Market Share Liability & Punitive Damages: The Case for Evolution in Tort Law

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Market share liability is a modern tort theory, developed by courts to facilitate recovery for plaintiffs who, injured by fungible, mass-marketed products, were unable to identify the responsible manufacturer with enough certainty to establish causation. Since its creation, plaintiffs proceeding under market share liability have been denied recourse to punitive damages awards, and limited to recovery of compensatory damages. This Note argues that no sound reason exists for this denial, and that the policy considerations, properly considered, weigh heavily in favor of the availability of punitive damages for plaintiffs forced to rely upon market share liability. The need for availability of punitive damages in these cases has, in fact, become even more pressing in light of the many environmental concerns which punitive damages can help protect.

I. INTRODUCTION

In 2007, a trial court in the Southern District of New York, interpreting New York tort law in a nation-wide toxic tort case, held that plaintiffs employing the evidentiary tool known as "market share liability" could not, as a matter of law, recover punitive damages.[1] By so holding, *In re Methyl Tertiary Butyl Ether Litigation* continued a trend begun by the Supreme Court of Wis-

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1. *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 517 F. Supp. 2d 662, 667–68 (S.D.N.Y. 2007) [hereinafter *MTBE*].

consin[2] and echoed by an intermediate appellate court in California[3] — the trend of resisting the award of punitive damages in market share liability cases. This Note's contention is that such resistance is baseless and ill-advised, and that society would benefit in many ways from the availability of punitive damages in market share liability cases.

While market share liability is a relatively new entrant to the law of tort,[4] it has quickly demonstrated its utility.[5] Punitive damages, on the other hand, have been an element of the law since before this nation was founded, if not earlier.[6] Separately, both concepts are quite useful — market share liability allows plaintiffs injured by fungible products to recover damages despite being unable to identify the defendant responsible for the injury, and punitive damages serve, among other things, to deter and punish particularly reprehensible conduct.[7] This Note argues that the combination of these two concepts will significantly serve tort law and the interests of society.

This position is not novel, but it has not been well-received by the few courts that have considered the issue. The Supreme Court of Wisconsin, which first examined the relationship between punitive damages and market share liability, explicitly declined to adopt the theory of market share liability altogether, foreclosing discussion of punitive damage awards.[8] California's Court of Appeals reviewed the question one year later and directly rejected the suggestion that market share liability and punitive damages can coexist.[9] In the twenty years since those decisions were issued, they have not been reconsidered. By contrast, the New York decision against allowing punitive damages in a

2. Collins v. Eli Lilly & Co., 342 N.W.2d 37 54 (Wis. 1984).

3. Magallenes v. Superior Court, 213 Cal.Rptr. 547 (Cal. Ct. App. 1985).

4. Market share liability was first adopted in *Sindell v. Abbott Labs*., 607 P.2d 924 (Cal. 1980).

5. *See, e.g*, Emily H. Damron, Comment, *Reviving the Market for Liability Theories*: *The "Commingled Product" Theory of Market Share Liability Enters the Judicial Lexicon*, 111 PENN. ST. L. REV. 505, 513–20 (2006) (arguing that market share liability provides a flexible model for courts to use in addressing the complications posed by modern tort actions).

6. *See* Annabelle Moore, Comment, *Sindell and Beyond: A Case for Imposing Punitive Damages in Market Share Litigation*, 17 PAC. L.J. 1445, 1454 (1986).

7. *See* discussion *infra* pp. 228-236.

8. Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984).

9. Magallenes v. Superior Ct., 213 Cal.Rptr. 547 (Cal. Ct. App. 1985).

market share case is quite recent.[10] Moreover, the New York opinion was issued by a trial court as part of a high-profile multidistrict litigation, and the decision will, foreseeably, be appealed. As a result, this Note's analysis will be particularly pertinent to New York courts.

This Note has three goals: 1) demonstrating that punitive damages and market share liability are not theoretically incompatible, 2) showing that the justifications previously offered by courts to keep punitive damages unavailable in market share cases are lacking, and 3) outlining the various benefits to society that will accrue from allowing punitive damage awards in market share liability cases. Part II will lay out the theories underlying market share liability and punitive damages. Building on this background, this Note will then recount the arguments that have been offered by the courts to justify the continued unavailability of punitive damage awards in market share liability cases. Part III will review and critique these arguments, and will reveal them to be either misguided or based on fallacious reasoning. Moreover, this analysis will demonstrate that market share liability is, in fact, entirely compatible with punitive damages. Finally, Part IV will discuss the policy benefits that would follow from the availability of punitive damage awards in market share liability actions. By the conclusion of the analysis, this Note will have established a compelling argument that the prior decisions on this subject were decided incorrectly, and that market share liability should, in fact, be allowed to support punitive damage awards.

II. BACKGROUND

This section first explains the history and theoretical underpinnings of the doctrines of market share liability and punitive damages. This will provide the background necessary to proceed to a review of the arguments which have been arrayed against allowing punitive damage awards in market share liability cases by the courts of Wisconsin, California, and New York.

10. *MTBE*, 517 F.Supp.2d 662 (S.D.N.Y. 2007).

A. WHAT IS MARKET SHARE LIABILITY?

The typical tort claim has four elements: (1) duty, (2) breach, (3) causation, and (4) damages.[11] Normally, "[a] plaintiff must prove each of these elements to the fact finder by a preponderance of the evidence in order to obtain relief."[12] Market share liability is a modern evidentiary tool[13] used to help the plaintiff establish the "causation" element of many causes of action where he or she otherwise could not.[14] Specifically, market share liability "provides an exception to the general rule that . . . a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury."[15] The exception is triggered when the injured plaintiff, due to "'inordinately difficult problems of proof caused by contemporary products and marketing techniques," — namely, that the injury was allegedly caused by a fungible product, distributed generically — cannot reasonably be expected to prove which actor caused the harm.[16] In such a situation, the plaintiff is permitted to join as defendants a representative group of the national manufacturers of the allegedly defective product. If the plaintiff can prove that the defective product caused her injury, the burden of disproving causation is shifted to the defendants, who must offer proof to defeat the presumption that their conduct was the cause of the injury.[17] If they cannot, liability for the injury will be assessed on the defendants in proportion to their share of the relevant market at the time the plaintiff was injured.[18]

Market share liability was first recognized in California's *Sindell v. Abbott Laboratories*,[19] a class action products liability suit

11. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1977).
12. *MTBE*, 517 F. Supp. 2d 662, 668 (2007).
13. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (demonstrating that market share liability is an evidentiary tool, rather than an independent claim).
14. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1075–78 (N.Y. 1989). Market share liability is most-commonly associated with products liability actions, where "identification of the exact defendant whose product injured the plaintiff is . . . generally required." *Id.* at 1073; *see also* W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS § 103 (5th ed. 1984).
15. *Hamilton*, 750 N.E.2d at 1066.
16. *Hymowitz*, 539 N.E.2d at 1075 (citations omitted).
17. *See, e.g.*, *id*. at 1078 n.2.
18. *See Hamilton*, 750 N.E.2d at 1066.
19. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

brought by female plaintiffs whose mothers ingested a drug known as "DES" during their pregnancies.[20] DES had been marketed and prescribed to pregnant mothers for the purpose of preventing miscarriage,[21] but it was later discovered that ingestion of DES was causally linked with the development of cancerous vaginal and cervical growths in the daughters of DES users.[22] Alleging that the manufacturers of DES knew or should have known of the drug's carcinogenic properties, Judith Sindell, a DES daughter afflicted with such a cancer, sued ten California DES manufacturers.[23] DES, however, is a generic drug, whose formula is a scientific constant.[24] As a result, Sindell could not identify the particular manufacturer of the DES that her mother ingested.[25]

Under traditional tort rules and their established exceptions, Sindell's inability to establish causation would have precluded her from recovering.[26] The *Sindell* court, however, felt that there were "forceful arguments in favor of holding that plaintiff ha[d] a cause of action."[27] In light of the changing times, the court noted, the law must change as well, rather than "adhere rigidly to prior doctrine" (and thereby deny recovery to the victims of dangerous generic products).[28] Sindell's inability to identify the manufacturer who injured her stemmed not from any fault on her part, but rather from the nature of our "contemporary complex industrialized society," in which "advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer."[29] Although, by the same token, the manufacturers themselves were not to blame for the lack of evidence of causation, the *Sindell* court felt that "as between an innocent plaintiff and negligent defendants, the latter

