The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation

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Between 1947 and 1971, doctors frequently prescribed diethylstilbestrol (DES) as a miscarriage preventative. Experts estimate that 500,000 to 2,000,000 pregnant women used the drug during this period of time. In 1971, the Food and Drug Administration (FDA) prohibited the sale of DES for use by pregnant women because the Agency determined that DES could cause cancerous vaginal and cervical growths in females exposed to the drug in utero. These cancers and related problems manifest themselves after a minimum latency period of ten to twelve years.

At present there are approximately 1,000 DES suits pending in the courts. The plaintiffs in these cases are the daughters of women who took DES, and the defendants are generally the major drug companies that marketed DES.

Identifying the proper defendant in DES cases creates a major problem. Under traditional tort theory, the plaintiff must estab-
lish that the defendant's actions caused her injury. The DES plaintiffs, however, claim that they cannot identify what type of DES was ingested because doctors often prescribed it generically, pharmacists often filled prescriptions from whatever stock they had on hand, and the mothers of DES victims have often forgotten the physical characteristics of the pills they took. In addition, medical and pharmaceutical records may have been lost or destroyed, and witnesses may have died in the years between in utero exposure and the manifestation of injury. Thus, the traditional requirement that the plaintiff identify the defendant who caused her injury has not been satisfied in numerous cases.

In 1980, the California Supreme Court examined the DES problem in *Sindell v. Abbott Laboratories.* Although the *Sindell* court rejected plaintiffs' attempts to relax the traditional identification requirement, the court did fashion a new theory, called market share theory. Under this theory a plaintiff can obtain damages from a given manufacturer in proportion to that manufacturer's share of the relevant market when the drug was being sold. Instead of predicing liability on the identification of a specific defendant, market share theory assigns damages according to the market share percentage of each manufacturer sued by the plaintiff at the time the plaintiff purchased the medication.

Market share theory has been met with mixed reactions by courts in other jurisdictions. Courts rejecting the theory have generally done so because the theory eliminates the traditional

9. *Id.* at 181, 342 N.W.2d at 44.
10. *Id.*
11. *Id.*
14. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 937, 163 Cal. Rptr. at 145. As simple as that may have sounded in *Sindell*, the practical difficulties involved in determining different companies’ market shares have been so great that one California court has determined it is not possible to do. *See* Reporters' Daily Transcript of Proceedings at 3784 (Oct. 11, 1985), Stapp v. Abbott Laboratories, No. C-344-407 (Cal. Super. Ct. Dec. 16, 1985): “Commentators use these nice-sounding percentages without any basis in fact. Now, when you are sitting in the ivory halls of academia, you can select 80 percent, or 60 percent, or 40 percent; and you can use these nice round, beautiful figures. But that's not the real world.”
15. *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 937, 163 Cal. Rptr. at 145.
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identification requirement. These courts fear that once the identification requirement is omitted from a cause of action, plaintiffs will be able to sue whomever they desire without regard to actual culpability.15

In response to the identification problem, a federal judge presiding over numerous DES cases in Massachusetts approved the use of market share theory, but imposed as a prerequisite for its use a showing by the plaintiffs that they had been "duly diligent" in attempting to identify the individual manufacturer of the DES which had injured them.16 The court reasoned that the plaintiffs should undertake their own investigation before the burden shifted to the defendants to exculpate themselves.

This Note argues that courts should impose a due diligence requirement on plaintiffs as a prerequisite to the use of market share theory. Part I examines traditional products liability theories along with alternative theories and explains the relationship of due diligence to market share theory. Part II argues that due diligence should be a prerequisite to market share liability. Part III discusses the nature of due diligence in this context. Finally,


Part IV considers various objections to a due diligence requirement and argues that they are essentially without merit.

I. Market Share Theory, Due Diligence, and Alternative Theories of Liability

The plaintiffs in DES cases have had difficulty demonstrating specific causation in order to recover under traditional tort theory.\(^\text{17}\) In addition, such burden-shifting theories as alternative liability, enterprise liability, and concert of action have been shown to be unsuitable to DES cases.\(^\text{18}\) Market share theory, or substantially modified versions of it, has therefore developed as an alternative method in some jurisdictions.\(^\text{19}\) Because of its relaxation of the traditional identification requirement, however, one court has required the plaintiffs to demonstrate that they have been duly diligent in attempting to identify the individual tortfeasor before the court allows the plaintiffs to use market share theory.

A. Traditional Identification Theory

Traditional products liability law requires a demonstration by a preponderance of the evidence that the defendant caused the injuries for which the plaintiff seeks damages.\(^\text{20}\) The plaintiff must typically show that his or her injuries were caused by an act of the defendant or by an instrumentality under the defendant's control.\(^\text{21}\) As discussed above, several factors have made such a showing more difficult for plaintiffs in DES litigation than for plaintiffs in traditional tort cases.\(^\text{22}\) Thus, many plaintiffs have found it difficult to identify the particular defendant that made the pill that caused their injuries and have faced the possibility of recovering no damages.

17. See supra text accompanying notes 7-11.
18. See infra text accompanying notes 23-44.
20. See supra note 7.
22. See supra text accompanying notes 8-11.
B. Alternative Theories

Plaintiffs have unsuccessfully advanced several liability theories to deal with the identification problem. One of these theories is known as "concert of action," according to which a defendant may be held liable for the actions of another if he acts tortiously in a common design with the other.23 Because the defendants acted together in creating the hazard that injured the plaintiff, each of them is considered individually liable.24

The primary difficulty in applying concert of action to the DES cases is demonstrating a sufficient agreement among the defendants.25 Because of the absence of any explicit agreement, plaintiffs must show an implicit agreement from the parallel conduct of testing and promoting DES.26 However, reliance upon a competitor's marketing and testing is a prevalent and acceptable business practice, not tortious group conduct.27 Because of the manner in which companies in the same industry share aspects of their manufacturing and marketing operations, courts have noted that to apply concert of action to manufacturing situations could render virtually any manufacturer liable for the defective products of an entire industry, even if that manufacturer could prove it did not manufacture the injurious sub-

23. Restatement (Second) of Torts § 876(a) (1979). The Restatement also provides two other possibilities:
   For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
   
   (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
   (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.
   Id. at § 876(b)-(c).

