infra notes 69-75 and accompanying text.

66. See, e.g., Comment, supra note 4, at 314-29 (suggests discarding the market share doctrine because of economic inefficiency and unfairness); Fischer, supra note 12, at 1627 (criticizes the market share theory for diluting the alternative liability doctrine to such an extent that the goal of allocating responsibility according to each defendant's share of the fault is not met, and for allowing courts and juries to decide cases without adequate evidence). Legislative proposals have even been put forth to eliminate the market share doctrine. See, e.g., S.B. 228 Cal. Leg. 1981-82 Regular Session, (California senate bill proposed to eliminate liability for latent defects unless manufacturer could be identified) (Died in committee, Jan. 19, 1982).

67. The following states have accepted at least modified versions of the market share theory: Massachusetts, see Payton v. Abbott Labs, 437 N.E.2d 171 (1982); New Jersey, see Ferrigno v. Eli Lilly & Co., 420 A.2d 1305 (1980); Washington, see Martin v. Abbott Laboratories, 689 P.2d 368 (1984).

68. The following states have declined to adopt the market share theory: Missouri, see Zafft v. Eli Lilly and Co., 676 S.W. 2d 241 (1984); South Carolina, see Ryan v. Eli Lilly, 514 F. Supp. 1004 (1981); Wisconsin, see Collins v. Eli Lilly & Co., 342 N.W. 2d 37 (1984).

69. See Fischer, supra note 12, at 1652. The market share theory conceivably could apply to all potentially harmful fungible products made from an identical formula. Id. Therefore the theory could encompass the manufacturing and marketing of cigarettes, food additives, generic drugs, asbestos, pesticides, aluminum wire, industrial waste, and products that cause environmental pollution. Id. See also, Comment, supra note 4, at 303.


71. Id. at 4, col. 4. For example, the market share theory has been applied in a case involving injuries resulting from a diptheria, pertussis and tetanus (DPT) vaccine. See Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1325 (C.D. Cal. 1983). But see, Sheffield v. Eli
8,000 asbestos cases could be affected. In fact, the market share doctrine could feasibly be applied in suits against cigarette manufacturers. These manufacturers have previously escaped liability because of their assertions that smokers switch brands frequently and therefore cannot prove that the smoker’s cancer was caused by any one manufacturer. Theoretically at least, the Sindell doctrine may be used to lessen a plaintiffs’ proof requirements in strict products liability suits against a manufacturer of any generic product.

Because of the potentially widespread use of the market share doctrine, the issues left unresolved by the Sindell court must be confronted. One vital question is whether the market share doctrine alters the plaintiff’s burden of proving causation before punitive damages are awarded. Generally, punitive awards are granted only after a plaintiff establishes that the defendant’s misconduct actually caused the plaintiff’s harm. Although the Sindell decision established that the

Lilly and Co., 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983), in which plaintiff attempted to recover under the market share theory after suffering injuries allegedly caused by Salk antipolio vaccine. The court held that although the vaccine was produced by different manufacturers pursuant to a common formula, the injuries resulted not from the use of a drug generally defective when used for the purpose for which it was marketed, but because some manufacturer made and distributed a defective product. Sheffield, 144 Cal. App. 3d at 594, 192 Cal. Rptr. at 876.

Thus far, however, no court has accepted the market share doctrine as applicable to an asbestos case. Many courts have rejected the implementation of the doctrine in asbestos litigation because of the difficulty in ascertaining market shares, difficulty in defining relevant product and geographic market because of the numerous uses to which asbestos is put, and because often the plaintiff is able to identify at least one of the defendants who caused the alleged injury. See, e.g., Hannon v. Waterman Steamship Corp., 567 F. Supp. 90 (E.D. La. 1983); In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); Starling v. Seaboard Coast Line Railroad, 533 F. Supp. 183 (S.D. Ga. 1982); Preluck v. Johns-Manville Corp., 531 F. Supp. 96 (W.D. Pa. 1982); Celotex v. Copeland, 471 So.2d 533 (Fla. 1985).

See supra note 70, at 4, col. 4. See also Note, Industrywide Liability, 13 Suffolk U.L. Rev. 980, 1002 (1979).

Id.

Id.

Id.

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burden of proving causation shifts to the defendants in compensatory claims, the court did not decide whether the burden shifts in punitive damage claims. Plaintiffs generally will seek punitive damages in market share products liability cases because of the outrage associated with a manufacturer profiting from a product that injures a member of the general public.

PUNITIVE DAMAGES

A. Background

The doctrine of punitive damages originated in the English common law and is an established principle in the common law of this country. When California adopted the Civil Code in 1872, the doctrine was incorporated in section 3294. The current version of section 3294 authorizes the recovery of punitive damages when the defendant has been guilty of oppression, fraud, or malice. "Malice" may be established not only by a showing that the defendant's wrongful conduct was willful or intentional, but also by a showing that defendant's conduct evinced a conscious disregard for the probability that the conduct would result in injury to others.

Although modern courts appear less reluctant to award punitive damages, the rules governing the imposition of these damages re-

76. See supra note 21 and accompanying text.
77. See Comment, supra note 20, at 185.
79. The current version of Cal. Civ. Code §3294 reads as follows: In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
main strict. A complaint for punitive damages must allege that the defendant has been guilty of oppression, fraud, or malice, either expressly or impliedly. Complaints alleging "opaque, unstable and compound averments" are not sufficient. Proof requirements also remain stringent. Adherence to traditional proof requirements for punitive damages would create an insurmountable obstacle to an award of punitive damages in a market share case. If a plaintiff were able to prove which particular defendant caused the plaintiff's injury, then that plaintiff would not be an appropriate market share plaintiff anyway. The strict rules governing the punitive damages doctrine aid in furthering the functions of that doctrine.

B. Functions

Punitive damages serve a number of functions in society. The primary functions are usually said to be punishment and deterrence. Secondary purposes include encouraging law enforcement and further compensating plaintiffs whose actual damages exceed those allowed by law or whose award will be depleted by attorneys' fees. The punishment and deterrence functions take on added importance in products liability suits because of the complexity of modern technology and consumers' inability to recognize the potential dangers of a product.

83. See, e.g., Searle v. Superior Ct., 49 Cal. App. 3d 22, 27, 122 Cal. Rptr. 218, 221 (1975). Plaintiff brought suit against two drug firms who manufactured and sold an oral contraceptive that injured plaintiff. Id. at 24-25, 122 Cal. Rptr. at 219. Plaintiff sought punitive damages, claiming that defendants placed the product on the market with knowledge of its hazards in complete disregard of the safety of others. Id. at 28, 122 Cal. Rptr. at 220. The Searle court held that plaintiffs failed to plead facts sufficient to show fraud, malice or oppression, and sustained defendant's demurrer. Id. at 33, 122 Cal. Rptr. at 225.

