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Michael F. Marchetti

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COMMENTS

THROWING PERSONAL JURISDICTION INTO THE POND: MASS-TORT DEFENDANTS' RIGHTS RIPPLE AWAY IN *ASHLEY v. ABBOTT LABORATORIES**

INTRODUCTION

In a decision that contradicts existing standards of *in personam* jurisdiction, Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York exercised personal jurisdiction over a nonresident drug manufacturer that had never sold or marketed its product in New York. Arguing that the "federalism Due Process" analysis,¹ which requires a territorial nexus between the forum and the defendant, does not adequately address the needs of "mass tort" plaintiffs,² Judge Weinstein proffered a revised fairness

* 789 F. Supp. 552 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

¹ Federalism due process is synonymous to the sovereignty due process inquiry which emphasizes a defendant's physical contacts with the forum. This analysis has its roots in *Pennoyer v. Neff*, 95 U.S. 714 (1878), and has been continually applied and modified in subsequent decisions.

² According to Judge Weinstein, a genuine mass tort possesses some or all of the following features:

(1) geographically widespread exposure to potentially harmful agents that (2) affects a large or indeterminate number of plaintiffs, (3) possibly over long time periods, even generations, (4) in different ways such that (5) there is difficulty in establishing a general theory of causation and (6) an inability to link a particular defendant's actions to a particular plaintiffs injuries, as well as (7) difficulty in determining the number of potentially responsible defendants and (8) in determining their relative culpability, if any, which often results in (9) multiple litigations that burden the courts and cause huge transactional costs, including heavy legal fees, and (10) which threatens the financial ability of many companies or of whole industries to respond to traditional damage awards.

analysis that instead focused on a state's interest in resolving the dispute.³ Judge Weinstein relied on the unique, nationwide ramifications of mass torts and the expanded notions of liability developed to resolve the resultant litigation to justify the need for a modified theory of personal jurisdiction.⁴ According to his modified analysis, if the forum state has a substantial interest in adjudicating the dispute and the defendant can mount a defense in the forum without suffering undue hardship, then the defendant's right to due process is satisfied.⁵

*Ashley v. Abbott Laboratories*⁶ presented Judge Weinstein with the opportunity to explore the shortcomings of personal jurisdiction in the mass tort context. In *Ashley*, New York residents, who claimed injuries resulting from their exposure to diethylstilbestrol ("DES"), attempted to recover damages from two non-resident drug manufacturers.⁷ The plaintiffs' claims were based on New York DES law, which permitted plaintiffs to join all the manufacturers that had produced DES for use during pregnancy and hold them severally liable for their individual share of the national market.⁸ The expansive reach of New York's substantive law, however, clashed with existing standards of personal jurisdiction under both New York's long-arm statute and federal due process standards, each requiring that the defendant have some purposeful contact with the forum. Accordingly, non-resident drug manufacturers joined under New York's substantive DES law may not be amenable to personal jurisdiction in New York. Judge Weinstein, however, used *Ashley* to expand existing notions of personal jurisdiction, both state and federal, to accommodate New York's substantive DES law and, in the process, to provide the plaintiffs in *Ashley* with full recovery.

This Comment will argue that the judicial activism undertaken by Judge Weinstein in *Ashley* resulted in the creation of

Ashley, 789 F. Supp. at 561-62.

³ *Id.* at 587.

⁴ *Id.* at 572, 586-88.

⁵ *Id.* at 586-87.

⁶ *Id.* at 552.

⁷ *Id.* at 559.

⁸ See *infra* text accompanying notes 90-102 (discussing New York's substantive DES law).

a theory of personal jurisdiction that is unconstitutionally premised on the forum's interest⁹ in resolving the dispute, and raises questions concerning the proper role of a district court judge. Part I of this Comment offers an account of DES's infamous history and the resulting litigation difficulties faced by injured parties. Part II then briefly presents the facts and procedural history of *Ashley v. Abbott Laboratories* and summarizes the district court's decision. Finally, Part III analyzes and critiques the reasoning in the *Ashley* decision, emphasizing Judge Weinstein's repeated departure from existing law. The Comment argues that Judge Weinstein's theory of personal jurisdiction, premised on the forum's interest in adjudicating the dispute, violates basic principles of jurisprudence underlying the Federal Constitution.

I. THE BACKGROUND OF DIETHYLSTILBESTROL

DES is the acronym for diethylstilbestrol,¹⁰ a synthetic estrogen developed in England in the late 1930s that mimics the activity of natural estrogen in the human body.¹¹ The ability to replicate the female hormone synthetically was considered a major scientific breakthrough because the synthetic estrogen, DES, was substantially less expensive, more potent and considerably easier and less painful to administer than natural estrogen.¹² As a result of these advantages, DES became an attractive source of estrogen in Great Britain.¹³ Ironically, no patent was ever sought for DES and it was left in the public domain.¹⁴

⁹ By placing primary emphasis on a state's interest, Judge Weinstein's theory violates the Due Process Clause by ignoring the *defendant's* right to due process—a right that is unrelated to the forum state's interest. See Bruce N. Morton, *Contacts, Fairness and State Interest: Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 9 PACE L. REV. 451 (1989).

¹⁰ *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 321, 436 N.Y.S.2d 625, 628 (1st Dep't 1981), *aff'd*, 35 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). DES is synthesized from a coal tar derivative and is actually two-and-one-half times more potent than natural estrogen. *Id.*

¹¹ Estrogen is a female hormone that is useful in treating women with disorders associated with low natural levels of estrogen. Naomi Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963 n.1 (1978).

¹² *Id.* at 963 n.1.

¹³ Laura A. Abrams, *The DES Dilemma: A Study in How Hard Cases Make Bad Law*, 59 U. CIN. L. REV. 489, 490 (1990).

¹⁴ Thomas Campion, *DES and Litigation: The First Ten Years*, in EFFECTIVE

In 1939, as word of DES began to trickle across the Atlantic, American pharmaceutical companies filed New Drug Applications ("NDA") with the Food and Drug Administration ("FDA")¹⁵ seeking approval to market DES in the United States for the treatment of certain female diseases and conditions.¹⁶ The FDA rejected these initial applications because they relied entirely on foreign studies to establish the safety and effectiveness of DES.¹⁷ In December 1940, however, the FDA advised the pharmaceutical companies to form a committee, which later became known as the "small committee," and to resubmit a single NDA that combined their clinical studies concerning DES.¹⁸ In 1941, the FDA approved the small committee's joint NDA for the use of DES to treat the conditions specified in the NDA—none of which were related to the use of DES during pregnancy or to prevent miscarriages.¹⁹

Although the small committee had not sought approval in 1941 to use DES during pregnancy, there was evidence that scientists had discovered an apparent link between miscarriages and low levels of natural estrogen.²⁰ Many studies suggesting that DES could reduce the threat of miscarriage by artificially raising the level of estrogen in the body were published in leading medical journals during the 1940s.²¹ Relying on

COORDINATION OF MULTIPLE PRODUCT LIABILITY LITIGATION 1988, at 315 (PLI Litig. & Admin. Practice Course Handbook Series No. 344, 1988).

¹⁵ The twelve companies that filed applications with the FDA were: Abbott Laboratories, Armour Laboratories, Ayerst, McKenna & Harrison, George A. Breon & Co., Charles E. Froest & Co., Eli Lilly & Co., Merck & Co., Inc., Sharp & Dohme, Inc., E.R. Squibb & Sons, The Upjohn Co., Winthrop Chemical, Inc. and John Wyeth & Brother, Inc. See *Campion*, *supra* note 14, at 316 n.9.

¹⁶ *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 321, 436 N.Y.S.2d 625, 628 (1st Dep't 1981), *aff'd*, 35 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). These included symptoms of menopause, senile vaginitis, gonorrheal vaginitis and breast engorgement in post-partum women. *Campion*, *supra* note 14, at 316. None of the proposed applications involved the use of DES in the treatment of pregnant women or to prevent miscarriages. *Bichler*, 79 A.D.2d at 321, 436 N.Y.S.2d at 628.

¹⁷ *Id.*

¹⁸ *Id.* Eli Lilly chaired the "small committee," which pooled all available information concerning DES and its toxicity. The literature Lilly prepared for submission to the FDA contained warnings that use of DES "was contraindicated only for women who had cancer or precancerous lesions of the breasts or cervix, or had a high incidence of breast or genital malignancy." *Id.*

¹⁹ *Id.*

²⁰ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 558 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

²¹ Two recognized experts in the field of hormonal problems, Drs. George and

these new studies, Eli Lilly in April 1947 filed a supplement to its 1941 NDA seeking permission to market DES for the treatment of miscarriages and problem pregnancies.²² The FDA approved Eli Lilly's application,²³ despite contradicting studies about DES usage during pregnancy.²⁴ By 1952, the FDA

Olive Watkins Smith of Harvard Medical School, administered large doses of DES to pregnant women on the theory that DES stimulated the production of progesterone, a hormone that helps the uterus maintain a healthy fetus. The doctors claimed that women who had previously miscarried delivered healthy babies after taking DES. See, e.g., George V. Smith, M.D., *Therapeutic Limitations of Female Sex Hormones in Gynecologic Conditions*, 222 NEW ENG. J. MED. 88 (1940); George V. Smith, M.D. & O. Watkins Smith, M.D., *Estrogen and Progesterin Metabolism in Pregnant Women: With Especial Reference to Pre-Eclampsic Toxemia and the Effect of Hormone Administration*, 39 AM. J. OBSTET. & GYNECOL. 405 (1940); George V. Smith, M.D. & O. Watkins Smith, M.D., *Pituitary Stimulating Property of Stilbestrol as Compared with that of Estrane*, 57 PROC. SOC. EXPER. BIOL. MED. 198 (1944); George V. Smith, M.D., *Therapy with Female Sex Hormones*, 23 NEW ENG. J. MED. 339 (1944); George V. Smith, M.D., *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTET. & GYNEC. 821 (1948) [hereinafter Smith, *Diethylstilbestrol*]; O. Watkins Smith, M.D. & George V. Smith, M.D., *DES in the Prevention and Treatment of Complications of Late Pregnancy*, 57 AM. J. OBSTET. GYNECOL. 821 (1948); George V. Smith, M.D. & O. Watkins Smith, M.D., *Use of DES to Prevent Fetal Loss from Complications of Late Pregnancy*, 241 NEW ENG. J. MED. 562 (1949); see also Karl J. Karnaky, M.D., *The Use of Stilbestrol for the Treatment of Threatened and Habitual Abortions and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942).

²² *Campion*, *supra* note 14, at 318 n.22. "The dosage contemplated for [problem pregnancies] was several times stronger than the maximum permitted in 1941." *Bichler*, 79 A.D.2d at 321, 436 N.Y.S.2d at 628.

