Hymowitz v. Eli Lilly and Co.: Markets of Mothers

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TORTS STORIES

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FOUNDATION PRESS
New York, New York
2005
Torts Stories

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Hymowitz v. Eli Lilly and Co.: Markets of Mothers

Back in the fifties, Shirley Hymowitz adored her doctor, a Park Avenue eminence named Ernest Gladstone. She remembered him later as "a man I had more faith in than God. He had delivered me, and he delivered my children." The young Brooklyn homemaker gave birth to her first daughter, Rita, in 1952, when she was 23, and her second daughter, Mindy, in 1954. Both pregnancies were fretful events. Shirley Hymowitz worried that they might not continue to term. "I was staining, and at the time it was considered a miracle drug," Mrs. Hymowitz said, recalling what the kind, father-like Dr. Gladstone prescribed for her. "I took more with Mindy because I bled more." Millions of pregnant American women—the estimates run as high as six million, and no lower than a million and a half—ingested DES during the decades following World War II, ostensibly to prevent miscarriages and make their babies healthier. Not all of these consumers knew what they were ingesting—several believed their DES was a vitamin—and others never remembered the name of the substance. Shirley Hymowitz remembered. "When I took that drug, the name fascinated me. stilbestrol. I said, what a strange name."*

Growing up near the peak of the American baby boom, the Hymowitz sisters became "very different" people, as their mother saw them.

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1 The six million figure is from a People magazine feature, presumably verified in some way by fact-checking staff. See Before His Cancer Ordained, Lawyer Craig Diamond Defended DES Makers Now He's Suing His Former Clients, People, May 9, 1983, at 40. See also Shelly S阿拉伯, DES Found to Pose Lifelong Risk, The Record (Bergen County), Aug. 2, 1999, at 1 (quoting National Institutes of Health estimate of 4.8 million); Robert Meyers, DES: The Silent Pill 12 (1983) ("At least 3 percent of the nation's current population was exposed ... ").

2 Interview with Shirley Hymowitz (July 3, 2002).
“Rita’s a very calm, gentle woman. She lives on a farm in Virginia. She has a daughter. She also had four or five miscarriages.” Mindy Hymowitz grew up funny tough, eager to reach for risks—“a pistol,” recalled her friend Randy Deutsch. When Mindy found out that she had been badly hurt—she had clear-cell adenocarcinoma of the vagina, a rare cancer almost never found in young women—and also that many well-informed observers blamed a negligent industry for that type of injury, she took a fighting stance. Lying in her hospital bed after her hysterectomy in 1979, weak and wracked with pain, the 24-year-old nurse stretched for the telephone and began calling lawyers, one after the next. “Somebody had to be held responsible,” she later recalled, “and it certainly was not my mother.”

**Biography of a Drug**

Stillbestrol, also known as DES or diethylstilbestrol, is a synthetic version of estrogen. Though naturally present in both male and female bodies, estrogen is considered the principal female hormone. Scientists first isolated estrogen in the 1920s. From the start, physicians sought to prescribe it as a treatment for symptoms of menopause. But estrogen proved difficult to administer. Like many other hormones, natural estrogen is destroyed by saliva and gastric juices, and therefore cannot be taken orally; it can be injected, but to little profit for those who market it: Patients dislike injections.

Accordingly, researchers set out to find a way to redesign natural estrogen into a form that patients could take by mouth, in a pill. The first to succeed was an English team of scientists led by chemist-physician E.C. Dodds. His link to an overprescribed drug notwithstand ing, Charles Dodds throughout a long, brilliant career opposed reckless medication. He spent time and effort in the 1930s pleading for more care in the dispensation of sex hormones, and also denounced “the general public’s desire for the maintenance of youth and all that it implies, together with the successful exploitation of this trait by commercial firms.” In the 1930s Dr. Dodds had the skills in biochemistry and endocrinology to understand, and perhaps even invent, a birth control pill and a “morning after pill,” but he disapproved of these projects and would not touch them, believing that the female reproductive cycle was too delicate to be maneuvered in what would amount to an uncontrolled experiment.²

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² Interview with Randy Deutsch (July 14, 2002).
⁴ Meyers, supra note 1, at 42-43.
Dodd's never patented his 1938 invention because his source of funding, a British Medical Research Council grant, required grant recipients to share their discoveries with the public rather than patent them for private gain. By not patenting DES, Dodd's made it easy for drug manufacturers to produce and sell it. Under the federal Food, Drug, and Cosmetic Act, newly enacted in 1938, anyone with Food and Drug Administration approval could manufacture or market an approved drug; the lack of a patent saved DES manufacturers the expense of a license. Manufacturing this drug was like printing money; according to one judicial opinion, natural estrogen cost three hundred times as much as DES to manufacture.\textsuperscript{4}

To get approval from the newly formed FDA, each would-be DES manufacturer was expected to file a new drug application. The 1930s version of a new drug application required the manufacturer to state the drug's chemical makeup, production methods, proposed labeling, and information about its safety and anticipated applications. Applicants did not have to say anything about efficacy; the efficacy requirement arrived later in 1962. By the end of 1940, ten companies had submitted separate proposals to the FDA regarding stilbestrol.

In their applications, these drug manufacturers proposed selling DES to treat gynecological ailments. They made no reference to improving the outcomes of pregnancy. For reasons that are now not entirely clear, the FDA, after meeting with officials from the ten applicants, directed the companies to withdraw their separate applications and create one consolidated new-drug file. This file referred to 20 controlled human studies, said nothing about a known association between estrogen and cancer, and did not cite animal studies that might have suggested DES was dangerous. What the file did provide were a number of anecdotes about successful outcomes.\textsuperscript{5}


\textsuperscript{6} Ferrigno at 1310.

\textsuperscript{7} Lucinda M. Finley, The Pharmaceutical Industry and Women's Reproductive Health: The Perils of Ignoring Risk and Blaming Women, in Corporate Victimization of Women 59, 64-64 (Elizabeth Skowry & James G. Fox eds., 1996). Today anecdotes about happy outcomes are not considered good enough evidence to support the use of a particular drug. Clinicians expect data from randomized and controlled studies, showing that the drug yields better results than a placebo.
The FDA approved DES in 1941 to treat four conditions: menopausal disorders, gonorrheal vaginitis, senile vaginitis, and unwanted lactation. The approval did not extend to pregnancy, but physicians were free to dispense DES to pregnant women if they so chose. In approving the new drug, the FDA also directed the companies to work with the same formula in manufacturing DES, to develop uniform labeling for usage and recommended dosage, and to send their patient reports to the same consolidated file.

Soon manufacturers began to think about marketing DES to pregnant women. This marketing strategy—the companies' going beyond passive supply and expressly telling physicians that DES was good for pregnancy—required separate new approval from the FDA. Manufacturers were encouraged by early findings that natural estrogen could correct hormonal deficiencies that contributed to miscarriages, and by other studies that supported the hypothesis that stilbestrol functioned like natural estrogen for this purpose. In their supplemental new-drug applications, manufacturers relied on various medical school reports; they conducted very little research in-house.