84. CAL. CIV. CODE §3294.

85. Searle, 49 Cal. App. 3d at 27, 122 Cal. Rptr. at 221.

86. See Comment, supra note 20, at 197.

87. See Comment, supra note 20, at 185-86. The inability of consumers to identify manufacturers of products who cause their injuries is an ever-increasing phenomenon. Unless these consumers are relieved of the burden of proving causation, punitive damage recovery becomes literally impossible. Id. at 185-86.

88. See In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982). When a plaintiff does have information as to the identity of the defendant who allegedly caused the plaintiff's injury, the rationale for shifting the burden of proof in Sindell is simply not present. Id.

89. At least one commentator suggests that retribution is no longer a valid justification in California. See Comment, supra note 20, at 193. A recent California case, however, stated that "punitive damages are awarded against a defendant for the sake of example and by way of punishing him." Hobbs v. Eichler, 164 Cal. App. 3d 174, 197, 210 Cal. Rptr. 387, 400 (1985).

90. See Owen, supra note 78, at 1277; RESTATEMENT (SECOND) OF TORTS §908 comment a (1976).

91. See Owen, supra note 78, at 1278.

92. Id.

Punishment of a defendant who has intentionally or recklessly in-
jured a plaintiff allows the plaintiff to see the defendant pay for the
misconduct. Additionally, this punishment serves the public func-
tion of maintaining the moral strength of society by punishing those
who violate societal norms. Imposing punitive damages conveys the
commitment of society to upholding moral and legal standards by
expressing disapproval of serious misconduct.

Deterrence is also a fundamental goal of the punitive damages doc-
trine. Punitive damage awards against one defendant will generally
deter not only the particular defendant’s further misconduct, but
also the conduct of others either engaged in or considering similar
tortious conduct. Some manufacturers may be aware of the defects
in the products they are distributing, but, even allowing for the pay-
ment of compensatory claims, find more profit can be made by con-
tinuing to market the products in their dangerous form. Because
of the unpredictability of the amount of any given punitive damage
award, manufacturers cannot account for these awards when predic-
ting the profitability of their products, and therefore the incentive
to engage in the lucrative misconduct is eliminated.

An ancillary function of the punitive damages doctrine is the pro-
motion of law enforcement. Plaintiffs are motivated to bring suits
for punitive damages against wrongdoers because of the possibility
of recovering large awards. Many critics of the doctrine complain of
the windfall received by a plaintiff. The notion of this windfall,
however, makes the prospect of potentially lengthy, traumatic, and expensive litigation more appealing to hesitant victims. The resulting increase in the litigation of these punitive damage claims further deters defendant misconduct.

Another incidental function of punitive damages is additional compensation of the victim. Accident victims frequently suffer uncompensable harm such as loss of emotional tranquility, family harmony, and employment security. Punitive awards help to compensate victims for these additional losses that generally are not accounted for in compensatory awards. Further, the payment of attorneys' fees out of an award intended for medical and special expenses is more burdensome on a plaintiff than the payment of a portion of a punitive award. All of these functions of the punitive damage doctrine will generally be reflected in a jury's measurement of an appropriate award.

C. Measurement

A jury is not bound by any fixed ratio in determining the proportion between punitive and compensatory damages. A punitive damage award, however, must generally bear a reasonable relationship to the actual damage. Several factors may be considered for measuring punitive damage awards. One proposed consideration is the reprehensibility of the defendant's misconduct.


102. See Owen, supra note 78, at 1287.
103. Id. at 1295-96; Grimshaw, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 383.
104. See Owen, supra note 78, at 1298. Some courts refuse to recognize punitive damages as a form of compensation since the whole idea behind compensatory damages is to "make the plaintiff whole again". See, e.g., U.S. v. Magnolia Motor and Lodging Co., 208 F. Supp. 63, 66 (N.D. Cal. 1962).
105. See Owen, supra note 78, at 1298-99.
106. Id.
107. See Grimshaw, 119 Cal. App. 3d at 757, 174 Cal. Rptr. at 348 (punitive damage awards not limited by state and federal statutes imposing maximum penalties).


109. The Model Uniform Product Liability Act lists a number of factors that a jury should consider in determining an appropriate amount of punitive damages. These considerations include:

(1) The likelihood at the relevant time that serious harm would arise from the product seller's misconduct;
(2) The degree of the product seller's awareness of that likelihood;
(3) The profitability of the misconduct to the product seller;
(4) The duration of the misconduct and any concealment of it by the product seller;
(5) The attitude and conduct of the product seller upon discovery of the misconduct and whether the conduct has been terminated;
sibility of the defendant’s conduct. Juries will instinctively attach a degree of culpability to a defendant’s misconduct based upon the likelihood of the harm and the extent to which the manufacturer was aware of the threatened harm. An additional factor juries may be instructed to consider is the amount of punishment the defendant has been subjected to thus far, and may be subjected to in the future. This may be difficult because a jury cannot predict the amount of punitive damages that the manufacturer may be subjected to in the future in their own or in other states, nor can the jury predict the amount to be assessed in suits by plaintiffs who have suffered varying injuries. Another consideration is the wealth of the defendant. The amount assessed should serve as a deterrent by hurting, but not bankrupting, the defendant. Another useful guideline is the cost of the plaintiff’s litigation. Finally, the jury may consider the profitability of the conduct to the defendant and the degree of risk posed to the consumer.

Before Sindell, a plaintiff who was unable to identify the specific tortfeasor that caused the plaintiff’s harm could not recover compensatory damages using traditional tort doctrines. Sindell lessened

(6) The financial condition of the product seller;
(7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected; and
(8) Whether the harm suffered by the claimant was also the result of the claimant’s own reckless disregard for personal safety.

MODEL UNIFORM PRODUCT LIABILITY ACT §120(B) (1983).

113. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (court expressed difficulty in seeing what even the most intelligent jury would do with this because of the jury’s inherent inability to know what punitive damages, if any, juries in other states may award plaintiffs in actions yet untried).
116. See Owen, supra note 78, at 1315; Comment, supra note 97, at 467.
117. See, Grimshaw, 119 Cal. App. 3d at 790, 174 Cal. Rptr. at 370.
118. Plaintiffs could, however, utilize some of the exceptions to traditional proof requirements outlined supra at note 32. Since Sindell, however, additional doctrines have been created in various states to lessen the causation requirements for plaintiffs who cannot identify the manufacturer that produced the good that caused the plaintiff’s harm. See, e.g., Martin v. Abbott Laboratories, 689 P.2d 368 (Wa. 1984) (market share alternate liability theory); Collins v. Eli Lilly & Co., 342 N.W. 2d 37 (Wis. 1984) (concerted action theory).
causation requirements for particular plaintiffs who are unable to prove which defendants caused their injuries by shifting the burden of proof to the defendants. The Sindell decision, however, did not discuss whether the burden shifts to the defendants to disprove causation in claims for punitive damages. Two courts in California have recently interpreted this open question, but each reached a different result. One approach concluded that in keeping with the spirit of Sindell, punitive damages may be imposed on a market share defendant. The other held that punitive damages are inappropriate in market share cases.