²³ *Campion*, *supra* note 14, at 318 n.23. Other companies also filed applications to the FDA: "Squibb, on April 29, 1947; Abbott, on May 15, 1947; Miller, on July 1, 1947; Boyle, on October 20, 1947; McNeil, on December 23, 1947; Premo, on January 8, 1948; Grant, on May 20, 1948; Physicians', on June 1, 1948; Rexall, on October 19, 1948; and Lilly (injection), on January 31, 1951." *Id.*

²⁴ In 1939, three prominent physiologists determined that when DES was administered to pregnant rats and mice, the hormone crossed the placenta and had malforming effects on the fetus. *Bichler*, 79 A.D.2d at 322, 436 N.Y.S.2d at 629. In fact, in 1938, Dr. Charles Dodd, one of the British researchers responsible for synthesizing DES, had published a paper stating that DES actually could cause miscarriages and abortions. *Id.* One of the studies cited in Eli Lilly's supplemental application actually questioned whether DES in large doses would be carcinogenic to pregnant women, and whether it could affect the hormonal balance in the fetus. Ironically, Eli Lilly was particularly concerned with problems to the male fetus. *Id.*

In addition, two of the main studies most influential in convincing the medical community that DES could prevent miscarriages: Smith, *Diethylstilbestrol*, *supra* note 21, and Karl J. Karnaky, M.D., *The Use of Stilbestrol for the Treatment of Threatened and Habitual Abortions and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942), were both criticized for methodological problems, and subsequent studies failed to duplicate their results. Sheiner, *supra* note 11, at 963 n.2.

determined that DES had been proven to be safe.²⁵ Thereafter, hundreds of additional manufacturers were permitted to enter the market without seeking FDA approval.²⁶ All DES manufacturers produced the drug from the identical chemical compound and marketed it as a generic drug.²⁷ Between 1941 and 1970, DES gained tremendous popularity²⁸ and was prescribed to an estimated two million pregnant women.²⁹

During this same period, literally thousands of articles discussing DES were published.³⁰ Many of these articles, which criticized the early studies, indicated that DES had no benefits for pregnant women³¹ and, in fact, might be harmful to the fetus and mother.³² Then, in 1971 two articles pub-

²⁵ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 558 (E.D.N.Y.), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 502, 539 N.E.2d 1069, 1072, 541 N.Y.S.2d 941, 944, *cert. denied*, 493 U.S. 944 (1989).

²⁶ It is uncertain exactly how many manufactures produced "DES" between the years 1947 and 1971. It is estimated that the number of companies was between 94, the number of NDA's that the FDA has on file for DES use during problem pregnancies, and 300, the number of companies mentioned by one defendant. Sheiner, *supra* note 11, at 964 n.3.

²⁷ DES is considered a generic drug because it was produced according to a specific chemical formula, which remained consistent throughout the industry. *Hymowitz*, 73 N.Y.2d at 504, 539 N.E.2d at 1075, 73 N.Y.S.2d at 944.

²⁸ Sheiner, *supra* note 11, at 964 n.4. "The public has been so frequently told of the virtue of [DES] . . . that it now takes a courageous physician to refuse this medication. . . . This situation, together with the understandable desire to do something positive toward rescuing a teetering pregnancy, has resulted in the widespread use of diethylstilbestrol in threatened abortion." *Id.* (quoting William K. Stevens, N.Y. TIMES, Mar. 29, 1977, at A16 (untitled news abstract)).

²⁹ Susan Kusner Resnick, *In the Graveyard of Western Medicine-Diethylstilbestrol*, EAST WEST NAT. HEALTH, July-Aug. 1992, at 144. There are also estimates that as many as 9 million mothers, daughters and sons were exposed to "DES." Beverly Sigl Felten, *The Lingering Tragedy of DES*, RN, Aug. 1990, at 36.

³⁰ Campion, *supra* note 14, at 319 (estimates exceed 10,000 books and articles discussing "DES").

³¹ Although articles questioning DES's effectiveness in preventing miscarriages appeared with some frequency, the drug laws of 1938 required drug manufacturers to submit only proof of safety to the FDA. Federal Food, Drug, and Cosmetic Act (FDCA) of 1938, ch. 675, § 505(b), 52 Stat. 1052 (1938). Congress amended the FDCA in 1968 to require proof of effectiveness. Sheiner, *supra* note 11, at 966 n.12.

³² See, e.g., M. Edward Davis & Nicholas W. Fugo, Ph.D., *Steroids in the Treatment of Early Pregnancy Complications*, 142 JAMA 778 (1950); W.J. Dieckmann et al., *Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Value?*, 66 AM. J. OBSTET. & GYNEC. 1062 (1953); Gordon Rosenblum, M.D. & Eugene Melinkoff, M.D., *Preservation of the Threatened Pregnancy with Particular References to the Use of Diethylstilbestrol*, 55 WESTERN J. SURG. OBSTET. & GYNEC. 597 (1947).

lished in the New England Journal of Medicine reported a significant statistical increase in the development of a rare form of cancer in the daughters of women who had ingested DES during pregnancy.³³ Subsequent research estimated the incidence of the rare cancer, known as clear-cell adenocarcinoma, in DES-exposed daughters to range from 0.14 per 1000 to 1.4 per 1000.³⁴ A more common abnormality detected in DES daughters was adenosis, a potentially cancerous skin growth resembling tiny cysts or ulcers on the vagina or cervix.³⁵ Adenosis has been reported in 30% to 90% of DES-exposed daughters.³⁶ Based on these studies of the harmful, latent effects of DES,³⁷ the FDA banned the use of DES as a miscarriage preventative in 1971.³⁸

Shortly after the FDA's recognition of the danger and ineffectiveness of DES, daughters claiming injuries³⁹ resulting from in utero exposure to DES filed hundreds of law suits in courts across the country.⁴⁰ Establishing liability on the part

³³ Peter Greenwald, M.D. et al., *Vaginal Cancer After the Maternal Treatment with Synthetic Estrogens*, 285 N. ENG. J. MED. 390 (1971); Arthur L. Herbst, M.D. et al., *Adenocarcinoma of the Vagina*, 284 N. ENG. J. MED. 878 (1971).

³⁴ *Campion*, *supra* note 14, at 319 n.31. As of 1990, about 500 cases of adenocarcinoma cases had been reported in DES daughters (less than 0.1% of the exposed population). See Felten, *supra* note 29, at 36.

³⁵ Adenosis exists in a large percentage of women regardless of DES exposure. It generally has no adverse effects on those who have it and needs only to be closely monitored. *Campion*, *supra* note 14, at 318 n.37.

³⁶ Sheiner, *supra* note 11, at 965-66 n.10.

³⁷ Some studies also indicated that women who took DES while pregnant have an increased chance of developing breast cancer. In addition, DES daughters have a five-times greater risk of an ectopic pregnancy (pregnancy occurring in an abnormal position) and a three-times greater risk of a premature birth. Studies also have reported that sons of DES mothers have a higher-than-average rate of genitourinary problems, including hypospadias (shortened urethra), meatal stenosis, epidymal cysts or undescended or hypotrophic testes. Felten, *supra* note 29, at 36.

³⁸ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 502, 539 N.E.2d 1069, 1072, 541 N.Y.S.2d 941, 944, *cert. denied*, 493 U.S. 944 (1989).

³⁹ Generally two classes of DES daughters presented claims. The daughters suffering from adenocarcinoma represented a very small percentage of all DES suits. By far the greatest number of claims, approximately 95% of all DES cases, were filed by DES daughters claiming adenosis. *Campion*, *supra* note 14, at 320. There have also been claims brought on behalf of women who claimed no physical harm as a result of their exposure but who alleged emotional distress for fear of developing adenocarcinoma in the future. See Gary S. Glickman, *DES and Emotional Distress: Payton v. Abbott Labs*, 37 U. MIAMI L. REV. 151 (1983).

⁴⁰ "DES" daughters filed suits in more than thirty states and the District of Columbia." *Campion*, *supra* note 14, at 320. Other parties claiming injuries have

of the manufacturers generally did not present a problem. Causes of action were based on theories of negligence, strict product liability, violation of express and implied warranties, false and fraudulent representation and failure to warn.⁴¹ However, identifying the specific manufacturer that had produced the DES that caused a plaintiff's injury raised complex practical and legal issues.

Identification of the manufacturer was important because under tort law, liability can only be imposed on a defendant if a plaintiff proves that it is more likely than not that the conduct of a particular defendant was the cause-in-fact of the damage suffered by the plaintiff.⁴² This burden has proven to be insurmountable in most DES cases for a number of reasons. First, all DES was of identical chemical composition and, therefore, pharmacists filled prescriptions with whatever brand was available.⁴³ Second, the number of manufacturers has been estimated at approximately 300, with many entering and leaving the market between 1940 and 1971.⁴⁴ Moreover, some of the companies that produced DES no longer exist, while others have been assumed by various companies. Finally, the long latency period of DES injuries, approximately three decades, leads to severe evidentiary problems, including faded memories, lost or destroyed records and the death of many witnesses.⁴⁵

To overcome the problem of identifying the responsible manufacturer, plaintiffs proffered three theories of liability

also filed suits. *See, e.g.*, *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1991) (third-generation DES daughters cause of action denied); *Anderson v. Eli Lilly & Co.*, 158 A.D.2d 91, 557 N.Y.S.2d 981 (3d Dep't 1990) (claim by husband for loss of consortium due to inability to have natural children properly dismissed).

⁴¹ *Sindell v. Abbott Lab.*, 607 P.2d 924, 925 (Cal. 1980) (DES manufacturers knew or should have known that it was carcinogenic, that there was a grave danger that after latency DES would cause cancerous and precancerous growth in daughters of the mothers who ingested it, that DES was ineffective in preventing miscarriages, that tests which manufacturers relied upon indicated that DES was not safe or effective and that they failed to warn of its potential danger).

⁴² W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 41, at 263-65 (5th ed. 1984).

⁴³ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 502, 539 N.E.2d 1069, 1072, 541 N.Y.S.2d 941, 944, *cert. denied*, 493 U.S. 944 (1989).

⁴⁴ *Id.*

⁴⁵ *Id.*

under which the burden of proving identification would be shifted to the defendants:⁴⁶ alternative liability, concert-of-action and enterprise liability.⁴⁷ Several courts, however, rejected these theories and adopted a novel approach known as market share liability.

A. *Alternative Liability*

Under the "alternative liability" theory, plaintiffs are permitted to join multiple defendants and hold each of them jointly and severally liable.⁴⁸ This theory was first articulated in 1948 by the California Supreme Court in *Summers v. Tice*.⁴⁹ In *Summers*, the plaintiff was injured when two hunters fired their guns across a road and one hunter's bullet struck the plaintiff. It was clear that both hunters were negligent, but the plaintiff could not prove which hunter's shot had caused the injury. Rather than dismissing the cause of action and letting the loss fall on the plaintiff, the court shifted the burden of proving causation from the plaintiff to the defendants.⁵⁰ One of the policies underlying the court's reasoning was that the defendants were in a better position than the plaintiff to know what had happened.⁵¹ Some DES plaintiffs claimed that alter-

⁴⁶ KEETON ET AL., *supra* note 42, § 41, at 271.

⁴⁷ For a listing of the numerous articles discussing the various theories of recovery advanced by plaintiffs, see Campion, *supra* note 14, at 321 n.44.

⁴⁸ When harm is incapable of being apportioned amongst joint tortfeasors, joint and several liability allows a plaintiff to recover the entire sum of damages from a single tortfeasor. If the harm can be divided, however, each defendant is severally liable, that is, liable only for his share of the harm. See KEETON ET AL., *supra* note 42, § 52, at 344-45. When multiple tortfeasors are held jointly liable, one tortfeasor may have to pay the entire amount of the plaintiffs damages regardless of the existence of other culpable defendants. *Id.* § 50, at 336-37. This seemingly inequitable result may occur when one or more of the multiple tortfeasors is insolvent. The tortfeasor that paid the entire judgment, however, may seek contribution from the other tortfeasors.

⁴⁹ 199 P.2d 1 (Cal. 1948).

⁵⁰ The Restatement of Torts reflects the rule developed in *Summers v. Tice*:

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.

RESTATEMENT (SECOND) OF TORTS § 433(B)(C) (1965).

