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is exonerated from liability for its result.) Enterprise and alternative liability are also alike because the primary purpose of both theories is to cure Plaintiff's inability to identify the injurious product, and both accomplish this purpose by shifting the burden of proof of causation to Defendants.

Unlike the theory of alternative liability, however, enterprise liability emphasizes certain activities of the industry as a whole; adherence to an inadequate safety standard and manufacture of an identically defective product." Sheiner, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963, 966. In enterprise liability the parallel behavior of the Defendants, absent a tacit agreement is sufficient.

The Plaintiff must prove an insufficient industrywide safety standard. This element of proof was established in *Hall* where the court determined that there existed a "national body of State Tort Law" and then went on to establish an industrywide safety standard.

Many of the decisions in the DES cases show a definite reluctance to apply this new doctrine of liability. *See, Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super 551, 570, 420 A.2d 1305, at 1315. *Lyons v. Premo Pharmaceutical Labs*, 107 N.J. Super 183, 193, 406 A.2d 185, at 190. *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132, 143, 607 P.2d 924, at 935. In fact, none of the DES cases have supported a recovery based on enterprise liability. Nevertheless, it could be argued successfully as its principles are well-rooted in traditional strict liability, products liability, and tort law rules. Plus, with increasing scientific and technological advancements there will be more and more cases involving Plaintiffs who will be unable to identify the precise manufacturer of the causative agent. Enterprise liability is an available avenue that should be argued because the policy behind permitting the innocent Plaintiff to recover against negligent Defendants is or should be weighted more than the burden of identifying the precise manufacturer or causation.

Struggle Continues for Rights of Developmentally Disabled

by Gloria Barnhart

Maud is a feminine name derived from old high German meaning powerful in battle. MAUDD, pronounced the same, is an acronym for the Maryland Advocacy Unit for the Developmentally Disabled, a non-profit corporation that often does battle to protect and defend the rights of the developmentally disabled. Developmentally disabled means a person who has a severe, chronic disability which occured before the age of 22, is likely to continue indefinitely and results in a substantial limitation to the person's ability to function normally in society. *See:* 49 USCA §6001 (7) (1974) for the federal definition of developmental disability. Unfortunately some of MAUDD's power or at least one of its most important weapons has been weakened by a recent Supreme Court decision.

The existence of MAUDD is mandated by an amendment to the Developmental Disabilities and Bill of Rights Act, 42 USC §6001-6080 (1974), which requires any state receiving funds under the Act to provide an independent agency capable of protecting and advocating the rights of persons with developmental disabilities, §49 USCA 6012 (1974). In the past MAUDD has provided a variety of services for the developmentally disabled, including reviewing state plans, designing volunteer programs and acting as a resource and information center, but foremost is the service MAUDD has provided as an advocate in individual cases. In 1980 it handled over 1300 cases involving the right of the developmentally disabled in the areas of educational rights, employment discrimination, transportation and architectural barriers, guardianship, and the rights of people within institutions. The task of MAUDD, already hampered by budget cuts, has been made even more difficult by a Supreme Court decision last spring which unfavorably interpreted the Developmental Disabilities Assistance and Bill of Rights Act.

The Court in *Pennhurst State School v. Halderman*, 101 S. Ct. 1531 (1981), reversed the Third Circuit Court of Appeals which has held that the Developmental Disabilities Assistance and Bill of Rights Act, 42 USC §6000 (1974) had created substantive rights in favor of the mentally retarded and that those rights were judicially enforceable. The case was a class action brought by a minor retarded resident of Pennhurst State School and Hospital, and all persons who have been or may become residents of Pennhurst. The findings of fact were undisputed: the conditions at Pennhurst were dangerous and inhumane, with the residents often physically abused or drugged by staff members. The District Court had found that the physical, intellectual and emotional skills of some of the residents had actually deteriorated at Pennhurst.