Morris v. Parke, Davis, & Co.

In Morris v. Parke, Davis, & Co., the United States District Court for the Central District of California held that punitive damages could be awarded in a market share case. The plaintiff, David Morris, suffered irreparable brain damage when he was six months old as a result of a reaction to a diphtheria, pertussis and tetanus (DPT) vaccine. A tort action was brought on his behalf against five pharmaceutical companies who manufactured a substantial share of the DPT market at the time of David Morris’ injury. Plaintiffs conceded they were unable to identify which manufacturer produced the vaccine that harmed David Morris. Instead they relied on Sindell and the market share theory of recovery. On defendants’ motion to strike a prayer for punitive damages, the court held that if plaintiffs were able to establish that their injuries were caused by DPT, and that one or more of the defendants marketed the drug with conscious disregard for the health of consumers, plaintiffs could recover punitive damages from each defendant who acted with the requisite “malice.”

The Morris court was not deterred by the question of causation, stating that the purpose of Sindell was to modify the rules of causa-

119. Sindell 26 Cal. 3d at 145, 607 P.2d at 937, 163 Cal. Rptr. at 611-12.
121. See Morris, 573 F. Supp. at 1330.
122. See Magallanes, 167 Cal. App. 3d at 890, 213 Cal. Rptr. at 554.
124. Id. at 1330.
125. Id. at 1324.
126. Id. at 1324-25.
127. Id. at 1325.
128. Id.
129. Id. at 1330.
tion so tortfeasors who might otherwise escape liability could be brought within the reach of the law.\textsuperscript{130} Manufacturers who act with conscious disregard for consumer safety should not be permitted to escape punitive damages simply because the nature of their activity precludes identification of which defendant is responsible for the resulting harm.\textsuperscript{131} The \textit{Morris} court also drew an admittedly imperfect analogy to the \textit{respondeat superior} theory, which holds employers liable for intentional torts of their employees.\textsuperscript{132} The court conceded that the analogy was flawed because in an agency situation, the plaintiff can identify the employee, who may be traced to a particular employer.\textsuperscript{133} The district court, however, was "unable to draw any meaningful distinction between the culpability of a reckless employer and that of a reckless manufacturer. Both have acted with conscious disregard of the rights of others."\textsuperscript{134} This employer/manufacturer analogy was used by the \textit{Morris} court to reject defendants' arguments that punitive damages can not be recovered absent a showing that defendant personally participated in the injurious conduct.\textsuperscript{135}

Furthermore, the \textit{Morris} court was undeterred by the problems of computing and allocating punitive damages, stating that mechanical problems could hardly outweigh the need to protect public safety.\textsuperscript{136} The opinion also noted the disparity between the purposes behind compensatory damages and those behind punitive damages.\textsuperscript{137} Since the purposes of punitive damages are primarily punishment and deterrence, the focus is on the defendant when determining what award amount would serve to punish and deter that party.\textsuperscript{138} Therefore, punitive damages would not be apportioned according to market share,

\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 1328.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} This is relevant because the apparent basis of the \textit{Magallanes} rejection of \textit{Morris} was that the \textit{Magallanes} court viewed "the employer-employee-victim connection warranting application of the doctrine of \textit{respondeat superior} to be substantially different than the manufacturer-unidentifiable drug-victim connection in \textit{Sindell}."] Magallanes v. Superior Ct., 167 Cal. App. 3d 878, 886, 213 Cal. Rptr. 547, 552 (1985). Immediately following the distinction between employers and manufacturers, the \textit{Magallanes} court stated, "Consequently, we are not persuaded by the reasoning of \textit{Morris}."] Id. Not only did the \textit{Magallanes} court neglect to give reasons for rejecting the view, the decision also implied that the decision in \textit{Morris} was \textit{based} upon the employer/manufacturer analogy. The \textit{Morris} conclusion was not based upon that analogy, but was based upon valid policy considerations. See \textit{ supra} notes 123-134 and infra notes 136-145 and accompanying text.
\textsuperscript{136} \textit{Morris}, 573 F. Supp. at 1328.
\textsuperscript{137} \textit{Id.} at 1329.
\textsuperscript{138} See \textit{ supra} notes 89-99 and accompanying text.
but rather each defendant would be assessed and pay as though the sole defendant.\textsuperscript{139}

The decision in \textit{Morris} emphasized that concern for the public safety was the very basis upon which \textit{Sindell} was founded, and that courts should be reluctant to adopt rules that would compromise this "paramount concern."\textsuperscript{140} The opinion went on to convey the fear that in a commercial context, the threat of compensatory damages may not serve as a deterrent to reckless conduct.\textsuperscript{141} Manufacturers could find that maintaining a product in a dangerous condition is more profitable than improving the product, and then would adjust prices to allow for the payment of compensatory claims.\textsuperscript{142}

In \textit{Morris}, the court concluded that neither government safety standards nor the criminal law have succeeded in providing adequate consumer protection against the manufacture and sale of defective products.\textsuperscript{143} Therefore, punitive damages remain the most effective means of protecting the consumer against defective, mass-produced articles.\textsuperscript{144} The \textit{Magallanes} decision did not address this final conclusion reached in \textit{Morris}, but rejected for other reasons the imposition of punitive damages in market share cases.\textsuperscript{145}

\textbf{Magallanes v. Superior Court}

In \textit{Magallanes v. Superior Court},\textsuperscript{146} the California Court of Appeal for the Second District held that punitive damages could not be imposed on a defendant in a market share case.\textsuperscript{147} In this case, plaintiff Patricia Magallanes brought suit under the \textit{Sindell} market share theory because she suffered from cancer as a result of her mother’s ingestion of DES while plaintiff was \textit{in utero}.\textsuperscript{148} As was the case in \textit{Morris}, the plaintiff could not identify which manufacturer produced the drug that caused the injury.\textsuperscript{149} The \textit{Magallanes} court rejected the \textit{Morris} reasoning for imposing punitive damages as unpersuasive, apparently on the grounds that the court did not find the employer-employee-victim connection mentioned in \textit{Morris} to be similar to the manufacturer-unidentifiable drug-victim nexus.\textsuperscript{150}

\textsuperscript{139} \textit{Morris}, 573 F. Supp. at 1329-30.
\textsuperscript{140} \textit{Id.} at 1327.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} See, e.g., \textit{Grimshaw}, 119 Cal. App. 3d at 757, 174 Cal. Rptr. at 348.
\textsuperscript{143} \textit{Morris}, 573 F. Supp. at 1327.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{See infra} notes 146-55 and accompanying text.
\textsuperscript{146} 167 Cal. App. 3d at 878, 213 Cal. Rptr. 547 (1985).
\textsuperscript{147} \textit{Id.} at 890, 213 Cal. Rptr. at 554.
\textsuperscript{148} \textit{Id.} at 880-81, 213 Cal. Rptr. at 548.
\textsuperscript{149} \textit{Id.} at 881, 213 Cal. Rptr. at 548.
\textsuperscript{150} \textit{Id.} at 886, 213 Cal. Rptr. at 552. \textit{See supra} notes 132-35 and accompanying text.
Magallanes opinion then recited five policy reasons why punitive damages should not be imposed in market share cases. These reasons included the punitive effect of numerous and substantial compensatory awards to present and future claimants, the attenuated deterrent effect of long belated awards, the inherent unfairness of punitive damages in the market share context, the preservation of rights of future claimants to compensatory damages, and the potential for bankrupting the company.