The FDA approved the first plan to market DES as a miscarriage preventative in 1944. The new anti-miscarriage market caused DES sales to swell. Some manufacturers marketed stilbestrol generically; others promoted the product by a trade name. DES pills varied only by strength and external appearance, however, and so pharmacists frequently would fill prescriptions with whatever they had on hand in the right dosage, a practice of which manufacturers were aware.10

The drug filled a deep niche in American society after World War II, as citizens settled into their growing economy. With millions of service men just back from the war, couples had reason to view babies as anchoring their new, or newly reunited, marriages. In this climate a healthy child—or, in the later years of DES marketing, a child expected to be even more healthy than nature would have provided—warranted the most ardent pursuit.11 The two decades right after the war also marked a high point of reverence for pharmaceutical innovation, in part because the arrival of penicillin was still a fresh memory. A genuine miracle drug, penicillin had only recently put dreaded conditions like syphilis and staph infection in their place. It made sense then to think that the next drug would be the next miracle. Pat Cody, founder of the patient advocacy group DES Action, said she shudders to think how much DES exposure would have occurred if manufacturers had been permitted to advertise prescription drugs directly to consumers in the

10 See Russell, supra note 7, at 1073.
11 See Meyers, supra note 1, at 16 (noting that "in postwar America, when pregnancy was so ardently sought by so many couples, a miscarriage could be enough to distort a woman's perspective, a family's peace, a couple's dreams").
1950s, as they do today: "Fifty million women, not five million," would have taken the drug, Cody estimated.\(^\text{12}\)

Not everyone had access to DES, however. The exposed population was mostly white, upper-income, and reasonably well educated.\(^\text{13}\) Sybil Shlainwald, who went on to become a prominent lawyer noted for work in behalf of DES plaintiffs, remembered being too poor to get DES when she was pregnant in 1950. She couldn't afford to see an obstetrician, even though she, like Shirley Hymowitz, had worried about miscarriage because she had experienced bleeding. "I don't think I would have taken [DES]," she mused more than fifty years later. "I wanted a natural childbirth. I'd read Childbirth Without Fear," the bible of the alternative birth movement that went through six printings following its first publication in 1944.\(^\text{14}\) But the point was moot: when she was a patient, Sybil Shlainwald could afford only a general practitioner, a man who did not keep up with the latest pharmaceutical wonders. Women of her class received DES only under rare circumstances.\(^\text{15}\)

Against the backdrop of enthusiasm for healthy babies and health-making pharmaceuticals, the manufacturers got a sales boost in 1952 when the FDA declared that stilbestrol was no longer a new drug. This FDA decision meant that any company could market DES for any purpose as long as it followed the standard formula and protocols of packaging. Hundreds of companies entered this lucrative market, promoting DES aggressively to physicians for prescription to pregnant women. Another significant event occurred in 1952: the first medical-journal paper questioning the effectiveness of DES as a miscarriage preventative was published.\(^\text{16}\) The two 1952 events came together in an unfortunate way. As word got out that DES was perhaps useless to prevent miscarriage—indeed, later studies found that it seemed to make miscarriage more likely, not less likely—manufacturers retreated somewhat from the miscarriage promise and marketed DES more vaguely as a source of healthier, heartier, better babies,\(^\text{17}\) a claim that the FDA did not ask them to support.

\(^{12}\) Interview with Pat Cody (Aug. 1, 2002).

\(^{13}\) Finley, supra note 9, at 67.

\(^{14}\) Interview with Sybil Shlainwald (Aug. 4, 2002).

\(^{15}\) See, e.g., Mink v. University of Chicago, 460 F. Supp. 713 (N.D.III.1978) (seeking damages for plaintiffs who were given DES without their knowledge or consent as part of a research study).


\(^{17}\) Finley, supra note 9, at 66-67. See also infra notes 25-26 and accompanying text.

\(^{18}\) Interview with Luzinda Finley (July 31, 2002). One 1957 advertisement in a medical journal touted DES in bold terms: "Recommended for routine prophylaxis in ALL pregnant
Although DES never lost its FDA approval and is still occasionally prescribed today—and can also be ingested via hormone-fed animals that are slaughtered to become meat—the era of routine distribution to healthy women came to an end in 1971, when researchers published the first of a series of grim findings regarding DES children: Young women whose mothers had ingested DES were developing clear-cell adenocarcinomas of the vagina, a disease that strikes almost no women absent DES exposure. The physician who won the most fame for the discovery was Arthur Herbst, whose report about teenage adipocarcinomas, published first in 1971, was reprinted in Classic Pages in Obstetrics and Gynecology in 1996. A DES mother, unknown in the literature, shares credit for discovering the connection. In 1989 gynecologist Howard Ulfelder, later a co-author with Herbst, was puzzling over having seen three young patients in three years with clear-cell adenocarcinomas, the disease that young women were never supposed to get. He remained puzzled when the third patient's mother remarked to him, "I don't think I ever told you that when I was pregnant with Shirley the doctor put me on stilbestrol because I had lost one pregnancy. Could that have anything to do with it?" Ulfelder doubted it, but checked with the mother of the second patient. Yes, said the second mother. She had taken DES. "I thought, My God . . . ." Ulfelder recalled.

Soon came new reports of other conditions. Among them were adenosil, a growth of misplaced tissue, sometimes called "prenoncious," that appears on the cervix or vagina and requires monitoring, infertility, miscarriages, and premature births; menstrual abnormalities; and an

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1 Charles R. Huggins won the Nobel prize in medicine for his use of DES in alleviating prostate cancer, a use that continues. Meyer, supra note 2, at 33-44.

2 Unlike DES generally, DES as food for animals to make their bigger is a patented technology. The Iowa State College Research Foundation made millions on this patent, and built an auditorium with some of the income. Ophelia Laitman, Greenberg, DES: The Complete Story 145 (2001). In 1973 the federal government banned feeding DES to food animals. The Department of Agriculture website now expressly doubts that anyone would violate this law, because other hormones "such as trenbolone acetate and estradiol," are more effective than DES in promoting growth, and also easier to obtain. Nevertheless, in July 1999 the Swiss government concluded that it had found DES in U.S. beef. See http://www.fsa.cds.ca/ivbs/background.htm. Robert Meyers believes that every American who ate meat before 1979 is a DES-exposed person. Meyers, supra note 1, at 302: "You didn't have to be pregnant to get DES in America: you just had to have a good meal."


4 Quoted in Meyers, supra note 2, at 85-86.
array of psychological and emotional conditions that remain inadequately understood. Researchers would later discover harmful effects in DES mothers and sons. In November 1971, the FDA decreed DES contraindicated for use in pregnancy, and ordered manufacturers to warn physicians of its dangers.26

Negligence? Defectiveness?

Because DES won its fame in Torts on the question of "market share," an observer can easily overlook the question of whether the manufacturers could be held liable in tort. When they rule on the question of whether to apply market-share liability, judges typically begin by presuming that DES manufacturers could be found liable if the identification problem were resolved. Were the manufacturers at fault? Or, to speak in the jargon of products liability rather than torts, was DES a defective product? Decades after ceasing to market DES to pregnant women, the manufacturers of DES do not concede negligence or defectiveness.

The Claim of Manufacturer Negligence and Product Defect

By 1939, before the FDA approved the marketing of DES for limited clinical conditions, more than 40 articles "documenting carcinogenic effects of natural and synthetic estrogens, including DES" had been published in medical journals.25 In 1939 and 1940, a Northwestern University study found that "an alarming number" of the offspring of pregnant rats that were fed DES had reproductive-organ anomalies: mishapen uteruses, ovaries, and vaginas in many of the females, tiny and malformed penises in a smaller number of the males.26 DES manufacturers did not act in response to these findings.

DES had won a big publicity boost following research in the late 1940s by the husband-and-wife team of George Smith, a gynecologist, and Olive Watkins Smith, an endocrinologist. The Smiths reported

25 See Orenberg, supra note 20, at 54-75.

26 Martin v. Abbott Laboratories, 689 P.2d 368, 374 (Wash. 1984). The FDA was slow to act. The 1971 findings were published in April, and the FDA did not declare DES contraindicated for use in pregnancy until November. By contrast the New York state health commissioner, Hollis Ingraham, immediately wrote to all practicing physicians in New York with the news of the adverse findings. Ingraham urged the FDA to ban DES for use in pregnancy, but the FDA did nothing for eight months, during which time an estimated 60,000 more women received prescriptions for DES. Finley, supra note 9, at 68-69.