   The classical application of concert of action has been its use in assigning liability to a group of drag racers whose race caused the plaintiff injuries. See Agovino v. Kunze, 181 Cal. App. 591, 5 Cal. Rptr. 534 (1960).

25. W. Prosser, supra note 7, § 46, at 322-23.

26. See Note, supra note 6, at 671. The concerted action typically alleged by plaintiffs in DES cases consists in part of manufacturers sharing marketing techniques and using an agreed upon formula for their DES to enhance its marketability as a generic drug. Id. at 670-71 n.18.

27. Id. at 670-71 n.18. With regard to concert of action, Prosser notes that "[e]xpress agreement is not necessary and all that is required is that there be a tacit understanding." W. Prosser, supra note 7, § 46, at 323.

28. Comment, supra note 5, at 135. "Moreover, [in Sindell] there was no basis for finding either that each defendant knew other defendants were acting tortiously toward the plaintiff or that they assisted or encouraged one another to test DES inadequately." Id.
stance. Thus, concert of action is not a suitable solution to the DES problem.

The courts have also considered and rejected the theory of industry-wide or "enterprise" liability. Enterprise liability holds defendants liable for sharing in industry-wide misconduct. The theory is based on Hall v. E.I. Du Pont De Nemours & Co., in which the court held the plaintiffs had a cause of action against the blasting cap industry whose products had exploded and caused injuries. Reasoning that the defendants had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had delegated some safety functions to their trade association, and that there had been industry-wide cooperation in the manufacture and design of the caps, the court held that the defendants jointly controlled the risk. The Hall court expressly cautioned against applying this doctrine to industries with a large number of manufacturers. It based its conclusion primarily on the companies' delegation of some of the functions relating to safety to a trade association. Enterprise liability is thus not suitable to the DES problem because the DES industry did not delegate any safety functions to a trade

29. See Note, supra note 6, at 671; see also Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963 (1978). This work discusses the theory of enterprise liability in the context of the DES cases and proposes seven requirements for establishing a cause of action:
   1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendants' conduct.
   2) A generically similar defective product was manufactured by all the defendants.
   3) Plaintiff's injury was caused by this product defect.
   4) The defendants owed a duty to the class of which plaintiff was a member.
   5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
   6) There existed an insufficient, industrywide standard of safety as to the manufacture of this product.
   7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability. Id. at 995; see also Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 608 n.24, 607 P.2d 924, 935 n.24, 163 Cal. Rptr. 132, 143 n.24, cert. denied, 449 U.S. 912 (1980).
31. The explosion of the blasting caps, having destroyed any potential evidence, had made identification of the specific manufacturer impossible.
33. Id. at 378. The blasting cap industry the plaintiffs sued in Hall consisted of six manufacturers.
34. Id.
association, and the requisite degree of industry-wide cooperation among the numerous manufacturers is lacking.\footnote{35}

The most promising theory for the DES problem, advanced prior to market share theory, was that of "alternative liability." A plaintiff employs this theory when she is injured by one of two or more possible defendants and is unable, through no fault of her own, to identify which of the defendants was negligent.\footnote{36} In a celebrated case discussing this theory, \textit{Summers v. Tice},\footnote{37} two hunters negligently shot in the direction of the plaintiff. The plaintiff could not prove which of the two hunters had fired the shot that seriously injured him. Thus, the Summers court, to prevent an innocent victim from assuming the expenses of damages caused by negligent defendants, held the hunters jointly and severally liable for the harm to the plaintiff.\footnote{38} Under this theory, the burden shifts to the defendants to exonerate themselves because they are typically in a better position than the plaintiff to determine which of them was negligent.\footnote{39} An important assumption of alternative liability theory is that all of the possible defendants have been brought into the suit, for unless this is the case, the guilty party may not be before the court.\footnote{40}

One difficulty with applying alternative liability to the DES cases has been bringing in all of the defendants to a suit. Approximately 300 drug companies manufactured DES.\footnote{41} Because the sale of DES took place many years ago and some manufacturers have since gone out of business,\footnote{42} it is possible that in any

\footnote{35. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 609, 607 P.2d 924, 934, 163 Cal. Rptr. 132, 142, cert. denied, 449 U.S. 912 (1980). The fact that nearly 300 companies marketed a chemically identical formula resulted in part from the FDA's role in developing the common formula. In fact, another major reason the Sindell court rejected enterprise liability is that the drug industry is closely regulated by the FDA, so the standards followed by drug manufacturers are suggested or compelled by the government: [S]ince the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry. \textit{Id.} at 611, 607 P.2d at 935, 163 Cal. Rptr. at 143 (footnotes and citations omitted).}

\footnote{36. W. Prosser, \textit{supra} note 7, § 4. This doctrine has also been incorporated into the \textit{Restatement (Second) of Torts} § 433B(3) (1965): Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.}

\footnote{37. 33 Cal. 2d 80, 199 P.2d 1 (1948).}

\footnote{38. \textit{Id.} at 86-87, 199 P.2d at 4.}

\footnote{39. \textit{Id.}}

\footnote{40. \textit{See Restatement (Second) of Torts} § 433B, comment h (1965).}

\footnote{41. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 603, 689 P.2d 368, 381 (1984).}

\footnote{42. Note, \textit{supra} note 6, at 672.}
given case none of the named defendants manufactured the DES ingested by the plaintiff's mother. Thus, the courts have considered it unfair to require each defendant to exonerate itself. In addition, alternative liability provides no way to apportion liability among manufacturers, meaning that defendants with widely varying shares of the market are equally liable. As formulated prior to Sindell, alternative liability is not a plausible solution to the DES problem.