These differing decisions reflect the uncertainty with which courts in California view the issue of whether punitive damages may be imposed in market share cases. Clearly, a resolution must be reached to avoid further inconsistent decisions. Initially, the policy considerations of each approach should be analyzed to determine whether California public policy warrants the imposition of punitive damages in actions brought under the market share theory of liability.

**POLICY CONSIDERATIONS**

At the very heart of Sindell is the idea that the manufacturer is in a position to guard against product dangers and must have incentive to protect consumers from those hazards. Imposition of punitive damage liability in the market share context promotes this reasoning in Sindell by providing added incentive for manufacturers to act in a manner that assures the public safety. Additionally, the manufacturer should not escape liability just because the plaintiff cannot identify whether manufacturer A or manufacturer B, each of whom produce an identical product, manufactured the particular object that caused the plaintiff's injury.

The Morris court focused on the purposes behind punitive damages and the importance of the doctrine in society today. If the plain-
tiff is able to prove malice, oppression, or fraud on the part of any one or more defendants, then the goals of deterring wrongful conduct and punishing wrongdoers will be served by the imposition of punitive liability on the defendant even if the plaintiff cannot prove that the particular defendant's misconduct caused the particular injury. The *Magallanes* decision, on the other hand, may have been based on superficial reasoning. The policy reasons promoted by that decision are not consistent with the reasoning of the California Supreme Court in *Sindell* and may not adequately respond to the situation posed by this issue. One reason given by the *Magallanes* court to justify the denial of punitive damages was that numerous and substantial compensatory awards to present and future claimants would have a sufficiently punitive effect on manufacturers. This idea is superficially appealing, but probably invalid. The effectiveness of the punitive damages doctrine in the area of products liability lies in the flexibility given a jury to assess an amount that is appropriate and responsive to a particular situation. The number and amount of compensatory claims can be reasonably predicted by a manufacturer. Manufacturers might maintain the dangerous condition of a product if they would profit by doing so, even in light of having to pay compensatory awards to victims. Because of the unpredictability of the amount of punitive awards, however, manufacturers may not be able to measure punitive liability in advance. Subjecting manufacturers to compensatory liability only, even "numerous and substantial" compensatory awards, may not have a punitive effect on the defendants. In addition, liability insurance will cover manufacturers for the payment of most, if not all, compensatory claims. If a manufacturer has liability insurance, then regardless of the "substantiality" of compensatory claims against the company, that manufacturer will not feel

162. For example, drug manufacturers may estimate potential compensatory liability based on their knowledge of the defects and the number of consumers to which their products may be distributed. The estimation, however, could not be precise if the defendants were to be compelled to pay punitive damages in addition to the compensatory damages.
163. *See Owen*, supra note 78, at 1294-95. In contrast, the method of measurement for punitive damages introduces additional unpredictable factors that render a manufacturer's attempt to forecast potential punitive liability virtually impossible. Thus, depending on such factors as the gravity of the misconduct, the number and seriousness of resulting injuries, and the manufacturer's wealth, the possible punitive damage awards that could be imposed for the misconduct could range from nothing to millions, or hundreds of millions of dollars. *Id.* at 1285.
the sting of having to pay the awards.\textsuperscript{166} Of course, in states that allow insurance coverage of punitive damage claims, the imposition of punitive damages would have little additional deterrent effect.\textsuperscript{167} California, however, prohibits such coverage as against public policy.\textsuperscript{168} In California, and in other states that prohibit punitive damage insurance coverage, the imposition of punitive damages will have a significant deterrent effect.

Another policy reason which the \textit{Magallanes} court used to justify the rejection of punitive damages in market share cases was the attenuated deterrent effect of long belated awards.\textsuperscript{169} The court stated that the objective of deterrence is hardly relevant when the defective goods have already been removed from the marketplace.\textsuperscript{170} This is an inaccurate appraisal of the function of deterrence in the punitive damages context. Society may have no interest in deterring the manufacture of the product in question because that particular good would presumably be off the market by the time a suit arose.\textsuperscript{171} The interest of society is in deterring similar future misconduct. Manufacturers must understand that disregard of the safety of society will not be tolerated.\textsuperscript{172}

The inherent unfairness of imposing punitive damages in the market share scheme was another policy reason upon which the \textit{Magallanes} decision was based.\textsuperscript{173} The court declared that the imposition of punitive damages on a defendant based solely on his market participation would be "grossly unfair."\textsuperscript{174} Some manufacturers who acted

\textsuperscript{166} The manufacturer, however, may have to pay the amount of compensatory claims that exceeds the company's insurance limits.

\textsuperscript{167} Twenty-two states allow insurance coverage against punitive damages judgments: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Iowa, Kentucky, Maryland, Mississippi, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin. Eight states prohibit such coverage on the grounds that the purposes of punitive damages would be defeated by the ability to insure against them: California, Colorado, Kansas, Maine, Minnesota, New York, North Dakota, and Ohio. The issue has yet to be decided in nine jurisdictions: Alaska, Hawaii, Missouri, Montana, Nevada, North Carolina, South Dakota, Utah, and Wyoming. And seven jurisdictions have not decided the issue because of their non-recognition of punitive damages: Louisiana, Massachusetts, Michigan, Nebraska, Puerto Rico, Virginia, and Washington. The remaining six states allow insurance of punitive damages only in cases of vicarious liability: Florida, Illinois, Indiana, New Jersey, Oklahoma, and Pennsylvania. Schumaier and McKinsey, \textit{The Insurability of Punitive Damages}, 72 A.B.A.J. 68 (March 1, 1986).


\textsuperscript{169} \textit{Magallanes}, 167 Cal. App. 3d at 886, 213 Cal. Rptr. at 552.

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} If the product has not been taken off the market, then presumably at least the defect will have been eliminated.

\textsuperscript{172} See Owen, supra note 78, at 1282.

\textsuperscript{173} \textit{Magallanes}, 167 Cal. App. 3d at 890, 213 Cal. Rptr. at 554.