27 Finley, supra note 8, at 61.

28 Id. at 62.
findings that suggested an association between DES ingestion and an unexpectedly large number of healthy full-term babies among women at high risk for pregnancy complications. But these findings were soon attacked as unsound. When researchers tried to replicate them with controlled studies (the Smiths' findings were mainly anecdotal), they found that DES was of no value in preventing miscarriage. Bed rest, not DES, probably deserved the credit when the Smiths' mix of bed rest and DES improved the outcomes of pregnancy.

In 1952, Columbia researchers announced that DES was "a dismal failure in the general treatment of threatened abortion." Later studies refuted the Smiths' claim that DES produced healthier babies, one going so far as to find it caused a statistically significant increase in miscarriages, premature births, and neonatal deaths. Whereas many dangers of DES, such as the risk of clear-cell cancer and adenosis among daughters, did not reveal themselves for many years, lack of efficacy could have emerged quickly if the manufacturers had undertaken the kind of clinical trials that the FDA began to demand in 1962 before approving new drugs. One might conclude that manufacturers marketed DES to improve pregnancy outcomes long after they knew, or should have known, that serious doubts had been cast on its effectiveness for this purpose.

In the early years of marketing, from 1941 to 1952, when DES was approved only to treat specific conditions in women, salesmen for the manufacturers encouraged physicians to dispense DES for a variety of other conditions. Long after the Smiths' claims about pregnancy outcomes were debunked, these manufacturers repeated these dubious claims to physicians in their promotional materials. Moreover, whereas the Smiths themselves had evaluated DES as a therapy for women at risk for losing their pregnancies, manufacturers touted the drug as a panacea, good for all pregnant women. These marketing tactics appear in hindsight unbounded. "The drug manufacturers who jumped on the DES bandwagon either never made the computations or didn't care," says one website addressed to DES claimants, but the recommended

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27 Id. at 65–67.
28 Apfel & Miller, supra note 6, at 24.
29 Id. at 18.
30 Finley, supra note 9, at 67.
31 It is not clear how catholic the Smiths were in their endorsement of DES. Compare Apfel & Miller, supra note 6, at 24–25 (describing careful, narrow recommendations), with W.J. Dieckmann et al., Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Value?, 66 Am. J. Obstetrics & Gynecology 1060 (1953) (claiming that the Smiths had "suggested that increasing amounts of diethylstilbestrol should be administered to all women during pregnancy") (emphasis added).
dosage of DES given to pregnant women “was the equivalent of the estrogenic effect of 55,666 birth control pills.”

Defense attorneys contacted for this chapter refused to provide the manufacturers’ side of the story, citing ongoing litigation, but over the years spokespersons for the DES industry have maintained that the manufacturers were not at fault. “Lilly relied on the universities to do all the testing,” one Lilly lawyer told a reporter in 1979. “If I were Lilly, and you gave me $100 million, and you said, ‘Okay, go test the drug in 1947,’ ” the most respected authorities to do the job would have been the Boston researcher Priscilla White, and George and Olive Smith. “They were state of the art,” the lawyer, Edwin Hedley, continued. “They knew more about this subject than anybody alive.”

For her part, Olive Smith objected bitterly to the blight that DES reports had cast on the Smiths’ long careers. The couple had been superstars: Olive was the first woman to get a Ph.D. from Harvard’s medical school, George published his first ten papers when he was still a medical student. The two were major players in obstetrics and endocrinology, but are thought of today as wrongheaded researchers whose Harvard credentials helped to underwrite the spread of a toxic drug. In an interview published in 1983, the octogenarian Olive insisted that DES did not cause cancer, and that reproductive-organ anomalies in DES daughters could well relate to their mothers’ having had similar problems.

Collateral Estoppel on Negligence or Defectiveness

The issues of negligence and defectiveness have remained disputed in DES litigation into the twenty-first century, even though the harmful properties of DES are today taken as fact in schools and departments of American universities and in the popular media. Yet this conclusion continues to be rebuffed. Plaintiffs sev er a 1979 precedent, Bichler v. Eli Lilly & Co.,3 that deemed Lilly to have been negligent for not testing the drug on pregnant mice. Defendants retort that issue preclusion on the point is improper because different claimants report different injuries, and experience different medical histories. New York courts have held that a plaintiff’s clear-cell cancer followed by a hysterectomy and vaginectomy is close enough to Joyce Bichler’s injuries to warrant issue

34Meyers, supra note 1, at 57. The Smiths also maintained that they had found DES indicated only in a small number of pregnancies. Id. at 71.
35436 N.E.2d 182 (N.Y.1982).
precision on the question of negligence; they have also held, however, that plaintiffs are not entitled to issue preclusion on proximate cause. DES litigators have reported wins and losses for both sides in recent years; teratologists and epidemiologists continue to be employed as courtroom expert witnesses on negligence and defect.

What About FDA Negligence?

In Torts classrooms over the decades, law students have volunteered their disapproval of the Food and Drug Administration’s performance with respect to the regulation of DES and wonder why the agency has not been held liable for careless decision making, given that careful decision making (for example, like that of the distinguished FDA scientist Frances Kelsey, who reviewed an application to market another notorious drug, thalidomide, in the early 1960s) might have saved lives. Observers have objected to the FDA’s passive acceptance of industry data on safety and efficacy, its unfounded expansion of manufacturer prerogatives in 1962, and its refusal to take a hint from the thalidomide disaster in 1962—admittedly, most of the DES damage was done by then—that drugs taken during pregnancy might harm offspring. Activist Pat Cody has some sympathy for the agency, especially regarding its decision to put so much faith in manufacturer data during the early years: the FDA “was new in 1950, part of the New Deal; they didn’t really know what they were doing.”27 Later in the DES era, the latter half of the 1947–1971 marketing period, however, the agency does appear remiss.

The reason for nonliability is the continuing effect of sovereign immunity on tort litigation. Although many barriers to suing government have fallen, federal agencies remain mostly immune from liability for their discretionary functions—that is, for decisions based on considerations of social or economic policy. Courts have interpreted discretionary-function immunity to be present whenever an official had discretion to adopt the policy that plaintiffs attack. Only if the official violated a binding rule or policy will the agency be liable.28 Even though FDA officials were obligated to authorize only safe and effective drugs, and even though DES is in hindsight both unsafe and ineffective as both a miscarriage preventative and a promoter of fetal well-being, FDA staff

27 Interview with Pat Cody (Aug. 1, 2002).
did not violate a clear agency rule or policy when they allowed DES to be marketed.

As plaintiffs and their lawyers appear to have conceded, the FDA had discretion to make the choices it made. Few have even attempted to sue the FDA for DES injuries. Joseph Japalis, a legally successful personal-injury lawyer based in Texas, gave it a try in the 1970s on behalf of a client named Beverly Ann Gray. The complaint named the United States and Lilly as defendants. The court dismissed the United States from the case, holding that the FDA approval of DES fell under discretionary-function immunity.48

"DES Daughters" Emerge, and Seek Redress, in the 1970s

The 1971 withdrawal of DES as a miscarriage preventative marked a new era for both medical providers and the legal community. Arthur Herbet, the researcher who broke the news about a link between DES and cancer, is the New England Journal of Medicine, continued his DES research after publishing his initial findings in 1971. He started keeping what became known as the Herbet Registry, a record of all known cases of clear-cell vaginal adenocarcinoma. DES daughters, including Mindy Hymowitz, had their names added to this registry when their physicians reported occurrences of this rare disease. Joyce Biehler, number 76 in the registry and author of the first DES memoir, wrote about the strong feelings her number provoked for her. Only seventy, she thought. And also, There are seventy others! Victim awareness, and a movement to the courts, grew in the 1970s.