20. *Id*. at 925–26.
21. *Id*.
22. *Id*. at 925.
23. One of the defendant manufacturers established that it had not manufactured DES during the time plaintiff's mother was taking the drug, and five other defendants named in the complaint were either dismissed or had abandoned their appeal by the time this case reached the California Supreme Court. *Id*. at 926 n.4.
24. *Id*. at 932.
25. *Id*. at 926.
26. *Id*. at 936.
27. *Id*.
28. *Id*.
29. *Id*.

should bear the cost of the injury."[30] Moreover, the court noted that, as between the plaintiff and the defendant manufacturers, the defendants were better able to bear the cost of injury resulting from the defective products.[31] Finally, the court pointed out that, since the manufacturer was "in the best position to discover and guard against defects in its products and to warn of its harmful effects," holding it liable for defects and failure to warn would protect the public by creating an incentive to maximize product safety.[32]

With these considerations in mind, the *Sindell* court fashioned an exception to the usual "causation" requirement: if, through no fault of her own, the plaintiff is unable to identify the manufacturer of the generic product which injured her, she may proceed by joining a "substantial share" of the manufacturers in the relevant market as defendants.[33] Once the plaintiff demonstrates that the product in question caused her injuries, the burden shifts to the individual defendants to show that they could not have been responsible for the injury.[34] If they cannot, liability for the injury will be assessed on the defendants proportional to their share in the relevant market.[35]

To illustrate, imagine a case in which the plaintiff suffered $100,000 in damages due to a defective generic product. Four manufacturers are named in the complaint, each one holding approximately twenty-five percent of the market for the product. Under *Sindell*'s market share liability system, each of these manufacturers would be held liable for twenty-five percent of the judgment: $25,000. This system thus balances the need to pro-

30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*. at 936–37. The "substantial share" concept marks a departure the "alternative liability" theory of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), upon which market share liability is, in part, based. *See Sindell*, 607 P.2d at 928. Under *Summers*, the plaintiff was required to join *all* possible wrongdoers. *See id*.
34. *Sindell*, 607 P.2d at 937.
35. *Id*. The reasoning behind this system, as enunciated by Naomi Sheiner in *DES and a Proposed Theory of Enterprise Liability* (and explicitly acknowledged in *Sindell*, 607 P.2d at 937 n.28), is that "if X manufacturer sold one-fifth of all the DES prescribed for pregnancy, and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases." Note, 46 FORDHAM L. REV. 963, 994 (1978). Thus, if a defendant is held liable for a percentage of the injury corresponding to that defendant's market share, liability will, over the long run, approximate the actual harm the defendant caused.

vide compensation to the plaintiff against the risk of holding defendants liable for injuries which they did not cause.

The *Sindell* model of market share liability has provided a framework largely complied with by the states which have adopted the doctrine.[36] In *Hymowitz v. Eli Lilly & Co.*, New York adopted a version of market share liability substantially similar to California's, but with important differences.[37] *Hymowitz* was also a DES suit, featuring the same problems of identification that complicated *Sindell*.[38] Embracing the market share theory in order to provide "a realistic avenue of relief for plaintiffs,"[39] the *Hymowitz* court also took heed of "lessons learned through experience in other jurisdictions" in order to render market share liability more workable.[40] First, noting California's discovery that "the reliable determination of any market smaller than the national one likely is not practical," the court announced that New York market share cases would be based upon a national market.[41] This choice implies that New York's market share theory is not "founded upon the belief that, over the run of cases, liability will approximate causation in this State."[42] Rather, liability was apportioned "so as to correspond to the over-all *culpability* of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[43]

The second departure from *Sindell*'s model is that *Hymowitz* allows a defendant to escape liability only if it demonstrated that it did not participate in the market of DES sold for pregnancy use *at all*.[44] This exculpation system differs from California's, where a defendant can avoid liability by showing that it could not have

36. *See, e.g.*, Smith v. Cutter Biological Inc., 823 P.2d 717 (Haw. 1991); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). Market share liability is by no means universally adopted, however. Several States have rejected the doctrine on the grounds that it departs so dramatically from the tort law principle that liability should be imposed only upon the manufacturer that actually caused the injury that adoption of market share should be left to the legislature. *See, e.g.*, Sutowski v. Eli Lilly & Co., 696 N.E.2d 187 (Ohio 1998); Gorman v. Abbott Labs., 599 A.2d 1364 (R.I. 1991); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986).

37. 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989).

38. *Id.* at 1074–75.

39. *Id.* at 1075.

40. *Id.* at 1077.

41. *Id.* at 1077.

42. *Id.* at 1078.

43. *Id.* (emphasis added).

44. *Id.*

caused a particular plaintiff's injury.[45] This difference follows from New York's explicit basing of liability on the overall risk produced, rather than risk of causation in each single case.[46]

Finally, under *Hymowitz*, the liability of defendants is several only, and there is no explicit requirement that a "substantial share" of the market be joined as defendants in the action.[47] This, too, stems from the fact that New York's market share doctrine does not attempt to apportion liability based on risk posed to the individual plaintiff: if liability isn't based on harm caused to the individual plaintiff, there is no need to include as many potentially liable tort-feasors as possible.

B. WHAT ARE PUNITIVE DAMAGES?

It is important to note that the damages awarded to the plaintiff under present market share liability models are strictly "compensatory" — they are awarded "to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[48] By contrast, punitive damages are not aimed at rectifying any injury, but rather at "deterrence and retribution."[49] Thus, although compensatory damages and punitive damages are usually awarded at the same time, they serve quite different purposes.[50]

1. *Functions*

"The doctrine of punitive damages originated in the English common-law, and is an established principle in the common law of this country."[51] Punitive damages provide a number of services

45. Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).

46. *Hymowitz*, 539 N.E.2d at 1078.

47. *Id*. The *Sindell* opinion did not address the question whether defendant manufacturers would be held jointly or severally liable, and ambiguity existed on this issue until it was addressed in *Brown v. Superior Ct*., 751 P.2d 470, 485–87 (Cal. 1988). *Brown* held that joint liability under market share liability was inconsistent with the policy rationale underlying *Sindell*, and therefore several liability was appropriate. *Id.* at 486–87. Thus, the New York and California models for market share liability are in accord on this point.

48. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

49. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

50. *Cooper Indus*., 532 U.S. at 432.

51. Annabelle Moore, Comment, *Sindell and Beyond: A Case for Imposing Punitive Damages in Market Share Litigation*, 17 PAC. L.J. 1445, 1454 (1986). In fact, according to one commentator, the practice of awarding punitive damages appears to predate Western

to society. The central aim of punitive damages is to deter both the defendant and others like him from committing similar torts in the future by raising the specter of special punishment.[52] Implicit in this concept is an acknowledgement that mere liability for compensatory damages will not sufficiently deter the unwanted conduct.[53] Thus, for example, punitive damages can be appropriate where compensatory damages for the injury would be so negligible as to provide little deterrence.[54] Consequently, even "an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort, such as a trespass to land, is committed for an outrageous purpose, but no significant harm has resulted."[55]

The added deterrence of punitive damages takes on special significance in products liability cases. There, in particular, courts have sometimes awarded punitive damages due to evidence that manufacturers might find it advantageous to simply write off possible compensatory damages stemming from product defects as a cost of business, rather than investing money in proper safety precautions.[56] The California Court of Appeal graphically highlighted the need for such deterrence in the famous case of *Grimshaw v. Ford Motor Co.*[57] In *Grimshaw*, the defendant manufacturer, aware that the design of the fuel system in its 1972 Pinto model created a serious risk of deadly explosion to its drivers, engaged in a cost-benefit analysis and determined that it would be more economical to absorb the resulting costs of compensatory damage liability than to remedy the design deficiencies.[58] As a result of the manufacturer's cost-benefit analysis,

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Civilization. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262–63 & n.17 (1976).

52. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977).

53. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

54. *See, e.g.*, Alcorn v. Mitchell, 63 Ill. 553 (1872) (holding $1,000 verdict not excessive where defendant spat in the face of plaintiff in a court room).

55. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977).