⁵¹ See Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 325, 436 N.Y.S.2d 625, 630 (1st Dep't 1981) (construing *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)), *aff'd*, 35 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

native liability should be applied in the DES context, because like the plaintiff in *Summers*, the DES plaintiffs were unable to identify which of the many DES manufacturers had caused their injury.⁵²

For various reasons, however, most courts have not adopted alternative liability to resolve the DES identification problem.⁵³ First, courts have found that DES manufacturers are not necessarily in a better position than the plaintiffs to determine which company's pill was ingested by the plaintiffs' mothers.⁵⁴ In most instances, the manufacturers have no records or direct contact with the patients that take their drug.⁵⁵ Additionally, alternative liability assumes that all potentially liable defendants are joined in the action.⁵⁶ Unless every defendant is joined, no rational basis would exist for inferring that one of the named defendants caused the plaintiffs' harm.⁵⁷ Courts have found this impractical in the DES situation since there may be as many as 300 potential defendants, many of which are no longer in existence. A final problem that has given courts pause is that the alternative theory holds multiple defendants fully liable for the harm caused by only one of them.⁵⁸ When transferred to the DES scenario, one manufacturer, which in all likelihood will be unable to exculpate itself, may be held liable for the harm caused by any one of 300 other potentially liable defendants. For these reasons, courts generally have rejected alternative liability as a solution to the identification problem in DES cases.

⁵² *Sindell v. Abbott Lab.*, 607 P.2d 924, 930 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

⁵³ Two courts have applied alternative liability. *Abel v. Eli Lilly & Co.*, 289 N.W.2d 20 (Mich. Ct. App. 1980); *Erlach v. Abbott Lab.*, 5 Phila. 249 (Phila. Co., Mar. 5, 1981) (available on LEXIS, Mega library, Pamega file).

⁵⁴ The *Sindell* court stated that although the defendants may not be in a better position than the plaintiffs to determine which pill was ingested, this fact in itself does not prevent application of alternative liability. *Sindell*, 607 P.2d at 930.

⁵⁵ *Id.*

⁵⁶ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 433B cmt. g (1965) (burden of proof shifts to defendants only if plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from one of them).

⁵⁷ *Sindell*, 607 P.2d at 930. The *Sindell* court noted that there is actually a substantial likelihood that the guilty manufacturer would escape liability. *Id.*

⁵⁸ *Id.* at 924.

B. Concert of Action

Another theory of multiple liability offered by DES plaintiffs was "concert of action."⁵⁹ The concert of action theory imposes joint and several liability upon all parties who, in pursuit of a common plan or design to commit a tortious act, tacitly or explicitly agree to take part in it actively, or to further the plan through aid, encouragement or cooperation.⁶⁰ Unlike alternative liability, the general purpose of concert of action was to deter deviant group activity and not to shift the burden of proving causation to the defendant.⁶¹ Some plaintiffs claimed that DES manufacturers should be held jointly and severally liable because they all acted together in failing to test adequately or warn sufficiently about the dangers of DES, which they all produced from a "common and agreed upon formula."⁶²

Most courts, however, have found that concert of action is not a viable theory for assessing liability against DES manufacturers.⁶³ The main reason for rejecting concert of action

⁵⁹ *Campion*, *supra* note 14, at 322.

⁶⁰ *KEETON ET AL.*, *supra* note 42, § 46, at 323 (1984). Concert of action is included in § 876 of the Restatement of Torts. The typical illustration of concert of action is the illegal drag race. All parties taking part in a drag race are jointly and severally liable to an innocent bystander injured by their joint tortious activity. Unlike alternative liability, concert of action requires agreement amongst defendants to commit tortious activity.

⁶¹ *Sheiner*, *supra* note 11, at 979.

⁶² *Sindell*, 607 P.2d at 932. The Plaintiffs in *Sindell* alleged that defendant's wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing, lack of warnings . . . and other acts or omissions" . . . and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES.

Id.

⁶³ Two courts have assessed liability based on claims of concert of action. See *Abel v. Eli Lilly & Co.*, 343 N.W.2d 20 164 (Mich. Ct. App. 1980); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (1st Dep't 1981), *aff'd*, 35 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). The New York Court of Appeals in *Hymowitz*, however, refused to adopt concert of action as the law for New York "DES" cases. The court stated that concert of action was the law in *Bichler* only because the defendant did not object. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 508, 539 N.E.2d 1069, 1076, 541 N.Y.S.2d 941, 948, *cert. denied*, 493 U.S. 944 (1989). Other cases that have rejected concert of action are: *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Payton v. Abbott Lab.*, 512 F. Supp. 1031

has been the plaintiffs' inability to prove the existence of a tacit agreement among DES manufacturers to engage in tortious activity.⁶⁴ The fact that DES manufacturers filed joint NDAs, relied on each other's tests and agreed on a uniform chemical composition is only evidence of parallel conduct in compliance with industry standards.⁶⁵ Courts have not been willing to infer a tacit agreement or understanding merely from such parallel activity.⁶⁶ Such an implication would greatly extend the concert of action doctrine and potentially could render a single manufacturer liable for the defective products of an entire industry.⁶⁷ As a result, courts have been reluctant to use concert of action in DES cases.

C. *Enterprise Liability*

The final theory offered by DES plaintiffs for imposing joint and several liability on the numerous DES manufacturers was enterprise liability. Enterprise liability holds all the manufacturers in an industry jointly and severally liable for the injuries caused by that industry's product. The theory was first enunciated by Judge Weinstein in *Hall v. E.I. DuPont de Nemours & Co., Inc.*⁶⁸ In *Hall*, dynamite blasting caps that were left around old construction areas,⁶⁹ had been discovered by children who were subsequently injured when the caps exploded.⁷⁰ Unable to identify the manufacturer of the cap that had exploded, the plaintiffs in *Hall* joined the six major domestic manufacturers of blasting caps and the industry's trade association, alleging that the defendants failed to provide adequate safety warnings.⁷¹ The court found that there was industry-wide cooperation in the promulgation of safety stan-

(D. Mass. 1981); *Sindell v. Abbott Lab.*, 607 P.2d 924, (Cal.), *cert. denied*, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 289 N.W.2d 20 (Mich. Ct. App. 1980); *Lyons v. Premo Pharmaceutical Lab., Inc.*, 406 A.2d 185 (N.J. App. Div.), *cert. denied*, 412 A.2d 774 (N.J. 1979).

⁶⁴ *Campion*, *supra* note 14, at 324.

⁶⁵ *Sindell*, 607 P.2d at 932.

⁶⁶ *Hymowitz*, 73 N.Y.2d at 508, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.

⁶⁷ *Id.*

⁶⁸ 345 F. Supp. 353 (E.D.N.Y. 1972).

⁶⁹ *Id.* at 382.

⁷⁰ *Id.*

⁷¹ *Id.* at 359.

dards and in the design and manufacture of the blasting caps. Therefore, all defendants jointly shared and controlled the risk by delegating the determination of safety standards to their trade association.⁷² As a result of the industry-wide misconduct, the plaintiffs needed to prove only that the manufacturer that caused their injury was among the named defendants, and the burden of identification would then shift.⁷³ Because the identification problem in the blasting cap case was similar to that in the DES cases, enterprise liability became an attractive theory for DES plaintiffs.⁷⁴ In addition, the DES manufacturers, like the manufacturers in *Hall*, also had cooperated in the design, testing and marketing of the product. Moreover, enterprise liability, unlike concert-of-action, was developed to solve the identification-causation dilemma created when an untraceable product causes injury.

Although enterprise liability was frequently proffered and widely discussed,⁷⁵ DES courts have ultimately rejected the theory for two major reasons. First, the *Hall* court specifically warned against applying enterprise liability in a situation involving a large number of defendants.⁷⁶ With the existence of 300 potentially liable manufacturers, all of which would not be joined in one action, the chance that any one defendant manufactured the DES that caused a given plaintiff's injury is slight.⁷⁷ The second reason for rejecting enterprise liability is because the regulations that the DES manufacturers followed were largely suggested or compelled by the government.⁷⁸ Unlike *Hall*, where the industry created and perpetuated its own standards, it would be unfair to hold the DES manufacturers liable for following the safety standards promulgated by the FDA.

Many courts, however, have modified enterprise liability and the other theories of multiple liability to fit the exceptional

⁷² *Id.* at 375.

⁷³ *Id.* at 379.

⁷⁴ The seminal law review article discussing the relationship between DES and enterprise liability is Sheiner, *supra* note 11.

⁷⁵ See *Campion*, *supra* note 14, at 328 (attributing the popularity of enterprise liability to Sheiner, *supra* note 11).

⁷⁶ *Hall*, 345 F. Supp. at 378.

⁷⁷ *Sindell v. Abbott Lab.*, 607 P.2d 924, 930, 931, 935 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

⁷⁸ *Id.*

circumstances found in DES litigation. These various modifications led to the creation of market share liability.

D. *A New Theory Emerges: Market-Share Liability*

In 1980, dissatisfied with existing theories of multiple liability and unwilling to dismiss DES claims against drug manufacturers, the California Supreme Court departed from existing doctrine and created market-share liability.⁷⁹ In *Sindell v. Abbott Laboratories*, the California court held that the plaintiffs may shift the burden of identification to the defendants if they join the manufacturers of a "substantial" share of the DES that their mothers might have ingested.⁸⁰ Any defendant could then exculpate itself by proving that its DES was not the cause of the plaintiffs' injuries.⁸¹ Each remaining defendant was liable for the proportion of the judgment represented by its individual share of the national DES market.⁸² In this way, market share liability not only overcame the identification problem, but it also apportioned damages among the defendants.⁸³

The emergence of this theory did not receive universal approval in the legal community.⁸⁴ Eliminating the burden of proving identification, regardless of what theory was used, was criticized as imposing liability that exceeded absolute liability.⁸⁵ Dissenting in *Sindell*, Justice Richardson stated that to "[s]trike [the identification] requirement and label what re-

⁷⁹ *Id.* at 924.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* Later California cases clarified the *Sindell* opinion. See, e.g., *Brown v. Superior Ct.*, 751 P.2d 470 (Cal. 1988) (defendants are held severally, but not jointly, liable); *Murphy v. E.R. Squibb & Sons, Inc.*, 710 P.2d 247 (Cal. 1985) ("substantial" market share requires more than 10 percent of the market).

⁸⁴ For negative commentary, see David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Petrina R. Albuлесcu, Note, *Market Share Liability—The California Roulette of Causation Eliminating the Identification Requirement*, 11 SETON HALL L. REV. 610 (1981); Steven Bonanno, Note, *Presumed Innocent: Illinois' Rejection of Market Share Liability In Smith v. Eli Lilly & Company Is "Cause In Fact To Celebrate,"* 24 J. MARSHALL L. REV. 869 (1991).

⁸⁵ Dale Coggins, *Industry-Wide Liability*, 13 SUFFOLK U. L. REV. 980, 998 (1979).

mains 'alternative' liability, 'industry-wide' liability, or 'market share' liability, prov[es] that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process."⁸⁶ Nonetheless, courts across the country were faced with an onslaught of DES plaintiffs, revised complaints in hand, proffering market share liability as the theory *de jour*.

In the years following *Sindell*, courts had to decide whether to accept, reject or modify California's latest judicial fad.⁸⁷ Including *Sindell*, there are currently four variations of market share liability that have been adopted by the highest courts of five different states.⁸⁸ All of the various theories remove the burden of identification from the injured plaintiffs and provide a scheme for apportioning damages among the named defendants. In fashioning a theory of market share liability, courts struggled with defining the relevant market boundaries to use when apportioning market shares, under what circumstances the defendants could exculpate themselves and whether to hold defendants jointly and severally liable.⁸⁹

The New York Court of Appeals in *Hymowitz v. Eli Lilly & Co.*⁹⁰ chose a unique and expansive solution to these competing issues. First, *Hymowitz* concluded that a market share theory should be based on the national market shares of each manufacturer as of the time the plaintiffs ingested DES.⁹¹

⁸⁶ *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980) (Richardson, J., dissenting).

