IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	CASE NO. 65,124
OWENS-CORNING FIBERGLAS CORP., Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	CASE NO. 65,154

DISCRETIONARY PROCEEDING TO REVIEW A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, AS INVOLVING A QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER, OWENS-CORNING FIBERGLAS CORP.

James E. Tribble and
Diane H. Tutt, of
BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Petitioner,
Owens-Corning Fiberglas
Corp.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	)	CASE NO. 65,124
OWENS-CORNING FIBERGLAS CORP., Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	)	CASE NO. 65,154

DISCRETIONARY PROCEEDING TO REVIEW A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, AS INVOLVING A QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER, OWENS-CORNING FIBERGLAS CORP.

James E. Tribble and
Diane H. Tutt, of
BLACKWELL, WALKER, GRAY, POWERS, FLICK & HOEHL
Attorneys for Petitioner, Owens-Corning Fiberglas Corp.
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Others

IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	CASE NO. 65,124
OWENS-CORNING FIBERGLAS CORP., Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	CASE NO. 65,154

INTRODUCTION AND JURISDICTIONAL STATEMENT

The Petitioner, OWENS-CORNING FIBERGLAS CORP. ("Owens-Corning"), seeks review of a decision of the District Court of Appeal, Third District (A. 1-24)[1/] in which the majority reversed the trial court's dismissal of the action with prejudice as to defendant, the Celotex Corp. ("Celotex") and adopted the novel theory of market share liability. Owens-Corning, another defendant below, was a nominal appellee in the district court, and as

---

1/ This brief is accompanied by an appendix consisting of the majority and dissenting opinions, the certificate of great public importance and the briefs filed in the district court. The page numbers of the appendix will be referred to by the abbreviation "A." References to the original record will be designated by the abbreviation "R."

such, filed its Notice to Invoke Discretionary Jurisdiction in this Court.[2/] Discretionary jurisdiction of this Court exists under Article V, Section 3(b)(4) of the Florida Constitution, by virtue of the district court's certification that its decision passes on a question of great public importance. That question, as framed in the district court's certification, is as follows:

> [W]hether market share liability as announced in Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 cert. denied, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980), should be adopted in Florida. [A. 25].

STATEMENT OF THE CASE AND FACTS

By their amended complaint, respondents, LEE LOYD COPELAND and VAUDEEN COPELAND ("the Copelands"), sued sixteen companies, all alleged to have engaged in the manufacture and distribution of asbestos insulation products which were used at various times by Mr. Copeland during the course of his employment as a boilermaker (R. 1312-1331). The Copelands based their claims on products liability theories of strict liability, failure to warn, implied warranty and negligence.

The relevant paragraphs of the Amended Complaint were as follows:

> 20. Plaintiff alleges that he was exposed to asbestos insulation products in his occupation for many years, both as an installer and

---

[2/] Celotex also filed a Notice to Invoke the Discretionary Jurisdiction of this Court (Case No. 65,124) and the two cases have been consolidated.

during rip-out operations. Although Plaintiff can identify several of the products he utilized, he is unable to identify each and every hazardous exposure to insulation products that he sustained. Moreover Plaintiff would show that the asbestos insulation products that he was injuriously exposed to during his work life were virtually unidentifiable as to brand name after they were removed from their original containers. In that each exposure to such products caused or contributed to Plaintiff's injuries, Plaintiff says that the doctrine of joint and several liability should be extended to apply to each Defendant herein.

21. In that Plaintiff is unable to identify each injurious exposure to the asbestos products, he would show the court that there is a substantial likelihood that he was exposed to products manufactured and/or distributed by each Defendant and that the Defendants as a group supplied virtually all of the asbestos products to which he was exposed. Under the doctrine of enterprise liability or alternative liability as described in Sindell v. Abbott Laboratories, 607 P.2d 924 (Calif. 1980) this court should apply joint and several liability to each Defendant found by the Jury to have supplied such products to which there is a substantial likelihood that Plaintiff was injuriously exposed.

