IN THE SUPREME COURT OF FLORIDA

CELOTEX CORPORATION,

Petitioner,

vs.

LEE LOYD COPELAND, et al.,

Respondents.

CASE NO. 65,124

OWENS CORNING FIBERGLAS CORPORATION,

Petitioner,

vs.

LEE LOYD COPELAND, et al.,

Respondents.

CASE NO. 65,154

ON CERTIFICATION FROM THE
THIRD DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
Jon W. Zeder
Douglas M. Halsey
1000 Southeast Bank Building
Miami, Florida 33131
(305) 350-1100

MAGUIRE, VOORHIS & WELLS, P.A.
Carl D. Motes
Kimberly A. Ashby
Two South Orange Plaza
Post Office Box 633
Orlando, Florida 32802
(305) 843-4421

Attorneys for the Florida Defense Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE

The Florida Defense Lawyers Association (the "Association") is a Florida non-profit corporation composed primarily of members of the Florida Bar who are engaged in trial practice in the courts of this State. One of the objectives of the Association is to assist in the development and progress of Florida's laws and legal procedures. Members of the Association represent a variety of companies which manufacture products for use in industry and in the home. These companies are occasionally sued for the alleged defectiveness of their products. The development of products liability law in Florida and the issue of great public importance before this Court - whether to adopt market share liability - are therefore of great significance to the Association and its members.

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association adopts the Statement of the Case and Statement of the Facts in the Initial Brief of Petitioner The Celotex Corporation.

ISSUE PRESENTED

Whether market share liability as announced in Sindell v. Abbott Laboratories, 25 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980), should be adopted in Florida.

INTRODUCTION

In response to the unique problem confronted by women injured by the drug diethylstilbestrol ("DES"), the Supreme Court of California fashioned a new tort remedy which eliminated the necessity for the injured plaintiff to identify the manufacturer of the product which caused her injuries. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980). This new remedy, known as market share liability, was the California court's answer to the following question:

> May a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Sindell, 607 P.2d at 925. The California court answered the question affirmatively and decided that a manufacturer of a defective product could be held liable in damages for injuries sustained from an identical product manufactured by another company, unless the manufacturer could prove the plaintiff's injuries were not caused by its product.

The issue of great public importance now before this Court is whether Florida should adopt market share liability as announced in Sindell. The issue comes to this Court in a factual setting completely different from that presented to the California Supreme Court in Sindell. The

Plaintiff[1/] in this case is a boilermaker who alleges injury as a result of exposure to asbestos products during the course of his employment. The Plaintiff worked with asbestos products over an extended period of time, had an opportunity to observe the products he worked with, and has positively identified the manufacturers of some of those asbestos products.[2/] The asbestos products which allegedly caused Plaintiff's injuries are not fungible. There are several types of asbestos, thousands of asbestos products, and numerous asbestos manufacturers selling varying amounts of different products. Thus, the question asked by the California Supreme Court in Sindell must be completely reformulated here:

> May a plaintiff, injured as a result of the asbestos products he worked with, who can positively identify some of those asbestos products as having been manufactured by certain companies, hold liable for his injuries other companies whose asbestos products he is unable to identify?

This Court should answer the question with a resounding "No." Market share liability is a totally impracticable method for apportioning liability in asbestos cases.

1/ Plaintiffs, Respondents in this Court, are Lee Loyd Copeland and his wife. For purposes of this Amicus Brief, all references will be made to Plaintiff/Respondent Lee Loyd Copeland ("Plaintiff").

2/ At his deposition, Plaintiff identified asbestos products manufactured by ten of the original defendants or their predecessors (Depo. 59-66, 259-60, 265-66, 272, 288, 297, 298, 300, 337-38, 347).

As the overwhelming majority of courts considering the doctrine have concluded, relieving plaintiffs from the responsibility of identifying the manufacturers whose products allegedly caused their injuries violates fundamental principles of products liability law and is totally unwarranted in asbestos cases.