56. *See* Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1327 (C.D. Cal. 1983) (holding punitive damages inappropriate in a DES case) (citing Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981)). *Morris* is of particular relevance to this Note because it explicitly approved of a punitive damage award in a case proceeding under market share liability. *See also* Owen, *supra* note 51, at 1292–95 (discussing why manufacturers may find it more profitable to pay compensatory damages than to remedy defective products).

57. 174 Cal. Rptr. 348.

58. *Id.* at 359–63.

one of the plaintiffs was killed and the other was extensively burned, managing to survive "only through heroic medical measures."[59] In an effort to skew this, and future, cost-benefit analyses in favor of the consumers' safety, the Court of Appeal affirmed the trial court's $3.5 million dollar punitive damage award. The court noted that "[p]unitive damages . . . remain as the most effective remedy for consumer protection against defectively designed mass produced articles."[60] Thus, just as punitive damages protect the public by deterring the tortious conduct of individuals, they also deter the tortious conduct of manufacturers by tilting cost-benefit analyses towards safer practices, thereby protecting the public from injuries caused by tortiously-manufactured products.[61]

Punitive damages further provide an expression of our society's contempt and disapproval of particularly egregious misconduct.[62] One way this disapproval is expressed is through punitive damages' incidental creation of "private attorneys general" — private persons who enforce the rule of law.[63] Due to the high cost, both in time and money, of litigation, plaintiffs may hesitate to enforce their rights in court. Consequently, many torts may go unlitigated. Courts, through large punitive damage awards, can entice otherwise hesitant plaintiffs to bring suit, thereby bringing lawbreakers before the court and promoting the enforcement of societal laws which would otherwise go broken.[64]

Finally, in some situations, a compensatory damage award will not make a plaintiff whole.[65] This might occur when the cause of action is statutory, and the maximum recovery allowed by that statute is less than the actual damages suffered.[66] Attorneys' fees, too, may eat into the compensatory damage award, and leave the plaintiff less than whole.[67] In these situations, punitive damage awards help restore the plaintiff to the status quo ante.

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59. *Id.* at 359.
60. *Id.* at 382.
61. *Morris*, 573 F. Supp. at 1327.
62. Owen, *supra* note 51, at 1281–82.
63. Moore, *supra* note 51, at 1456–57 (citing Owen, *supra* note 51, at 1287).
64. *Id.*
65. *Morris*, 573 F. Supp. at 1326 (citing Owen, *supra* note 51, at 1278).
66. *Id.*
67. *Id.*

2. *Application*

Generally, "exemplary damages are recoverable in all actions ex delicto based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation, as a punishment of the defendant and admonition to others."[68] In evaluating whether such damages are necessary, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[69] The Supreme Court has instructed courts to determine the reprehensibility of a defendant's conduct by considering the following factors: (1) whether "the harm caused was physical as opposed to economic;" (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) whether "the target of the conduct had financial vulnerability;" (4) whether "the conduct involved repeated actions or was an isolated incident;" and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or [rather] mere accident."[70] Under these guidelines, a court must investigate both the intrinsic nature of the tortious conduct and the subjective mindset of the defendant in determining whether punitive damages are appropriate.

Generally speaking, the States retain discretion over the imposition of punitive damages.[71] In New York, punitive damages are guided by common law principles, rather than statute. It is

68. Le Mistral, Inc. v. CBS, 61 A.D.2d 491, 494 (N.Y. App. Div. 1978) (citations omitted).

69. BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996).

70. State Farm Mut. Auto Ins. v. Campbell, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

71. *Id.* at 416. There are, however, procedural and substantive constitutional limitations on the award of punitive damages. *Id.* (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); *Gore*, 517 U.S. 559; Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)). The crux of these limitations is that while punitive damages "serve the same functions as criminal penalties, defendants subjected to punitive damages have not been accorded the protections applicable in a criminal proceeding." *Campbell*, 538 U.S. at 417. Furthermore, in the event that "an award can be categorized as 'grossly excessive'" in relation to the State interests advanced by the punitive damage awards, it may be considered "arbitrary" and thereby violate the Due Process Clause. *Gore*, 517 U.S. at 569. These limitations, are somewhat beyond the scope of this Note, but will likely become more relevant should my proposal be adopted.

imperative that punitive damage awards bear a reasonable relationship to the defendant's *culpability*.[72] In this way, punitive damage awards in New York align with the rationale underlying the market share liability system announced in *Hymowitz v. Eli Lilly & Co.*.[73]

C. CAN A PLAINTIFF RELY ON MARKET SHARE LIABILITY AND PUNITIVE DAMAGES AT THE SAME TIME?

Earlier judicial treatment of the question whether punitive damages were available in market share liability cases has not only been largely unfavorable, but also quite rare.[74] These cases have put forth a number of reasons intended to demonstrate that punitive damages should not be awarded in market share liability cases. This section will review the reasoning underlying the respective decisions which have held punitive damages unavailable in market share liability actions.

1. Collins v. Eli Lilly & Co.

The Supreme Court of Wisconsin was the first to address the intersection of non-traditional liability and punitive damages in *Collins v. Eli Lilly & Co.*,[75] a DES action involving the same problems of identification as *Sindell*.[76] *Collins* rejected the market share liability theory on the grounds that defining and proving market share was a "near impossible task, if it [was] to be done accurately."[77] Wisconsin then proceeded to adopt a unique model for providing DES plaintiffs relief, allowing plaintiffs to recover, despite not having shown causation, under a comparative negli-

72. Parkin v. Cornell Univ., Inc., 182 A.D.2d 850 (N.Y. App. Div. 1992); *see also Gore*, 517 U.S. at 580.

73. 539 N.E.2d 1069, 1078 (1989) ("[W]e chose to apportion liability so as to correspond to the *over-all culpability* of each defendant . . . .") (emphasis added).

74. Magallenes v. Superior Court, 213 Cal. Rptr. 547 (Ct. App. 1985); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 54 (Wis. 1984). *But see* Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983) (holding that punitive damages could be awarded in a market share liability case).

75. 342 N.W.2d at 47–49.

76. *Id.* at 44–45.

77. *Id.* at 48–49.

gence theory.[78] That is, recovery would be allowed independent of the relative market shares of the defendants.[79]

In outlining the contours of the Wisconsin model for DES recovery, the *Collins* court addressed the plaintiff's plea for punitive damages.[80] Noting that the "concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous," the court held that this required that "where punishment [i.e. punitive damages] is to be exacted, it must be certain that the wrongdoer being punished because of his conduct actually caused the plaintiff's injuries."[81] Thus, recovery of punitive damages was held unavailable under the *Collins* model.[82]

Although *Collins* addressed the availability of punitive damages only in relation to its comparative negligence model (rather than market share liability), the reasoning used by the court is significant because it illuminates the likely result if market share liability were ever to be accepted in Wisconsin. Moreover, this line of reasoning was echoed in a subsequent California case, *Magallenes v. Superior Court*, to similar effect.[83]

2. Magallenes v. Superior Court

When Judith Sindell brought her action against the manufacturers of DES in California, she included a plea for an award of punitive damages.[84] Despite specifically noting this request, the *Sindell* opinion made no further mention of punitive damages, focusing instead on the apportionment of compensatory damages under its newly-announced market share liability model.[85] As a result, California law was, for a time, unclear on whether punitive damages were available to a plaintiff proceeding under a market share theory. The issue was first resolved by *Morris v. Parke, Davis & Co.*, the second case to discuss it, which held that punitive damages were indeed available to a market share plain-

78. *Id.* at 50–53.
79. *Id.* at 52–53.
80. *Id.* at 54.
81. *Id.*
82. *Id.*
83. 213 Cal. Rptr. 547, 552–53 (Ct. App. 1985).
84. Sindell v. Abbott Labs., 607 P.2d 924, 926 (Cal. 1980).
85. *Id.*

tiff.[86] Four years later, however, the issue was revisited by *Magallenes v. Superior Court*, which rejected the reasoning of *Morris*, and held the opposite.[87]

Magallenes, another DES action, based its rejection of *Morris* on a number of considerations. First, the court noted that there were "hundreds" of DES cases pending nationwide, which by and large were not amenable to combination in a class action.[88] Allowing the award of punitive damages in DES cases, it reasoned, could lead to "overkill" — repeated punishment of the defendant for conduct which has already been punished.[89] The potential for overkill also raised the threat that "early claimants securing punitive damage awards may exhaust the economic resources of the alleged wrongdoers and may thereby even preclude the satisfaction of awards of compensatory damages, [sic] to future claimants."[90]