Various defensive motions were filed by certain of the defendants. The motion at issue in this case is Celotex' Supplemental Motion to Strike and to Dismiss (R. 672-677). The trial court granted the motion, stating that "this Court does hereby dismiss this suit with prejudice insofar as it relates to the Defendant, THE CELOTEX CORPORATION" (R. 1906-1909). The trial court subsequently entered summary judgment in favor of the remaining defendants. Two separate appeals were taken by the Copelands, one as to Celotex' dismissal and the other as to the

summary judgments entered in favor of the remaining defendants. Two different panels heard these appeals and two opinions were entered.[3/]

Neither the Copelands nor Celotex briefed the issue of market share liability in their briefs filed in the Third District. The Copelands' brief primarily addressed the sufficiency of identification of Celotex products by Mr. Copeland. The primary factual contention of the Copelands was that in his deposition Mr. Copeland "repeatedly testified that he had been exposed to asbestos products manufactured by THE PHILLIP CAREY MANUFACTURING COMPANY, the predecessor-in-interest to THE CELOTEX CORPORATION" (A. 31). The legal argument made by the Copelands was that the trial court should not have stricken their pleadings because a pleading may be stricken as a sham only where it is shown to be palpably or inherently false (A. 34-35). Celotex' brief, on the other hand, centered on the legal standard to be applied in determining whether a complaint states a cause of action. According to Celotex' brief, the trial court dismissed the Amended Complaint (rather than striking it as the Copelands had asserted) because of the failure of the Copelands to set forth the ultimate facts identifying what product was manu-

---

3/ The present proceeding arises out of Third District Case No. 81-997. The other case, Copeland v. Armstrong Cork Co., Third District Case No. 81-1369, was not certified as passing on a question of great public importance, although the panel in that case relied upon the adoption of market share liability by the panel in Case No. 81-997. Owens-Corning moved the Third District to certify Case No. 81-1369, which motion was denied.

factured by the defendant, what defect allegedly existed, what allegedly unreasonably dangerous condition existed, and when, where and how the accident occurred (A. 45). Celotex argued that the deposition testimony of Mr. Copeland was irrelevant to a determination of whether the pleading was sufficient.

Notwithstanding these arguments made by the Copelands and Celotex, the district court panel, in a two-to-one decision, reversed the dismissal and adopted market share liability, a theory of recovery first adopted judicially in Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). The Third District initially determined that the very nature of asbestos and asbestos-related diseases makes it virtually impossible to pinpoint the time and place of injury. The court held, therefore, that the allegation of a long-time exposure to the alleged defective product, such as asbestos, sufficiently alleges the ultimate facts of cumulative exposure injury. The court noted:

> It may be that when this case passes beyond the pleading stage the Copelands will produce all the times and places of exposure they have alleged produced the injuries, if only in the form of Mr. Copeland's times and places of employment. In the context of a case of this nature, however, any requirement of pleading a specific time and place of injury would place an insurmountable burden upon a plaintiff. [A. 7].

The majority went on to adopt the rationale and theory utilized by the Supreme Court of California in Sindell, supra, a DES case, with "slight technical modification necessitated by the

nature of the asbestos injury." The majority determined that an asbestos manufacturer would be liable to the plaintiff according to that manufacturer's percentage share of the entire production of the defective product. The court stated:

> Thus, if a manufacturer supplied seven percent of the entire production of the defective product it would bear seven percent of the total liability to a given plaintiff. If identification could be made in all asbestos cases, of course, it follows that this manufacturer would be a defendant in approximately seven percent of all asbestos cases. Under market share liability this manufacturer would be joined in all cases in which identification could not be made, but liable for only seven percent of the total damages in each case. Although the correlation cannot be perfect, it is close enough to satisfy considerations of fairness to all parties. ... Defining the market and determining market share are matters of proof not susceptible to determination at the pleading stage of the proceedings. [A. 9-10].

In his dissenting opinion, Judge Nesbitt stated that, in his view, it was unnecessary for the panel to consider whether or not to adopt the Sindell market share liability theory. Judge Nesbitt observed that on its face the Amended Complaint asserted that "Plaintiff can identify several of the products he utilized." (A. 16). Judge Nesbitt stated:

> Where, as here, the plaintiff is able to identify at least one manufacturer who caused his injury, the reasons for imposing market share liability do not exist. [A. 16].