ARGUMENT

I

MARKET SHARE LIABILITY IS IMPRACTICABLE IN ASBESTOS CASES

> With slight technical modification necessitated by the nature of the asbestosis injury, we adopt the reasoning of the California Court and its conclusion with respect to market share liability. 3/

With these words, a majority of one panel of the Third District Court of Appeal engrafted onto a Florida case, brought by a plaintiff allegedly injured as a result of exposure to asbestos, a theory conceived in California for cases based on injuries caused by DES. In adopting market share liability, the panel not only rejected the established requirement of causation in products liability cases, but also glossed over the numerous practical considerations which render market share liability unworkable in asbestos cases. Asbestos and DES cases are so completely dissimilar

---

3/ Copeland v. Celotex Corp., 9 F.L.W. 537, 539 (Fla. 3d DCA 1984).

that, even with "slight technical modification," the panel's formulation of market share liability creates far more problems than it solves.

A. Asbestos Products Are Not Fungible.

DES is a generic term for synthetic estrogen which numerous companies produced between 1941 and 1971 as a medication to prevent miscarriages.[4/] In 1971, the Food and Drug Administration banned the further sale and use of synthetic estrogen for the prevention of miscarriages and ordered drug companies to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.[5/] DES was fungible - the product sold by the various companies was chemically identical and was, to a large extent, marketed generically. Its fungibility was one of the most important factors in the California court's decision[6/] to adopt market share liability in response to the unique problem of DES plaintiffs.[7/]

4/ Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 925, cert. denied, 449 U.S. 912 (1980).

5/ 36 Fed. Reg. 21,537-38 (1971).

6/ Sindell, supra, 607 P.2d at 936-37; see Fischer, Products Liability - An Analysis of Market Share Liability, 34 Vand. L. Rev. 1623, 1652-53 (1981).

7/ The unique problem of DES plaintiffs was that of product identification. The plaintiffs were exposed in utero to DES, a generic drug manufactured by hundreds of companies, and thus were unable to identify which specific company manufactured the product which caused their injuries.

Asbestos products are not fungible and are not produced according to a single formula. Asbestos is a generic term covering several fibrous silicate materials, and is found in more than 3,000 products.[8/] It has been used for numerous purposes for over 2,000 years.[9/] The thousands of asbestos products which have been used in this country contain varying amounts of asbestos fibers. Thus, unlike DES, the potential health hazard posed by asbestos products is not uniform.

The lack of uniformity in the threat posed by asbestos products stems not only from the different amounts of asbestos but also from the different types of asbestos fibers contained in asbestos products. There are six asbestos minerals of commercial importance: chrysotile, amosite, crocidolite, anthophyllite, tremolite and actinalite.[10/] These fibers differ in their physical characteristics and in their potential health hazard.[11/]

8/ Atkins Research and Development, Asbestos: Review of Uses, Health Effects, Measurement and Control, 13 (1977), hereinafter referred to as "Review."

9/ Id., at 5. See National Cancer Institute, Asbestos: An Information Resource, 1 (1981), hereinafter referred to as "Resource."

10/ Review, supra note 8, at 5.

11/ Resource, supra note 9, at 27. See, e.g., McDonald, The Health of Chrysotile Asbestos Mine and Mill Workers of Quebec, 28 Archives of Envtl. Health 61 (1974); Enterline, Type of Asbestos and Respiratory Cancer in the Asbestos Industry, 27 Archives of Envtl. Health 312 (1973); Weiss, Mortality of a Cohort Exposed to Chrysotile Asbestos, 19 J. Occupational Med. 737 (1977).

In addition to the amount and type of asbestos fibers it contains, the nature of the asbestos product and the manner of its intended use will affect its potential hazardousness. Some asbestos products, because of the manner in which the asbestos fibers are imbedded in the product or because of the use for which they are intended, pose little or no risk to the user. Other asbestos products, which must be mixed, cut or prepared, may pose a higher degree of risk than those which require little or no preparation prior to use.

In summary, each asbestos product poses a different potential health hazard because of: (i) the amount of asbestos in the product; (ii) the type of asbestos fiber in the product; (iii) the manner in which the asbestos is contained in the product; and (iv) its intended use. As a result, the wide variety of asbestos products do not pose a uniform health hazard. The uniformity of defectiveness in a fungible product, such as DES, is the essential element of market share liability. Because that uniformity is totally lacking in the asbestos industry, market share liability cannot and should not be applied to asbestos cases.