Paul Rheingold filed the first multi-plaintiff DES lawsuit in 1974. Motivated in part by the DES exposure of his daughter, Julia, Rheingold brought a class action against twenty drug manufacturers. The relief he sought included a national fund, research and treatment programs, and publicity to make DES daughters aware of their plight. What exactly this right meant, Rheingold could not say. The young class members had not

48 Gray v. United States, 445 F.Supp. 337, 339–42 (S.D.Tex.1978). Accord in re Orthopedic Bone Screw Product Liability Litigation, 264 F.3d 344 (3d Cir.2000) (imputing an FDA decision regarding a medical device); Saeuber v. Shidara, 896 F.Supp. 1178, 1192 (W.D.Wis.1995) (rejecting consumers’ claim against the FDA for approving the marketing of human growth hormone because plaintiffs could not prove that the decision to approve was arbitrary or capricious); Sharon H. Nelson, Continuous Concern: Human Subject Protection, the Institutional Review Board, and Containing Review, 68 Tenn. L. Rev. 725, 743-44 (2001) (noting that a claim against the FDA based on injuries that occurred during a clinical trial is unlikely to succeed because of sovereign immunity).

yet set out to have children, nor yet experienced adult life under conditions of uncertainty about reproductive health. In the past Rheingold had won notable victories in behalf of plaintiffs' groups. But here he lost, because of the inchoate nature of the harm. Rheingold could allege only exposure, and not a certain injury. His action was dismissed. Undaunted by the class action defeat, Rheingold devoted time in the 1970s to individual claims.

Litigator Sybil Shainwald also spent the 1970s making her mark in New York DES litigation. As a junior lawyer Shainwald represented Joyce Bichler, who at age 17 had been through a hysterectomy and a vaginectomy. Bichler was the first plaintiff to win damages from a jury—$500,000—in a DES cancer case.

As a litigant Bichler was lucky, despite her severe illness and wrenching surgeries: she escaped the Scylla of the statute of limitations (because she was young when she discovered her injury) and the Charybdis of nonidentification. Bichler's mother remembered that her pharmacist had told her the drug came from Lilly, a contention that made Lilly a plausible defendant, even though the jury ultimately rejected Bichler's contention that Lilly had supplied Mrs. Bichler with the drug. And Joyce Bichler brought luck to her fellow plaintiffs too. While refusing to agree that Joyce Bichler had identified the right supplier, her jury found that "the defendant, Eli Lilly, and the other drug manufacturers had acted in concert with each other in the testing and marketing of DES for miscarriage purposes." This finding rested in part on the coordination among manufacturers in seeking FDA approval decades earlier. Upheld by the Court of Appeals, the highest court in New York, the concert-of-action precedent permitted courts to hold any DES manufacturer liable in full for the amount of damages that a plaintiff suffered.

New York Litigants Get Over Their Biggest Hurdle

The DES problem is familiar to any Torts student. Two hundred and sixty-seven manufacturers, some of them with only brief experience marketing the drug . . . nobody paying for patent licenses that might...

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48 Bichler, supra note 41, at 65-67.
49 See infra, "New York Litigants Get Over Their Biggest Hurdle."
50 Quoted in Bichler, supra note 41, at 180-81.
52 Judicial opinions often assert uncertainty about the number, but Robert Meyers says 267. Meyers, supra note 1, at 19-19.
have kept better track of sales . . . most of the (pre-computer) pharma-
aceutical and medical records scattered . . . some DES mothers deceased,
or unable to recall what kind of pill they took . . . But wait. Not so fast.
From the New York plaintiffs' standpoint, these issues arose only
secondarily.

Consider Mindy Hymowitz. In 1979, Hymowitz found out about her
vaginal adenocarcinoma. She had been exposed to DES in 1954, before
she was born. Thereafter, she had experienced no contact with the
substance. Now, assuming the existence of a claim, tort law will ask:
When did the tort happen? Surely Mindy's injury occurred before her
birth in December 1954. Her claim would be negligence, and in New
York, negligence claims are supposed to be brought within three years of
the harmful contact. Plaintiffs get the clock turned off when they are
minors, but that benefit runs out when they come of age: then the clock
turns back on. Mindy Hymowitz hadn't let any time go by. She learned
about the cancer in April 1979, at age 24; she underwent a hysterectomy
a week later, and was calling for legal help from her hospital bed. Too
late, the lawyers said. You're too old.

For DES claimants in New York, the statute of limitations was a far
more pressing problem than identifying the defendant. If the statute
could not be relaxed, or reinterpreted, or rewritten to permit them to
see, their claims would vanish. Defense litigators typically raise the
statute of limitations as an affirmative defense long before they begin to
dispute the merits of a claim. As Mindy Hymowitz learned in her
hospital room, there was no point even thinking about liability unless
the statute of limitations could be dealt with.

Veteran litigator Paul Rheingold recalled the grim work of explain-
ing the statute of limitations, again and again, to his DES clients. They
did not accept that the passage of time functions to cut off liability. In
their view, what was wrong in the 1950s remained wrong in the 1980s;
Mindy Hymowitz spoke for many DES claimants when she said that
"(a) somebody had to be held responsible, and it certainly was not my
mother." Rheingold remembered one client in particular, Fran Fish-
bane, a painter and activist. In the mid-1980s Rheingold advised Fish-
bane that her cause was hopeless. "I told her she might as well just go
home and cry," he said. Fishbane duly went home, but instead of crying
sketched him a pencil drawing of what she called a hue and cry. She
drew angry women in a mob, holding up signs with slogans like "DES
Sucks," a raging and protesting fury. Rheingold framed the drawing and
hung it in his New York brownstone office, in a collection of law-themed
art.

48 See supra note 4 and accompanying text.
49 Interview with Paul Rheingold (July 16, 2002).
The difficulty that Blasingold struggled to communicate came from a misfit between latent exposure and tort statutes of limitation. Statutes of limitations work well for claims based on traumatic injury—an intentional punch in the nose, or a collision that results from bad driving. With latent exposure, however, injuries take years to ripen, over a gap between what is called the time of exposure and the time of discovery. On this injustice, a bit of wit from Jerome Frank still gets quoted: ‘Except in topos-turvy land, you can’t die before you are conceived, or be divorced before you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad.’ It seems harsh to use the statute of limitations against a plaintiff who may have proceeded at lightning speed. Moreover, if the main purpose of statutes of limitation is to remind courts that memories get stale, and that factual evidence decays as it ages, such statutes offer less benefit for latent-exposure claims—where defendants typically are business enterprises with the capacity to keep records almost indefinitely—than they do for traumatic impacts.