Judge Nesbitt also noted that in their Amended Complaint the Copelands were unclear as to which theory they sought to use. Although they cited Sindell, they referred to the theory as "enterprise liability" or "alternative liability." Judge Nesbitt additionally discussed the fallacies involved in the market share liability approach, and the inherent difficulties in the theory's application.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN ADOPTING MARKET SHARE LIABILITY IN A CASE IN WHICH THE THEORY WAS NEITHER ASSERTED IN THE TRIAL COURT NOR ARGUED ON APPEAL.

It is elementary that appellate courts may not pass on questions which were not presented to or considered by the trial court. Jacques v. Wellington Corp., 134 Fla. 211, 183 So. 718 (1938); Henry v. Lemack Builders, Inc., 245 So.2d 115 (Fla. 3d DCA 1971). The appellate court should not go beyond the record made and appearing in the lower court. Jacques, supra. Furthermore, the appellate court is not authorized to pass upon issues other than those properly presented on appeal. Lightsee v. First National Bank of Melbourne, 132 So.2d 776, 778 (Fla. 2d DCA 1961). See also, Larkin v. Tsavaris, 85 So.2d 731 (Fla. 1956) (a point not raised can have no effect upon the outcome of an appeal).

In the instant case, the issue of whether the Sindell theory of market share liability should be adopted was not placed

directly before the trial court and was not argued at all in the Third District. In the trial court, the Copelands pleaded a form of enterprise liability, seeking joint and several liability of all defendants. On appeal the Copelands did not assert any form of enterprise liability, relying instead on the fact that in Mr. Copeland's deposition he identified certain Celotex products to which he was allegedly exposed. The issue presented to the Third District in essence was whether the complaint filed by the Copelands needed to specifically identify Celotex products and the time and place of exposure. Under the facts of this case, the Third District need not have considered a theory that was not squarely before the trial court and not presented to the appellate court at all. The district court majority could have determined that although it is necessary to plead specific products, the Copelands should be given an opportunity to amend their complaint to do so. Alternatively, the majority could have determined that the pleading was sufficient without the need for amendment. Instead, the district court chose to render what in effect was an advisory opinion.

This Court has specifically criticized advisory opinions:

> It is a fundamental principle of appellate procedure that only actual controversies are reviewed by direct appeal. 4 C.J.S., Appeal and Error §1354(a), page 1945. We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution. [Sarasota-Fruitville Drainage District v. Certain Lands

Within Said District, etc., 80 So.2d 335, 336 (Fla. 1955)].

Likewise, an appeal will not be allowed to settle mere abstract questions. Cottrell v. Amerkan, 35 So.2d 383, 384 (Fla. 1948).

The district court in this case rendered an advisory opinion, adopting a theory which the Copelands did not urge either in the trial court or in the district court. The Third District thus violated these fundamental precepts of appellate law, and the decision under review must therefore be quashed.

II.

THE MAJORITY ALSO VIOLATED THE HOFFMAN V. JONES ADMONITION AGAINST DISTRICT COURTS RENDERING DECISIONS CONTRARY TO ESTABLISHED SUPREME COURT PRECEDENTS.

In rendering its advisory opinion, the district court also violated the admonition set forth in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).[4/] The district court in this case did the same thing as had the Fourth District in Hoffman, which this Court described as follows:

> The District Court of Appeal attempted, therefore, to overrule all precedent of this Court in the area of contributory negligence and to establish comparative negligence as the proper test. In so doing, the District Court has exceeded its authority. [280 So.2d at 443].
>
> This is not to say that the District Courts of Appeal are powerless to seek

---

4/ In a footnote, the majority stated that the result reached was not precluded by Hoffman v. Jones because "we are venturing into an area not yet explored by the Florida Supreme Court." (A. 9).

> change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court. [Id. at 434].

Established law in this state requires that a plaintiff, when suing a manufacturer in tort, plead and prove the identity of the manufacturer of the product alleged to have caused the plaintiff's injury. Even in a strict liability action, the plaintiff must establish the manufacturer's relationship to the product in question and the defective and unreasonably dangerous condition of the product. West v. Caterpillar Tractor Co., 336 So.2d 80, 87 (Fla. 1976). Accord, Ford Motor Co. v. Hill, 404 So.2d 1049 at 1051 (Fla. 1981) (strict liability applies to secondary collision cases).

The manufacturer's "relationship to the product" is an aspect of the concept of proximate cause. It is axiomatic that before liability for negligence can arise, there must be a causal connection between the damage and the act alleged to have occasioned it. Similarly, there can be no liability unless it can reasonably be said that but for the act, the injury would not have occurred. Sardell v. Malanio, 202 So.2d 746, 747 (Fla. 1967).