\textsuperscript{174} \textit{Id.}
with malice, and may even have produced the object which caused the harm, may not be named in the suit and will thereby fortuitously escape punitive liability; whereas some manufacturers who acted with malice but have caused no actual harm to the plaintiff may be subjected to punitive damages. The unfairness of this situation is dubious. Society has an interest in deterring further misconduct by punishing all the wrongdoers who can be proven to have actually acted in a manner that intentionally created serious risks to the public safety. Some “malicious” wrongdoers will inevitably escape punitive liability since proving a case for punitive damages is so difficult. But this is no reason to allow proven wrongdoers to escape unpunished. Manufacturers of generic products would have little incentive to refrain from intentionally producing hazardous products if they knew they could not be held liable for punitive damage awards.

The final reason given by the Magallanes court for not allowing punitive damages in market share litigation was the preservation of rights of future claimants and the potential for bankrupting defendants. While possibly a substantial concern in theory, the concern for future claimants may in reality be unfounded. Actual mass tort litigation has not resulted in widespread bankruptcy of defendant manufacturers. Nevertheless, the threat of bankrupting a socially

175. Id.
176. Punitive damages serve the functions of criminal sanctions within the civil context. Both are penal, and intended to deter others from the commission of similar acts. See Owen, supra note 78, at 1277 n.103. Punitive damages are allowed because our legal system recognizes that the deterrence function can better be achieved through modification of civil awards than through the requirement of criminal sanctions. See Davis v. Schuchat, 510 F.2d 731, 738 (D.C. Cir. 1975).

Because of the penal nature of punitive damages, an analogy may be drawn between the punitive damages doctrine and the criminal law. See Fischer, supra note 12, at 1630. Although one is never punished for “evil thoughts” alone, one may be punished for evil conduct even if that conduct never results in the intended harm. Id. Examples of this concept can be seen in the criminal punishment of persons for attempted murder or reckless driving. Id. These crimes may cause no injury to individuals, but society will punish the wrongdoers for their “malicious” conduct. Similarly, whether the civil defendant in the courtroom caused the plaintiff’s injury or not, by virtue of that defendant’s having acted with the requisite malice, society has a strong interest in punishing the defendant for the conduct that jeopardized the public safety, and in deterring further similar misconduct.

This analogy is imperfect because when society punishes wrongdoers in the criminal context, money is not awarded to plaintiffs who may have been injured by this “malicious” conduct. As in criminal law, however, the focus in the punitive damages doctrine is on the defendant and not the victim. The fact that a victim may receive a windfall is not enough to preclude the imposition of punitive damages upon a defendant who acted with malice.

177. Magallanes, 167 Cal. App. 3d at 886, 213 Cal. Rptr. at 552.
178. See Comment, supra note 97, at 469. A review of the litigation surrounding the MER/29 litigation, a fully litigated mass tort situation which seemed to threaten the solvency of the defendant, suggests that this fear of overkill may be overstated. Only eleven of nearly one thousand MER/29 cases went to a jury. Of these, four verdicts were for the defendant, and
beneficial manufacturer may be a concern that needs to be taken into account when considering whether some limitation on the amount of punitive damages to be assessed is warranted. The risk of bankrupting defendants that provide socially desirable services and products may be the one concern of the Magallanes court that has some merit. This concern, however, is not substantial enough to preclude the imposition of punitive liability on manufacturers in a market share situation since the risk of bankruptcy could be reduced substantially through procedures that limit the amount of punitive damages which could be awarded.\(^\text{179}\)

In addition to the concerns expressed by the Magallanes court, some commentators contend that the imposition of punitive damages in market share cases should not be allowed\(^\text{180}\) because that implementation, at least in the field of drug manufacture, may inhibit pharmaceutical research and development, thereby precluding the strong societal interest in medical advances.\(^\text{181}\) Punitive damages, however, are only allowed when a plaintiff proves malice, oppression or fraud on the part of the defendant. Manufacturers who adequately, or even negligently, test their products will not be subjected to punitive damages unless they act with intent to injure or in conscious disregard of the public safety.\(^\text{182}\) The interest of society in medical progress is not so strong that we should encourage drug manufacturers to put new drugs on the market regardless of the potential risk. Furthermore, not allowing punitive damages in drug cases could have the dangerous effect

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seven were for the plaintiffs. Only three juries awarded punitive damages. One of the awards was reversed on appeal, and the other two were upheld as reduced on remittitur by the trial judge. Thus, the total amount in punitive damages imposed against the defendant Richardson-Merrell was $1 million. The company had a reserve of $42 million from surplus earnings. Defendants paid $1 million in punitive damages, and $5 million in compensatory damages that exceeded their insurance limits—$7 million in all. \(\text{Id.}\) For a comprehensive reading of the MER/29 litigation, see Rheingold, \textit{The MER/29 Story — An Instance of Successful Mass Disaster Litigation}, 56 CALIF. L. REV. 116 (1968).

\(\text{179.}\) This comment will propose a suggested means of limiting the damages to achieve the purposes of the punitive damages doctrine without bankrupting the defendant. \textit{See infra} notes 185-236 and accompanying text.

\(\text{180.}\) \textit{See Comment, supra} note 20, at 207-08.

\(\text{181.}\) \textit{Id.} at 207 n.10.

The 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.


\(\text{182.}\) \textit{CAL. CIV. CODE} §3294.
of encouraging manufacturers to avoid testing new drugs adequately before placing them on the market. If manufacturers, through comprehensive testing, discover some health risk posed by a new drug, then they are faced with the difficult choice of either putting the dangerous drug on the market anyway, and risking possible liability, or not marketing the drug, and losing all of the research and development costs already incurred. Some manufacturers may prefer to risk potential products liability claims if no punitive damages are involved rather than write off the costs of developing a new drug.  

As demonstrated by the preceding discussion, most of the objections raised by the Magallanes court and some commentators to imposing punitive liability in market share cases can be refuted. The one concern raised by the Magallanes decision that may retain some merit is that numerous punitive damage awards may bankrupt the defendant and therefore leave later plaintiffs uncompensated. Although public policy and the reasoning of Sindell warrant the imposition of punitive damages in market share cases, a workable and just procedure for their distribution must be implemented to avoid potentially counterproductive consequences.

**SUGGESTED PROCEDURAL GUIDELINES FOR THE AWARD OF PUNITIVE DAMAGES IN MARKET SHARE CASES**

Once the determination has been made that California public policy and the rationale behind the market share doctrine in Sindell warrant the imposition of punitive damages in market share cases, courts should have the flexibility to distribute the awards in a manner suitable to the circumstances of each particular case. Depending on the nature of the product that caused the injury, and more importantly, the nature of the resulting injuries, suits could arise that mandate different means of determining punitive awards. This comment suggests one feasible approach to controlling the award of punitive damages in market share liability cases.