B. The Relevant Market Will Be Impossible To Define.

The lack of uniformity in asbestos products destroys the premise of equal fault on which market share liability is based. In Sindell, the California Supreme Court theorized

that apportionment of liability among the defendants according to each manufacturer's percentage of the total market for DES would approximately equal the damage each caused by the DES it manufactured. Such equivalence was predicated on a presumed direct relationship between the total amount of DES each manufacturer sold and the number of injuries caused by DES. But, as discussed above, the broad spectrum of diverse asbestos products does not pose a uniform threat. Thus, there is no direct relationship between the volume of asbestos products sold and the number of injuries caused by exposure to those products. Moreover, as a practical matter, it will be impossible to define the relevant markets for apportioning liability among defendant manufacturers of asbestos products.

The majority opinion below offers no guidelines for defining the relevant product and geographic markets or for determining the relevant time periods within which the market share calculations should be made. Judges and juries will be confronted with countless questions if market share liability is adopted in asbestos cases: Does the relevant product market include all asbestos products or just those to which the plaintiff alleges he was exposed? Are separate product markets to be established for each type of asbestos product to which he alleges exposure, e.g., cement, pipe covering, cloth, and tile? Is the manufacturer's liability then determined according to its percentage of the market for each separate product? What adjustments are made to reflect that the plaintiff worked more with certain asbestos

products than with others? Should a further adjustment be made for the relative degree of hazardousness of the various products? How are damages and liability determined for the asbestos products with which the plaintiff did not work but to which he was indirectly exposed through their use by others? Is the relevant geographic market a composite of the named defendants' respective product markets in the numerous locations where the plaintiff worked, or is it the national market for the relevant products during the relevant time period? What is the relevant time period? Is it a continuum dating from the plaintiff's first exposure to asbestos through the date of his last exposure, or are the relevant time periods the actual dates when the plaintiff worked with or was exposed to asbestos products? Are separate product market share calculations to be done for each separate exposure? Relevant questions of this type are virtually endless.

Defining the liability of the individual defendants will be difficult not only because of the problem in defining the relevant geographic and product markets and the time periods within which the market shares should be calculated, but also because certain manufacturers of asbestos products, including the largest manufacturer of asbestos products in the world, Johns-Manville Corporation, have

filed for bankruptcy.[12/] Other asbestos manufacturers may not be subject to the jurisdiction of Florida courts. Unless the plaintiff's recovery is reduced by the market shares allocable to those companies not before the trial court, other defendants will be contributing more than their "share," even assuming the relevant product and geographic markets could be defined.

Market share liability also provides no mechanism for reducing the defendants' liability for the known harmful effects of non-asbestos products which may have caused or contributed to the plaintiff's injuries. It is well documented that asbestos insulation workers who smoke have a 19-fold higher incidence of lung cancer than non-smoking asbestos workers.[13/] Thus, the lung cancer of the cigarette smoking asbestos worker may have been caused or exacerbated by smoking.[14/] But market share liability makes no adjustment for the harm caused by non-asbestos products, whose

---

12/ Johns-Manville Corporation and its affiliates filed petitions for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code on August 26, 1982, in the Southern District of New York, Case Nos. 82-B-11656 through 11676 (BRL). Amatex Corporation filed a Chapter 11 Petition in the Eastern District of Pennsylvania on November 1, 1982, Case No. 82-05220(K). UNR Industries, Inc. and its affiliates filed Chapter 11 Petitions in the Northern District of Illinois on July 29, 1982, Case Nos. 82-B-9841 through 9851.

13/ Selikoff, Seidman and Hammond, Mortality Effects of Cigarette Smoking Among Amosite Asbestos Factory Workers, 65 J. Nat'l Cancer Inst. 507, 512 (1980).

14/ Id. The authors concluded, "had it not been for cigarette smoking, many of the excess deaths [among the asbestos workers studied] would have been avoided." Id., at 512.

manufacturers arguably might be included among those having a share of "the market."15/

The alleged fairness of market share liability is one of the arguments most frequently relied on in favor of its adoption. Proponents of the doctrine contend that by holding a manufacturer liable in a percentage amount which approximates its share of the market for the product causing the plaintiff's injuries, the manufacturer's liability will be roughly equivalent to the total damage its product in fact caused, even if its product did not cause the damage complained of by the named plaintiff. But as shown above, this logic, tenuous as it may be in a DES case, is specious in an asbestos case.16/ Because there are literally thousands of heterogeneous asbestos products, a manufacturer's "market share", however defined, cannot and should not be equated with its share of liability for a plaintiff's injuries from