The majority opinion in this case ignores the foregoing precedents from this Court, adopts a theory of recovery which eliminates the need for pleading and proof of a necessary element

of the pleaded causes of action, and thus violates Hoffman v. Jones.

III.

EVEN IF PROPERLY CONSIDERED BY THE DISTRICT COURT, THE NOVEL THEORY OF MARKET SHARE LIABILITY SHOULD NOT BE ADOPTED IN FLORIDA, AND THUS, THE DISTRICT COURT OPINION SHOULD BE QUASHED.

Even if this Court determines that the theory of market share liability was properly considered by the district court, this Court should quash the majority opinion of the district court, and determine that market share liability will not be adopted in the State of Florida.

It is well settled that in a products liability suit the plaintiff must identify the manufacturer of the article in question in order to state a cause of action. Although courts of a few jurisdictions have substantially expanded certain existing theories or adopted new theories which avoid the need for identification, these cases represent a substantial departure from established principles of tort law. The rule requiring identification of the manufacturer in a products liability suit has been stated by Prosser as follows:

> [Plaintiff] still has the burden of establishing that the particular defendant has sold a product which he should not have sold, and that it has caused his injury. This means that he must prove, first of all, not only that he has been injured, but that he has been injured by the product. The mere possibility that such may have occurred is not enough, and there must be evidence from which the jury may reasonably conclude that it is more probable than not.

Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 840 (1966).

Until the district court's departure from existing law in this case, the law of Florida has been clear that identification of the manufacturer in a products liability suit is essential. Matthews v. GSP Corp., 368 So.2d 391 (Fla. 1st DCA 1979) is illustrative of the importance of manufacturer identification. In that case, the plaintiff was injured when one of the cables supporting the scaffold on which he was working broke. The plaintiff sued a number of defendants, including the alleged manufacturer of the cable and the company that supplied the cables with which the scaffold was originally equipped. Based upon evidence that the cables had been replaced twice before the accident occurred, the trial court directed a verdict in favor of the alleged manufacturer and cable supplier. The First District affirmed, because of the absence of proof that the cable supplier had in fact supplied the cable involved in the accident and the fact that the plaintiff had failed to present evidence showing the identity of the manufacturer of the cable which broke. See also, West v. Caterpillar Tractor Co., supra (the manufacturer's relationship to the product is an essential element of strict liability); Sansing v. Firestone Tire & Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978) (same); Vecta Contract, Inc. v. Lynch, 444 So.2d 1093 (Fla. 4th DCA 1984) (reversed because proof did not sufficiently support a jury finding that the defendant had manufactured the chair which collapsed and caused plaintiff's

injuries). In Vecta, the Fourth District stated the applicable rule a follows:

> In a products liability case, it is necessary to present evidence that the defendant manufactured or produced the product that caused the injury. Morton v. Abbott Laboratories, 538 F.Supp. 593 (M.D. Fla. 1982).

In Morton, a DES case, the federal court rejected all four theories of recovery urged by the plaintiff in that case: (1) market share liability, (2) enterprise liability, (3) concert of action and (4) alternative liability. The Morton court rejected market share liability as it did the other theories, because it did not believe that the Florida courts would adopt the theory which "unquestionably represents a radical departure from the traditional concept of causation." 538 F.Supp. at 599.

Like the Morton court, a number of courts have criticized market share liability in DES and asbestos cases. For example, the District Court in South Carolina in Ryan v. Eli Lilly & Company, 514 F. Supp. 1004, 1018 (D.S.C. 1981), described the action of the Sindell court as follows:

> While the Court in Sindell v. Abbott Laboratories, supra, correctly rejected the applicability of "alternative liability," "concert of action" and "enterprise liability," a bare majority went on to fashion a remarkable new burden-shifting theory which is not now the law of either North Carolina or South Carolina.