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184. See Magallanes, 167 Cal. App. 3d at 886, 213 Cal. Rptr. at 552; Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1966), reh'g denied (May 8, 1967); Comment, supra note 20, at 203-07.
185. See infra notes 186-236 and accompanying text.
A. Proof Requirements

Courts imposing punitive damages in market share cases should retain the high proof requirements that are now required of any plaintiff proving a case for punitive damages. With the exception of proving causation, no reason exists why traditional punitive damage proof requirements should be lessened in a market share case. Therefore, a plaintiff should be required to prove that:

(1) Plaintiff was injured by a generic object,\(^{186}\) (2) Defendant manufactured and sold identical products in the time and space that plaintiff acquired the good,\(^{187}\) and (3) Manufacturer acted with intent to injure or a conscious disregard for the public safety.\(^{188}\)

In the event the plaintiff proves these elements against a manufacturer by a preponderance\(^{189}\) of the evidence, that manufacturer must then rebut the claim by showing that it could not have manufactured the product which injured the plaintiff. If the manufacturer can not rebut the claim, then the plaintiff is entitled to a punitive damage award to be assessed in terms of the extent of the misconduct.

B. Assessment Of Punitive Damages

Once malice has been established, the judge must instruct the jury on what to consider in determining the amount the defendant must pay in punitive damages.\(^{190}\) In a market share situation, the jury should be instructed to determine an amount that would sufficiently punish the defendant and deter further misconduct by this defendant and others. Since a defendant’s liability is based on share in the market and not necessarily involvement in any particular injury, the jury should know what the manufacturer’s share of the market was in

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186. See Sindell, 26 Cal. 3d at 612, 607 P. 2d at 937, 163 Cal. Rptr. at 145.
187. Id.
188. CAL. CIV. CODE §3294.
189. Some suggest that the standard of proof for punitive damages in products liability actions should be “clear and convincing”. The Model Uniform Product Liability Act states:

    Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller’s reckless disregard for the safety of product users, consumers, or others who might be harmed by the product.

    MODEL UNIFORM PRODUCT LIABILITY ACT §120(A) (1983).
190. See RESTATEMENT (SECOND) OF TORTS §908 comment d (1965). Some commentators suggest that allowing the judge to measure the amount of a punitive award after the jury has determined punitive damages should be imposed would also be an appropriate means of limiting excessive awards. See infra notes 197-212 and accompanying text. See MODEL UNIFORM PRODUCT LIABILITY ACT §120(B) (1983); Owen, supra note 78, at 1320; Dubois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 INS. COUNSEL J. 344, 352-53 (1976).
light of the reprehensibility of the conduct. The factors to be considered include the degree of risk taken, the seriousness of the potential effects, and the number of people who may have been affected. For example, if the defendant represented seventy percent of a market and knew the product could cause skin inflammation but did not warn, then the reprehensibility of that manufacturer is probably less than that of a manufacturer who represents two percent of the market but knows the product may be life threatening.\(^1\)

The wealth of the defendant should certainly be considered in the determination of the punitive award to promote the goals of punishment and deterrence.\(^2\) The best way to accomplish these goals in a commercial context is to force a manufacturer to pay a large enough amount that the company feels an economic burden.\(^3\) As previously stated, the judge has control over the amount of punitive damages awarded.\(^4\) Both the trial judge and the appellate judge may attempt to reduce excessive awards by requiring the plaintiff to choose between remitting the excessive portion of the verdict or submitting to a new trial on the damages issue.\(^5\)

In traditional tort litigation, the function of the court ends after the jury determines an appropriate punitive amount and the defendant pays. A unique problem arises, however, in litigation involving injuries to large numbers of plaintiffs arising from one product.\(^6\) The imposition of punitive damages in this type of mass tort litigation may require limitations to protect defendants from unlimited liability and bankruptcy.

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1. See, e.g., Grimshaw, 119 Cal. App. 3d at 757, 174 Cal. Rptr. at 348. The defendant in Grimshaw, Ford Motor Company, saved four to eight dollars per car in not improving what it knew was a defective fuel system design. Id. at 790, 174 Cal. Rptr. at 370. Ford knew that the Pinto was a popular economy car, and distributed it widely. Id. at 776, 174 Cal. Rptr. at 361. Evidence exists that Ford estimated its potential compensatory liability, and since this amount was less than the amount of correcting the defects, Ford continued to distribute the cars in the defective condition. Id. at 790, 174 Cal. Rptr. at 370.


3. Dalkon Shield, 526 F.Supp. at 899 (purpose of punitive damages is to sting, not to kill, a defendant, and their imposition should not be permitted to bankrupt a defendant).

4. See, e.g., Caspersen v. Webber, 213 N.W.2d 327 (Minn. 1973) “Even in the absence of passion or prejudice, the trial court should not hesitate to adjust a verdict where it is felt that the evidence does not justify the amount.” Id. at 331.

5. See Owen, supra note 78, at 1321.

C. Distribution Of Punitive Damage Awards

In any mass tort situation, the imposition of punitive awards could threaten the financial security of the defendant. Although one societal goal of punitive damages is to "teach the manufacturers a lesson" for intentionally causing injuries, society is not benefitted by putting manufacturers out of business. Not only would bankrupting these manufacturers deprive society of potentially desirable products and services, but also the bankruptcy would preclude recovery by later plaintiffs. Therefore, special limitations must be placed on the distribution of punitive awards among injured plaintiffs in mass tort situations. Several approaches to limiting liability have been suggested in other mass tort litigation. One procedural solution includes the certification of a class action for the punitive damages aspect of the claim. This approach would allow plaintiffs to separately try their claims for compensatory damages. Those plaintiffs who prove their injuries were caused by the manufacturers' misconduct would then be joined in a class action to determine appropriateness and amount of punitive damages. This solution would logically seem to limit the amount of liability to which a manufacturer could be