Second, under California law, punitive damages are assessed "for the sake of example and by way of punishing" the defendant.[91] California courts have concluded that, in order to accomplish this statutory objective, "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be . . . [and] that the poorer the wrongdoing defendant the smaller the award of punitive damages need be."[92] In light of the multiple cases pending against each defendant, *Magallenes* reasoned that early plaintiffs would be awarded larger punitive damage awards than later plaintiffs, who would find that their defendants' net worth had been lessened.[93]

Third, in light of the number of DES cases pending, the *Magallenes* court opined that "the objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages."[94] Moreover, part of the reason the DES plaintiffs faced such diffi-

86. 573 F. Supp. 1324, 1325 (C.D. Cal. 1983).
87. *Magallenes*, 213 Cal. Rptr. at 550–54.
88. *Id.* at 553.
89. *Id.* at 554.
90. *Id.* at 552.
91. CAL. CIV. CODE § 3294 (West 2008).
92. *Magallenes*, 213 Cal. Rptr. at 553 (quoting Bertero v. Nat'l Gen. Corp., 529 P.2d 608 (Cal. 1974)).
93. *Id*. at 553.
94. *Id.* at 552.

culty in establishing causation was that the ingestion of the drug occurred many years in the past and DES had long been unavailable. *Magallenes* stated that "the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace."[95]

Finally, *Magallenes* suggested that if punitive damages were allowed in market share cases, some manufacturers might avoid liability altogether, either by not being named in the action, or by introducing evidence proving that they did not furnish the DES that caused plaintiff's injury.[96] As a result, punitive damages might be awarded against defendants whose conduct had not led to the plaintiff's injury, while, by the same token, the responsible defendant might escape liability altogether.[97] The court characterized this possible outcome as "grossly unfair."[98]

3. *In re* MTBE

The question of punitive damage awards in market share liability cases arose most recently in the ongoing toxic tort litigation, *In re Methyl Tertiary Butyl Ether Litigation ("MTBE")*, the fourth case to fully explore the intersection of market share liability and punitive damages.[99] MTBE is a chemical compound added to gasoline to reduce "harmful air emissions"[100] and boost the octane of gasoline.[101] The chemical, however, "has also caused widespread and serious contamination of the nation's drinking water supplies."[102] Bringing suit under a number of causes of action, the plaintiffs in *MTBE* — the County of Suffolk, NY and the Suffolk County Water Authority — invoked market share liability against the defendant petroleum companies.[103] In addition to

95. *Id.*
96. *Id.* at 554.
97. *Id.*
98. *Id.*
99. 517 F. Supp. 2d 662 (2007).
100. *Id.* at 664.
101. Methyl Tertiary-Butyl Ether (MTBE): Advance Notice of Intent to Initiate Rulemaking Under the Toxic Substances Control Act to Eliminate or Limit the Use of MTBE as a Fuel Additive in Gasoline, 65 Fed. Reg. 16,094, 16,094 (Mar. 24, 2000).
102. *Id.* at 16,096–97.
103. *MTBE*, 517 F. Supp. 2d at 668.

their pleas for compensatory damages, the *MTBE* plaintiffs also requested punitive damages against the defendants.[104]

Deciding the question as a motion *in limine* at the trial court level,[105] the *MTBE* court held that punitive damages were not available in conjunction with market share liability under New York law.[106] In so doing, however, *MTBE* expressly disagreed with the reasoning in *Magallenes* "to the extent it held that the use of an alternative method of proving causation leads *inevitably* to the conclusion that punitive damages — or any particular type of relief — can never be awarded."[107] The court's holding stemmed from a reading of market share law announced in *Hymowitz v. Eli Lilly & Co.*,[108] rather than the "pure logic" and "deductive reasoning" relied on by *Magallenes*.[109]

Hymowitz, the *MTBE* court reasoned, was aware that use of market share liability could potentially visit liability disproportionately upon manufacturers.[110] Despite this, *Hymowitz* adopted market share liability because it was an "equitable way to provide plaintiffs with the relief they deserve."[111] At the same time, the decision in *Hymowitz* allowed only several liability under the market share theory, even though "as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages."[112] These two considerations, *MTBE* extrapolated, indicated that the court in *Hymowitz* was seeking to "minimize the inequities imposed on defendants" when plaintiffs invoke market share liability.[113] Therefore, since "allowing punitive damages would magnify any inaccuracies between the harm done and the relief provided by particular defendants," the spirit of *Hymowitz* required the preclusion of punitive damages.[114] The *MTBE* court also noted that allowing suits to proceed under market share liability is "easier for plaintiffs than proving which defendants ac-

104. *Id.*
105. *Id.* at 666.
106. *Id.* at 667–68.
107. *Id*. at 667 (emphasis in original).
108. 539 N.E.2d 1069 (N.Y. 1989).
109. *MTBE*, 517 F. Supp. 2d at 670.
110. *Id.* (citing *Hymowitz*, 539 N.E.2d at 1077–78).
111. *Id*. (quoting *Hymowitz*, 539 N.E.2d at 1078).
112. *Id. (*quoting *Hymowitz*, 539 N.E.2d at 1078).
113. *MTBE*, 517 F. Supp. 2d at 671.
114. *Id.*

tually caused the harm,"[115] which could entice plaintiffs to rely on market share liability "even when they could, with greater effort, identify the particular defendant . . . that caused their injury."[116] In order to encourage plaintiffs to identify "the actual bad actors" before proceeding with a lawsuit, *MTBE* restricted recovery of punitive damages to cases proceeding under traditional tort theory.[117]

III. THE INTERSECTION OF MARKET SHARE LIABILITY AND PUNITIVE DAMAGES RECONSIDERED

The earlier judicial rejections of punitive damage awards in market share cases were based on a belief that the concepts of punitive damages and market share liability are fundamentally irreconcilable and that various policy considerations weigh against allowing such recovery. These analyses are questionable. This section will attempt to demonstrate the faultiness of each argument offered by the above cases.

A. MARKET SHARE LIABILITY AND PUNITIVE DAMAGES ARE NOT FUNDAMENTALLY IRRECONCILABLE

The irreconcilability of punitive damage awards in market share liability cases was the central theme of both *Collins v. Eli Lilly & Co.*[118] and *Magallenes v. Superior Court*.[119] However, there exists no fundamental "irreconcilability" between these concepts.[120]

1. *The Need for the Defendant to Be Linked to the Plaintiff's Injuries*

Collins reached the conclusion that these concepts were irreconcilable by reasoning that, because punitive damages in Wisconsin law were to be awarded to provide "individualized pu-

115. *Id.*
116. *Id.*
117. *Id.*
118. 342 N.W.2d 37, 54 (Wis. 1984).
119. 213 Cal. Rptr. 547, 553–54 (Ct. App. 1985).
120. The court in *MTBE* reached the same conclusion regarding the ultimate reconcilability of punitive damages and market share liability. 517 F. Supp. 2d at 667.

nishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous," it followed that, "where punishment is to be exacted, it must be certain that the wrongdoer being punished because of his conduct *actually caused the plaintiffs' injuries*."[121] This is clearly a logical *non sequitur*. Nothing in the concept of "conduct particularly outrageous towards the plaintiff" requires an injury to have been caused.[122] Indeed, the *Collins* court itself, earlier in the opinion, described the showing a plaintiff must make before punitive damages could be awarded: "the injured party must show a wanton, willful or reckless indifference to or disregard for the rights of others on the part of the wrongdoer."[123] That is to say, it is the defendant's extreme indifference to the plaintiff's rights that is the crux of "particularly outrageous conduct," and not the fact that the plaintiff has been injured.

By way of illustration, imagine that a prescription drug company affirmatively knew that its newest product presented a risk of grievous brain damage to those who took it. If that company decided to release this product into the market without warning of the potential side-effect, surely we would not hesitate to call this conduct "particularly outrageous" and evidence of a wanton indifference to the rights of others, regardless whether any consumer was actually injured.[124] This is precisely the sort of con-

121. *Collins*, 342 N.W.2d at 54 (emphasis added).