Similarly, in Starling v. Seaboard Coastline Railroad Co., 533 F.Supp. 183 (S.D. Ga. 1982), an asbestos case, the court held that market share liability is a theory that has no basis in Georgia law and that such a rule would be contrary to Georgia's product liability rule that a manufacturer is not an insurer of his products. 533 F.Supp. 189, 190. See also, Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982) (applying Maryland and District of Columbia law). Similarly, the rule in Florida is that manufacturers are not insurers of their products. West v. Caterpillar Tractor Co., supra, 336 So.2d at 90. The District Court in South Carolina in Mizell v. Eli Lilly & Co., 526 F.Supp. 589 (D.S.C. 1981) in a case where the DES pills were purchased in California, went so far as to refuse to apply California law, holding that the Sindell theory was so antithetical to South Carolina policy that it would not apply California law even though the injury occurred in that state.

A federal district court in Texas initially reached a contrary result, in giving preliminary approval to the market share liability approach by ordering that one of the defendants could take discovery from the others relating to market share information. Hardy v. Johns-Manville Sales Corp., 509 F.Supp. 1353 (E.D. Tex. 1981). However, the court in Hardy specifically stated that it was "not thrust in the position of making a final adjudication of whether market share is applicable." 509 F.Supp. at 1355. As pointed out in Celotex' brief filed in this Court, even the Hardy court later rejected the market share approach.

Significantly, a federal court in California refused to extend the Sindell rule to asbestos cases. In re Related Asbestos Cases, 543 F.Supp. 1152 (N.D. Cal. 1982). The court was of course bound to follow Sindell in an appropriate case, and thus did not discuss the public policy or rationale for adopting or not adopting the theory. The court's consideration was limited to whether market share liability should be adopted in an asbestos case. The court determined that it should not, for several reasons. First, in an asbestos case, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. This is so because asbestos fibers are of several varieties, each used in varying quantities by defendants in their products and each differing in its harmful effects. Second, defining the relevant product in geographic markets would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out-of-state at a time prior to the plaintiff's exposure. Third, some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products. Finally, and most importantly, the court considered the following:

> [P]laintiffs 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].

In Prelick v. Johns-Manville Corp., 531 F.Supp. 96 (W.D. Pa. 1982) the court determined that it need not decide whether Pennsylvania would adopt market share liability, because the plaintiffs had identified some manufacturers who supplied the asbestos-containing products to which plaintiff was exposed.

> We conclude, therefore, that where, as here, the plaintiff is able to identify at least one manufacturer or supplier whose product caused plaintiff's injury, the "Sindell" or "enterprise" theory is inapplicable. [531 F.Supp. at 98].

See also, Hannon v. Waterman Steamship Corp., 567 F.Supp. 90 (E.D.La. 1983) (market share liability inappropriate in asbestos case).

This rationale should be applied to the present case (as suggested in the dissenting opinion). Here, the Copelands were able to identify Mr. Copeland's exposure to certain of the defendants' products. Under these circumstances, there is no reason to consider, much less adopt, market share or any other form of enterprise liability.

Market share liability in effect imposes absolute liability on those asbestos manufacturers or distributors which the plaintiff chooses to name as defendants--even though the plaintiff cannot show that any of these defendants played a part in bringing about the injury of which the plaintiff complains. Such

a result would not only be patently unfair, but a violation of due process as well. See, e.g., Cleveland Board of Education v. Lafleur, 414 U.S. 632, 644 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The adoption of market share liability in asbestos cases results in a situation where those asbestos manufacturers or distributors which the plaintiff chooses to name as defendants are liable not only for their own products but for the products of other manufacturers as well. Such a result, particularly in a situation where the product involved is manufactured in several forms and under many conditions, is fundamentally unfair. This result deprives persons of the opportunity to be heard on an individual basis and thus violates procedural due process. See, e.g., Bell v. Burson, 402 U.S. 535 (1971); Stanley v. Illinois, 405 U.S. 645 (1972). In addition, due process requires a meaningful opportunity to present evidence and to be heard. Armstrong v. Manzo, supra; Saunders v. Shaw, 244 U.S. 317 (1917).