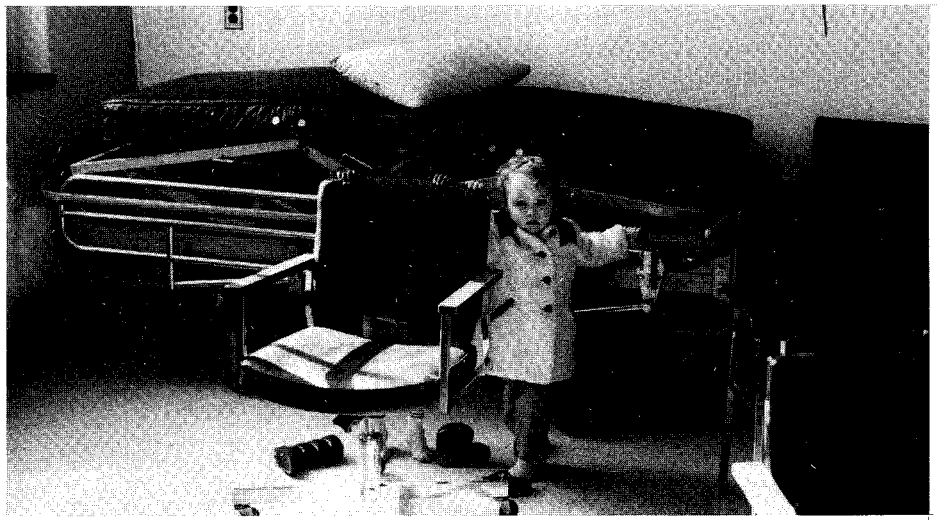
The plaintiffs claimed there were various state, federal and constitutional violations including the denial of rights confirmed by the Developmental Disabilities Assistance and Bill of Rights Act. In addition to seeking injunctive and monetary relief, the plaintiffs urged that Pennhurst be closed and that community living arrangements—smaller less isolated residences where retarded people are treated as much as possible like non-retarded people—be established for its residents. The District Court found for the plaintiffs and ordered that Pennhurst eventually be closed and, that individual treatment plans be

developed for each resident and that conditions at Pennhurst be improved in the interim, 446 F. Supp. 1295 (E.D. PA. 1977). The Court of Appeals substantially affirmed the District Court's order but avoided the other federal and state claims and rested its decision on the Developmental Disabilities Assistance and Bill of Rights Act. The Court of Appeals did not require Pennhurst to close but remanded the case to District Court for individual determinations as to the appropriateness of an improved Pennhurst for each patient and instructed the court to engage in a presumption in favor of placing individuals in community living arrangements, 612 F. 2d 84 (1979). Pennhurst appealed. The Supreme Court granted certiorari and narrowed the issue to one of statutory construction: "Did Congress intend in §6010 to create enforceable rights and obligations?" 101 S. Ct. at 1536.

The relevant statute titled "Congressional finds respecting right of developmentally disabled" provide in part that:

> (1) Persons with developmental disabilities have a right to appropriate treatment, service, and rehabilitation for such disabilities.
>
> (2) The treatment, service and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liability.
>
> (3) The Federal Government and the State both have an obligation to assure that public funds are not provided to an institutional or other residential program for persons with developmental disabilities that—
>
> (A) does not provide treatment service, and habilitation which is appropriate to the needs of such persons; or
>
> (B) does not meet the following minimum standards.
>
> (4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served. . .42 USC §6010 (1974)

Chief Justice Burger in the majority opinion found that §6010 "does no more than express a congressional preference for certain kinds of treatment." 101 S. Ct. at 1540. He reasoned since there was not express reference to §5 of the 14th Amendment that the Developmental Disabilities Assistance and Bill of Rights Act was enacted under the authority of the Spending Power alone.