⁸⁷ No court outside of California has adopted the *Sindell* rationale in its entirety. Christopher J. McGuire, Note, *Market-Share Liability After Hymowitz and Conley: Exploring the Limits of Judicial Power*, 24 U. MICH. J.L. REF. 759, 763 n.23 (1991).

⁸⁸ Bonanno, Note, *supra* note 84, at 869 n.1; see *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990) (adopting the *Martin* theory but requiring the plaintiff to make a genuine attempt to locate and identify the manufacturer responsible for her injury); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (see *supra* notes 65, 68-69 and accompanying text), *cert. denied*, 493 U.S. 944 (1989); *Martin v. Abbott Lab.*, 689 P.2d 368 (Wash. 1984) (modifying the *Sindell* approach by, *inter alia*, permitting the plaintiff to sue only one defendant who then may elect to implead third-party defendants); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wisc.), *cert. denied*, 469 U.S. 826 (1984) (adopting a theory similar to *Martin* but requiring damages to be divided among two or more defendants according to Wisconsin's comparative negligence statute); .

⁸⁹ For an in-depth discussion of these competing interests and New York's attempt to resolve them, see Aaron D. Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOK. L. REV. 869 (1989).

⁹⁰ 73 N.Y.2d at 487, 539 N.E.2d at 1069, 541 N.Y.S.2d at 941.

⁹¹ *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The market share of

The court's principal reason for utilizing the national market share was one of practicality.⁹² A determination of any market smaller than the national one, in addition to being unreliable, ostensibly would be unduly burdensome to litigants—especially in light of the possibility that some New York plaintiffs may have ingested DES in another state.⁹³ The court also noted that “[u]se of a national market is a fair method . . . of apportioning defendants’ liabilities according to their total culpability in marketing DES for use during pregnancy.”⁹⁴

Second, the *Hymowitz* court ruled that a DES manufacturer could not exculpate itself from liability even if it could prove unequivocally that the plaintiff did not consume its brand of DES.⁹⁵ The court stated, “[T]here should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff’s injury.”⁹⁶ The court reasoned that it would be “a windfall for a producer to escape liability solely because it produced a more identifiable pill, or sold only to certain drug-stores.”⁹⁷

Finally, *Hymowitz* decided that manufacturers could be held only, severally liable for their share of a plaintiff’s damages, equal to their percentage of the national DES market.⁹⁸ Thus, the absence of some defendants from a case would not increase the liability of the defendants that were present. In this way the court could mitigate the harshness of forgoing exculpation by holding each defendant responsible only for the proportionate share of harm it caused. The court stated, “[W]e eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant’s liability beyond its fair share of responsibility.”⁹⁹

each defendant is a factual question to be litigated by the parties. *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

⁹² *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

⁹³ *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

⁹⁴ *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 512-13, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

The combined effect of the New York theory's components resulted in the abandonment of a causation requirement and instead "apportion[ed] liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."¹⁰⁰ One well-respected commentator recognized the apportionment of liability based on risk as a step into the twenty-first century and a break from "senseless obeisance to tradition."¹⁰¹ It is precisely that aspect of *Hymowitz*, however, that raises questions as to a state or federal court's judicial power to impose liability on a defendant under New York's expansive theory of market-share liability. Under a system in which each defendant will be held liable based upon its share of the national market, plaintiffs must join every DES manufacturer to insure full recovery. Yet, existing requirements of personal jurisdiction, such as minimum contacts and purposeful availment, represent formidable obstacles to bringing successfully all DES manufacturers before a court, thereby impeding plaintiffs from recovering 100% of their damages. Judge Weinstein sought to resolve this conflict in his decision in *Ashley*.¹⁰²

II. *ASHLEY V. ABBOTT LABORATORIES*

A. *Facts and Procedural History*

Ashley v. Abbott Laboratories is one of thousands of DES cases brought against scores of defendants in New York and throughout the country. The *Ashley* case is a consolidation of two separate diversity actions filed in the United States District Court for the Eastern District of New York:¹⁰³ *Ashley v.*

¹⁰⁰ *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

¹⁰¹ Twerski, *supra* note 89, at 870.

¹⁰² For a prescient account of the problems surrounding *Hymowitz's* market-share theory, including personal jurisdictional and federal court standing limitations, see McGuire, *supra* note 87, at 759.

¹⁰³ New York has consolidated all its DES cases under the heading "*In re New York County DES Litigation*." The DES cases that were filed in the state supreme court were assigned to Justice Ira Gammerman, while cases filed in the federal district court were assigned to Judge Jack B. Weinstein. *In re New York County DES Litig.*, 142 F.R.D. 58 (E.D.N.Y. 1992). The DES cases are not being handled as a class action, but rather have been consolidated to ease administration pur-

Abbott Laboratories and *Silveri v. Abbott Laboratories*.¹⁰⁴ Plaintiffs in the consolidated *Ashley* case claimed injuries resulting from their exposure or their spouses' exposure in utero to DES.¹⁰⁵ The defendants were all manufacturers or distributors of DES or successors in interest to such companies.¹⁰⁶ Two of the named defendants, Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") and Boyle & Co. ("Boyle") moved to dismiss the claims against them. Boehringer moved to dismiss the complaints under Federal Rules of Civil Procedure 12(b)(6) for a failure to state a claim upon which relief can be granted and 12(b)(2) for lack of personal jurisdiction.¹⁰⁷ Boyle joined in the 12(b)(2) motion to dismiss for lack of personal jurisdiction.¹⁰⁸ The motions of both defendants with respect to plaintiff Angela Silveri and the *Ashley* plaintiffs domiciled in New York were denied.¹⁰⁹

Following the district court's decision, Boehringer filed a notice of appeal but subsequently withdrew the appeal at the suggestion of staff counsel.¹¹⁰ The district court then entered a judgment to the effect that the case had been resolved

suant to the Case Management Order, Supreme Court, New York County (Ira Gammernan, J.), entered on or about March 6, 1990, and affirmed by the New York Appellate Division, 168 A.D.2d 50, 570 N.Y.S.2d 802 (1st Dep't 1991).

¹⁰⁴ In *Silveri*, Angela Silveri moved for permission to introduce evidence that pharmaceutical manufacturers were responsible for the defective design of DES. Judge Weinstein denied that motion holding that under New York law, if plaintiffs are unable to identify the manufacturer of the DES that caused their injury, then the drug manufacturers' liability would be limited to their share of the market. *Silveri v. Abbott Lab.*, 789 F. Supp. 548 (E.D.N.Y. 1992).

¹⁰⁵ Plaintiffs alleged causes of action in warranty, negligence and strict liability and sought compensatory and punitive damages. *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 559 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

¹⁰⁶ *Id.*

¹⁰⁷ FED. R. CIV. P. 12(b)(2) & (b)(6).

¹⁰⁸ *Ashley*, 789 F. Supp. at 559. Boyle made the identical motion in an indemnity action brought in New York State Supreme Court. The court denied Boyle's motion with leave to renew following further discovery. *Feit v. Emons Indus.*, No. 81-12026 (Sup. Ct. N.Y. Co. Aug. 9, 1982). The motion apparently was not renewed. *Ashley*, 789 F. Supp. at 591.

¹⁰⁹ *Id.* at 559. Plaintiff Angela Silveri and approximately one-half of the *Ashley* plaintiffs were New York residents. *Id.* With respect to the non-New York *Ashley* plaintiffs, defendant's motions were left to be decided at a later date. *Id.* Judge Weinstein never wrote an opinion addressing the non-New York plaintiffs, however, because those plaintiffs and the defendants ultimately reached a settlement.

¹¹⁰ *Ashley v. Boehringer Ingelheim Pharmaceuticals*, 7 F.3d 20, 24 (2d Cir. 1993).

through settlement or adjudication on the merits.¹¹¹ Boehringer later renewed its appeal, fearing that the district court's jurisdiction and choice of law rulings would be given preclusive effect by the trial judges in the 42 other DES cases pending against Boehringer in New York.¹¹² The Second Circuit, however, dismissed the appeal on the grounds of mootness and lack of standing.¹¹³ Yet, the Second Circuit noted that its "decision to decline appellate review of the District Court's order confirms the lack of any possible collateral estoppel effect arising from the District Court's . . . ruling."¹¹⁴

B. *The District Court Decision*

Ashley presented Judge Weinstein with a problem that had not been resolved at the state court level¹¹⁵—a problem

¹¹¹ On September 14, 1992, apparently at Boehringer's request, the district court entered a judgment that provided:

[T]he case having been fully resolved as to all parties and claims by settlement or adjudication on the merits, it is ORDERED AND ADJUDGED that all of the claims in this action, including specifically cross-claims, are DISMISSED, without costs, subject to the rights of any party to re-open the final judgment if any settlement is not consummated.

Id. at 22.

¹¹² *Id.* at 23. Boehringer contended that the district court rulings were unconstitutional and constituted erroneous interpretations of New York law. *Id.* at 20.

¹¹³ The Second Circuit found the appeal to be moot because the plaintiffs declined to contest the appeal, neither filing a brief, nor appearing for argument. *Id.* More importantly, the court determined that Boehringer lacked standing because Boehringer had prevailed on the merits by successfully moving to have the plaintiffs' complaint dismissed. *Id.* As a general rule, a prevailing party cannot appeal from a district court judgment in its favor. *Id.* (citing *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1973 (1993)).

¹¹⁴ *Ashley*, 7 F.3d at 24. One exception to the rule that a prevailing party cannot appeal is when the prevailing party is aggrieved by the collateral estoppel effect of a district court's decision. *Id.* at 23. The Second Circuit, however, found that the district court opinion would not have preclusive effect because the judgment entered in the district court was not dependent upon the determination of the issues that Boehringer was appealing. *Id.* The Second Circuit stated that the district court could enter a judgment dismissing the complaint irrespective of the finding of personal jurisdiction over Boehringer and regardless of whether or not New York law applied to Boehringer. *Id.*

¹¹⁵ DES litigation concerning causation and liability had, for the most part, been resolved by various state courts. See generally *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550, (1991) (no cause of action by third generation DES daughters against manufacturers), *cert. denied*, 112 S. Ct. 197 (1991); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (adopting national market share liability in DES cases), *cert. denied*,

that *Hymowitz's* national theory of market-share liability created: how must a court treat non-resident drug manufacturers that are not otherwise amenable to personal jurisdiction in New York? Boehringer, a Delaware corporation with its principal place of business in Connecticut, has been licensed and authorized to do business in New York since its inception in 1971.¹¹⁶ Although Boehringer had never produced or sold DES, it is responsible for the liabilities of Stayner Corporation ("Stayner"),¹¹⁷ which it acquired in 1979, and which manufactured and sold DES.¹¹⁸ Stayner, however, did not produce or sell DES in New York.¹¹⁹ Consequently, Boehringer claimed that plaintiffs' suits seeking to impose liability for Stayner's acts could not proceed in New York, because the court would

493 U.S. 944 (1989); *In re DES Market Share Litig.*, 171 A.D.2d 352, 578 N.Y.S.2d 63 (4th Dep't 1991) (right to a jury in market share trial); *In re New York County DES Litig.*, 168 A.D.2d 50, 570 N.Y.S.2d 802 (1st Dep't 1991) (affirming case management order of Gammernan, J.); *Wind v. Eli Lilly & Co.*, 164 A.D.2d 885, 559 N.Y.S.2d 561 (2d Dep't 1990) (delaying plaintiffs' requests for information relating to appearance of defendant's packaging of DES); *Anderson v. Eli Lilly & Co.*, 158 A.D.2d 91, 557 N.Y.S.2d 981 (3d Dep't 1990) (husband's consortium, claim for loss of ability to have natural children properly dismissed), *aff'd*, 79 N.Y.2d 797, 588 N.E.2d 66, 580 N.Y.S.2d 168 (1991); *Clark v. Abbott Lab.*, 155 A.D.2d 35, 553 N.Y.S.2d 929 (4th Dep't 1990) (effect of revival statute); *Besser v. E.R. Squibb & Sons*, 146 A.D.2d 107, 539 N.Y.S.2d 734 (1st Dep't 1989) (foreign statute of limitations, if shorter than New York statute, must apply where cause of action accrues outside New York), *aff'd*, 75 N.Y.2d 847, 552 N.E.2d 171, 552 N.Y.S.2d 923 (1990); *Schaeffer v. Eli Lilly & Co.*, 113 A.D.2d 827, 493 N.Y.S.2d 501 (2d Dep't 1985) (collateral estoppel applies to issues of medical effects and manufacturers' inadequate testing, but not to issue of proximate cause); *Bichler v. Willing*, 58 A.D.2d 331, 397 N.Y.S.2d 57 (1st Dep't 1977) (plaintiffs' claim against dispensing pharmacist properly dismissed); *see also Sandberg v. White Lab.*, 871 F.2d 3 (2d Cir. 1989) (New York revival statute, although applicable to DES, does not apply to DEN, a similar estrogen compound); *Clark v. Eli Lilly & Co.*, 725 F. Supp. 130 (N.D.N.Y. 1989) (husband's consortium claim properly dismissed where wife's injuries occurred before marriage).