C. Market Share Theory

To deal with the plaintiffs' inability to recover using established principles of tort law, the California Supreme Court, in Sindell v. Abbott Laboratories, created a modified version of alternative liability. It eliminated the specific causation requirement and instead assessed liability as a function of market share. Reasoning that in a complex industrialized society fungible goods that are not traceable to their manufacturer often harm consumers, the Sindell court argued that it would be better to fashion new remedies for changing needs, rather than to adhere rigidly to established doctrine. Because defendants are better able to bear the cost of injuries and because plaintiffs are not at fault for failing to provide evidence of causation, the court held that it is "reasonable... to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose." To employ the Sindell theory, a plaintiff initially alleges only that a manufacturer held a "substantial percentage" of the relevant DES market. The burden then shifts to the manufacturer to demonstrate that it could not have produced the DES ingested by the plaintiff's mother. The end result, according to Sindell,
is that each manufacturer's liability approximates its responsibility for the injuries caused by its products.⁴⁹

Although different state courts have used various refined forms of this market share theory,⁵⁰ perceived problems with the theory have prevented many courts from accepting it. The major objection to the theory is that it eliminates the burden of proof traditionally placed on the plaintiff to identify the individual tortfeasor.⁵¹ This problem has been sufficiently significant to lead to a good deal of controversy regarding market share theory.⁵²

One example of a negative reaction is the opinion of the Supreme Judicial Court of Massachusetts in Payton v. Abbott Labs.⁵³ In Payton the court denied plaintiffs a cause of action under market share theory, expressing disapproval of the elimination of the identification requirement.⁵⁴ Yet the court noted at the end of its opinion that on an "adequate record" it might recognize some relaxation of the traditional identification requirement in appropriate circumstances.⁵⁵

of market shares providing reasonable approximations of total liability. That the Sindell court made exculpation an important part of market share theory demonstrates that the court only intended it to be used when other theories could not be used. See infra text accompanying notes 61-62. In addition, for the implications of allowing exculpation in market share theory in terms of the due diligence requirement, see infra text accompanying notes 100-04.

The Sindell court assumed the only way to show that a company did not supply the DES which injured the plaintiff would be to show it did not market the drug in the geographic area in which the plaintiff lived or that it did not sell the drug for the purpose of preventing miscarriages. Exculpation, however, has become a complex part of market share. See Martin v. Abbott Laboratories, 102 Wash. 2d 581, 592-93, 689 P.2d 368, 376 (1984) (citing Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980)); see also infra text accompanying notes 98-104.

49. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
50. See supra note 15.
51. See Sindell, 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting) ("An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.") (quoting W. Prosser, supra note 7, § 41, at 236) (emphasis omitted).
54. Id. at 573, 437 N.E.2d at 189.
55. Id. at 574, 437 N.E.2d at 190. The Payton court stated in full that it might allow
D. The Due Diligence Requirement

In response to Payton, a federal judge presiding over a large number of DES cases in Massachusetts applied market share theory, but also imposed an additional requirement upon the plaintiffs. Prior to their use of market share theory, the court held, plaintiffs must make a showing of "due diligence" with respect to their attempts to identify the individual tortfeasor whose DES harmed the plaintiff. Thus, the plaintiff's failure to identify the specific DES manufacturer had to be the result of a reasonable but unsuccessful effort to determine the identity of the tortfeasor. This due diligence requirement resulted in a summary judgment for the defendant in one such Massachusetts case because the plaintiff failed to show the requisite degree of due diligence, as determined by the court in a pretrial hearing. Due diligence with regard to identification efforts had been previously applied to DES cases only once. In Abel v. Eli Lilly & Co., the Michigan Supreme Court held that DES plaintiffs must make a genuine attempt to locate and identify the responsible tortfeasor before they could rely on a modified version of alternative liability against the defendants. The genuineness of the attempt, according to Abel, should be measured by the traditional due diligence standard, and it is the trial court's duty to determine whether this standard has been met.

"some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time." Id. The court declined to elaborate further on what might be an adequate record or appropriate circumstances. In summarizing its views later in the opinion, the court indicated that it "might permit recovery from those defendants shown to be negligent to the extent of their participation in the DES market, even though the plaintiffs cannot identify the particular source of DES which their mothers ingested." Id. at 575, 437 N.E.2d at 190.

56. The district judge, while considering what the Payton court would consider an "adequate record," saw identification evidence being produced by Eli Lilly & Co. at one trial, Payton v. Abbott Labs, Claim of Andrea Goldstein, No. 76-1514-S (D. Mass. filed 1976). See infra note 86. Believing that more of this type of evidence existed and would become important, the court imposed the requirement of due diligence. See Hearing on Due Diligence at 3-79 (May 28-30, 1985), Payton v. Abbott Labs, Claim of Janice Cohen Garfinkle, No. 76-1514-S (D. Mass. filed 1976) [hereinafter cited as Hearing on Due Diligence].


58. Hearing on Due Diligence, supra note 56, at 3-113, 3-114.


60. Id. at 332, 343 N.W.2d at 173.
II. REASONS FOR IMPOSING THE DUE DILIGENCE REQUIREMENT

A due diligence requirement should be applied to the theory of market share liability for two reasons. First, an investigation by the plaintiffs is implicitly presupposed by market share. Second, the due diligence requirement provides the plaintiff with an incentive to investigate that would otherwise be lacking. Because the plaintiff is initially in a better position than the defendant to conduct such an investigation, the requirement enhances the efficiency of the discovery process.

A. Due Diligence Is Presupposed in Market Share Cases

One reason for imposing the due diligence requirement is that it is a basic assumption of market share theory that the plaintiff is generally unable, with a reasonable effort, to identify the manufacturer of the DES to which she was exposed. It is a theory of last resort, adopted only because courts generally could not apply traditional theories of tort law to the DES litigation. As one defendant argued, “Plaintiff here is seeking a radical change in existing law: the relaxation or elimination of the requirement that a plaintiff identify the manufacturer of the product which injured her. At a minimum, she has the burden of establishing that such relief from existing law is justified.”