The Court likened legislation enacted pursuant to the Spending Power that requires States to comply with federally imposed conditions, to that of a "contract." Accordingly, the conditions must be unambiguous so the State may voluntarily and knowingly accept the terms of the "contract." The Court found §6010 lacking any language suggesting it is a "condition" for receiving federal funds under the act, 101 S. Ct. 1542. Chief Justice Burger pointed to other sections of the statute which imposed conditions for receiving funds in clear terms, as in §§6006, 6009, 6011, 6012, 6063, and 6067. Burger continued by accusing the Third Circuit of failing to recognize the well settled distinction between Congressional "encouragement" of state programs and the imposition of binding obligations on the states. He compared the statutes here with the Medicaid Statute considered in *Harris v. McRae*, 488 U.S. 297 (1980) and concluded both were "designed as a co-operative program of shared responsibilities, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." However, he failed to mention that here there was no equivalent Hyde Amendment preventing federal funding or that the rights being asserted were legislated by Congress and not created by judicial fiat.

The majority also cited another case as an example of when Congress attempts to encourage rather than mandate rights for the handicapped. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court reversed the 4th Circuit Court of Appeals, holding that a hearing-impaired student, otherwise qualified, could not be denied admission to Southeastern's Nursing Program. The Court of Appeals had found that §504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1973), required affirmative conduct on the part of Southeastern to modify its program to accommodate the disabilities of applicants. However, the Supreme Court reviewed the other provisions of the Act and concluded that when Congress intended to require affirmative efforts it knew how to do so. It pointed to sections requiring affirmative action

programs in hiring by the Federal Government 29 U.S.C. 791 (b) (1973), and by contractors to the Federal Government 29 U.S.C. §793 (1973) and then pointed out that State agencies are only "encouraged" to institute such programs 29 U.S.C. §791(c) (1973). Therefore, the school could not be required to admit a hearing-impaired student to its nursing program.

The Court used the same analysis in both *Pennhurst* and *Southeastern*. The Court looked to other provisions of the statute in question to find express conditions for affirmative obligations and compared the language creating express conditions with these in the provision being reviewed. In *Southeastern* the comparison was simple because the statute by express language only "encourage[d]" state agencies to develop affirmative action program. *Id.* The statute in *Pennhurst* does not contain a clear statement by Congress that its intention was only to 'encourage' the States to abide by the Bill of Rights Section. Section 6010 (3) clearly places an obligation on both Federal and State governments to assure that public funds are not spent on programs that do not meet certain requirements, yet the Court found the language to be merely prefatory.

As if holding that the language of Section 6010 was only "wishful thinking" on the part of Congress was not handicapping enough, Burger went on to another crippling blow by attacking the right to a private course of action under other provisions contained in the Act. That issue is on remand to the Third Circuit, but if the Court of Appeals follows Burger's lead by upholding his view, The Developmental Disabilities Assistance and Bill of Rights Act may be without a right to a private cause of action or the remedy may be limited to enjoining the Federal Government from providing funds under the Act to the offending State. This would create further injuries to the supposed beneficiaries of the Act.

MAUDD, as a result of the holding in *Pennhurst*, may be hampered in its current attempt to seek individualized treatment programs in the least restrictive setting for the so called "Sachs" population. The "Sachs" population was named after Maryland Attorney General Steven Sachs when he disclosed in a public letter that many retarded persons were illegally confined in hospitals for the mentally ill. Letter from Steven Sachs to President of Mental Health Assoc. of Maryland (August 16, 1979). A suit was filed by MAUDD on behalf of the Sachs population, which centered on the evaluation and placement process to be used to relocate the Sachs population, *Knott v. Highes*, No. 80-2832 (D. Md. filed Oct. 18, 1980). As a result a State Plan was negotiated. However implementation of this plan, as a result of *Pennhurst*, will not require the consideration of Section 6010.

Although MAUDD and its sister units in other states remain frustrated in their attempts to secure individual treatment plans in least restrictive settings for retarded citizens now institutionalized, they are hopeful that the Supreme Court will set forth some guidelines concerning the constitutional rights of the involuntarily committed mentally retarded. The Supreme Court has granted certiorari in *Romeo v. Youngberg*, 644 F.2d 147 (3rd Cir. 1980) cert. granted, 101 S. Ct. 2313 (1981) (No. 80-1429). This case involves another resident of Pennhurst who was shackled by the staff, beaten by other patients, and never offered appropriate rehabilitation treatment. A favorable decision would enable MAUDD to remain 'powerful in battle'.