122. By way of illustration, consider that a classic example of an appropriate situation to award punitive damages is where "a tort, such as a trespass to land, is committed for an outrageous purpose, *but no significant harm has resulted*." *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977) (emphasis added). This result holds true even under Wisconsin's punitive damages regime, which requires "particularly outrageous conduct" to support punitive damages. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) (holding that a claim for intentional trespass supports an award of punitive damages, even where only nominal damages are proven). If a trespass, incurring only nominal damages and certainly not *physically* harming the plaintiff, can be "particularly outrageous" enough to support punitive damages, surely a breach of the duty of care a manufacturer owes a consumer can support punitive damages, even if the consumer has not been personally harmed.

123. 342 N.W.2d at 54 (citing Fahrenberg v. Tengel, 291 N.W.2d 516, 520–21 (Wis. 1980)).

124. Tellingly, the *Collins* court *itself* notes that "punitive damages may be awarded in products liability cases where it is shown that the defendant wantonly, willfully, or recklessly disregards the plaintiff's rights by selling a defective and unreasonably dangerous product." *Id.* (citing Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980)).

duct which punitive damages are intended to punish and deter.[125] Why then should such a company, shown to have acted outrageously, be spared from punitive damages solely because the company's particular industry masks the proximate cause of the harm suffered by the unwitting public?

2. *Unfairness Caused by the Operation of the Market Share Model*

Magallenes' conclusion that market share liability was incompatible with punitive damage awards was based on somewhat different reasoning: because the market share theory announced in *Sindell v. Abbott Laboratories* allowed a plaintiff to proceed after naming a "substantial share" — rather than all — of the relevant manufacturers as defendants, there was the possibility that some culpable manufacturers would be left out.[126] Were punitive damages allowed, those culpable manufacturers would escape liability, while others "whose conduct was no more culpable" would be made to pay.[127] This, reasoned *Magallenes*, "would be grossly unfair."[128]

The difficulty with taking this position becomes apparent when it is applied in other similar situations. By the above reasoning, for example, imposing criminal liability on those criminals unlucky enough to be caught, while other, equally culpable lawbreakers run free, is also "grossly unfair." Should society then stop enforcing the criminal law until we are assured of perfect enforcement? Indeed, by *Magallenes*' reasoning it would seem that the courts should properly refrain from imposing even compensatory damages on the manufacturers until all market participants are included. Moreover, the chance that some culpable parties will escape liability is diminished by *Sindell*'s explicit invitation to market share defendants to cross-complain against other manufacturers not joined in the action.[129] That is, if a market share defendant feels that it is being unfairly included in a lawsuit while other, similarly-culpable, manufacturers are not

125. *See id*.; *see also* RESTATEMENT (SECOND) OF TORTS § 908 ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's . . . reckless indifference to the rights of others."); Owens, *supra* note 51, at 1265.

126. *Magallenes v. Superior Court*, 213 Cal. Rptr. 547 (Ct. App. 1985).

127. *Id.* at 554.

128. *Id.*

129. Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).

named, that defendant can itself make a motion to bring those other manufacturers into the suit, thereby mitigating the "gross unfairness."[130] Finally, one could easily turn the *Magallenes* court's argument on its head and claim that allowing demonstrably-culpable defendants escape punitive damage liability because other culpable parties might not have been named is the real unfairness. When faced with a choice between protecting the public from the outrageous conduct of manufacturers by punishing those who have been successfully haled into court, and refraining from punishing any such manufacturer until they are all gathered, the moral choice appears much less clear than *Magallenes* makes it out to be.

B. THE RELEVANT POLICY CONSIDERATIONS DO NOT WEIGH AGAINST AWARDING PUNITIVE DAMAGES IN MARKET SHARE LIABILITY CASES

Having shown that punitive damage awards are not intrinsically irreconcilable with market share liability, any decision to withhold such awards from otherwise meritorious plaintiffs must be predicated on countervailing policy considerations. While some issues — which will be discussed below — counsel against this Note's proposal, on the whole, the policy considerations, properly analyzed, weigh in favor of allowing punitive damage recoveries in market share liability cases. To begin, this Note must address the policy arguments made by *Magallenes* and *MTBE* to the contrary.

1. *Rebutting the Policy Arguments of* Magallenes

a. Overkill

The "overkill" argument in *Magallenes* encompassed two separate conclusions, both apparently counseling against the availability of punitive damage awards in market share cases. They are predicated on the fact that, at the time *Magallenes* came down, there were "hundreds" of similar DES cases pending.[131]

130. *Id.*
131. *Magallenes*, 213 Cal. Rptr. at 553.

First, the court suggested that early plaintiffs allowed to secure punitive damages could exhaust the resources of the alleged wrongdoers, to the point that later plaintiffs might find their defendants unable to pay even compensatory damages.[132] Second, noting that one purpose of punitive damages is to "punish" the culpable defendant, the court questioned "whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried."[133]

While these considerations are certainly worth noting, they are somewhat inapposite to the question whether punitive damages are appropriate in the market share liability context. That is to say, overkill is a problem with the concept of punitive damages *in itself*, rather than a problem which arises from market share liability.[134] If DES had been produced by a single manufacturer, such that market share liability was unnecessary, the threat of overkill through punitive damages would still be present so long as multiple plaintiffs were injured. Considering that California's legislature saw fit to enact a statute making punitive damages available despite the potential for "overkill," the *Magallenes* court arguably had no ground for circumventing the application of the statute in market share cases.[135] Put differently, once a jurisdiction has decided to embrace punitive damage awards in civil litigation despite the threat of overkill, it is disingenuous to revive the overkill argument in the market share liability context.

b. The Punitive Effect of Numerous and Substantial Compensatory Awards

Noting that punitive damages in California law are intended to achieve "punishment [of the defendant] and deterrence of like

132. *Id.* at 552.

133. *Id.* at 554.

134. The threat of overkill has often been raised as an argument against the imposition of punitive damages in themselves. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (noting concern over multiple punitive damage awards in a non-market-share-liability case); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (same).

135. CAL. CIV. CODE § 3294 (West 2008).

conduct by the wrongdoer and others,"[136] *Magallenes* felt that these objectives were "sufficiently met by the enormity of the present and prospective awards of *compensatory* damages."[137] This conclusion is subject to the same critique made above: the possibility that compensatory liability might be sufficient to punish and deter wrongdoers is an argument against punitive damages in themselves. Once the decision has been made to allow punitive damages at all, this consideration should not bear upon the decision to allow such recovery in market share cases.

The above argument is also susceptible to criticism on another ground. Experience has shown that punitive damages are "particularly important as a deterrent in cases involving defective products."[138] First, in an "age of mass distribution of goods, the harmful consequences of reckless misconduct may be multiplied a thousandfold."[139] Thus, relying on compensatory damages to deter tortious conduct by manufacturers and summarily denying punitive damages to a whole class of cases is tantamount to taking a risk with the public's health. Additionally, courts and commentators of the DES-era recognized that "manufacturers may find it advantageous to accept compensatory damages as a cost of doing business," rather than preventing the injuries in the first place.[140] In order to further dissuade manufacturers from employing this type of cost-benefit analysis — thereby increasing the safety of the public — punitive damages are required.[141] The impact of punitive damages in this regard is particularly pronounced. Whereas a manufacturer can reasonably predict the number and amount of compensatory claims, punitive damage awards (which are determined by a jury) are unpredictable, mak-

136. *Magallenes*, 213 Cal. Rptr. at 551.

137. *Id.* at 552 (emphasis added).

138. Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1327 (C.D. Cal. 1983).

139. *Id.*

140. *Id.* (citing Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382 (Ct. App. 1981)). As discussed above, *supra* pp. 10–11, *Grimshaw* concerned a car manufacturer who, aware of deadly defects in one of its models, compared the predicted costs of compensatory damage liability to the cost of remedying the defect, eventually choosing to absorb the former. 174 Cal. Rptr at 382. *See also* Owen, *supra* note 51, at 1291, 1292–95.