The New York time-of-exposure rule for the statute of limitation was “a dinosaur,” according to activist Jay Hallon, the director of the New York Public Interest Research Group (NYPIRG). Other states had started to liberalize these statutes for latent exposure, but New York law held firm to the view that the DES clock had started to tick for Mindy Hymowitz in the mid-1960s, with only a brief, now-expired extension based on her infancy at the time of impact. Mindy and her mother Shirley knew they needed a new statute. The Hymowitzes began traveling to Albany to share their plight with lawmakers. A handful of other DES claimants would make the same trip. “I always saw the same people,” Shirley recalled. NYPIRG coordinated the lobbying effort. The AFL-CIO, a leading voice for labor in Albany, joined the endeavor: it too wanted relief from the time-of-exposure cutoff, because many union members were in a similar position with respect to injuries they attributed to workplace exposure to chemicals like PVC in past decades. The governor of New York, Mario Cuomo, supported their cause. But the coalition met tough opposition from Republican leaders in the legislature, who viewed the time-of-exposure rule necessary to protect against unbounded litigation “You could have driven companies out of the state,” said Warren Anderson, the state senate majority leader, several years after the lobbying effort. Eventually Anderson supported a com-

51 Discher v. Merlin Firearms Co., 198 F.3d 821, 823 (2d Cir.1999) (Frank, J., dissenting). Judge Frank may have won some in Discher, but he lost in the Second Circuit; his fellow judges did not agree with him, and Mr. Discher’s claim, for the loss of his eye, did indeed die before its conception.

52 Quoted in Giloff, supra note 4.

53 Quoted in id.
promise, the revival statute of 1986.\(^{34}\)

Under this revival statute, some toxic exposure claims that would have been barred under the statute of limitations could be prosecuted in New York during a one-year window that ran from July 30, 1986 to July 30, 1987. In order to be revived, the claims had to allege injury from one of five substances: asbestos, tungsten-carbide, chlorosane, polyvinyl chloride—or DES. Perhaps more important, the 1986 law also substituted a "time of discovery" trigger for the old time-of-exposure rule, opening the door for some future DES claims to reach the New York courts.\(^{35}\)

Now the DES daughters of New York could sue. But sue whom? A minority of the plaintiffs knew which manufacturer had made the DES their mothers had taken, or could at least present evidence that one particular manufacturer was the source. Now and then pharmacy records were available; sometimes hospital records established at the plaintiff's birth noted whose drugs her mother had taken; some versions of DES pills were distinctive in dosage or appearance. Most plaintiffs, however, needed judicial help to get over the identification barrier.

\textit{Hymovitz Comes to the Court of Appeals}

In the same decade that DES litigators like Rheingold and Shainwald were changing DES case law, a student built theory to accompany and shape this work. To pick up the summer credit hours that every evening student needed to switch into the day division, Fordham law student Naomi Sheiner chose professor Sheila Birnbaum's products liability class. In that class Birnbaum, who would leave Fordham a few years later to become a prominent defense lawyer, encouraged Sheiner to think about the DES cases just beginning to percolate through the courts. Sheiner set out to write a law review comment. Her market share argument developed in the summer of 1977, Sheiner recalled a couple of decades later, when she and a friend would drive to classes, kicking around ideas in the car. Back then, Sheiner thought of market share as a way to collect damages, not an approach to causation. "Of course, I had no idea how hard it would be to figure out market share," she said. Her paper, probably the most significant student-written publication in all of tort law, was almost strangled in its crib when a supervising editor at the law review dismissed it as "too theoretical."\(^{36}\) Another editor rescued


\(^{35}\) N.Y. C.P.L.R. 214-c(4) (Consol. 2002).

\(^{36}\) Interview with Naomi Sheiner (Mar. 31, 1998).
the paper; it was published in 1978, and the California Supreme Court relied on it when issuing the first market share liability decision in 1980, Sindell v. Abbott Laboratories.

By 1989, the year Hymowitz was decided, Shenker's market share idea had won some and lost some around the country, while Sybil Shainwald's preferred theory, concert of action, had won no judicial support outside New York. The Sindell decision on market share had been accepted in Michigan and Washington, modified in a pro-plaintiff direction in Wisconsin, and rejected in Missouri and Iowa. Bichler v. Eli Lilly and Co. was still available as a Court of Appeals precedent on full concert-of-action joint liability—a much better theory for plaintiffs than market share, because so many defendants were unidentified and unavailing—but DES litigators had reason to doubt the solidity of this stance. Hundreds of claims lay in wait in New York.

Hymowitz reached the Court of Appeals, the state's highest court, as a quasi-class action—that is, never certified as a class, but involving common injuries and the same allegations of tortious conduct against DES manufacturers. The court was presented with certified questions: Defendants contended that they should prevail where plaintiffs could not identify the manufacturer of her mother's DES, and also that the 1986 revival statute was unconstitutional. Ira Gammerman, the trial judge

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20 409 P.2d 574 (Cal.1965).


22 The Wisconsin Supreme Court held that a DES plaintiff could recover in full from just one manufacturer if she could prove that the defendant had marketed the type of DES that her mother took (that is, similar in color or shape or other identifiable appearance). The defendant would be free to implicate third parties, and liability would be apportioned on many criteria including market share. Collins v. Eli Lilly & Co., 342 N.W.2d 27 (Wis.1984).

23 Zeiff v. Eli Lilly & Co., 676 S.W.2d 341 (Mo.1984); Mulesky v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1980).

24 In Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y.1982), Lilly appealed the judgment entered on Joyce Bichler's $600,000 jury verdict. See supra notes 47-50 and accompanying text Lilly objected to the application of concert-of-action liability. The Court of Appeals rejected this contention—but on procedural grounds, holding that Lilly had "abandoned or withdrawn" its efforts to gain contrary jury instructions at trial. Bichler, 436 N.E.2d at 187. The court seemed to treat on the plaintiff's strategy—concert of action against only one defendant—but declined to disrupt a finding against which Lilly had not fought vigorously at trial. See id at 186.
handling DES cases in New York City, had ruled for the plaintiffs on these points.

DES litigation is famous today for its numerous defendants, but the New York plaintiffs were even more numerous. About 500 DES daughters had retained various lawyers, none of whom could be called a shrinking violet. Paul Rheingold popped his client Mindy Hymowitz at the top of the Court of Appeals caption: "It could have been Erin Murphy." Sybil Shainwald said with a little regret, more than twenty years later, remembering her own client. Also jockeying for influence were NYPIRG, which had led the fight for the revival statute, and the New York attorney general's office, which appeared as amicus. "Ego, power, and money," Paul Rheingold grinned, remembering conflicts among plaintiffs' lawyers over which of them would have to sit on the sidelines.45

Five Court of Appeals judges rather than the normal seven participated in Hymowitz: three judges—Joseph Bellacosa, Judith Kaye, and Richard Suneson—recused themselves, and one, Milton Mollen, the presiding justice of the Second Department appellate court, sat as a replacement.46 The court spent a full afternoon hearing arguments from several lawyers. Listening to the judges' questions, Rheingold had a distinct feeling that the Court of Appeals would endorse market share liability. The only suspense, he wrote soon after the decision, was over whether "defendants would be exculpated from responsibility and whether joint liability would be applied."47

The court issued its opinion on April 4, 1989. Chief Judge Sol Wachtler, whose career would crash into disgrace a few years later,48 wrote for the 4-1 majority. Hymowitz v. Eli Lilly and Co.,49 upheld the revival statute against claims by the defendants that it violated their rights to equal protection and due process. Choosing among the theories that plaintiffs had invoked to hold all DES manufacturers liable, the court rejected both concert of action and "alternative liability," the

46 Paul D. Rheingold, The Hymowitz Decision: Practical Aspects of New York DES Litigation, 55 Brook. L. Rev. 853, 887 (1989). Rheingold dedicated this article to Mindy Hymowitz, his client, then enrolled in law school, noting "her courage to speak out against restrictive DES laws." Id. at 883.
47 Id. at 887.
48 Judge Wachtler was arrested in 1993 on charges of harassing and threatening a former lover, the New York tabloids enjoyed the detail that he had sent the woman's 14-year-old daughter a condom in the mail. He served more than a year in federal prison. Wachtler later attributed his behavior to manic-depressive illness. Sol Wachtler, After the Madhouse: A Judge's Own Prison Memoir (1997).
approach made famous in California's *Summers v. Tice*. It accepted market share liability, a variation on Sheiner's theme, where defendants are liable to each plaintiff in proportion to their share of the DES market at the time of exposure.