Thus, the very nature of a market share case presupposes that the plaintiff has made a diligent effort to identify the wrongdoer and has failed. To impose the requirement of due diligence is only to require explicitly what is already implicit in a market share case. Unless this assumption is made explicit, however, courts may lose sight of the fact that market share is a theory of

61. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 596, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134 (“[T]he trial court sustained the demurrers of these defendants... on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries.”), cert. denied, 449 U.S. 912 (1980). Thus, the Sindell court based its theory on the presupposition that the plaintiff had made some sort of identification effort which had failed. Accord Abel v. Eli Lilly & Co., 418 Mich. 311, 337, 343 N.W.2d 164, 176 (“Only when traditional concepts fail to meet the demands which are placed upon them must novel responses develop to fill the void and answer society’s need for equitable loss distribution.”), cert. denied, 105 S. Ct. 123 (1984).

last resort. In addition, were the plaintiff relieved of her normal burden of identification and no substitute made for the burden, many courts may conclude the theory is unacceptable.

B. Without Due Diligence, Plaintiffs Have Little Incentive to Look for Identification Evidence

A further reason for imposing the due diligence requirement is to provide plaintiffs with an incentive to search for identification evidence. As discussed above, market share theory is a theory of last resort, and it is therefore desirable to determine, if possible, which defendant actually caused the plaintiff's harm. Thus, the law should encourage investigation to determine the proper defendant.

In DES litigation, the plaintiff can undertake the initial investigation more efficiently because she is initially in a better position to determine which defendant is liable. If the plaintiff's mother is available, she can provide her daughter with a description of the DES she took, as well as the name of the pharmacy where the DES was obtained and the name of the physician who prescribed it. The plaintiff can then use this information immediately to investigate further. In contrast, the defendants' access to this information must await the formal discovery process.

63. See supra text accompanying notes 61-62. This idea might seem contrary to the philosophy of market share. Some proponents of market share theory have argued that all of these identification efforts should be abandoned and all plaintiffs should be allowed the use of market share. This suggestion, however, is a far more radical change from traditional tort law than the authors of Sindell ever contemplated, and few, if any, state courts would accept it. See generally infra notes 100-04 and accompanying text.

64. "[T]here may be situations where a plaintiff, confronted with estrangement from her family or the death of her mother, will be unable to satisfy a court that she has genuinely attempted to locate the manufacturer." McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1529 (D. Mass. 1985). If this is the case, however, the court could easily take that factor into account in determining whether the plaintiff has made a reasonable effort. Indeed, the definition of due diligence emphasizes the facts of the individual situation. See infra note 76.

65. Memorandum of Upjohn on Due Diligence, supra note 57, at 8-9. To some extent, the defendants in DES cases have much more knowledge regarding identification information, such as information about pharmacies, pharmacy practices, and drug distribution. Plaintiffs' Memorandum on Trial Issues Regarding Pharmacy Market Share and Alternative Liability at 11 (Nov. 13, 1984), Payton v. Abbott Labs, Claim of Andrea Goldstein, No. 76-1514-S (D. Mass. filed 1976) [hereinafter cited as Plaintiffs' Memorandum on Trial Issues]. However, in general, the nature of the DES litigation contrasts to the situations in which plaintiffs try to use alternative liability, concert of action, and enterprise liability. In these situations the defendants are much more apt to have access to information which would determine who might be liable, and the courts apply the
Unless the due diligence requirement is imposed, however, a plaintiff in a DES case to which market share theory is applied will have little or no reason to conduct a search. Without the due diligence requirement, she is not required to identify the defendant who produced her mother's medication. In addition, because the DES industry consisted at one point of over 300 manufacturers, many of whom may now be bankrupt or low on funds and difficult to sue, a plaintiff might be tempted to remain silent in the face of evidence that the maker of her DES is not one of the major companies.

As one defendant argued, the due diligence requirement "serves the same purpose as a statute of limitations does: it prevents destruction of evidence which may have existed at the time of injury and it does not permit plaintiff to wait until her claim becomes stale before divulging essential information which only she has." The due diligence requirement, then, provides the plaintiffs with the necessary incentive to investigate and thus enhances the efficiency of the investigative process.

In McCormack v. Abbott Laboratories, however, the court refused to apply the due diligence requirement, partly because it rejected the arguments discussed above. The court adopted a version of market share theory according to which a plaintiff might not recover her entire verdict, but only a reduced percentage of it. The court reasoned that the possibility of this recov-

burden-shifting theories in part because of this fact. See supra text accompanying notes 23-44.

66. See supra note 41 and accompanying text.
67. See Fischer, supra note 52, at 1649-50; Overcoming the Identification Burden, supra note 52, at 636; see also Order Granting Default Judgment at 2, Collins-Gastrow v. Eli Lilly Co. (Wis. Cir. Ct. Jan. 31, 1986). In Collins-Gastrow the court granted default judgment against 30 companies which had manufactured DES and which were made third-party defendants in one suit. Because these companies did not respond to service of process, they were probably out of business.

In addition to the problem of companies being out of business or bankrupt, the law concerning successor liability has prevented recovery when plaintiffs sue a corporation that has acquired a DES manufacturer. See McCarty v. Abbott Laboratories, No. C82-439T (W.D. Wash. Feb. 12, 1985).

With regard to local companies, the plaintiffs' lawyers, who are used to dealing with the major companies, may consider it inefficient to go after a small company with whom they have done no prior discovery.