197. See Owen, supra note 78, at 1325; Note, Mass Liability and Punitive Damages Overkill, 30 Hastings L.J. 1797 passim (1979).
198. See Owen, supra note 78, at 1322-25; Comment, supra note 97, at 470.
199. See Owen, supra note 78, at 1322-25; Comment, supra note 97, at 470.
200. See Owen, supra note 78, at 1322-25; Comment, supra note 97, at 470.
201. See infra notes 202-12 and accompanying text. Some have even proposed that criminal sanctions be imposed upon manufacturers of defective products in lieu of punitive damages. See, e.g., Indiana v. Ford Motor Co., No. 5324 slip op. (Elkhart Superior Ct. Feb. 2, 1979) (Ford indicted on three counts of reckless homicide when passengers in a Pinto were killed as a result of a known defective fuel system).
202. Courts vary in their decisions on whether to allow certification of a class for mass liability purposes. See, e.g., In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 897-98 (N.D. Cal. 1981) The district court in California held that class certification was appropriate for purposes of assessing punitive damages, while plaintiffs would try their compensatory claims separately. Id. Those who were successful in their claims for compensatory awards, could join the class to determine propriety of the punitive damage award. Id. But see In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 693 F.2d 847, 857 (9th Cir. 1982) (class decertified because of problems with commonality and typicality). For other cases in which plaintiffs have sought class certification, see In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (Kansas City Hyatt skywalk collapse); Snyder v. Hooker Chems. & Plastics Corp., 429 N.Y.S.2d 153 (1980) (Love Canal toxic waste action); Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979) (DES case). Certification was granted on a conditional basis in two cases: In re Agent Orange Products Liability Litigation, 506 F. Supp. 762 (E.D. N.Y. 1980) (under Fed. R. Civ. P. 23(b)(3)), and Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) (DES action under Fed. R. Civ. P. 23(b)(3)).
203. See Comment, supra note 97 at 473.
204. Id.
subjected. There are, however, numerous problems with this approach.205 Problems include unique issues outnumbering common issues,206 jurisdictional problems,207 slowing the settlement process,208 and determining when the class would close.209

Another proposed solution suggests limiting each plaintiff's recovery to twice the plaintiff's compensatory damages or $1 million, whichever is less.210 This solution, however, is clearly inappropriate when the defendants are manufacturers, because the manufacturers could simply double their estimated compensatory liability or compute $1 million as the amount of their potential liability in advance, and adjust their pricing schemes accordingly.

Another approach establishes a ceiling on the amount a defendant may be liable for in injuries arising out of a single product, and only requires the payment of punitive claims until the till is peaked.211 Once the "ceiling" is reached, punitive damages may be limited to attorneys' fees and costs of litigation, or totally prohibited.212 Some commentators have criticized this "ceiling" approach.213 One criticism is that the established limit may not be high enough to have an impact on some manufacturers.214 Another problem is that the goal of deter-

205. Id. See In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 693 F.2d 847 (9th Cir. 1982); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Comment, supra note 97, at 474.

206. See In re Northern District of California "Dalkon Shield" Products Liability Litigation, 693 F. 2d at 853; Comment, supra note 97, at 474. For example, there is frequently no one set of operative facts establishing liability and no single proximate cause. Id. Additionally, such issues as adequacy of warnings, or fraud or conspiracy, may be different in each individual case. Id.

207. Id. When plaintiffs opt out or are forced out of the class for jurisdictional reasons, they should not be allowed to recover punitive damages on their own. If they could recover individually, the purpose of creating the class, i.e., reducing the number of suits and awards, would be defeated. Id.

208. See In re Federal Skywalk Cases, 680 F.2d 1175, 1180 n. 12 (8th Cir. 1982); Comment, supra note 97, at 474. The settlement process will slow when a class is certified for the punitive damages issue because plaintiffs will be unable to release their individual punitive damage claims, and defendants may not be willing to settle only the compensatory damage claims. Id.

209. See Comment, supra note 97, at 474. A class can not fairly close until all potential plaintiffs are identified. Many of the products involved in mass tort litigation, however, are on the market for a long period of time, and injuries resulting from the use of these products may not become evident until a long time after the product has been removed from the marketplace. Id. Asbestos is a good example of this type of product. No one yet knows how many future generations will be affected by exposure to asbestos products that have since been removed from the market. Id. at 474 n.110.

210. See H.R. 5214, 97th Cong., 1st Session (1981); Comment, supra note 97, at 472.

211. See Owen, supra note 111, at 49 n.227.

212. Id. See also Comment, supra note 97, at 473-74.

213. See Comment, supra note 97, at 473; Note, supra note 197, at 1804-05.

214. See Comment, supra note 97, at 473; Note, supra note 197, at 1804-05.
rence would be inhibited since companies who know how much could be awarded against them could adjust their pricing schemes to reflect this knowledge. 215 The final criticism of this approach is that the means are inflexible — juries could not determine how much punishment is required based on the reprehensibility of the defendant’s conduct in each particular case. 216

With a few adjustments, however, a ceiling placed on punitive damages in market share cases could be an ideal means of limiting defendants’ punitive expenditures so as not to bankrupt the companies while still accomplishing the goals of punitive damages. The first necessary adjustment is to establish a limit that is substantial enough to hurt large manufacturers, but not high enough to bankrupt smaller concerns. 217 Obviously, this will require different ceiling amounts for different manufacturers. A solution may be to separate the trial on the issue of punitive liability from the trial determining the appropriate amount of punitive damages. 218 The amount deemed appropriate at this latter trial would be the amount this defendant would be compelled to pay for all conduct relating to the injurious product regardless of the number of plaintiffs to later sue. 219 Under the proposed solution, once a plaintiff establishes that a defendant acted with malice, oppression, or fraud, punitive liability would be established. Then the jury who heard the liability case, or a new jury impaneled for the limited purpose of determining the amount of the punitive award, could determine an appropriate amount of liability. 220 The jury should be instructed, however, that the award they determine will serve as

215. See, e.g., Grimshaw, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348; Comment, supra note 97, at 473.
216. See Comment, supra note 97, at 473.
217. If, for example, a $1 million limit was set for all mass tort punitive damage claims, then a company with $50 million in surplus assets may not feel punished by being compelled to pay this amount. Likewise, a small manufacturer may be rendered insolvent as a result of the payment of a $1 million punitive damage award.
218. A separate jury may be impaneled solely for the purpose of assessing an appropriate amount of punitive damages based upon the defendant’s conduct with respect to the product at hand. On the other hand, this award-measuring jury could be the same one who found the defendant liable for punitive damages against the first plaintiff. This latter solution may be more efficient for the court system since the jury will have heard all the evidence at the trial on liability. See Jenkins v. Raymark Industries, Inc., No. 85-2815 (U.S. Ct. of App. 5th Cir. February 5, 1986) (available March 20, 1986, on LEXIS, Genfed library, Dist file). "While no plaintiff may receive an award of punitive damages without proving that he suffered actual damages, ... the allocation need not be made concurrently with an evaluation of the defendant's conduct. The relative timing of these assessments is not critical." Id.
219. See infra notes 225-29 and accompanying text.
220. The determination would be based upon the judge's instructions relating to measurement (see supra notes 190-96 and accompanying text), and would be subject to the traditional controls of the trial judge in that jurisdiction. See Note, supra note 197, at 1800-01.
the complete punishment of the defendant for all misconduct relating to this product. In this manner, the defendant will not be subjected to repeated punitive awards for the same misconduct.