Of all the many questions that the market share concept raised—among them, which years of sales, which dosages, and miscarriage DES or all DES—*the most fundamental related to geographic terrain. Sindell* had left the question unresolved. Florida, in a post-*Hymowitz* decision, would later choose a much narrower market: it held that if the mother had bought her DES from only one pharmacy, the market would be the suppliers to that pharmacy. Similarly, current case law in Washington looks for a market "as narrow as possible." *Hymowitz*, however, issued an explicit judicial endorsement of a national market.

*Hymowitz* also held that defendants with a share of the market could not escape liability based on what was known about the source of DES in a particular instance of exposure. For instance, if a plaintiff's mother testifies that her DES pill was a particular color and the defendant can prove that it never made DES pills in that color, *Hymowitz* does not the defendant no less obliged to pay, still stuck with liability in proportion to its share of the market at the time. It was only this last piece of the majority opinion that did not win a unanimous court: Milton Mollen, the replacement judge filling in from the Second Department, wrote in a separate opinion that each defendant should be permitted to exculpate itself.

Mollen's opinion highlights an inconsistency worth noting. On the one hand, when a plaintiff can identify one particular defendant, then that defendant, if deemed negligent (or strictly liable), becomes liable for all of her damages. No identification issue impedes the causation element of the plaintiff's case; she recovers in full. On the other hand, equally positive non-identification does not exonerate the defendant in

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66 190 P.2d 1 (Cal.1948).
67 See infra notes 60-63 and accompanying text.
70 *Hymowitz*, 539 N.E.2d at 106; (Mollen, J., concurring and dissenting).
71 Sybil Shainwald, however, has reported that Lilly takes a contrary position in settlement negotiations. "Even if I have an affidavit from the pharmacist" identifying Lilly, she said, the company insists on proceeding on a market-share fractional basis. Interview with Sybil Shainwald (Nov. 8, 2003). In principle, market share is supposed to be used only when the plaintiff cannot identify the defendant supplier.
A manufacturer that can prove it was not the source of the mother’s DES is nevertheless burdened with a market share of liability. Identified or unidentified, a defendant that sold DES can only lose, never win, on causation. As Mollen pointed out in his separate opinion, no other court had gone this far in a DES market-share ruling. Others share his disapproval. “The Hymowitz decision is dangerous precedent,” one student writer concluded promptly after the case was decided, “because it totally eliminates causation as an element of recovery, develops a theory which is plagued with internal inconsistencies, and establishes liability that far exceeds absolute liability.”

Among lawyers and litigants at the time of decision, Hymowitz provoked more moderate commentary. A Lilly spokeswoman seemed satisfied. Hymowitz struck “a reasonable balance between the interests of the plaintiffs and the interests of the defendants in the New York DES cases,” she told a reporter. For Sybil Sinai, Hymowitz was a defeat. She, after all, had won Bichler, the concert-of-action precedent. Now her clients, and all DES claimants in New York, would have to chase numerous manufacturers whenever they could not identify the supplier in order to obtain judgments or settlements containing anything close to full damages: Hymowitz rejected joint liability, and treated market-share percentages as the maximum each unidentified defendant had to pay. Later Sinai recalled the decade between Bichler and Hymowitz as a transition where the Court of Appeals grew “more conservative.”

Her colleague and contemporary LeRoy Hersh, a Bay Area lawyer, agreed that the market share rule of Hymowitz was a disappointment, as has been the California market share holding nine years earlier. Paul Rheingold, however, published a law review article soon after Hymowitz was decided, deeming market share superior to concert of action as a way to impose liability. Concert of action, Rheingold wrote:

“Hymowitz, 159 N.E.2d at 1062.”


“Quoted in Abin E. Bennett, Court Clears Path for DES Cases, Newsday, Apr. 5, 1989, at 29.”

Interview with Sybil Sinai (Aug. 4, 2002).

Hersh remembers being at a social event one evening in 1980, aware that Sinai had just been decided that day but not yet told what the court had held. The news would be announced the next morning. At the gathering, Hersh encountered Justice Matthew Tobriner of the California Supreme Court. “Matt Tobriner said to me, ‘The court’s decision will make you very happy, LeRoy,’” Hersh recounted in 2002. “But as it turned out, it was a Pyrrhic victory.” Interview with LeRoy Hersh (July 31, 2002).
had been rejected by every other state in the country which had the DES identification issue before it, although a number of them had adopted other theories. [Moreover], the briefs of virtually every defendant advocated, in one way or another, that, if the court was going to consider some legal theory shifting the traditional burden of identification away from the plaintiffs, market share was the most equitable of the devices.79

DES Litigation Practice in New York after Hymowitz

New York litigators now had to work with Hymowitz. As their architect-theoretician Naomi Sheiner could see only in hindsight, market share is extremely hard to do. For starters, not all manufacturers subject to jurisdiction could provide their sales figures for the relevant years. Even Lilly, as extraordinarily sophisticated defendant, a company that could provide the number of DES units it had made between 1942 to 1971—that would be 716 million—could not count the number of those units that went to pregnant women.80 So much for the numerator of the fraction. The denominator remains even more elusive. Without the central recordkeeping that a patent license would have created, courts had trouble counting the total number of DES units sold.

The New York lawyers knew California had had a hard time following Sindell. The California Supreme Court had ordered a trial on the market share question; a rancorous and protracted hearing ensued. "We started by asking every company for their sales data, and then we started interpreting, massaging, mixing the data," recalled Roman Silberfeld, a plaintiffs' lawyer based in Los Angeles. "It was far from perfect, because the data were so bad."81 Plaintiffs' attorneys described the San Francisco endeavor as too dependent on manufacturer self-reporting. Some of them thought that Lilly in particular got off easy, winning a market share apportionment that some said was perhaps half of the truth.82 John McGoldrick, who once represented Lilly and went on

79 Sheinger, supra note 64, at 886.
80 Meyers, supra note 1, at 80. Cynthia Ormberg writes that Lilly claimed $2.5 million in total sales of DES to pregnant women, Ormberg, supra note 30, at 153—a figure that seems low.
81 Interview with Roman Silberfeld (Aug. 16, 2002).
82 Lilly drew less than a third overall in the San Francisco proceeding, with higher fractions in the early years and lower ones later. According to Robert Meyers, Lilly "made at least half, and possibly 75 percent of all DES sold in this country"—although not all of it was marketed under the Lilly name, and some of it was not used to prevent miscarriage. Meyers, supra note 1, at 78-80. It is hard to assess the charge that Lilly benefited from an unduly low market share assessment. If all the sales figures were too low, not just Lilly's,
to become general counsel of Bristol Myers Squibb, dismissed these speculations as a kind of backhanded compliment to a company that had a stellar reputation: "The pharmacist would say, 'I only carried Lilly,' the implication being, 'I only carried the best,'" he recalled. 8

Soon after the Hymowitz decision came down, litigants took the New York market share fight to the grand Erie County courthouse in Buffalo. Judge James Kane, who presided, made no market share decision; the lawyers worked out their own deal regarding the national market that Hymowitz mandated they identify and measure. Under this settlement, finalized in 1992, the plaintiffs' side won a 10% increase per defendant over the California amounts, so that, for instance, a defendant assigned 29% in San Francisco would be assigned 22% in New York—an adjustment that still left their clients undercompensated, in their view. The lawyers for both sides crafted what they called "the grid" or "the matrix," a chart listing the years 1947 to 1971, when DES was marketed to pregnant women, and the market share of each corporation for that year.