¹¹⁶ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 559 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993). Boehringer markets its products (which do not include DES) in all states and is licensed to do business in several other states besides New York. *Id.*

¹¹⁷ Boehringer conceded that it is subject to the same tort liabilities as Stayner would have been had Stayner continued to exist. *Id.* at 589.

¹¹⁸ *Id.* Stayner was merged into Boehringer in 1979. Between 1949 and 1971, Stayner obtained DES from chemical companies in California, Tennessee and Ohio, manufactured DES at a plant in California and sold tablets in California, Oregon, Washington and Montana. *Id.*

¹¹⁹ Affidavits from senior Stayner employees indicate that the company never was licensed to do business in New York, had an office or agent in New York, solicited business in New York or shipped DES to New York. *Id.*

not have had personal jurisdiction over Stayner.¹²⁰ Boyle, the second defendant, joined the motion to dismiss, and made a similar jurisdictional challenge. Boyle is a California corporation that manufactured and sold DES between 1949 and 1960 in California and other states west of the Mississippi River,¹²¹ but Boyle had never manufactured or sold DES in New York.¹²² Boyle argued, therefore, that New York courts lacked personal jurisdiction under section 302(a)(3)(ii) of New York's Civil Practice Laws and Rules ("NYCPLR"),¹²³ and that a finding of jurisdiction would violate the Federal Due Process Clause.¹²⁴ Rather than tackle the jurisdictional challenges head-on, Judge Weinstein, in what proved to be a dispositive switch, first chose to address Boehringer's second ground in its motion to dismiss—for plaintiffs' failure to state a claim upon which relief could be granted.¹²⁵

1. Failure to State a Claim

Boehringer premised its motion on two theories. First, Boehringer argued that New York's substantive DES law, although evincing a strong concern for New York plaintiffs, nonetheless prohibits suits against a company that never sold DES in New York.¹²⁶ Boehringer pointed out that under New York law, a DES manufacturer that had never sold DES for

¹²⁰ *Id.* at 559.

¹²¹ *Id.*

¹²² Employee affidavits attested that Boyle never was licensed to do business in New York, maintained an office or agents in New York, or advertised in New York. *Id.*

¹²³ N.Y. CIV. PRAC. L. & R. § 302(a)(3)(ii) (McKinney 1992) is New York's long-arm jurisdiction statute and provides for *in personam* jurisdiction over:

[A]ny non-domiciliary . . . who in person or through an agent . . . commits a tortious act without the state causing injury to person or property within the state . . . if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

Id. Boyle claimed that the "causation," "injury" and "reasonable expectation" elements of the statute had not been satisfied. *Ashley*, 789 F. Supp. at 592.

¹²⁴ *Ashley*, 789 F. Supp. at 592.

¹²⁵ *Id.* at 559. It is the normal practice of courts to determine first whether it has personal jurisdiction over a defendant before addressing substantive motions—such as failure to state a claim. See *infra* notes 184-91 and accompanying text.

¹²⁶ *Ashley*, 789 F. Supp. at 589.

use during pregnancy is immune from suit.¹²⁷ Boehringer argued that the same reasoning should apply to a manufacturer that had never sold DES in New York, because neither manufacturer had created any risk to women in New York.¹²⁸ Alternatively, Boehringer argued that if *Hymowitz* did permit a cause of action, then comity¹²⁹ and conflicts of law principles, as well as the Due Process and Full Faith and Credit Clauses of the Federal Constitution, required application of California¹³⁰ rather than New York law.¹³¹

Judge Weinstein rejected Boehringer's motion, holding that plaintiffs had stated a cause of action against Boehringer and that New York's law was applicable.¹³² Judge Weinstein presented two reasons. First, unlike a manufacturer that had never produced DES for use during pregnancy, a manufacturer that had never sold DES in New York nevertheless could have caused injury to New York residents.¹³³ New York residents could have ingested the DES while in another state or purchased DES in another state and brought it back to New York to ingest.¹³⁴ Second, Judge Weinstein found it ironic that Boehringer's argument for dismissal rested on New York's policy for protecting its residents since it is precisely this policy that created the cause of action against Boehringer in the first place.¹³⁵ According to Judge Weinstein, *Hymowitz* purposely avoided seeking a causal link between a particular plaintiff's harm and a particular defendant's acts in order to protect

¹²⁷ *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 493 U.S. 944 (1989) (suits against manufacturers that never produced or sold DES for use during pregnancy were not allowed because such manufacturers did not create any risk to pregnant women. See also *supra* notes 90-102 and accompanying text (discussing the *Hymowitz* decision).

¹²⁸ *Ashley*, 789 F. Supp. at 559.

¹²⁹ The principles of comity grant a court sitting in one state the discretion to recognize the law of another state where the application of the other state's law does not conflict with the public policy of the forum state. *Id.*

¹³⁰ Under California law, Boehringer could exculpate itself by proving that its DES was not the cause of the plaintiffs injury. See *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 511, 539 N.E.2d 1069, 1077, 541 N.Y.S.2d 941, cert. denied, 493 U.S. 944 (1989).

¹³⁵ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 589 (E.D.N.Y. 1992), appeal dismissed, 7 F.3d 20 (2d Cir. 1993).

injured New York residents, while at the same time fairly apportioning liability among defendants.¹³⁶ As such, Boehringer's reliance upon this policy was misplaced. As to Boehringer's second argument, that California law should apply, Judge Weinstein held that under New York's choice-of-law rules, the New York Court of Appeals would apply New York substantive law.¹³⁷ Judge Weinstein noted that a finding that the law of each defendant's state was applicable would cripple the New York Court of Appeals' attempt to process DES cases efficiently.¹³⁸

2. Personal Jurisdiction

After denying Boehringer's motion to dismiss for failure to state a claim, Judge Weinstein then proceeded to address Boyle and Boehringer's motions to dismiss for lack of personal jurisdiction. Two inquiries are necessary to determine whether New York may exercise personal jurisdiction over either of the two defendants.¹³⁹ First, New York law must authorize the court to exercise personal jurisdiction.¹⁴⁰ Under New York

¹³⁶ *Id.*

¹³⁷ The choice-of-law analysis required the evaluation of several factors including whether the states' laws are in direct conflict, whether the conflict concerns conduct-regulation or loss-distribution, which state has a greater interest in having its substantive law applied, and where the tortious activity occurred. For an exhaustive discussion of New York choice-of-law rules, see Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

Although the conflict-of-laws issue in *Ashley* is beyond the scope of this Comment, the importance of conflict of laws in mass torts is profound and presents many difficult problems. See, e.g., Aaron D. Twerski, *With Liberty and Justice for All: An Essay on Agent Orange and Choice of Law*, 52 BROOK. L. REV. 341 (1986). Since liability ultimately will depend on a state's substantive law, defendants, for the most part, are more concerned about which state's substantive law will be applied than in which court room they must litigate the dispute. Issues of personal jurisdiction nevertheless are important because if a state has sufficient contacts to exert personal jurisdiction, then that state will apply its own substantive law. See Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to The Choice of Law Impasse*, 96 YALE L.J. 1077, 1089 (1987) (emphasizing the tendency of state courts to favor forum law).

¹³⁸ *Ashley*, 789 F. Supp. at 568. A contrary finding would have rendered the *Ashley* opinion moot, as far as Judge Weinstein was concerned, because the defendants would have been able to exculpate themselves under California DES law, thereby inhibiting the plaintiffs' full recovery.

¹³⁹ *Id.* at 569.

¹⁴⁰ See *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (en banc).

law, sections 301 and 302 of the NYCPLR produced possible bases of personal jurisdiction.¹⁴¹ If the inquiry satisfies New York standards, the exercise of personal jurisdiction must then be measured against federal due process requirements.¹⁴² The traditional federal due process test for personal jurisdiction requires that the defendant have sufficient "minimum contacts" with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹⁴³ Under both state and federal law, the plaintiff bears the burden of proving facts supporting the exercise of personal jurisdiction.¹⁴⁴

a. *New York Law*

The first provision that Judge Weinstein considered to determine whether New York could exercise personal jurisdiction over either of the defendants was NYCPLR section 301.¹⁴⁵ One basis of personal jurisdiction recognized under section 301 is consent.¹⁴⁶ A foreign corporation that files a certificate of authority to do business in New York is considered to have consented to be sued in New York upon any cause of action, regardless of where the cause of action arose.¹⁴⁷ Such an exercise of jurisdiction is known as general personal jurisdiction.¹⁴⁸ Since Boehringer was licensed to do business

¹⁴¹ Section 301 provides that "[a] court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore." This section codified existing personal jurisdiction law at the time of the section's enactment in 1962. N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1993).

In contrast, § 302 is New York's long-arm statute, providing for jurisdiction over non-resident defendant's under certain circumstances. *See supra* note 123.

¹⁴² *See, e.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁴³ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁴⁴ *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Connell v. Hayden*, 83 A.D.2d 30, 34, 443 N.Y.S.2d 383, 388 (2d Dep't 1981).

¹⁴⁵ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 568 (E.D.N.Y. 1992).

¹⁴⁶ N.Y. CIV. PRAC. L. & R. § 301(4) (McKinney 1993).

¹⁴⁷ *See* N.Y. BUS. CORP. LAW §§ 304, 1304 (McKinney 1986); *LeVine v. Isoserve Inc.*, 70 Misc. 2d 747, 334 N.Y.S.2d 796, 799 (Sup. Ct. Albany Co. 1972) (citing, *inter alia*, *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 111 N.E. 1075 (1916) ("[w]hen a foreign corporation is licensed to do business in New York, it consents to be sued on issues of action arising within and without the state")).