70. Under the version of market share theory used in Martin v. Abbott Laboratories, 102 Wash. 2d 581, 605, 689 P.2d 368, 383 (1984), the courts initially presume the defendants to have equal shares of the relevant DES market, and the defendants may reduce their potential liability by establishing their respective market shares in the relevant
ery, as opposed to a complete recovery under an identification theory, identification having been achieved through the due diligence requirement, provides a sufficient incentive for the plaintiffs to investigate. In addition, the court argued, a verdict based on identification would probably be more appealing to the average juror.\(^{71}\)

The McCormack court's reasoning was logical, but the court neglected the possibility that the plaintiff will weigh the difference between market share and no recovery rather than market share and identification recovery because she fears her identification efforts will produce a judgment proof or otherwise undesirable defendant. Furthermore, the court did not explain why a plaintiff, knowing that market share is the law, would believe that a juror would have any more difficulty handing down a large award based on that theory rather than one based on identification theory.\(^{72}\)

The court's discussion of due diligence also stated that because the "market-share theory relieves plaintiffs only of the burden of proving causation in fact[,] . . . the evidence which defendants fear will be negligently lost or purposely concealed, will often be plaintiffs' only evidence of proximate cause and damage."\(^{73}\) However, because all the DES sold by the pharmaceutical companies used the same chemical formula, the question of proximate cause has no relation to exactly whose DES the plaintiff's mother ingested. Identification evidence relates to proximate cause only to the extent that it is used to establish

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72. The McCormack court's arguments here would have no bearing in a jurisdiction using a version of market share that did not employ the judgment reduction aspect of Martin.  
73. McCormack, 617 F. Supp. at 1529; see Memorandum and Order Re Defendants' Motion for Summary Judgment as to the Plaintiff Jacqueline Green, Anthony v. Abbott Laboratories, No. 80-0556-S (D.R.I. Feb. 14, 1985) (summary judgment motion granted against a plaintiff who could not produce a prima facie showing that the medication her doctor prescribed was DES).
that the mother actually took DES. Although the need to prove this fact does create an incentive to look for the doctor’s records, it does not create an incentive to go any further in terms of satisfying the due diligence requirement.\textsuperscript{74}

\section*{III. The Due Diligence Standard}

No court has discussed in detail what actions the plaintiffs must take in order to satisfy the due diligence requirement.\textsuperscript{75} This Part attempts to provide a general description of what due diligence involves in the context of a DES case, though the exact parameters of the due diligence requirement must be worked out on a case-by-case basis.

The traditional due diligence standard has generally meant a reasonable effort.\textsuperscript{76} The first court to apply due diligence to market share theory interpreted it to require a variety of actions by the plaintiffs and their attorneys.\textsuperscript{77} These actions included trying to track down any of the doctors who treated the plaintiff’s mother, trying to find any of the pharmacists who operated the pharmacy at which plaintiff’s mother purchased the DES, and trying to find any of the old pharmacy records, especially pre-

\textsuperscript{74} See infra text accompanying notes 75-86 for a discussion of the actions a plaintiff must take to satisfy this requirement.

\textsuperscript{75} For purposes of the diligence investigation, the term “plaintiff” should be construed to include her attorneys and people working for them. The courts should not expect the plaintiff herself to do as much as her attorneys. Nevertheless, the defendants have argued that the plaintiffs themselves should have commenced some sort of investigation as soon as they learned of their exposure to a hazardous substance, and one court has agreed. See Memorandum of Upjohn on Due Diligence, supra note 57, at 9-11; Hearing on Due Diligence, supra note 56, at 3-82. The court in Payton v. Abbott Labs, Claim of Janice Cohen Garfinkle, No. 76-1514-S (D. Mass. filed 1976), did not describe what the plaintiff should have done to be considered duly diligent because the plaintiff, claiming the attorney-client privilege, refused to place the attorney who had originally interviewed the plaintiff on the stand. The court indicated, however, that some inquiry would have been appropriate, such as locating and deposing a doctor (deceased at the time of the hearing) who had practiced with the prescribing doctor (also deceased) and inquiring into the possibility of talking to jobbers and wholesalers to determine distribution practices of DES to pharmacies in the relevant area. See Hearing on Due Diligence, supra note 56, at 3-83, 3-111, 3-112.

\textsuperscript{76} See Black’s Law Dictionary 411 (5th ed. 1970) (“Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”).

scriptions, which might reveal how the relevant prescription was filled.\textsuperscript{78}

Given this standard, it seems reasonable to expect the plaintiff in a DES case to ask her mother if she can remember any of the physical characteristics of the pill she ingested. In addition, the plaintiff should try to find out which pharmacy filled the prescription. If the pharmacy is no longer in business, the plaintiff should try to find out who the owners were\textsuperscript{79} and then try to locate them. The plaintiff should also try to find out if the pharmacy, or its practice, was sold, and if so, to whom, because that person may have information about the location of the pharmacy's records. Furthermore, the plaintiff should try to visit the pharmacy and check its storage area to see if any old records still exist.

The plaintiff should also try to locate the wholesalers and jobbers involved in the sale of DES in the relevant location at the relevant time. They may provide information about the drug companies from whom they purchased DES. The wholesalers, moreover, may have information about the employees of the pharmacy that could prove valuable in the investigation.

Finally, the plaintiff should attempt to locate her mother's prescribing doctor. If he is deceased, the plaintiff should determine whether another doctor purchased his practice, and if so, the plaintiff should try to find the other doctor to obtain information.

The plaintiff may find some of these searches lead to dead ends quickly; other inquiries may seem promising, but will generally require a huge amount of effort. In general, a plaintiff should end any investigation of these areas when it is apparent that future inquiry is either hopeless or will require a massive expenditure of resources. Hence, the amount of productive investigation may vary widely from case to case. Because the definition of due diligence includes examining the "particular circumstances"\textsuperscript{80} of the situation, the courts should not expect each plaintiff to produce the same results.

Although the above description should be a sufficient starting


\textsuperscript{79} This can be done through the state's Office of the Secretary of State. See Plaintiffs' Offer of Proof Re: Due Diligence at 2 (Dec. 6, 1984), Payton v. Abbott Labs, Claim of Andrea Goldstein, No. 76-1514-S (D. Mass. filed 1976) [hereinafter cited as Plaintiffs' Offer of Proof].