---

15/ See Starling v. Seaboard Coast Line Railroad, 533 F.Supp. 183 (S.D. Ga. 1982); see also Note, Market Share Liability: An Answer To The DES Causation Problem, 94 Harv. L. Rev. 668 (1981) in which the author noted that the plaintiffs' cancer in Sindell was uniquely caused by DES. "In many cases injury cannot be isolated to the industry in question; often the product merely increases the incidence of a common disease . . . The "market" would need to include all possible sources of injury. This would require a virtually impossible calculation of the probability that the industry in question caused the injury relative to other possible causes and would present extraordinary problems of proof." Id., at 678 and n.55.

16/ "In contexts in which the product in question is not uniformly harmful, total volume sold will not correspond to injury caused, since the total risk created by any manufacturer would be a function of both its share of the market and the relative harmfulness of its product. Thus unadjusted market share data cannot be employed." Id., at 679.

exposure to asbestos. This key equivalence being absent, market share liability must be rejected for application in asbestos cases.

II

THE MAJORITY OF COURTS HAVE REJECTED MARKET SHARE LIABILITY

Only a few courts have followed the California Supreme Court's decision in Sindell and adopted market share liability in DES cases.[17/] Most courts have recognized Sindell as an unwarranted deviation in the development of products liability law.[18/]

17/ See McElhaney v. Eli Lilly & Co., 564 F.Supp. 265 (D.S.D. 1983) (adopting market share liability as announced in Sindell). Other courts have followed Sindell only in part: Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (Law. Div. 1980) (adopting hybrid of alternative liability and market share liability for DES case); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979) aff'd. as modified, 418 Mich. 311, 343 N.W.2d 164 (1984) (adopting alternative liability for application in DES case); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984) (adopting new mechanism of recovery for DES plaintiffs based on contributory negligence and market share liability theories).

18/ Morton v. Abbott Laboratories, 538 F.Supp. 593, 599 (M.D. Fla. 1982); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Mizell v. Eli Lilly & Co., 526 F.Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F.Supp. 1004 (D.S.C. 1981); Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171, (1982).

Attempts to extend market share liability to asbestos cases have been consistently rejected.[19/] No state supreme court or federal circuit court has approved the use of market share liability in an asbestos case, nor has any state appellate court, with the exception of the majority opinion below.

The three trial courts which initially endorsed market share liability in asbestos cases have since reversed their prior orders.[20/] In fact, there is only one reported case of a trial court permitting a plaintiff to plead a Sindell theory of recovery, and that court relied on another

---

19/ See, e.g., Starling v. Seaboard Coast Line Railroad Co., 533 F.Supp. 183 (S.D. Ga. 1982); Garcia v. Johns-Manville Sales Corp., Case No. 81-649-Civ-T-GC, (M.D. Fla. 1981); In re Related Asbestos Cases, 543 F.Supp. 1152 (N.D. Cal. 1982); Prelick v. Johns-Manville Corp., 531 F.Supp. 96 (W.D. Pa. 1982); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983) cert. denied, 80 L.Ed.2d 129 (1984); Hannon v. Waterman Steamship Corp., 567 F.Supp. 90 (E.D. La. 1983).

20/ In Hardy v. Johns-Manville Sales Corp., 509 F.Supp. 1353 (E.D. Tex. 1981), rev'd. on other grounds, 681 F.2d 334 (5th Cir. 1982), Judge Parker, reversed himself and entered an order prohibiting discovery premised on market share liability, concluding that it departed from traditional tort theories of recovery in Texas and was not likely to be approved by the Fifth Circuit. In Burke v. Johns-Manville, Case No. C-1-81-209 (S.D. Ohio) the Judge originally permitted the plaintiff to proceed under market share liability but later rejected the doctrine because plaintiff could identify some of the manufacturers whose products her decedent was exposed to. In Dombroff v. Armstrong Cork Co., Asbestos Litigation Rep. 4,978, Case No. 79-14048 (12) (Fla. 11th Cir. Ct. May 14, 1982) Judge Harold Vann withdrew a previous order which had permitted the plaintiff to proceed under Sindell.

court's preliminary approval of the theory, which later was reversed.[21/]