141. Owen, *supra* note 51, at 1290–91 ("[A]bsent the punitive damages remedy, many manufacturers may be tempted to maximize profits by marketing products known to be defective and to absorb resulting injury claims as a cost of doing business.").

ing it difficult to evaluate the costs of consciously allowing a defective product to enter the market.[142]

In light of the protective role served by punitive damages, it is difficult to see why *Magallenes* would feel free to bar their availability in all market share cases.[143] Even if it were true that the DES defendants would be sufficiently punished and deterred through compensatory damages, the functions of punitive damages may yet be required in future cases. Moreover, the fact that a defendant manufacturer, acting wrongfully, has managed to seriously injure a large number of persons should not relieve it of liability for punitive damages.

c. The Attenuated Deterrent Effect of Long Belated Awards

By 1971, the Food and Drug Administration had determined that DES should be pulled off the market as a miscarriage prevention drug due to the danger its use posed to female fetuses.[144] By the time *Magallenes* was decided, DES had therefore been off the market for fourteen years. In justification of its decision to deny punitive damage awards in all market share liability cases, the *Magallenes* court argued that "the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace."[145]

First, as with its other policy arguments, the court has confused a criticism of punitive damages with a criticism of punitive damages *in combination with market share liability*. Second, this argument is guilty of the logical fallacy of reasoning from the specific to the general: the fact that DES had long been removed from the market before this litigation does not imply that all market share liability cases will involve offending conduct that has long stopped.[146] Third, as noted above, manufacturers have

142. Moore, *supra* note 51, at 1463 (citing Owen, *supra* note 51, 1294–95).

143. Magallenes v. Superior Court, 213 Cal. Rptr. 547, 552, 554 (Ct. App. 1985).

144. Sindell v. Abbott Labs., 607 P.2d 924, 925 (Cal. 1980).

145. 213 Cal. Rptr. at 552.

146. For example, in *Hamilton v. Beretta*, 264 F.3d 21 (2d Cir. 2001), market share liability (*inter alia*) was utilized to allow survivors of persons killed through the use of illegally obtained handguns to sue handgun manufacturers. The fact does remain, however, that market share liability will be employed more frequently in cases where the offend-

long engaged in cost/benefit analysis to determine whether risky behavior should be pursued despite the potential harms to the public and subsequent civil liability.[147] Finally, the argument conflates punitive damages' dual aims of specific deterrence and general deterrence. Whereas there may be little societal interest in deterring conduct that has long since stopped (specific deterrence), society is also interested in deterring similar *future* conduct (general deterrence).[148] Thus, even where the conduct has long since stopped, it may produce benefits to society (in the form of increased consumer protection) to punish offenders.

2. *Rebutting the Policy Arguments Advanced by* MTBE

The reasoning advanced by *MTBE* to deny punitive damages in market share cases is markedly more thoughtful than that of its predecessors in *Collins* and *Magallenes.* This is likely a result of the court's decision to base its ruling on the established law of New York, rather than *a priori* reasoning.[149] In reaching its conclusion, *MTBE* explicitly disagreed with the reasoning in *Magallenes* "to the extent it held that the use of an alternative method of proving causation leads *inevitably* to the conclusion that punitive damages — or any particular type of relief — can never be awarded."[150] In this regard, the *MTBE* decision represents a progressive step toward reconciliation of punitive damages and market share liability. Nevertheless, in basing its decision on a textual analysis of the *Hymowitz* opinion, the *MTBE* court took sev-

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ing conduct occurred in the past, making it more difficult to identify the liable parties and proceed under traditional tort theory.

147. *See supra*, notes 142–44.

148. Moore, *supra* note 49, at 1464. *See also* RESTATEMENT (SECOND) OF TORTS § 908(a) (1977) ("Punitive damages . . . are awarded against a person to punish him for outrageous conduct and to deter him *and others like him* from similar conduct in the future.") (emphasis added). The dual aims of punitive damages were explicitly embodied in California's "Exemplary Damage" statute, which authorizes the award of punitive damages "for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294(a) (West 2008). Additionally, in light of the conspicuous absence of any temporal limitation on punitive damage awards in the statute, it appears the court has substituted its judgment for that of the legislature.

149. *MTBE*, 517 F. Supp. 2d 662, 667–68 (S.D.N.Y. 2007).

150. *Id.* This conclusion stemmed from the acknowledgement that "market share liability is an evidentiary tool to prove an element of a claim" and a court, therefore "cannot reflexively conclude that using it prevents an award of punitive damages." *Id.* at 670.

eral statements out of context and reached a conclusion which is, in this commentator's opinion, incorrect.

a. Punitive Damage Awards "Magnify" the Inequity of Market Share Liability

In approaching the question whether market share liability under *Hymowitz* could support punitive damage awards, the *MTBE* opinion attempted to extrapolate from the reasoning expressed in *Hymowitz*.[151] The court noted that *Hymowitz* admitted its version of market share liability would "likely result in a disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused in this State."[152] *MTBE* also pointed out that *Hymowitz* had held that liability under its market share theory would be "several only, and should not be inflated when all participants in the market are not before the court in a particular case."[153] From these comments, the *MTBE* court perceived "caution" underlying *Hymowitz*'s reasoning.[154] In light of this caution, the *MTBE* court predicted that *Hymowitz* would have declined to allow punitive damages, which "would magnify any inaccuracies between the harm done and the relief provided by particular defendants."[155]

This argument is both superficially appealing and plausible, but a closer reading of the *Hymowitz* opinion reveals that the quotations relied on by *MTBE* to support its impression of "caution" are taken out of context. The lines *MTBE* cites as a demonstration of *Hymowitz*'s awareness that its market share model would result in "disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused in this State,"[156] were not an acknowledgement by the *Hymowitz* court of "flaws in its method."[157] Rather, *Hymowitz* was detailing a necessary consequence of its decision to base market share lia-

151. *Id.* at 667.
152. *Id.* at 670 (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1077–78 (N.Y. 1989)).
153. *Hymowitz*, 539 N.E.2d at 1078.
154. *MTBE*, 517 F. Supp. 2d at 671.
155. *Id.*
156. *Id.* at 670 (citing *Hymowitz*, 539 N.E.2d at 1077–78).
157. *Id.* at 670.

bility on a national market, rather than a local one.[158] While *MTBE* points out that *Hymowitz*'s national market system admittedly could not "provide a reasonable link between liability and the risk created by a defendant *to a particular plaintiff*,"[159] it omits the three lines that follow. These read:

> Instead, we choose to apportion liability so as to correspond to the *over-all culpability* of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a *fair* method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an *equitable* way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants.[160]

Taken as a whole, these quotations illustrate that the *Hymowitz* court was confident in its approach to the market share question, and not nearly as reluctant as the *MTBE* decision suggests.[161]

Noting that *Hymowitz* perceived its model for market share liability as "fair," "equitable," and "[rational],"[162] it is not apparent *which* "inaccuracies" would be "magnif[ied]" by punitive damage awards in market share cases.[163] A better reading of *Hymowitz* would combine an appreciation for the court's confidence in market share liability's fairness with the court's explicit apportionment of liability so as to "correspond to the over-all *culpability* of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[164] Considering that punitive damages are based on the culpability of the conduct, rather than the plaintiff's injury, it appears that market share liability

158. *Hymowitz*, 539 N.E.2d at 1077.

159. *MTBE*, 517 F. Supp. 2d at 670 (quoting *Hymowitz*, 539 N.E.2d at 1078) (emphasis added).

160. *Hymowitz*, 539 N.E.2d at 1078 (emphasis added).

161. *See also id.* at 1078 n.3 (defending the market share system and deriding the approach of Mollen, J. in dissent).

162. *Id.* at 1077–78.

163. *MTBE*, 517 F. Supp. 2d. at 671.

164. *Hymowitz*, 539 N.E.2d at 1078 (emphasis added).

under *Hymowitz* is particularly amenable to punitive damage awards.[165]

b. Creating an Incentive for Plaintiffs to Rely on Standard Tort Theories

MTBE's secondary justification for denying punitive damages in market share cases was that it would "encourage plaintiffs to make every effort to identify the particular defendants who caused the harm," rather than relying on market share liability, which is "easier."[166] This consideration, while reasonable, is also somewhat questionable. The argument turns on whether proceeding under a market share liability theory is indeed "easier." Were that the case, the only counter-argument would be that denial of punitive damages in all market share cases because lazier plaintiffs might choose to eschew identification of the proper defendant is inequitable to vigilant plaintiffs, who had no choice but to proceed under market share liability. As the long history of the *MTBE* litigation illustrates, however, proceeding under market share liability is arguably more arduous for the plaintiff. Furthermore, the availability of market share liability under *Hymowitz* is dependant on the inability of the plaintiff to identify the actual manufacturer of the product which caused his or her injury.[167] If a plaintiff attempted to proceed under market share liability without truly being unable to identify the responsible manufacturer, the defendant manufacturers would surely move to dismiss that cause of action and the court would have the opportunity to evaluate whether or not market share liability is appropriate for the case. As a result, the plaintiff already has the proper incentives to ensure that she attempts to identify the proper defendant.

165. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977).
166. *MTBE*, 517 F. Supp. 2d at 671.
167. *Hymowitz*, 539 N.E.2d at 1083.

IV. POLICY CONSIDERATIONS IN SUPPORT OF AWARDING PUNITIVE DAMAGES IN MARKET SHARE LIABILITY CASES

Having demonstrated that punitive damage awards are not "irreconcilable" with market share liability,[168] and that the policy considerations offered against punitive damage awards in market share liability cases are fallacious, spurious, or exaggerated,[169] this Note will now examine the policy considerations which weigh in favor of allowing punitive damage awards in market share cases.

A. PREVENTING INEQUITABLE ESCAPE FROM LIABILITY

The central justification of market share liability announced in *Sindell v. Abbott Laboratories* was that the plaintiff's inability to identify the particular manufacturer responsible for her injury stemmed not from any fault on her part, but rather from the nature of our "contemporary complex industrialized society," in which "advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer."[170] Although, by the same token, the manufacturers themselves were not to blame for the lack of evidence of causation, the *Sindell* court felt that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[171] That is to say, it is more equitable to force a culpable manufacturer to pay compensatory damages for an injury it might not have caused, than to allocate the cost onto an innocent plaintiff. To do otherwise would deliver a windfall to defendants, which they would receive by virtue of their participation in an industry which would otherwise insulate them from the consequences of their misdeeds. With this in mind, a new model of tort liability was created.

Making punitive damage awards available in cases based on market share liability would further eliminate the inequity in the relationship between consumers and the manufacturers of generic products. Under the systems of market share liability present-

168. *See infra* pp. 241-44.
169. *See infra* pp. 244-51.
170. 607 P.2d 924, 936 (Cal. 1980).
171. *Id*.

ly available in New York and California, culpable manufacturers who would otherwise be subject to punitive damages are receiving the windfall of insulation from punitive damages by virtue of their participation in a market which hides their identity — a possibility distinctly contrary to the intent originally underlying the creation of market share liability.[172] As one commentator has put it, "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."[173] Now that it has been shown that punitive damages and market share liability are compatible, there remains little reason to allow defendant manufacturers to retain this windfall.

B. PROTECTING THE CONSUMER

As noted above,[174] punitive damage awards are aimed at deterrence and retribution.[175] By awarding damages beyond those caused by the unwanted conduct, society simultaneously punishes the wrongdoer and sends a message to other potential wrongdoers that this conduct will not be tolerated. In the field of products liability, as we have seen, punitive damages take on an even more significant role.[176] While the threat of compensatory damages is ordinarily sufficient to deter misconduct, this may not be true in the commercial context,[177] "where manufacturers may find it more profitable to pay compensatory damages than to remedy defective products."[178]

This is made possible by two characteristics of the present system. First, due to consumer ignorance of their legal right to compensation and the high costs of litigation faced by those who are inclined to file a lawsuit, "manufacturers may escape liability for all but a fraction of the injuries caused by their products."[179]

172. Moore, *supra* note 51, at 1462.
173. *Id.* (citing *Sindell*, 607 P.2d at 936).
174. *See* discussion *infra* pp. 232-34.
175. State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 416 (2003).
176. *See* discussion *supra* pp. 233-34.
177. Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1327 (C.D. Cal. 1983) (citing Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382 (Ct. App. 1980)).
178. *Id.* at 1327 n.4 (citing Owen *supra* note 51, at 1292–95).
179. *Id.* (citing Owen, *supra* note 51, at 1292–95).

Second, compensatory damages may be less expensive than measures taken to remedy the defective product.[180] Combined with the mass distribution of goods which characterizes our age, the potential for a defective product to injure thousands is no stretch of the imagination.[181]

Allowing punitive damages provides important protection to the public by raising the costs of defective products. Accordingly, punitive damages have long been allowed in standard products liability cases.[182] Due to the decisions in *Magallenes* and *MTBE*, however, the manufacturers of generic products have remained largely free from the impact of punitive damages. As a result, the public remains relatively unprotected from misconduct from this sector. Having demonstrated that punitive damages are compatible with market share liability (which allows plaintiffs to reach the manufacturers of generic products), it would be folly to choose against protecting the public by refusing to extend punitive damage awards to market share cases.

C. PROTECTING THE ENVIRONMENT

In addition to providing judicial relief to *physically*-injured plaintiffs, the theory of market share liability can be used to provide relief to claimants suffering injury through environmental torts.[183] Indeed, according to one commentator, it is in toxic and environmental tort cases that "indeterminate defendant" scenarios, such as those dealt with by market share liability, have their "most significant contemporary application."[184] It is easy to imagine any number of cases under which an environmental tort is committed through the actions of several defendants via a fungible product, thereby rendering identification of the responsible tortfeasor impossible. For example, if several factories, engaged

180. *Id.* (citing Owen, *supra* note 51, at 1292–95).

181. *Id*.

182. 63B AM. JUR. 2D *Prods. Liab*. § 1960 (listing cases).

183. *See MTBE*, 379 F. Supp. 2d 348, 377–78 (S.D.N.Y. 2005) (announcing the availability of "commingled product" liability, modeled on market share liability); *see also* Ora Fred Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909, 934–35 (1986) (noting that "the market share theory of Sindell . . . appear[s] to be ripe for constructive utilization in toxic tort litigation").

184. John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2962–63 (2003).

in similar industry, discharged toxic waste product into a nearby body of water, it might be impossible to allocate liability under classical tort theories. Because market share liability may play an important role in the future of environmental litigation, a review of the particular services the award of punitive damages provides in environmental cases is appropriate.

1. *Deterrence and Retribution*

Punitive damages have long been available in environmental law cases based on common law.[185] As in personal injury and product liability actions, liability for punitive damages stemming from particularly egregious environmental torts serves the functions of deterring and punishing such unwanted conduct.[186] The impact of the deterrent and retributive functions of punitive damages in environmental cases, however, differs slightly from the impact of punitive damage awards in other tort cases.[187] Whereas punitive damages in the standard tort context protects *individuals* from harm with their deterrent effect, punitive damages in the context of the natural environment serve to protect "natural value" — that is, natural resources and ecosystem services.[188]

The difference, while subtle, is significant. In standard tort actions, the law typically presumes that compensatory damages can make the injured party whole. By contrast, when natural values are harmed, "there is never a guarantee of restoration to prior conditions."[189] This follows from the character of natural resources, which may be non-renewable. The protective benefits

185. *See, e.g.*, Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986) (upholding punitive damage award to plaintiff who suffered lung injuries caused by exposure to asbestos); Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979) (holding that air pollution could be sued on under a trespass theory, and that punitive damages were recoverable); Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982) (holding that punitive damages could be recovered in an action alleging defendant oil company willfully failed to protect groundwater).

186. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 174 (2004). *But see* W. Kip Viscusi, Symposium, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 288–99 (1998) (arguing that punitive damages have no significant deterrent effect).

187. Alex Sienkiewicz, *Toward a Legal Land Ethic: Punitive Damages, Natural Value, and the Ecological Commons*, 15 PENN ST. ENVTL. L. REV. 91, 95 (2006).

188. *Id.*

189. Sienkiewicz, *supra* note 187, at 103.

provided by the threat of punitive damages in environmental tort cases are therefore particularly important, since they deter conduct which could potentially lead to irreparable damage to natural resources.[190]

If society benefits from the deterrent and retributive effects of punitive damages in environmental tort cases proceeding under traditional liability, it follows that society will also receive similar benefits if punitive damage awards were allowed in environmental tort cases proceeding under market share liability. In fact, because the use of market share liability implies the existence of multiple defendants, the scale of the benefits of punitive damages will similarly be increased.[191] Making punitive damages available in a market share case of *MTBE*'s magnitude, for example, would allow the benefits of punitive damages to be achieved on a truly grand scale. The combination of market share liability with punitive damage awards would further serve the public by allowing society's interests in deterrence and retribution to be vindicated against defendants who, under traditional environmental tort law, would escape these burdens. Having demonstrated that punitive damages are feasible in market share liability cases,[192] the policy considerations all point toward allowing recovery of punitive damages in environmental tort actions proceeding under market share liability.