\textsuperscript{80} See supra note 76.
point for determining the scope of the due diligence requirement, some disagreement may remain as to what will be considered a "reasonable effort." For example, in one statute of limitations ruling, *O'Brien v. Eli Lilly & Co.*, a plaintiff lost her claim because the court held she had not been duly diligent in determining that she had a claim that should have been filed. The court held that the plaintiff was not duly diligent when asking her mother whether she had taken DES after the plaintiff had read a magazine article in 1976 that described the medical problems associated with DES.

Instead, the court held, the plaintiff should have called her mother's doctor to verify her mother's story. The majority found no reason for the plaintiff to wait until 1979 to call her mother's doctor and found her explanation that she read some new articles at that time to be insufficient. Thus, her claim was barred. The dissent argued that the majority had articulated a far higher requirement of diligence than could be rationally expected from a frightened teenager who learns for the first time that she has cancer. The dissent reasoned that in this situation the plaintiff could find her mother's initial denial sufficiently credible.

*O'Brien* illustrates the difficulty of formulating precise standards of due diligence. In light of this difficulty it seems best to allow the courts to work such standards out on a case-by-case basis.

82. *Id.* at 707-08.
83. *Id.* at 710-11.
84. *Id.* at 710.
85. *Id.* at 713 (Higginbotham, J., dissenting).
86. One defendant has argued that the courts should impose a strict standard of due diligence because if plaintiffs need only perform some cursory questioning of a few witnesses, then the plaintiff who pays lip service to the due diligence requirement might be allowed to pursue a market share claim against several defendants when, with a little more effort, she could have identified the true tortfeasor. Unless the courts require an extensive search, a plaintiff might consider performing only a perfunctory search, then declare that she has no knowledge of the identity of the drug company which made the DES to which she was exposed in utero. Memorandum of Upjohn on Due Diligence, *supra* note 57, at 4.

Although the above argument has some merit, an important consideration in these cases is that the plaintiffs have far less resources than the defendants. To expect them to perform an investigation comparable to that of the defendants denies the fact that the defendants have much more money, time, and manpower than the plaintiffs. In addition, the defendants can spend their superior resources developing sophisticated investigative techniques. (The fact that the defendants have superior resources does not change the fact that plaintiffs are initially in a better position in terms of where to begin the investigation, *see supra* text accompanying notes 64-65.) However, once the defendants have deposed the plaintiff and her mother, the former can commence an investigation com-
IV. OBJECTIONS TO THE DUE DILIGENCE REQUIREMENT

The application of the due diligence requirement to market share theory has been objected to as requiring plaintiffs to engage in a useless search during which nothing will be found, as preventing the use of class actions, and as an invasion of the attorney-client privilege. An examination of these objections will reveal that they do not merit a rejection of the due diligence requirement.

A. Due Diligence Will Require a Useless Search

A major objection to the application of due diligence is the claim that it will require plaintiffs to conduct a useless search. Because so many of the records have been destroyed, so many of the potential witnesses have passed away, and so many memories have faded, the McCormack court argued that the due diligence

mensurate with their resources. Accordingly, it would not be fair for the defendants to launch a massive investigation for evidence, find something, then claim that the plaintiffs were not duly diligent because they did not find it. For example, in one case, the defendants located the building which had housed the plaintiff's pharmacy in a deteriorating neighborhood. The defendant's detective searched inside the building and in the basement he found old records still intact relating to the pharmacy. Supplemental Written Offer of Proof by Defendant Eli Lilly and Company on the Failure of Plaintiffs to Establish the Prerequisites to Alternative Liability, Market Share Liability, or Any Other Non-Identification Theory of Liability at 3-4 (Jan. 9, 1985), Payton v. Abbott Labs, Claim of Andrea Goldstein, No. 76-1514-S (D. Mass. filed 1976). Further inquiry, however, revealed that the relevant records were probably destroyed two years after the plaintiff filed her lawsuit. Id. at 3.

The plaintiff's attorneys stated that they learned the store had been abandoned and that there had been radical changes in the neighborhood. Plaintiffs' Offer of Proof, supra note 79, at 4. In addition, the plaintiff's attorneys had contacted a prior owner of the pharmacy who said the basement had flooded several times. Id. at 7. It is possible that the plaintiffs did not investigate the pharmacy further because they judged that their limited resources would be better spent elsewhere. Attorneys in such circumstances probably work on a contingent fee and must judge carefully how much money should be allocated each DES plaintiff. The defendants, on the other hand, can probably afford to have a lawyer and detective working full time. Thus, it might be fair to find the plaintiffs duly diligent even though they did not get into the basement of the building and find the records because doing so would have required more than a reasonable effort in this particular case.

It should be noted that even though the plaintiffs would not be required to examine the basement they would be expected to do so if the building appeared more accessible. In this case, the fact that the defendant did not discover that potentially relevant records had been destroyed until a week or two before trial indicates the magnitude of the defendant's effort. See Plaintiffs' Memorandum on Trial Issues, supra note 65, at 9-11.

87. See Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (neither the
gence requirement will do nothing but add unnecessary litigation costs. Yet several of the DES cases reveal that a plaintiff’s vigorous investigation might be successful in identifying the defendant. Such an investigation might profitably explore several different areas.

First, although many pharmacy records might be difficult to find, locating them is not impossible. Many of the pharmacies operating in the 1950’s may still be in business. Although the general policy of these businesses is to discard old prescriptions after five years, many pharmacists have not followed that practice. Thus, it can never be said for certain that old records have been destroyed. Furthermore, even if the pharmacy has gone out of business, the owners may have sold their practice to a competitor, who may have retained the records. If the plaintiff can find her prescription, that document should tell her with whose DES the pharmacist filled it. Even if the prescription is not available, other records might provide some circumstantial evidence.

Second, the pharmacy’s DES purchasing patterns may be a useful area to explore. Often a pharmacy will purchase a particular drug in a regular fashion, borrowing from neighboring pharmacies when necessary. If the plaintiff can obtain information about these purchasing and borrowing practices from the pharmacists or the wholesalers who supplied them, the plaintiffs may be able to develop an identification case against a manufacturer.

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... Requiring a plaintiff to allege and prove due diligence is, in essence, requiring her to explain what can already be presumed: the plaintiff has no cause of action under traditional standards of liability.