The same reasons appear throughout the opinions rejecting market share liability in asbestos cases: (a) at least some of the manufacturers with whose asbestos products the plaintiffs worked can be identified, either through personal testimony, co-workers, shipping records, or invoices of the plaintiff's employers; (b) unlike DES, asbestos products are not fungible and vary in degree of potential hazard; (c) the relevant markets and market shares will be impossible to define; (d) many plaintiffs were exposed to asbestos products over an extended period, and some of the companies which manufactured asbestos products during the relevant times may no longer be in business or may not be subject to the jurisdiction of the court where the plaintiff seeks relief; (e) by eliminating the requirement that plaintiff show causation in fact, innocent defendants will have to pay for injuries caused by others; and (f) adoption of market share liability in an industry where

---

21/ In Herbeck v. Johns-Manville Sales Corp., Asbestos Litigation Rep. 4,698, Case No. SA-80-CA-520 (W.D. Tex. 1982) the court entered an order allowing the plaintiffs to amend their complaint to allege "enterprise liability" in accordance with Sindell. The Court relied on Judge Parker's first order in Hardy in which he opined that Texas would probably adopt some sort of Sindell-type theory of recovery for asbestos plaintiffs. Judge Parker later recanted this position. See note 20, supra. In view of the limited nature of the order and the later decision of Judge Parker in Hardy, Herbeck is of limited significance.

products are not fungible and are not generically marketed will create a disincentive for the invention of new and better products. These factors are discussed in the following survey of cases which have considered and rejected the application of market share liability in asbestos cases.

The first reported decision to consider and reject market share liability in an asbestos case was from the United States District Court in Tampa, Florida, Garcia v. Johns-Manville Sales Corp., Case No. 81-649-Civ-T-GC, (M.D. Fla.).22/ In that case Judge Carr denied plaintiffs' request to apply market share liability, stating that even if the Florida Supreme Court were to follow Sindell in a DES case, there were too many key factual distinctions to make it likely Florida would adopt Sindell in an asbestos case. Specifically, Judge Carr noted there are a wide variety of asbestos products containing differing amounts of asbestos. Thus, unlike DES, which was uniformly defective and often generically marketed, the defendants' asbestos products posed no standardized threats to plaintiffs. In addition, the plaintiffs in Sindell were exposed to DES in utero, while the plaintiffs in asbestos cases were typically working adults when they came into contact with the defendants' products and had an opportunity to observe and remember the products they used. Elimination of the requirement that

---

22/ A copy of the Garcia order is contained in the Appendix to the Initial Brief of the Celotex Corporation at A-12.

plaintiffs establish causation-in-fact, Judge Carr concluded, simply was not justified in asbestos cases.[23/]

Judge Carr's order in Garcia was followed in Starling v. Seaboard Coast Line Railroad Co., 533 F.Supp. 183 (S.D. Ga. 1982), in which the court ruled that market share liability "would result in an unprecedented departure from traditional Georgia tort law." 533 F.Supp. at 186. The court recognized that market share liability was not derived from joint venture principles, but "eliminate[d] proof of causation strictly for public policy reasons." 533 F.Supp. at 187. It found no such public policy grounds in asbestos cases, and identified three reasons for rejecting market share liability. First, the court was unwilling to impose a radical new theory which represented a "quantum leap toward render[ing] every manufacturer an insurer not only of the safety of its own products, but of all generically similar products made by others." 533 F.Supp. at 190, citing Ryan v. Eli Lilly & Co., 514 F.Supp. 1004, 1017 (D.S.C. 1981). The court believed such a drastic revision in tort law should come from the state legislature. Second, market share liability would open a Pandora's box of undesirable economic and social effects, including the inability of asbestos manufacturers to spread losses by insurance.[24/] If extended to

---

23/ Maryland courts have rejected Sindell on similar grounds. See Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982), a DES case rejecting market share liability, which discusses two Maryland asbestos cases which have rejected market share liability.