¹⁴⁸ *Ashley*, 789 F. Supp. at 590. General jurisdiction is exercised when a defendant's contacts with the forum are so extensive as to amount to "presence"

in New York, it was amenable to jurisdiction under NYCPLR section 301. Therefore, the lack of any forum-related contacts by Stayner (Boehringer's predecessor) was irrelevant in assessing Boehringer's amenability to personal jurisdiction in New York.¹⁴⁹

The second defendant, Boyle, had no prior contacts with New York and, thus, NYCPLR section 301 did not apply.¹⁵⁰ Under New York's long-arm statute (section 302(a)(3)), however, a court may exercise personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state"¹⁵¹ To satisfy this provision, in addition to causing injury in state, the non-domiciliary must also "expect[] . . . or . . . reasonably expect[] [its] act to have consequences in the state and derive[] substantial revenue from interstate or international commerce."¹⁵² Thus, whether New York could exercise personal

within that state for jurisdictional purposes. As a consequence of the fictional "presence," the defendant is amenable to personal jurisdiction in that forum irrespective of where the acts underlying a particular claim occurred. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). See generally Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

¹⁴⁹ *Ashley*, 789 F. Supp. at 590. Boehringer contested jurisdiction under NYCPLR § 301, claiming that since New York could not have exercised jurisdiction over Stayner, the state was also precluded from exercising jurisdiction over its successor corporation, Boehringer. *Id.* Judge Weinstein, however, rejected this argument, relying heavily on Justice Gammerman's decision in *Akerman v. Abbott Lab.*, No. 90-7669 (1st Dep't Aug. 21, 1991). In *Akerman* the Court found Boehringer amenable to personal jurisdiction for DES suits under § 301 of the NYCPLR. Judge Weinstein noted that there are numerous cases supporting jurisdiction over a successor corporation with no forum contacts on the basis of the contacts of its predecessor. *Ashley*, 789 F. Supp. at 590 (citing *Simmers v. American Cyanamid Corp.*, 576 A.2d 376 (Pa. Super. Ct. 1990) (discussing such cases), *cert. denied*, 112 S. Ct. 62 (1991)). In this instance, however, the forum was exercising personal jurisdiction over the successor corporation based on the successor corporations forum contacts even though it was the acts of its predecessor that were at issue (acts that took place outside the forum). Nonetheless, because Boehringer had consented to general jurisdiction, which extends to causes of action "not arising out of or related to the defendant's contacts with the forum," jurisdiction under § 301 was appropriate. *Ashley*, 789 F. Supp. at 589 (quoting *Helicopteros*, 466 U.S. at 414).

¹⁵⁰ Section 301 also provides for jurisdiction over foreign corporations doing business in New York, doing business through an affiliate in New York and jurisdiction by estoppel. None of these other bases applied to Boyle.

¹⁵¹ N.Y. CIV. PRAC. L. & R. § 302(a)(3) (McKinney 1986).

¹⁵² *Id.* Section 302(a)(3) contains another provision that could also be satisfied in conjunction with "causing injury in state" to permit the exercise of personal juris-

jurisdiction over Boyle depended on how section 302(a)(3) was interpreted by New York courts and, in the instant case, by Judge Weinstein.¹⁵³

The first requirement of the long arm statute is that the defendant have committed a tortious act outside the state that caused injury within the state.¹⁵⁴ Since Boyle distributed DES outside of New York, the tortious act, if any, occurred outside the state.¹⁵⁵ Yet, whether Boyle caused injury within New York was more complicated. Initially, Boyle claimed that it did not "cause" injury in New York because such a determination had not been proven.¹⁵⁶ Judge Weinstein, however, dismissed this argument, relying on substantive New York DES law. He noted that under market share liability, plaintiffs are not required to prove that a particular defendant caused their injury.¹⁵⁷ But section 302(a)(3) does require the plaintiff to prove that the injury giving rise to the plaintiff's claim occurred within New York.¹⁵⁸ Judge Weinstein reasoned that the plaintiffs either ingested DES in New York or were residents of New York when the drug acted upon them or their progeny and, therefore, New York was the situs of the injury.¹⁵⁹

Once Judge Weinstein found that Boyle had caused injury within New York, he was faced with an even more formidable obstacle—satisfying the second requirement of section 302(a)(3). Section 302(a)(3)(ii) requires that the defendant

diction. Subsection (a)(3)(i) permits personal jurisdiction over a non-resident defendant who: "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state." *Id.*

This subsection, however, is inapplicable because there was no evidence that Boyle regularly conducted business in New York.

¹⁵³ *Ashley*, 789 F. Supp. at 569.

¹⁵⁴ N.Y. CIV. PRAC. L. & R. § 302(a)(3).

¹⁵⁵ See *Naples v. City of New York*, 34 A.D.2d 577, 309 N.Y.S.2d 663 (2d Dep't 1970) (sale of defective fireman's coat outside of New York which caused injury in New York was a tortious act outside the state).

¹⁵⁶ *Ashley*, 789 F. Supp. at 592.

¹⁵⁷ "It would be counterproductive to *Hymowitz* policy to pose such a requirement as a procedural bar to their recovery." *Id.*

¹⁵⁸ See *Diskin v. Starck*, 538 F. Supp. 877 (E.D.N.Y. 1982) (where plaintiffs' injury occurred in Vermont, New York jurisdiction cannot be predicated on § 302(a)(3) merely because further damage was suffered in state on account of earlier injury sustained outside of the state).

¹⁵⁹ *Ashley*, 789 F. Supp. at 570.

"expects or should reasonably expect [its] act to have consequences in the state and derives substantial revenue from interstate or international commerce."¹⁶⁰ The revenue element was not at issue since Boyle had received substantial revenue from commerce in several states.¹⁶¹ Proving that Boyle reasonably should have expected that its selling DES in states west of the Mississippi River would have consequences in New York, however, presented Judge Weinstein with a difficult problem. The lack of even a single contact between Boyle and New York rendered satisfaction of this requirement impossible under existing New York case law.

Judge Weinstein argued, however, that New York case law interpreting the "reasonable expectations" element of NYCPLR section 302(a)(3)(ii) provided no controlling authority in the DES/mass tort context, because "[e]ach [case] involved traditional tort suits by individual plaintiffs against individual providers of goods and services."¹⁶² According to Judge Weinstein, because DES cases were not traditional tort cases (one defendant and one plaintiff), and because the defendants involved manufactured generic goods and participated in a national market,¹⁶³ the *Ashley* defendants could not rely on the fact that they never expected their products to have any contact with New York.¹⁶⁴

Instead, Judge Weinstein crafted an analysis applicable to mass torts that satisfies the "reasonable expectation" requirement of New York's long-arm statute. He reasoned that "all DES manufacturers knew that their acts were having forum consequences in New York."¹⁶⁵ This implied knowledge was attributed to the fact that since DES was a "perfectly fungible consumer item," the sale of the item by a manufacturer in one locality would cause other manufacturers to seek different markets in which to sell DES.¹⁶⁶ In other words, the national

¹⁶⁰ N.Y. CIV. PRAC. L. & R. § 302 (a)(3)(ii).

¹⁶¹ *Ashley*, 789 F. Supp. at 569.

¹⁶² *Id.* at 571.

¹⁶³ *Id.* at 572.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Defendants' engagement in the national DES industry alerted them to the fact that their conduct in marketing generic DES in one part of the country would have economic and trade flow consequences in every other

DES market was like a pond—entry into which by a manufacturer at any point had direct and foreseeable ripple effects in every other state.¹⁶⁷ Judge Weinstein concluded that DES manufacturers should have “reasonably expected” participation in the national DES market to have consequences in New York, thereby satisfying the second requirement of New York’s long-arm statute.¹⁶⁸

This line of reasoning, however, must rest on New York law, because a federal district court trying a case based on diversity jurisdiction is constrained by the *Erie* doctrine.¹⁶⁹ Specifically, Judge Weinstein was required to resolve the jurisdiction question “in a manner consistent with the court’s informed prediction of what the New York Court of Appeals would do when faced with the same issue.”¹⁷⁰ Judge Weinstein interpreted the *Hymowitz* decision as providing “a direct link between jurisdictional and substantive components of DES litigation by imposing several, rather than joint and several, liability.”¹⁷¹ As a result of this, Judge Weinstein reasoned, DES plaintiffs’ full recovery would be frustrated if all manufacturers could not be brought into court.¹⁷² Accordingly, Judge Weinstein held that “*Hymowitz* and the New York Civil Practice Law and Rules as well as legislative policy must thus be read as favoring a jurisdictional reach consistent with

part, including New York. There was here a true national market encouraged and protected by the Commerce Clause of the federal Constitution and national drug regulations, not a series of discreet inward-looking and unrelated markets.

Id.

¹⁶⁷ *Id.* at 576.

¹⁶⁸ *Id.* at 572. Although the use of *Hymowitz* to modify personal jurisdiction appeared to be applied retrospectively against Boyle, Judge Weinstein stated that “[t]he fact that DES manufacturers did not anticipate *Hymowitz* or the jurisdictional consequences flowing from that decision is not significant. The parties in this suit are governed by the substantive common law and jurisdictional law in effect at the time of the suit.” *Id.* at 572 (citations omitted); cf. *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1991) (when applying long-arm statute in DES cases jurisdiction must be determined based on the date of manufacture and distribution of DES).

¹⁶⁹ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires all federal courts sitting in diversity to apply the forum’s substantive law and to interpret that law in accordance with the way the highest court of that state would interpret it.

¹⁷⁰ *Ashley*, 789 F. Supp. at 571.

¹⁷¹ *Id.*

¹⁷² *Id.* at 572.

the national market share rationale and the adoption of several liability."¹⁷³

b. *Federal Due Process*

The exercise of personal jurisdiction over these two defendants, however, still had to satisfy constitutional standards of due process. As to Boehringer, Judge Weinstein held that the assertion of personal jurisdiction over a corporation that is licensed to do business in the forum is consistent with the requirements of Federal Due Process.¹⁷⁴ The due process inquiry as to Boyle, however, was more complicated. Judge Weinstein framed this issue as "whether the Constitution limits the ability of New York State to provide full compensation to residents injured by a product sold in the national market."¹⁷⁵ Having thus set the terms of the inquiry, Judge Weinstein undertook an extensive analysis and critique of current federal due process law.¹⁷⁶ He emerged with a new theory of due process applicable to mass torts, which is premised on the forum's interest in resolving the dispute.

According to Judge Weinstein's modified due process analysis, manufacturers of products sold in the United States may be sued in any state in which the plaintiffs reside—irrespective of the manufacturers' lack of contact within the forum—if two requirements are satisfied. First, there must be a substantial state interest in resolving the dispute.¹⁷⁷ To discern the requisite "substantial state interest," Judge Weinstein looked to

¹⁷³ *Id.*

¹⁷⁴ *Ashley*, 789 F. Supp. at 591 ("[T]he Constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived *International Shoe*." (citing *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)). Judge Weinstein also applied the modified theory of personal jurisdiction and due process that he had developed for Boyle to Boehringer. *Ashley*, 789 F. Supp. at 592. However, since Boehringer would have been amenable to jurisdiction under existing law, that analysis was unnecessary.

¹⁷⁵ *Ashley*, 789 F. Supp. at 573.

¹⁷⁶ *Id.* at 573-89.

¹⁷⁷ "[W]hether the litigation raises issues whose resolution would be affected by, or have a probable impact on the vindication of, policies expressed in the substantive, procedural or remedial laws of the forum." *Id.* at 587.

New York's substantive DES law.¹⁷⁸ According to this law, a defendant drug manufacturer cannot exculpate itself by attempting to prove that its drug did not cause the plaintiffs' injury.¹⁷⁹ Judge Weinstein thought this rule to be indicative of New York's substantial interest in fully compensating resident plaintiffs.¹⁸⁰ Once a substantial state interest is shown, then "the assertion of jurisdiction will be considered constitutional unless, given the actual circumstances of the case, the defendant is unable to mount a defense in the forum state without suffering relatively substantial hardship."¹⁸¹ Boyle failed to meet this requirement, because it had not made a showing that it would suffer any undue burden by defending in New York.¹⁸² Thus, Judge Weinstein concluded that the assertion of personal jurisdiction over Boyle under NYCPLR section 302(a)(3) was consistent with due process.¹⁸³

III. ANALYSIS

A close analysis of the *Ashley* decision reveals that Judge Weinstein's modified theory of personal jurisdiction for mass tort cases not only contradicts existing standards of personal jurisdiction and due process, but also raises troubling questions concerning the proper role of a district court judge. To reach his desired outcome of exercising personal jurisdiction over the non-resident drug manufacturers, Judge Weinstein embarked upon a long and arduous journey that ultimately spanned 103 pages in the Federal Supplement. He crafted the

¹⁷⁸ *Id.* at 559.