With the grid in front of them, a plaintiff's lawyer like Paul Rheingold or Sybil Shainwald could sit down with a defense lawyer like John McGoldrick and look up the relevant year of exposure. Lilly, or any other defendant, would have an assigned market share for that year, and that fractional number would be multiplied by the value of the plaintiff's damages. In identifying damages, some lawyers preferred to work with broad classifications—cancer, infertility, miscarriage—whereas others preferred a more individualized assessment.

The grid facilitated settlement, 9 but some lawyers felt chafed by its static, bureaucratic approach to damages. In the early 1990s Shainwald, an early and energetic grid user, believed that plaintiffs' counsel in New York saw the market share calculation would not have given Lilly any particular advantage among the defendants.

8 Interview with John McGoldrick (Aug. 5, 2002). Roman Silberfeld agreed that the Lilly market share really did not exceed about thirty percent overall, mainly because the phenomenon of generic drugs did not develop until around 1955. From 1947 to 1955, Silberfeld believed Lilly did dominate the market. But generics quickly denatured Lilly to a much smaller share. Silberfeld added that Lilly had about three times the market share of the runner-up.

9 It was, however, only part of the process. Roman Silberfeld pointed out that the grid is particularly roasting in cases of partial identification—for instance, where the plaintiff's mother has a vague memory of taking a red pill (Lilly made DES in red, among other colors). Has the defendant been identified? Not clear. If this vague memory constitutes an identification of Lilly, then the market share grid is not supposed to be relevant. See supra note 73 and accompanying text. If Lilly has not been identified, then Lilly should not pay more in settlement than the grid suggests. In practice, however, the grid proved neither preceptive nor outcome-determinative, just a part of the mix. Interview with Roman Silberfeld (Aug. 16, 2002).
York tended to settle too cheaply. Ranked by what she saw as the injustice of market share liability, so inferior to concerted action as a means to compensate plaintiffs, Shainwald sat down to think of a way to increase the DES settlement values—for cancer and infertility, the costlier injuries, in particular.

Shainwald decided to venture a reverse-bifurcated trial. In her plan, first the jury would consider damages; only afterwards would it consider liability. Shainwald had little precedent to cite in support of proceeding backwards. Although reverse bifurcation had been used in asbestos litigation, the tactic was and remains, rare. But Judge Ira Ganimerman, still handling DES trials in New York post-Hymowitz as he had done pre-Hymowitz, accepted the plan. He began presiding over a reverse-bifurcated, multi-plaintiff DES trial in early 1994.

Shainwald brought in California DES litigator LeRoy Hersch, and the two seasoned hands put together a notebook about each of the plaintiffs, containing undisputed facts—like the plaintiffs’ age, education, experience, life activities—in which the jurors could write their own notes. Coming alive as individuals during the damages phase of the trial, these young women won significantly higher awards than their predecessors had achieved. Shainwald remembered waiting nervously for the announcement of damages for her first plaintiff, Gina Cardinale. A hundred and fifty thousand, said the jury. Shainwald’s heart sank. Chicken feed. Not remotely worth all the effort she and Hersch and the clients had put into the trial. Oh no, if this is how the jury is pricing the cases...

“Two million,” came the next award, for infertility, and Shainwald could breathe again. Then came what she called “two tens and a twelve”—multimillion-dollar awards for vaginal adenocarcinoma, a landmark in damages litigation. Swiftly the defendants settled; the negligence half of the bifurcated trial never took place. The cost of doing DES business thirty years ago had just gone up.

Epilogue

Observers expected DES claims to be filed through the 1990s and stop in 2001. The drug had been marketed to pregnant women until 1971, and reproductive-organ anomalies in DES daughters typically

85 Lucinda Feelon, Female Trouble: The Implications of Tort Reform for Women, 54 Tenn. L. Rev. 847, 863 n.60 (1997).
86 Interview with Sybil Shainwald (Aug. 4, 2002).
87 Interview with Sybil Shainwald (Nov 8, 2002).
88 Market share liability without consent of action liability or joint liability, however, meant that plaintiffs could collect only a fraction of the value of their injuries. See DES Daughters Awarded $22 Million, But..., Nat’l L.J., Jan. 24, 1994, at 6 (quoting an estimate that 11 DES plaintiffs would recover no more than $400,000, despite the eight-digit sum that the jury awarded to them).
appear before age 21. The big cohort of baby boomers, which included Mindy Hymowitz, Joyce Bichler, and countless other DES daughters, did conclude almost all its litigation before the end of the century. But DES claims have continued to be filed in the twenty-first century. One source of belated claims has been the availability of DES in the years after the FDA disapproved it as a miscarriage preventative; a few physicians, defying the ban, continued to prescribe it in the 1970s. And so Sybil Shainwald, for instance, filed a claim in March 2002 in behalf of four DES daughters; the Washington, D.C. litigator Aaron Levine filed a claim in December 2001. Enough time has passed since Hymowitz, however, to conclude the DES story with a retrospective on what this decision wrought.

Having arrived relatively late in the market-share case law Hymo-
waitz, rather than Sindell, is the decision that best captures the social and legal phenomenon of DES exposure. Though not certified as a class, the hundreds of plaintiffs in New York stood in for millions exposed. The plaintiff named in the caption had the right condition: whereas Judith Sindell suffered from bladder cancer, a disease that usually develops without known DES exposure, Mindy Hymowitz’s clear-cell vaginal adenocarcinoma marked a signature encounter. The Hymowitz caption named lawyers who were already leaders of DES litigation, and the decision strengthened their leadership role. Hymowitz’s declaration of a national market deemed DES an American public health problem rather than a questionable product distributed in isolated regional sales; this view of DES was congruent with DES consumer health-care activism at a national level. Encouraged by litigation like Hymowitz, feminist health networks, including Pat Cody’s still-strong DES Action, have not only expanded awareness of this substance but also linked it to medical and pharmaceutical impacts on women’s bodies generally.

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8 Interview with Sybil Shainwald (Nov. 8, 2002).
What did *Hymowitz* achieve for plaintiffs? Many DES-exposed persons did not benefit from the decision. In contrast to powerful public awareness about—and courtroom victories by—DES daughters, DES grandchildren and sons are noteworthy for not emerging as a presence in the courts. Two years after *Hymowitz* the Court of Appeals, Wachtler again writing for the court, held that DES grandchildren had no claim against manufacturers for injuries sustained as a result of their mothers’ reproductive-organ anomalies. A malformed vagina or cervix that obstructs conception or full-term fetal development can be charged to DES manufacturers when the malformed plaintiff was in her own behalf; but cerebral palsy in a neonate, the DES daughter’s child, attributed to the same anatomical damages, cannot.

DES sons remain almost unseen on the litigation landscape. This obscurity is not for their lack of damages. Soon after the female-organ reports of the early 1970s, researchers found links between maternal ingestion of DES and epididymal cysts, spermat and semen abnormalities, microphallic penises (smaller than four centimeters when nonerect), difficulty in urination, and undescended testicles in DES sons—an outcome consistent with findings from mice studies of the 1960s. Undoubtedly part of what obscures the injuries to DES sons is their relative lack of organ damage and the lack of a distinctive cancer. But these factual, objective conditions do not entirely explain the cultural invisibility of DES damage to men.