24/ See Parnell, Industry Wide Litigation, Where We've Been And Where We're Going, 48 Ins. Couns. J. 296 (1981).

non-fungible, non-generically marketed products, market share liability would result in "over-deterrence" and would create both a disincentive to produce safe products and an incentive to produce unsafe products.[25/] Third, allocation of damages would be inherently unfair in asbestos cases. As in Garcia, the court noted that asbestos products are not fungible commodities, and are not uniformly harmful, and that other products, such as cigarettes, may have caused or contributed to the injuries. 533 F.Supp. at 191. Thus, based on (i) Georgia's preference to change existing products liability law through legislation; (ii) the undesirable social and economic effects which could result; and (iii) the practical difficulties in attempting to make a fair allocation of damages among manufacturers in an industry as heterogeneous as the asbestos industry, the court rejected market share liability for application in asbestos cases.

Courts have also rejected market share liability in asbestos cases where the plaintiffs have been able to identify specific products of the named defendants. When the California Supreme Court ruled that the Sindell plaintiffs would not have to prove which manufacturer caused their injuries, it was responding to a unique situation: plaintiffs

---

25/ Note, Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Indentification, 76 Nw. U.L.Rev. 300, 316-21 (1981); Fischer, supra, note 6 at 1652-54.

were exposed in utero to DES, a fungible product which was generically marketed. But where a plaintiff has been exposed to a variety of products which may have caused or contributed to his injury and is able to identify at least one of the manufacturers of such products, there is no reason to relieve the plaintiff from the requirement of establishing causation. This was recognized in Prelick v. Johns-Manville Corp., 531 F.Supp. 96 (W.D. Pa. 1982) which rejected Sindell because the plaintiff was able to identify the asbestos products of eleven of the named defendants. The court stated:

> [w]e conclude, therefore, that where, as here, the plaintiff is able to identify at lease one manufacturer or supplier whose product caused plaintiff's injury, the "Sindell" or "enterprise" theory is inapplicable.

531 F.Supp. at 98. The decision in Prelick, based solely on the plaintiff's ability to identify the asbestos products of at least one manufacturer defendant, is precisely on point: Plaintiff Lee Loyd Copeland has identified the asbestos products manufactured by ten of the defendants or their predecessors.[26/]

Prelick was cited with approval in an order denying a motion for use of market share theory, entered in In re Related Asbestos Cases, 543 F.Supp. 1152 (N.D. Cal. 1982). The court carefully examined the policy considerations on

---

26/ See note 2, supra.

which Sindell was based and concluded that market share liability was not intended to be applied in asbestos cases. 543 F.Supp. at 1158. The court noted that, unlike DES, asbestos fibers are not a fungible commodity and are of several varieties, each used in varying quantities by different manufacturers. The court also recognized that defining the relevant markets in terms of products and geography would be an extremely complex task.[27/] But more important than the practical difficulties in ascertaining shares, the court stated:

> [u]nlike the plaintiff in Sindell, who was completely unable to identify which defendant had manufactured the product which her mother had ingested, plaintiffs in the present case apparently plan to call as witnesses individuals who will testify that plaintiffs were exposed to asbestos products manufactured by defendants. Where a plaintiff does have information as to the identity of the defendants who caused his alleged injury, the rationale for shifting the burden of proof in Sindell is simply not present.

543 F.Supp. at 1158. Thus, in California, where market share liability was conceived, courts have refused to extend the doctrine to asbestos cases.[28/]

27/ Recent studies have shown that market definition is by far the most lengthy and expensive part of an antitrust trial. Market definition issues would be the most complicated aspect of the trial if Sindell were adopted in an asbestos case. See Note, supra note 25, at 325.

28/ See also Aguilar v. Johns-Manville Corp., Asbestos Litigation Rep. 3,882, Case No. 460769 (San Diego County Ct. 1981) in which the court refused to apply market share liability in an asbestos case.

The opinion in In re Related Asbestos Cases, supra, was relied on Hannon v. Waterman Steamship Corp., 567 F.Supp. 90 (E.D. La. 1983), which held that asbestos litigation is an inappropriate context in which to apply market share liability. In addition to the reasons set forth in In re Related Asbestos Cases, supra, the court observed:

> A fourth practical difficulty with market share theory in this context would be the prominent absence from the calculation of Johns-Mansville, which is, according to the manufacturer's brief, the largest asbestos manufacturer in the United States.

567 F.Supp. at 92. When the dominant market power is not a defendant there is a greater likelihood that manufacturers not responsible for the plaintiff's injuries will be forced to pay damages. In addition, if only Florida adopts market share liability in asbestos cases, liability will fall unevenly on manufacturers subject to the jurisdiction of Florida's courts.[29/] The court concluded that Louisiana would not follow Sindell.