2. *Creation of Private Attorneys General*

The enforcement of environmental law in the United States is characterized as a "mixed public/private" regime: there is "some centralized bureaucratic enforcement, but it is relatively light."[193] In some instances, arms of the government, such as the Environmental Protection Agency and the Department of Justice, initiate actions against offenders and enforce the body of environmental laws.[194] Since the 1970s, however, government enforce-

190. *Id.*
191. *See supra* at pp. 228-32.
192. *See supra* at pp. 241-44.
193. David Luban, Symposium, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 366 (1998).
194. *See* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (1995) (reviewing the typical process involved in government enforcement of environmental laws).

ment has been supplemented by suits brought by private individuals and private environmental organizations.[195] Encouraging this trend, Congress has included citizen suit provisions in virtually all of the major environmental laws.[196] Typical citizen suit provisions can be found in the Clean Air Act,[197] the Clean Water Act,[198] and the Resource Conservation and Recovery Act.[199]

The enforcement of environmental statutes by private parties, however, generally will not occur without something more than statutory permission to bring suit.[200] That is, because a successful action for enforcement of environmental statutes will typically result in nonmonetary benefits to the public at large, rather than damage awards to the individual plaintiffs, very few private plaintiffs can afford to finance such litigation.[201] Appreciating this situation, Congress has included fee-shifting incentives to its environmental statutes.[202] These provisions allow successful plaintiffs to recover costs of litigation, including attorney and expert witness fees.

Much as fee shifting provisions encourage private enforcement of statutory environmental law, punitive damage awards in common-law cases encourage private enforcement of tort-based environmental law.[203] To the extent that the existence of environmental tort law expresses society's desire to protect the environment, punitive damage awards in environmental tort actions advance the interests of society. By motivating private citizens to enforce environmental norms and supplement government enforcement efforts, punitive damage awards serve as a potential "bounty" for the successful plaintiff.[204] Extrapolating from Congress' long-held policy of creating incentives for private enforcement of statutory environmental law,[205] one might even conclude

195. PLATER ET AL., *supra* note 186, at 1027–28.
196. *Id.*
197. 42 U.S.C. § 7604 (2006).
198. 33 U.S.C. § 1365 (2006).
199. 42 U.S.C. § 6972 (2006).
200. PLATER ET AL., *supra* note 186, at 1039.
201. *Id.*
202. *See* 42 U.S.C. § 7604(d) (2006); 33 U.S.C. § 1365(d) (2006); 42 U.S.C. § 6972(e) (2006) (fee-shifting provisions corresponding to the citizen-suit rights of the statutes named *supra* notes 197-99).
203. Luban, *supra* note 193, at 366–67.
204. *Id.*
205. *See generally* Part IV.C.

that the creation of private attorneys general through punitive damage awards in environmental tort actions furthers the will of Congress.

Finally, the motivation provided by punitive damage bounties in environmental tort actions serves society in an important — though slightly different — way than punitive damage awards in other tort actions. The private attorneys general created through punitive damage awards in non-environmental tort actions are beneficial because they enforce the law, thereby increasing public safety.[206] By contrast, the additional enforcement of environmental laws achieved by the availability of punitive damages confers an indirect benefit to society through protection of natural values, which are inherently public.[207]

The preceding analysis of the various benefits attending the award of punitive damages in the average environmental tort action can be repeated in the context of environmental tort actions proceeding under market share liability. Because reliance on market share liability implies the presence of multiple defendants, the scale of private environmental law-enforcement would be correspondingly increased. Moreover, the availability of punitive damage awards in environmental tort cases proceeding under market share liability would advance society's interests by creating incentives for private law enforcement against defendants who would escape suit altogether, were punitive damages unavailable. Finally, allowing recovery of punitive damages in environmental tort actions relying on market share liability would confer a benefit to the public in the form of increased protection of natural values. Accordingly, the policy considerations counsel allowing punitive damage recoveries in environmental tort actions proceeding under market share liability.

D. AN ARGUMENT BASED ON THE (POSSIBLE) FUTURE ROLE OF MARKET SHARE LIABILITY

Since resolving the then-novel problems of identification presented by DES cases, market share liability has developed into a more robust and useful theory. As illustrated by the *MTBE* liti-

206. *See* discussion *supra* p. 234; *see also* Owen, *supra* note 51, at 1278.
207. Sienkiewicz, *supra* note 187, at 91–92.

gation, market share liability has been applied to cases somewhat outside the realm of typical products liability actions.[208] Indeed, according to one commentator, "market share liability theories are particularly well suited to toxic tort litigation."[209]

The utility of market share liability comes from the doctrine's ability to accommodate the factual complexity of modern litigation in toxic tort and products liability.[210] Tort law is "a continually expanding field."[211] The majority of tort law has developed to accommodate what the American Law Institute has dubbed "first tier" actions — accidents where an individual defendant causes harm to a stranger.[212] Increasingly, however, "second tier" torts (including product defect cases) and "third tier" torts (including "mass" torts where toxic exposure to many plaintiffs may, many years later cause cancer and other illnesses) have come before the courts.[213] As a result, the courts are faced with unprecedented scenarios, where the traditional rules of negligence cannot equitably accommodate the parties.[214] Exotic theories of tort liability — like market share liability — are better able to address the complexities of these "third tier" torts. Consequently, market share liability will gradually become more than a niche theory rarely relied on.[215]

If the courts do, in fact, respond to the changing face of tort law by adopting new theories like market share liability, the thin reasoning underlying the denial of punitive damage awards in cases like *Magallenes* will have to be revisited and addressed. Furthermore, with an increase in the popularity of market share liability, the perception of plaintiffs who rely on that tool as somehow less meritorious than plaintiffs proceeding under classic tort doctrine will be eroded.[216] The incongruity of denying puni-

208. 517 F. Supp. 2d 662 (S.D.N.Y. 2007).

209. Damron, *supra* note 5, at 506 (citing 1-3 Guide to Toxic Torts § 3.09 (2005)).

210. Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980).

211. Smith v. Cutter Biological, Inc., 823 P.2d 717, 724 (Haw. 1991).

212. AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURIES — REPORTER'S STUDY [hereinafter ALI STUDY] 9–10 (1991).

213. *Cutter Biological, Inc.*, 823 P.2d at 428 (citing ALI STUDY 9–10).

214. *Id.* at 724; *see also Sindell*, 607 P.2d at 936.

215. For a more focused argument that market share liability — specifically, the "commingled product" theory enunciated by the *MTBE* court — will increase in significance, see Damron, *supra* note 5.

216. *See, e.g.*, *MTBE*, 517 F. Supp. 2d 662, 671–72 (S.D.N.Y. 2007) (noting that "a plaintiff who seeks punitive damages should [ ] be required to identify the defendants that

tive damages to otherwise meritorious plaintiffs will then be exposed. By the same token, if market share liability becomes more commonly used, the windfall bestowed upon otherwise culpable defendants by the unavailability of punitive damages in these cases will be highlighted and subjected to criticism.

V. CONCLUSION

The doctrine of market share liability, a modern evidentiary tool used to allow plaintiffs to recover despite their inability to demonstrate causation is a useful addition to the body of tort law. Allowing the recovery of punitive damages in cases proceeding under the market share liability model is not only feasible, but advisable. The arguments which have been arrayed against the combination of these two tort doctrines do not hold up to rigorous analysis and should be rejected.

With an eye toward the continuing advancement of tort law and the concerns of the public in this day and age, it is time for the courts to shake off their reluctance to expand market share liability and their hesitance at the thought of allowing the cherished traditions of tort law to be supplemented. By allowing recovery of punitive damages in market share liability actions, the courts will not only advance the aims of these doctrines in themselves, but will also unleash the synergistic benefits the doctrines can convey together. Thus, one small (though progressive) step will further society's interests in deterring and punishing egregious conduct, allowing plaintiffs to *fully* recover after suffering injury from defective, fungible products, encouraging of law enforcement, protecting the consumer and environment, and facilitating the continued evolution of the law of tort.

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caused the harm rather than *lumping all defendants together to find the deepest pockets among them*") (emphasis added).