89. See supra note 86 (describing the location of old records in an abandoned pharmacy’s basement).

90. See Plaintiff’s Statement Regarding Pharmacy Market Share, supra note 78, at 6. Although the plaintiff claimed the purchasing pharmacy disposed of the records “shortly after it got possession of them,” id., that may not have been a standard practice when pharmacy businesses were purchased.

91. For example, in one case, on an identification theory against Eli Lilly & Co., the plaintiff was able to get to the jury using the following inferences: that her mother remembered using a generic prescription for a certain dose pill, that the relevant pharmacy generally ordered that dosage DES pill from its main wholesaler as an open order, and that the wholesaler had a policy to fill such orders with Lilly products. Plaintiff-Appellee Reply Brief at 35, Payton v. Abbott Labs, Claim of Andrea Goldstein, No. 76-
Third, even if she cannot provide enough evidence to produce an identification, the plaintiff may be able to recover under a subtheory of market share called "pharmacy market share." According to this theory, the named defendants who are shown to have sold their product to the pharmacy at which the plaintiff's mother purchased her DES are each held liable in proportion to their share of that pharmacy's DES sales.\textsuperscript{92} This form of market share theory eliminates many defendants and limits the possibility of liability to only a few, thus approximating more closely the ideal of identification. The plaintiff can use pharmacy market share theory only when she has conducted a thorough investigation to find out where the drugs were purchased and who supplied the pharmacy.

Finally, the physical characteristics of the DES itself may be helpful in identification efforts. Although many of the companies did market DES generically,\textsuperscript{93} several major firms produced pills of varying color, shape, and composition.\textsuperscript{94} To the extent that the plaintiff's mother can remember the characteristics of the pill she ingested, that information can be used to narrow down the number of possible defendants.\textsuperscript{95}


\textsuperscript{93} Note, \textit{supra} note 6, at 670.

\textsuperscript{94} See \textit{Drug Topics RED BOOK} 159-60 (1954 ed.) (listing the Upjohn Company as marketing, in varying dosages, green, blue, purple, and violet perles (liquid-filled capsules) of DES, and Massengil as selling yellow, green, orange, red, and purple tablets). \textit{But cf.} Plaintiff's Memorandum in McCormack, \textit{supra} note 70, at 9 (arguing all DES pills were "indistinguishable from each other in size, shape, smell, and texture").

In fact, for several years, the pharmaceutical companies insisted that they make their pills available to the courts under a protective order without making them available to opposing counsel. The companies wanted to ensure that plaintiffs' lawyers would not show the pills to plaintiff's mothers, who might then "refresh" their memories as to the characteristics of the pill they ingested. Hearing on Due Diligence, \textit{supra} note 56, at 3-84, 3-85.

\textsuperscript{95} For example, in one case, a defendant argued that a pharmacist informed plaintiff's counsel that the relevant pharmacy carried only red and white DES and did not carry any kind of "capsulated" DES, which would mean that the pharmacy could not carry any of that defendant's DES, all of which was capsulated. Memorandum of Upjohn on Due Diligence, \textit{supra} note 57, at 11.
A further objection to the application of a due diligence requirement to market share theory is that it would make the use of class actions impossible. However, class actions are not useful devices in the context of DES litigation, whether or not due diligence is imposed. For example, although a federal judge in Boston certified a 3,800 member DES class action against the major manufacturers, he later had to decertify it, in part because the Supreme Judicial Court of Massachusetts emphasized the importance of allowing individual defendants to offer exculpatory evidence against each plaintiff.

The primary reason that class actions are not appropriate for DES litigation is that the major defendants in DES cases possess a significant amount of exculpatory evidence regarding specific causation, due to the differing physical characteristics of their DES. This makes class actions difficult, if not impossible, because each defendant would have this evidence available to offer against each plaintiff whose mother can remember anything about the pill she ingested. Thus, most defendants would be liable only to certain plaintiffs, which would destroy the commonality of questions of law and fact necessary for a class action. Because, therefore, class actions in DES cases are made ineffective by factors unrelated to the due diligence requirement, it is not persuasive to argue against the due diligence requirement on the ground that it interferes with the use of class actions.

96. See Note, supra note 6, at 675 (the application of market share to DES cases is particularly useful because it would facilitate the use of class actions, so that a large number of plaintiffs could receive compensation from a large number of defendants without the necessity of the assignment of individual liability). To make each plaintiff search for identification evidence and to make those who can identify their defendant proceed using traditional tort theory would destroy the commonality of questions of law and fact necessary for a class action. Id.; see also Fed. R. Civ. P. 23(b).


99. In fact, the judge who originally certified the class action later noted that "the impression I received from plaintiffs' counsel" when the class action case was first presented was that "DES was fungible, uniform in appearance and flowed into the market without differentiation by manufacturer. . . . That does not appear to be the typical situation. In the typical situation, the inquiry narrows down to one or two drug stores and pills that are differentiated in size, shape and color." Memorandum Concerning Martin v. Abbott Laboratories, supra note 16, at 3.

The same factors that make class actions ineffective also render unworkable a market share theory that eliminates any possibility of exculpation or individual defendant identification. One author has argued to the contrary, noting that some deserving plaintiffs might not be able to recover under traditional market share theory because their manufacturers are judgment proof. Thus, this author argues, market share theory should not require efforts by the plaintiff to identify the defendant who actually caused her injury. Rather, a plaintiff should be allowed to sue as if it were impossible to identify her particular manufacturer. Although some defendants would be forced to pay more than their share of the damages, courts could justify this as a type of social cost spreading. In addition, allowing this recovery would avoid expensive litigation to determine whether a particular plaintiff is knowing or unknowing.