¹⁷⁹ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944 (1989).

¹⁸⁰ *Ashley*, 789 F. Supp. at 591-93.

¹⁸¹ *Id.* at 587.

Evidence to be considered in determining the defendant's relative hardship includes, inter alia, (1) the defendant's available assets; (2) whether the defendant has or is engaged in substantial interstate commerce; (3) whether the defendant is being represented by an indemnitor or is sharing the cost of the defense with an indemnitor or co-defendant; (4) the comparative hardship defendant will incur in defending the suit in another forum; and (5) the comparative hardship to the plaintiff if the case were dismissed or transferred for lack of jurisdiction.

Id.

¹⁸² *Id.* at 594.

¹⁸³ *Id.*

Ashley decision, which looks and reads more like a law review article than a judicial opinion, to dispense systematically with each procedural, substantive and constitutional issue that threatened to derail the delivery of his theory. First, Judge Weinstein ignored Second Circuit law when he decided to examine substantive New York DES law before determining whether the defendants were properly before the court. Judge Weinstein then reinterpreted New York's long-arm statute in a manner inconsistent with existing state law and in violation of the *Erie* doctrine. Finally, Judge Weinstein crafted a new theory of personal jurisdiction applicable to mass torts, predicated on a state's interest in resolving the dispute, which violates a defendant's due process rights. This pioneering judicial exercise left a trail of discarded precedent marking the path to a theory of personal jurisdiction that jeopardizes the due process rights of defendants.

A. *Resolving Substance Before Procedure*

The first hurdle that Judge Weinstein faced was the sequence in which to address Boehringer's two motions.¹⁸⁴ Judge Weinstein noted that the normal practice is to consider 12(b)(2) motions prior to 12(b)(6) motions "[o]n the theory that a court ought to first determine whether a party is properly present before considering substantive issues. . . ."¹⁸⁵ If Judge Weinstein first had addressed the personal jurisdiction claim outside the mass tort/DES context, however, he would have been forced to launch an immediate frontal attack on existing standards of personal jurisdiction. Instead, by addressing the 12(b)(6) motion first, he was able to discuss substantive New York DES law to establish a foundation from which he could later justify his attack on accepted principles of personal jurisdiction. Yet, Judge Weinstein was not compelled to reverse the order of the motions and disregard *Arrowsmith v. United Press International*¹⁸⁶ because Boehringer clearly was amenable to general jurisdiction under NYCPLR section 301.¹⁸⁷ Rather, he

¹⁸⁴ Boehringer advanced both the 12(b)(6) motion and the 12(b)(2) motion. Boyle joined only in the 12(b)(2) motion. *Id.* at 559.

¹⁸⁵ *Id.* at 559 (citing *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2d Cir. 1963)).

¹⁸⁶ 320 F.2d at 219.

¹⁸⁷ In fact, one New York court previously had found Boehringer amenable to

inverted the order for the strategic purpose of presenting a more persuasive case for modifying existing standards of long-arm jurisdiction based on New York's substantive DES law and, ultimately, for exercising jurisdiction over Boyle. Thus, by ignoring *Arrowsmith*, Judge Weinstein was able to create his theory of personal jurisdiction in a more persuasive manner, namely with the alleged support of New York substantive law.

A problem, however, with this seemingly innocuous switch is that the Second Circuit had ruled definitively on this issue in *Arrowsmith*.¹⁸⁸ In that case the Second Circuit held that "[n]ot only does logic compel initial consideration of the issue of jurisdiction over the defendant—a court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim—but the functional difference that flows from the ground selected for dismissal likewise compels considering jurisdiction and venue questions first."¹⁸⁹ This rule acknowledges that a motion to dismiss for failure to state a claim is granted with prejudice whereas a determination that the court lacks personal jurisdiction does not preclude a subsequent action in the appropriate forum.¹⁹⁰ As a result, Judge Weinstein's analysis of the motion to dismiss was legally meaningless.¹⁹¹

B. *Personal Jurisdiction*

After denying Boehringer's motion to dismiss for failure to state a claim, Judge Weinstein then proceeded to address the jurisdictional challenges. Boehringer was licensed to do business in New York and, therefore, was amenable to general jurisdiction. Boyle, however, having no past or current contacts with New York was not amenable to general jurisdiction. The only way personal jurisdiction could be exercised over Boyle was under New York's long-arm statute. Interestingly, New

general jurisdiction in New York for DES suits. *Akerman v. Abbott Lab.*, No. 90-7669 (1st Dep't Aug. 21, 1991).

¹⁸⁸ 320 F.2d at 219.

¹⁸⁹ *Id.* at 221.

¹⁹⁰ *Id.*

¹⁹¹ Although Judge Weinstein had no intention of dismissing the claim, he could not have done so according to the mandate of *Arrowsmith*. In *Arrowsmith*, the Second Circuit reversed the district court for proceeding to dismiss for failure to state a claim before resolving the jurisdictional issue. *Id.*

York never intended the reach of the statute to extend as far as the limits of jurisdiction permissible under the Federal Constitution.¹⁹² In fact, one of the original drafters of the statute was Judge Weinstein. Nonetheless, Judge Weinstein interpreted the long-arm statute in a way that far exceeded the limits of federal due process as well as existing New York case law.

1. NYCPLR 302: Causation and Foreseeability

Judge Weinstein first misapplied the long-arm statute by finding that Boyle had caused injury within the state. Although Boyle committed a tortious act without the state, it did not cause injury within New York. The general rule as to in-state injury is that "the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff."¹⁹³ DES cases present an interesting problem in making this determination due to the long latency period involved before injury is realized. Whether the location of the original injury-causing event should be defined as where the mother first ingested the drug, where the infant is conceived and, thereby, exposed to the drug in utero, where the infant is born, or where the child ultimately discovers the injury is difficult to ascertain. Using the time of ingestion as the original incident necessary to cause injury makes the most practical sense. If a DES mother or child was pursuing damages for fear of future harm or increased risk of future harm, then only the date of ingestion would make sense as the original injury-causing event. The other events, birth or in utero exposure, are far too speculative on which to base such a claim, and looking to the discovery of the injury would preclude a claim for fear of future harm. Judge Weinstein agreed that the "injury-causing event in these cases was the mothers' ingestion of DES."¹⁹⁴ Yet that event could not have occurred in New York, since Boyle had

¹⁹² *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 569 (E.D.N.Y. 1992) (citing *Banco Ambrosiano v. Artoc Bank & Trust*, 62 N.Y.2d 65, 71, 464 N.E.2d 432, 435, 476 N.Y.S.2d 64, 67 (1984)), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

¹⁹³ *Carte v. Parkoff*, 152 A.D.2d 615, 543 N.Y.S.2d 718, 719 (2d Dep't 1989) (citations omitted).

¹⁹⁴ *Ashley*, 789 F. Supp. at 592.

never sold DES in New York.¹⁹⁵

To avoid the reality that Boyle's drug could not have been ingested in New York, Judge Weinstein decided that the locus or situs of the injury is the place of *exposure*, not just the place of ingestion, and therefore that New York is the situs of the original event.¹⁹⁶ "Where, as here, an allegedly harmful drug is ingested in New York, or acts upon a resident of the state while the resident is in the state or her progeny when they are in the state, the situs of the injury is New York."¹⁹⁷ Judge Weinstein contended that although the injury-causing event was the ingestion of DES, all plaintiffs had been exposed to DES in utero while in New York.¹⁹⁸

As a matter of statutory construction, this application of section 302 contradicted all existing case law, which held that the location of the original event that caused the injury controls—not the place where the injury is discovered or where damages are subsequently felt. Where plaintiff sustains an injury outside of New York, a claim that the plaintiff suffered further damage in New York based upon the earlier injury is insufficient to establish personal jurisdiction under NYCPLR section 302(a)(3).¹⁹⁹ It appears as though Judge Weinstein focused principally upon the fact that all plaintiffs were resi-

¹⁹⁵ None of the plaintiffs offered any evidence that they had purchased DES in a state in which Boyle sold DES and then ingested it in New York, or that they had purchased Boyle's DES in New York. Even if plaintiffs had purchased DES in another state and brought it into New York, Boyle still would not have been amenable to personal jurisdiction under the long-arm statute. See *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't) (mere likelihood that a product will find its way into New York is insufficient without some purposeful affiliation), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983).

¹⁹⁶ *Ashley*, 789 F. Supp. at 570. Judge Weinstein claimed that New York was the location where the DES had been ingested. *Id.* at 592. Yet, there is no indication that the plaintiffs had ingested Boyle's DES in New York. While it is true that many, if not all, of the New York plaintiffs ingested DES in New York, the proper question is not whether they did so, but rather if Boyle's product caused injury in New York for purposes of personal jurisdiction.

¹⁹⁷ *Id.* at 570.

¹⁹⁸ *Id.* at 592.

¹⁹⁹ *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981); see also *Ditchik v. Baines*, 665 F. Supp. 350 (S.D.N.Y. 1987) (where malpractice occurred in New Jersey, resultant injury suffered while in New York does not provide for injury within state); *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga Co. 1967) (original injury must occur within state, not resulting damage).

dents or domiciliaries of New York.²⁰⁰ Yet, the mere fact that injured plaintiffs are New York residents or are domiciled in New York has never been held a sufficient basis for jurisdiction under the long-arm statute.²⁰¹

Moreover, even Judge Weinstein's broad interpretation of "original injury-causing event" fails to link the plaintiffs' injuries directly with Boyle's DES.²⁰² Therefore, personal jurisdiction based on the long-arm statute should have failed before ever passing the first requirement. Relying on substantive New York DES law, however, Judge Weinstein declared that since DES plaintiffs did not have to prove causation under *Hymowitz*, Boyle could not escape from jurisdiction based upon that fact.²⁰³ Judge Weinstein thus disregarded the first requirement of section 302(a)(3) and held that Boyle had caused injury within New York. He justified such a drastic departure from precedent and statutory construction on a commingling of substantive New York DES law with personal jurisdiction law.

The second requirement of section 302(a)(3), whether Boyle reasonably expected its activity to have forum consequences, presented an even more challenging problem for Judge Weinstein. Clause (ii) of subparagraph (3) seeks to ensure that New York's long-arm statute will not conflict with federal due process standards.²⁰⁴ According to federal due

²⁰⁰ *Ashley*, 789 F. Supp. at 559 (stating that this opinion only applies to plaintiffs domiciled in New York); *Id.* at 570 (stating that DES acted upon residents of the state while in state or upon her progeny while in state).

²⁰¹ See *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523 (S.D.N.Y. 1985); *Miji Assoc. v. Halliburton Servs.*, 552 F. Supp. 418 (S.D.N.Y. 1982); *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 402 N.E.2d 122, 425 N.Y.S.2d 783 (1980); *Bissinger v. DiBella*, 141 A.D.2d 595, 529 N.Y.S.2d 516 (2d Dep't 1988); *Bramwell v. Tucker*, 107 A.D.2d 731, 484 N.Y.S.2d 92 (2d Dep't 1985); *McGowan v. Smith*, 72 A.D.2d 75, 423 N.Y.S.2d 90 (4th Dep't), *aff'd*, 52 N.Y.2d 268, 419 N.E.2d 321, 437 N.Y.S.2d 643 (1979).