The determination of a variable ceiling amount would prevent manufacturers from accounting for punitive damage awards in their cost of doing business. Since the punitive liability of each manufacturer will depend on its own wealth and reprehensibility as determined at the time of the trial, the manufacturer will not be able to predict whether a jury will impose punitive damages based, for example, on two percent or ten percent of the company’s surplus earnings. This flexible means of assessing punitive damages based on the misconduct of each defendant clearly would be more effective in punishing and deterring these defendants than the implementation of a system requiring the payment of a set ceiling or percentage of the company’s assets. Once this ceiling amount for punitive damages is established by the jury, the defendant should be compelled to pay the entire amount into a fund established by the court. Any later plaintiffs who establish the elements necessary for an award of punitive damages against this defendant will receive their award from the fund. The punishment and deterrence functions of punitive damages could be

221. The amount assessed would be distinct from any amount awarded to an individual plaintiff. If the jury determining an amount is a separate entity comprised for the sole purpose of determining amount, then the fact that this award is separate should be obvious. However, if the jury who determined the validity of the punitive damage claim is also charged with determining an amount, then they may not be clear on this distinction.

222. See supra note 99 and accompanying text.

223. Id. If a straight percentage or dollar amount were set, then certainly the manufacturer could allow for possible punitive awards and reflect this cost in the price of the product. However, allowing juries to determine an appropriate amount at the time of the trial should preclude the producer’s speculation. See Comment, supra note 97, at 473.

224. See supra notes 186-88 and accompanying text. Since initial plaintiffs will have already proven this defendant’s share of the market and that the defendant acted with malice, the later plaintiffs may only be required to prove that their injuries were caused by the generic object.

225. The establishment of this fund will obviously require the cooperation of all jurisdictions who implement the market share theory. Since a California court will be unable to control the award of punitive damages granted in a Washington court, plaintiffs who know the ceiling has been reached in the fund of a certain manufacturer in California, may take their suits to Washington. This forum-shopping would defeat the purpose of the fund. Plaintiffs would be enabled to recover multiple punitive awards against one manufacturer, albeit recovering judgments in different states. State A may not be willing to recognize the award granted in State B because of every state’s interest in the welfare and benefits of its own citizens. To remedy this, other states should cooperate by including in the calculation of ceiling amount any amount already paid by this manufacturer in other states. If a jury in State B assesses an amount that exceeds that imposed in State A, then the manufacturer should be compelled to pay the excess into the fund. In this manner, the manufacturer would be subject to the amount the harshest jury deemed appropriate. Realistically, states are not required to adhere to the doctrines of other states. However, in light of the very important interest of every state in not bankrupting manufacturers, it may not be unreasonable to expect other states to recognize the amounts assessed in their sister states.
fulfilled regardless of the amount any individual plaintiff receives because that manufacturer will have already paid into the fund an amount designed to punish that company. The purposes of extra compensation and law enforcement, however, may be better furthered with some control over the amount each plaintiff receives so that the entire fund would not be depleted by the first one or two plaintiffs. To serve this purpose, some control may be imposed mandating that plaintiffs may recover in punitive damages amounts equivalent to their compensatory damage awards. Since the amount of the compensatory liability would presumably be lower than an amount that a jury would ordinarily determine appropriate for punitive damages, the money in the fund would survive more than the first one or two plaintiffs. Once the money in the fund was depleted, plaintiffs would no longer be able to recover ordinary punitive damage awards from this defendant. These later plaintiffs may, however, be awarded their costs of litigation and attorneys' fees if they prove the requisite punitive damage elements against the manufacturer. This result may seem unfair to later plaintiffs. But in reality, the first plaintiff to prove the defendant acted with malice, oppression, or fraud has a very difficult and risky case to prove. Later plaintiffs may gather evidence from "pools" created by early plaintiffs. Additionally, recall that the primary purposes of punitive damages are to punish and deter misconduct. The doctrine is only secondarily concerned with fairness to the plaintiffs.

This suggested mechanism provides a flexible means of attaining the goals of punitive damage awards in the market share context.

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226. This proposition could be as effectively implemented utilizing a percentage of the compensatory award other than the equivalent. For example, two hundred percent of the compensatory amount may be appropriate. But see Model Uniform Product Liability Act §120, Analysis Factor (8) (rejecting equivalent or multiple compensatory award proposition utilized in antitrust actions as inappropriately inflexible in products liability cases).

227. See Prosser & Keeton, supra note 3, at 15.

228. In the unlikely event that money remains in the fund after all possible plaintiffs have either recovered or been precluded from recovery, a fair method of distributing the remainder is warranted. A possible solution to this situation would be to turn the remaining money over to the state. See Hodgkin & Veitch, supra note 101, at 132 (suggesting punitive damages should go directly to the state).

229. See Owen, supra note 78, at 1325; Owen, supra note 111, at 49 n.227.

230. See Owen, supra note 78, at 1325. Enormous diligence, imagination, and financial outlay is required of initial plaintiffs to discover and prove that a product manufacturer acted with the malice required for proving a case for punitive damages. Id.


232. See supra notes 89-99 and accompanying text.

233. See supra notes 100-06 and accompanying text.

234. See supra notes 89-106 and accompanying text.
The punishment and deterrence functions of punitive damages would be served as described. The extra compensation for hurt feelings and loss of family and job security could to some extent be provided, at least to the plaintiffs who receive judgment before the ceiling is reached. Additionally, the law enforcement goal would be promoted because victims would have incentive to bring actions for punitive damages since they could receive a windfall.

CONCLUSION

California should maintain the spirit and reasoning of Sindell when attempting to decide the punitive damages issue left unanswered in that case. Plaintiffs who are injured by generic products should not be denied recovery because they are unable to identify which of a number of manufacturers produced the defective object that caused their injuries. In line with this reasoning is the idea that a manufacturer who recklessly or intentionally injures another should not escape punitive damages because victims of that manufacturer are unable to trace the product back to that producer. California public policy and the Sindell reasoning warrant the imposition of punitive damages in market share cases. The only valid reason for denying punitive liability in market share cases would seem to be the threat of bankrupting manufacturers. If this threat exists at all, then the threat exists in all mass tort situations. Obviously, disallowing punitive damages in any products liability action in which there may be a large number of plaintiffs would be contrary to public policy. This would encourage large manufacturers to engage in profitable misconduct. Therefore, the best solution is to create a mechanism for distributing the punitive awards so as not to subject a manufacturer to unlimited liability.

Since the solution suggested by this comment can be adopted in practical fairness to all, California should not hesitate to impose punitive damages on manufacturers who have acted in a malicious, fraudulent, or oppressive manner.

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235. See supra notes 103-06 and accompanying text.  
236. See supra notes 100-02 and accompanying text.  
237. Ideally, this proposed system for controlling the imposition and distribution of punitive damages would be enacted by Congress pursuant to the authority granted that body in the Constitution. See U.S. Const. art. I, §8, cl. 3 (commerce clause). Federal legislation in this area would promote uniformity of the system within the states that have relaxed their causation requirements. In the alternative, however, the California State Legislature should enact statutes providing for this suggested mechanism.