The Sindell court admitted that the rule it was adopting was a complete departure from recognized rules of causation and liability. The court nevertheless held that a plaintiff would state a cause of action if she joined in the action the manufacturers of a substantial share of the DES ingested by her mother. The majority stated, as an explanation for this unprecedented judicial legislation, its "rough justice" belief that under the new rule each defendant would be held liable for the proportion of the judgment represented by its share of the market

unless the defendant demonstrates that it could not have made the product which caused the plaintiff's injuries. If market share in the relevant geographic area and relevant time period is proved by substantial competent evidence, the analysis nevertheless fails when one considers the following: (a) a certain proportion of manufacturers will no longer be in business at the time of suit and (b) a certain proportion of manufacturers will not be subject to the jurisdiction of the forum state. The relatively few companies which have remained unchanged organizationally since the time the DES was taken by the plaintiffs' mothers and which do business in a substantial number of states to the extent that they are amenable to suit will be disproportionately subjected to liability. The same difficulty exists in asbestos cases.

The Sindell court purports to avoid these problems and justify its formulation of market share liability by requiring the plaintiff in a DES suit to join as defendants "the manufacturers of a substantial share of the DES which her mother might have taken." 163 Cal. Rptr. at 145. The court noted that one authority had suggested that 75 to 80 percent of the market be joined, but the court declined to determine the required percentage, holding only that "a substantial percentage is required." Id. The court further declined to define the "market" although it recognized the existence of the practical problems involved in defining the market and determining market share. Id.

Similarly, the majority opinion in the present case failed to define the market and failed to provide any guidelines for the application of the theory, stating that:

> Defining the market and determining market share are matters of proof not susceptible to determination at the pleading stage of the proceedings, ... [A. 10].

The existence of numerous practical problems in effecting market share liability in asbestos cases should bear on the decision whether to adopt market share liability. Not only did the district court ignore the practical problems in its consideration of the theory, it refused even to address them or to provide any guidance to the trial court.

Some of the many practical problems which will inevitably arise at the trial of a DES or asbestos case, in any jurisdiction adventuresome enough to adopt the Sindell rule, are: What is the "market"--geographically and otherwise? What is the relevant time period? In determining the market share, does the court take into account only those manufacturers before the court? What kind of liability is imposed; i.e., joint and several or otherwise? How is market share determined when one or more of the defendant manufacturers have incomplete records or no records at all for the relevant time period? If the plaintiff and defendants are in the same position with respect to availability of proof of market share, whose burden is it to go forward with proof? What happens, from the standpoint of proof of market share, when one or more defendants settle with

the plaintiff and are no longer defendants in the case? How does the court determine which defendants are to be considered in determining market share; i.e., all named defendants or just those which have been served? How much does the plaintiff have to prove regarding the defendants' manufacture of the product before the burden shifts to the defendants to prove or disprove market share? How does the court deal with companies which are out of business at the time of suit?

These uncertainties demonstrate the fundamental unfairness of the market share approach. This theory provides little more assurance that the manufacturer of the product involved in a particular case will be held financially responsible than the other theories rejected by the Sindell court--"enterprise liability," "alternative liability," and "concert of action."

The market share liability approach ignores the very likely result that certain "target companies" will bear the entire financial burden. The presumption that a static, definable product market existed is simply incorrect. Any attempt to determine actual market share percentages will likely be costly, complicated, and often times speculative.

The Sindell court, very simply, determined that the defendants should be held liable because they are "deep pockets" who are better able to bear the cost of injury. 163 Cal.Rptr. at 144. The dissenting opinion in Sindell, however, demonstrates the fallacy of the majority's determination in this regard:

> But as a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. In the absence of proof that a particular defendant caused or at least probably caused plaintiff's injuries, a defendant's ability to bear the cost thereof is no more pertinent to the underlying issue of liability than its "substantial" share of the relevant market. A system priding itself on "equal justice under law" does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant's wealth. [163 Cal.Rptr. at 149 (Richardson, J., dissenting) (emphasis in original).]

Market share liability extends far beyond any concept of joint liability recognized in Florida. The substantial change in Florida law which results from the adoption of market share liability effectively imposes liability on all defendants named by the plaintiff when one, and perhaps none, was the actual cause of plaintiff's injuries. Such a result should be rejected by this Court.

CONCLUSION

Based on the above arguments and authorities, the majority opinion of the District Court of Appeal, Third District should be quashed.

BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Owens-Corning
Fiberglas Corp.

By: James E. Tribble
JAMES E. TRIBBLE

and

By: Diane H Tutt
DIANE H. TUTT
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was mailed to all counsel on the attached service list this 21st day of May, 1984.

BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Owens-Corning
Fiberglas Corp.

By: Diane H Tutt
DIANE H. TUTT
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880