The millions of offspring born to mothers who took DES during pregnancy, especially if they are in the majority that do not have cancer, might be seen as a privileged and powerful cohort—children of affluence and near-affluence, articulate, politically poised to claim rewards from the legislatures and the courts—and, as this book goes to press in 2003, at about the top of their earnings game. The shadow of DES in their lives does not obscure all the sunlight they enjoy. Most DES daughters will never develop clear-cell vaginal adenocarcinoma—even if the Herbst follow-up study, which found this cancer in only 1.4 per thousand

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79 Crestberg, supra note 20, at 63-88; see also supra note 25 and accompanying text. Physicians and researchers also suspect a link between DES exposure and testicular cancer, although the evidence is ambiguous. Meyers, supra note 1, at 144-45, 158-55.

80 Men do not readily identify themselves as DES victims. Two physician-writers, considering DES damage, speculate that whereas women know that their bodies will change whether they want change or not—all of them can expect at least breast and menopause—most women will also experience pregnancy—men “are socialized from earliest childhood to idealize bodily integrity.” Thus they feel less willing to admit that their bodies have been changed by forces they could not control. Apfel & Fisher, supra note 6, at 42-43. And because their genitals have more prestige than women’s genitals, “there is also a greater tendency toward denial of this harm.” Id. at 52.
daughters, undercounted the cancers. Experts say that the majority of daughters born to mothers who took DES have some kind of reproductive-organ anomalies, but frequently the condition is benign: a small uterus, for instance, or adenosis that goes away. Although infertility has been a common problem for these women, 81 percent reached adulthood capable of having babies, compared to 95 percent of the unexposed population. DES exposure did not stop Paul Rheingold’s daughter from presenting him with grandchildren.

“Our major cause of concern now,” the chairman of obstetrics of a large research hospital said in 1969, “is the emotional problems.” Female reproductive anatomy had been problematic enough in American culture before DES exposure added its own measure of suspicion, shame, and blight. In the early 1980s activist Fran Fishbane expressed concern about the effects of identifying DES daughters as sexually pathological before they are old enough to make love: “Can a young woman who has associated pain and anxiety with her vagina from the age of 12 then feel pleasure in that same area when she becomes sexually active years later?” she asked. Relations between DES mothers and their exposed daughters have been a key venue for the expression of distress. Roberta Apfel and Susan Fisher write that although often “the DES daughter will not experience anger at her mother for taking the drug,” because she “will fully appreciate that her mother’s intentions were absolutely the best,” a “new stress situation” when it emerges can expose a suppressed rage. Apfel and Fisher suggest that DES mothers may feel “uneasy about their mothering,” apart from DES, and the toxic exposure their daughters suffered can become a focus of unrelated guilt and hostility.

In more harmonious mother-daughter relationships affected by DES, guilt and blame are supposed to stay banished, but they linger. Joyce Bichler wrote in DES Daughter about watching her mother testify at her trial—a crucible of mutual pain, where each woman felt she had hurt the other. Mindy Hymowitz used to say to Shirley, “Don’t blame yourself,

90 Gorsey, supra note 33.
91 Gina Kolata, Power Problem: The Medical Record on DES Emerges After Years of Research and Anxiety, N.Y. Times, Apr. 9, 1989, § 4, at 26.
92 Interview with Paul Rheingold (July 16, 2002).
93 Quoted in Kolata, supra note 97.
94 Quoted in Oremberg, supra note 20, at 71.
95 Apfel & Fisher, supra note 6, at 76–77.
96 For one woman they describe, DES was proof that she was a bad and destructive mother and her daughter would do best not to heed her advice. Id. at 80.
97 Bichler, supra note 41, at 147.
Mom." And Shirley was a trooper: "I told her, 'I never thought about it.' That wasn't true—I did—but it would have made her feel bad."104

Without Mindy there would have been no Hymowitz, and this story of Hymowitz concludes by remembering her. In 1987, while her claim was making its way to the Court of Appeals, Mindy enrolled in Brooklyn Law School as a night student, continuing to work as a nurse during the day. She graduated four years later. Cancer came back for Mindy while she was working as a medical malpractice litigator. Surgery for the cancer recurrence, which her doctors called successful, changed her bladder permanently for the rest of her life, she would need catheters to empty it. Mindy carried the catheters in her purse and kept her spirits high.

In June 1996, grappling with her illness but active and outgoing, Mindy said yes to a blind date with John Cella, a trade-union paperhanger. They soon were married. "We were best friends right away," Cella remembered; he said he wished he could have met Mindy earlier to share more time with her before her death in October 1998. "I'll never get married again," Cella declared in 2002. "My friends tell me not to say that, but I know I never will, because I think about her all the time."105 Shirley Hymowitz shared a similar feeling: "It never leaves you. I have pictures of her all over. I have a big 16 by 20 picture in my bedroom. I see her face every morning."106

Today Brooklyn Law School maintains a scholarship in memory of Mindy Hymowitz Cella. The school describes the scholarship as honoring "the named plaintiff in the landmark DES lawsuit Hymowitz v. Eli Lily, [who] died at 43 years of age after a long and courageous battle with cancer. She had a nursing career before pursuing a legal education. As an associate of Aaronson Rappaport Feinstein & Deutsch, LLP, she focused on medical malpractice defense work. The firm established the scholarship to honor her loyalty, commitment and fortitude."107

She was buried in Pinehawn Memorial Park on Long Island, under a marker reading 1954-1998 for Mindy and 1947- for John. The stone is flat, by Pinehawn rules:66 the cemetery wants to keep its grassy acres serene, never jarred by the force that a headstone would assert on the landscape. Mindy Hymowitz, a different sort altogether, preferred to stand up.

104 Interview with Shirley Hymowitz (July 3, 2002).
105 Interview with John Cella (Aug. 27, 2002).
106 Interview with Shirley Hymowitz (July 3, 2002).
108 Interview with John Cella (Aug. 27, 2002).
... in their rejections of market share liability, courts express their aversion to a judicial maneuver that looks like legislation. Both the real New York state legislature and the legislature-lish Court of Appeals chose to install prospective, policy-focused, aggregative legal change in the 1980s. New York’s revival statute rescued DES claims from statute-of-limitations death. The same statute also replaced an old rule, time of exposure, with a new one, time of discovery, to aid plaintiffs against defendants. Three years later, the Court of Appeals used Hymowitz to legislate away the barrier of proving causation in fact. In further defiance of judicial tradition, Hymowitz held that a defendant that did...
not cause injury to a plaintiff could be obliged to compensate her. It linked manufacturers together for furnishing the same product to a market, even when the manufacturers shared few if any other connections, and even though the Court of Appeals could no longer accept the concert-of-action conclusion that it had tolerated in Bichler. These legislature-like moves declared tort traditional inadequate to address the problem of DES injury, and jettisoned them in order to achieve better policy. To courts considering market share in later cases, such deviations from doctrine exceeded the bounds of what the judiciary could do. And so having disappointed plaintiffs in 1989 for not going far enough, Hymowitz stands judged for going too far.

This legacy of judicial discomfort and retreat should not surprise those who read the story about markets of mothers. Judges prefer a limited-powers role whose contours they can feel, even if they occasionally have trouble stating where judging ends and legislating from the bench begins. Hymowitz reached into the province of the legislature. But perhaps reaching is not so bad as neglecting to reach. American legislatures—from Congress on down—have shirked their obligation to promote public welfare through effective health-care policy. Dozens of millions of Americans without health insurance testify to this failure. As tort law likes to insist, actors who have a duty to act are just as responsible for their omissions as they would be for intentional, denigrate, affirmative initiatives like Hymowitz.