That Louisiana would not permit market share liability to be used in an asbestos case also was recognized by the Fifth Circuit in Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983), cert. denied, 80 L.Ed.2d 129 (1984). In that case, as in Prelick, the plaintiff was able to recall the brand names of some of the products to

---

29/ See Fischer, supra, note 6 at 1647-48.

which he was exposed. Under those circumstances, there was no justification for adopting market share liability, and the court affirmed summary judgment in favor of four of the defendants whose products plaintiff had failed to identify. The court noted there was no precedent in Louisiana for the adoption of a theory which so radically departed from traditional principles of tort law.

CONCLUSION

Although the attempt to expedite and streamline asbestos cases should be applauded, market share liability is not the solution to this mass tort litigation. Most asbestos plaintiffs, or other witnesses or evidence, can be used to identify one or more of the manufacturers with whose asbestos products the plaintiff worked. The Plaintiff here already has identified asbestos products of ten of the defendants or their predecessors. Thus, unlike DES plaintiffs, there is no reason to eliminate the causation-in-fact requirement for asbestos plaintiffs. In addition, the determination of what share of the market the numerous manufacturers had during varying time periods for hundreds of different asbestos products of varying degrees of hazard would create more proof problems than it would eliminate. Extending market share liability to products which are not uniformly defective and do not present the same risk would have an inhibiting effect on industry.

Other jurisdictions have carefully examined the potential repercussions from the adoption of market share liability in asbestos cases and concluded that it should not be utilized. This Court should join these jurisdictions, and reject the theory of market share liability in asbestos cases.

THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK

Jon W. Zeder
Douglas M. Halsey
1000 Southeast Bank Building
Miami, Florida 33131
(305) 350-1100

and

MAGUIRE, VOORHIS & WELLS, P.A.
Carl D. Motes
Kimberly A. Ashby
Two South Orange Plaza
Post Office Box 633
Orlando, Florida 32802
(305) 843-4421

Attorneys for the Florida Defense
Lawyers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amicus Curiae Brief Of the Florida Defense Lawyers Asssociation was served by mail this 21st day of May, 1984, upon the following:

Jack E. Thompson
Thompson & Clark
25 Southeast Second Avenue
516 Ingraham Building
Miami, Florida 33131

James W. Kynes
Jim Walter Corporation
Post Office Box 22601
Tampa, Florida 33622

Susan J. Cole
2801 Ponce de Leon Blvd.
Suit 550
Coral Gables, Florida 33134

Thomas M. Sherouse
Corlett, Killian, Hardeman,
McIntosh and Levi, P.A.
116 West Flagler Street
Miami, Florida 33130

Harold C. Knecht, Jr.
Suite 810 - Douglas Centre
2600 Douglas Road
Coral Gables, Florida 33134

Peter H. Murphy
800 Peninsula Federal Building
200 Southeast First Street
Miami, Florida 33131

Steven Rudin
19 West Flagler Street
10th Floor
Miami, Florida 33130

Jane N. Saginaw
8333 Douglas Avenue
Suite 1050
Dallas, Texas 75225

Thomas C. MacDonald, Jr.
Shackleford, Farrior, Stallings
& Evans
Post Office Box 3324
Tampa, Florida 33601

Steven R. Berger, P.A.
Suite B-8
8525 Southwest 92nd Street
Miami, Florida 33156

Louis S. Robles
Robles & Robles, P.A.
75 S.W. 8th Street, Suite 401
Miami, Florida 33130

James C. Blecke
Rodd Buell
2400 First Federal Building
One Southeast Third Avenue
Miami, Florida 33131

Michael K. McLemore
799 Brickell Plaza
Suite 900
Miami, Florida 33131

James C. Rinaman, Jr.
Southeast Bank Building
Post Office Box 447
Jacksonville, Florida 32201

Lewis G. Gordon
1010 Concord Building
66 West Flagler Street
Miami, Florida 33130

Arthur H. Taylor
1107 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Robert M. Klein
One Biscayne Tower
Suite 2400
Miami, Florida 33131

Robert L. Vessel
Post Office Box 345118
Coral Gables, Florida 33114

679-L