Admittedly, this theory might provide a more efficient way of assessing damages because no time or money would be devoted to identification or exculpation efforts. It is questionable, however, whether it is fair to hold a company liable for damages even though that company can show it did not cause them, and no state court has ever considered this version of market share theory. Two important premises of Sindell, and the variations other state courts have developed from it, are that market share liability should be used only when identification efforts fail and that no defendant should pay for any damages it can prove it did not cause. Whether or not this alternative method is more efficient, it is beyond the scope of this Note to advocate a change in law that no state court has accepted, let alone discussed. The purpose of this Note is to show how existing market share theory can be made more coherent, not to develop a completely new doctrine.

100. Note, supra note 6, at 676.
101. Id. This type of market share would resemble a trust fund; see id. at 675 n.43.
102. See supra text accompanying notes 61-62.
104. Admittedly, the use of market share theory with due diligence and exculpation may arguably create some injustices. For example, a duly diligent plaintiff who finds a judgment proof manufacturer would not be given any recovery. But because the major companies occupied such a large percentage of the market—i.e., the six major ones sued in Sindell alleged by plaintiffs to have 90%—this injustice should not happen often. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 613, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, cert. denied, 449 U.S. 912 (1980). Furthermore, this injustice would not be caused
C. Due Diligence as an Unreasonable Burden upon the Plaintiffs

Due diligence has been criticized for imposing an unreasonable imposition on DES plaintiffs. Plaintiffs have argued that because they were in utero when they were exposed to DES, with no control over their exposure or the lapse in time between the exposure and the manifestation of their medical problems, they should not have any unnecessary burdens placed upon them.\(^{105}\)

While it is true that DES plaintiffs are not at fault for their injuries or their difficulties in identifying the proper defendant, the fact that they have not been contributorily negligent does not mean that the courts should relieve them of the burden of proving the necessary elements of their suit. The need to identify the proper defendant is important because market share theory is a theory of last resort. The due diligence requirement is necessary to ensure that the proper defendant is identified, if possible. Thus, it is in no way an unnecessary burden. Moreover, because the due diligence inquiry requires only a reasonable effort, there is no reason to relieve the plaintiffs of this responsibility.

D. Attorney-Client Privilege and Work Product Doctrine

Another objection to the due diligence requirement is that it invades the attorney-client and work product privileges.\(^{106}\) Plaintiffs contend that the type of information needed to identify a defendant is privileged and that they should not be required to reveal it.

Producing evidence for a due diligence hearing, however, will not require any breach of the attorney-client privilege. The rele-

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by a problem specific to the DES litigation, but rather by the more general problem of culpable defendants who are bankrupt. It is beyond the scope of present market share theory to solve that problem as well as the problem of identification.

In addition, although plaintiffs’ attorneys may consider it inefficient to sue a small company of which they know little rather than a large one with which they have dealt frequently, that difficulty should not justify holding the larger company liable if it can prove it did not manufacture the relevant DES.


vant Revised Uniform Evidence Rule states that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Exchanges of legal advice are not involved in the due diligence inquiry, so those communications would not be disclosed. Rather, the inquiry would concern what actions had been taken by the attorneys, presumably in reaction to what the plaintiffs told them about their DES exposure. Thus, the inquiry would reveal whether routine factual investigation into an issue of obvious importance was carried out.

Although statements made for the purpose of facilitating professional legal services might be of importance when, for example, the plaintiff first tells the attorney what she knows about the DES she took, the issue for inquiry would be not the contents of the conversation, but rather whether it had taken place at all, and what the attorney's response was to it.

Nor will the due diligence requirement violate the related doctrine of the work product privilege. In this area, the standards from *Hickman v. Taylor* are controlling. In *Hickman* the Supreme Court held that relevant and nonprivileged facts, where essential to another party's case, are not protected by the work product doctrine. In addition, Federal Rule of Civil Procedure 26(b) states that the judge, in ordering discovery of protected materials, is directed to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." Initially, it is difficult to see just how the work product doctrine applies to any documents related to a due diligence investi-
gation. Because the scope of the documents would be limited to the due diligence inquiry, none of the plaintiff's strategies would be revealed through these records. The work product doctrine prevents opposing parties from obtaining an advantage by claiming they need to see documents which actually give away a plaintiff's strategic position. A description of a plaintiff's unsuccessful attempts to identify the manufacturer should not have any bearing on strategy.

CONCLUSION

The theory of market share has not been accepted with a great deal of enthusiasm by state appellate courts. The application of a due diligence requirement, however, may lead to greater acceptance by the courts because such a requirement furthers the objectives of both plaintiffs and defendants with regard to market share theory. The plaintiffs may be more successful in their efforts to get market share theory accepted by state appellate courts if they can show that all other possibilities of providing relief have been exhausted. Likewise, the defendants should welcome the due diligence requirement because it discourages plaintiffs in market share jurisdictions from indiscriminately suing a large number of companies, pleading ignorance, and leaving it to the companies to exculpate themselves.

In terms of its conceptual relation to market share theory, the due diligence requirement explains why the burden of investigation must be shouldered by the defendants when market share theory is used. As a theory of last resort, market share should be seen as relieving the plaintiff of the burdens of production and persuasion with regard to specific defendant identification, provided plaintiffs have shown they have done everything they possibly can to meet that burden themselves. Because plaintiffs are originally in a better position to discover identification evidence, moreover, the due diligence requirement, by compelling plain-

114. Comment, supra note 5, at 144-45, 148 ("Market share liability has been rejected by most courts as an ill-conceived solution based on policy grounds, not legal precedent. Furthermore, these same courts have not yet adopted either a single legal theory or a consistent set of standards to apply in latent, mass-injury cases.").

115. See Memorandum Concerning Martin v. Abbott Laboratories, supra note 16, at 2 (due diligence "provides a desirable brake on the wholesale abandonment of traditional grounds for liability and is therefore consistent with the viewpoint of the Supreme Judicial Court").
tiffs to do the initial investigation, enhances the efficiency of the investigative process.

Thus, imposing a due diligence requirement in market share theory would make it more compatible with traditional theories of liability. The due diligence requirement would also provide a degree of fairness to defendants which is vital in a theory abandoning the long-established causation requirement of traditional tort law.

—Thomas C. Willcox