²⁰² See *supra* note 196.

²⁰³ Boyle also contends that it cannot be shown to have committed tortious acts "causing" injuries as required by section 302(a)(3)(ii). This argument, while perhaps cogent under the common law applicable to individual torts, is untenable as to mass torts controlled by *Hymowitz*. As a matter of substantive New York law, DES plaintiffs are not required to prove that a particular plaintiff caused their injuries. It would be counterproductive to *Hymowitz* policy to pose such requirements as a procedural bar to their recovery.

Ashley, 789 F. Supp. at 592.

²⁰⁴ N.Y. CIV. PRAC. L. & R. § 302 (C302:24 Practice Commentary) (McKinney 1993).

process requirements, mere foreseeability that a defendant's acts occurring outside the state will have consequences within the state, without more, is an insufficient basis for a state to exercise personal jurisdiction.²⁰⁵ To avoid a potential conflict with federal due process standards, New York courts have required defendants to undertake some purposeful act that invokes the benefits and protection of New York law.²⁰⁶ Since Boyle did not purposefully avail itself of the New York market or of the protection of New York's laws, trying to prove that it should have reasonably expected its corporate acts to have consequences in New York was futile. Judge Weinstein acknowledged that existing jurisdictional law would be inadequate to satisfy this requirement and declared that "precedent is here only a slight inhibitant against rational decision-making."²⁰⁷ Realizing that an even more drastic departure from existing law was necessary to satisfy the second requirement of the long-arm statute than was required to satisfy the first, Judge Weinstein invoked the *Erie* doctrine²⁰⁸ and proceeded to interpret New York DES law under *Hymowitz* as providing for nationwide jurisdiction, thereby granting him license to apply the long-arm statute in a manner consistent with that interpretation.

2. A Misinterpretation of *Hymowitz*

Judge Weinstein's mistaken assertion that the New York Court of Appeals' adoption of several liability in *Hymowitz* was indicative of desire to create national jurisdiction is belied by the language of *Hymowitz*. The *Hymowitz* court explicitly stated that several liability will, as a practical matter, "prevent some plaintiffs from recovering 100% of their damages."²⁰⁹ The shortfall, the court noted, would occur when all the manu-

²⁰⁵ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²⁰⁶ *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983).

²⁰⁷ *Ashley*, 789 F. Supp. at 571.

²⁰⁸ *Id.* at 581. By invoking the *Erie* doctrine, Judge Weinstein was able to claim that he merely was interpreting the long-arm statute consistent with the way that the New York Court of Appeals would in light of *Hymowitz*.

²⁰⁹ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989).

facturers were not before the court in a particular case.²¹⁰ The *Hymowitz* court was well aware that not all defendants could be brought into every case: "the liability of DES producers is several only, and should not be inflated when all participants in the market are not before the court in a particular case."²¹¹ It is true that *Hymowitz* held that a defendant could not exculpate itself by proving that it did not produce the injury causing DES.²¹² In so doing, however, the New York court apparently was concerned with defendants already properly before the court²¹³ trying to exculpate themselves by raising factual evidence that in most cases would be difficult or impossible for DES mothers to contradict or rebut.²¹⁴ The language of *Hymowitz* assumed that the manufacturer is amenable to jurisdiction. Indeed, the question of jurisdiction arises before any consideration of the actual cause-in-fact inquiry, such as whether a women took one shape pill or purchased DES from a certain drug store. Due to the lapse of time, this type of factual question cannot be ascertained with certainty. Comparing the selling of DES to a particular drug store to Boyle's selling outside of New York, however, is fallacious. The fact that a manufacturer is claiming that it sold DES only to certain drug stores within a state tends to indicate that jurisdictional inquiries have already been satisfied. But Boyle did not merely argue that it had not caused these plaintiffs' injuries. Rather, Boyle contested New York's power to adjudicate this dispute. Ultimately, for Judge Weinstein to jump from *Hymowitz's* decision to prohibit exculpation to a conclusion that *Hymowitz* provides for nationwide jurisdiction seems little more than a leap of faith.

In addition, Judge Weinstein's interpretation of *Hymowitz*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

²¹³ There was no discussion of personal jurisdiction in the *Hymowitz* decision.

²¹⁴ "[T]here should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores." *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

The non-exculpation rule was used to deny Boehringer's motion to dismiss for failure to state a claim, but it was not raised again when Judge Weinstein attempted to interpret *Hymowitz* as providing for nationwide jurisdiction.

is inconsistent with the Court of Appeals' rationales for adopting a national market share theory. The *Hymowitz* court, after reviewing market share theories used in other jurisdictions, concluded that the use of a national market is preferable for essentially practical reasons.²¹⁵ The *Hymowitz* court first explained that "the reliable determination of any market smaller than the national one likely is not practicable."²¹⁶ The court then acknowledged that a national market share theory will result in a disproportion between a manufacturer's liability and the actual injuries that the manufacturer caused in New York.²¹⁷ The discrepancy between liability and fault exists because the national theory would not provide a reasonable link between liability and the risk a defendant created to a particular plaintiff.²¹⁸ The *Hymowitz* court stated that the "[u]se of a national market is a fair method, we believe, of apportioning defendant's liabilities according to their culpability in marketing DES for use during pregnancy."²¹⁹ *Hymowitz*, therefore, was concerned primarily with ease of administration and finding a way to apportion damages for defendants who were properly before the court and for plaintiffs who could not identify the manufacturer that had caused their injury, but not to provide a theory that would permit nationwide personal jurisdiction. Thus, while *Hymowitz* offered an equitable solution to the identification and apportionment problems present in DES litigation, Judge Weinstein instead interpreted it to expand greatly on long-arm jurisdiction.

In fact, there was no indication that the New York Court of Appeals intended to provide for, or alter, personal jurisdiction. In addition to the reasons articulated by the court for adopting such an expansive market share theory, the court's silence concerning personal jurisdiction should have been read as indicative of its desire to leave jurisdictional questions unchanged—especially if no question of personal jurisdiction had been raised. A prior DES decision, *Fleishman v. Eli Lilly*,²²⁰ provides evidence of the Court of Appeals' reluctance to make

²¹⁵ *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 950.

²¹⁶ *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

²¹⁷ *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 950.

²¹⁸ *Id.* at 512, 539 N.E.2d at 1077, 541 N.Y.S.2d at 950.

²¹⁹ *Id.*

²²⁰ 62 N.Y.2d 888, 467 N.E.2d 517, 478 N.Y.S.2d 853 (1984).

such a drastic departure from existing law. *Fleishman* presented the court with an issue concerning DES plaintiffs that, like the personal jurisdiction question faced by Judge Weinstein, required the abandonment of existing precedent and statutory interpretation to promote plaintiffs' recovery. In *Fleishman*, the New York Court of Appeals affirmed the Appellate Division's decision to dismiss thousands of DES plaintiffs' claims because the statute of limitations had expired. The Court of Appeals concluded that there was nothing in the record to warrant departure from prior decisions and that any departure from the policies underlying these well-established precedents is a matter for the legislature and not the courts.²²¹ Rather than creating new law, the *Fleishman* court explicitly chose to defer to the New York legislature. In contrast, instead of deferring to the legislature or certifying the jurisdiction issues to the New York Court of Appeals,²²² Judge Weinstein elected to create a new body of personal jurisdiction law.

By placing the cart before the horse, Judge Weinstein concluded that because New York law permits a cause of action against the defendants, *a fortiori*, the defendants must also be amenable to personal jurisdiction.²²³ This blurring of the distinction between substantive New York DES law and the issue of personal jurisdiction enabled Judge Weinstein to declare that he merely was interpreting the long-arm statute consistent with the New York Court of Appeals. But such a commingling of substantive law and long-arm jurisdiction is explicitly rejected in the Practice Commentary to New York Civil Practice Law and Rules:

Whether the manner of the accident is foreseeable may have substantive implications as to the liability of the defendant, but issues of ultimate liability must never be confused with jurisdictional issues. The liability issue is whether defendant should pay for the wrong to the plaintiff; the jurisdictional issue is whether defendant

²²¹ *Id.* at 889, 467 N.E.2d at 517, 478 N.Y.S.2d at 854.

²²² Under New York Rules of Court § 500.17, the Second Circuit is permitted to certify a question to the New York Court of Appeals. Thus, Judge Weinstein first would have had to certify the question up to the Second Circuit in order to certify it to the New York Court of Appeals.

²²³ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 572 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

should be compelled to litigate the liability issue in this state.²²⁴

Nonetheless, Judge Weinstein ruled that "any manufacturer of DES, by its participation in the national marketing of a generic drug, should 'reasonably expect' its act of selling in the national market 'to have,' as NYCPLR § 302(a)(3)(ii) puts it, 'consequences in the state.'"²²⁵

3. The Pond Theory

Judge Weinstein was able to reach the conclusion that Boyle should reasonably have foreseen that its act of selling DES in the national market would have effects in New York by relying on his pond theory.²²⁶ Judge Weinstein premised the pond theory, to a large extent, on the fungible nature of DES.²²⁷ He assumed that because DES is a generic product, manufacturers would avoid competing in the same market and would instead seek other markets in which to sell their product.²²⁸ Consequently, Judge Weinstein asserted, a manufacturer's entrance into the DES market, at any point, had direct and foreseeable ripple effects on every other part of the market, much like tossing a pebble into a pond.²²⁹ This reasoning is not only an expansive departure from existing law, but it is also flawed.

The pond theory, as Judge Weinstein referred to it, was a clever way of disguising the "stream of commerce" theory which, without additional "contacts" between the defendant and the forum, has been rejected by both state and federal courts.²³⁰ Whether a single manufacturer places its goods into

²²⁴ N.Y. CIV. PRAC. L. & R. § 302 (Practice Commentary by Joseph M. McLaughlin) (McKinney 1993).

²²⁵ *Ashley*, 789 F. Supp. at 572.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 576.

²³⁰ The Supreme Court rejected the stream of commerce theory, which posited that placing a product in the stream of commerce should be sufficient to confer jurisdiction, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and again in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). See also *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't) (mere likelihood that a product will find its way into New York is insufficient without some purposeful affiliation), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1982). But see Pamela J. Stephens, *Sovereignty and Personal Juris-*

the stream of commerce or an entire industry does so with a generic product—that manufacturer, unless specifically targeting a market, has not purposefully availed itself of every state's law in which its product fortuitously lands.²³¹ The fact that DES is a fungible product should not alter the rule that a manufacturer's amenability to suit does not travel with its product.²³² According to Judge Weinstein, the presence of Boyle's DES in any market had foreseeable ripple effects in New York. Yet, if this reasoning is carried to its logical end, the sale of any product in one market would have some consequence in every other market in which the same or similar product is sold. Jurisdiction based on such an attenuated theory would render it impossible for a corporation to predict where it would be amenable to suit and undermine its ability to conform its conduct.²³³

In addition, the fact that DES is a generic product does not prevent competition within a market. Certain markets, whether because of population, demographics, age characteristics or advantageous laws, would attract many manufacturers regardless of the presence of other manufacturers. Some manufacturers may rely on increased advertising or their good reputation to try to boost their share of a certain market without considering the effect that their action may have on every other market. Thus, the notion that drug manufacturers were somehow forced into different markets based on the presence of a manufacturer in one particular market does not necessarily hold true. Moreover, the national character of the DES mar-

diction Doctrine: Up The Stream of Commerce Without a Paddle, 19 FLA. ST. U. L. REV. 105 (1991) (in-depth account of stream of commerce cases and criticism of the Supreme Court's *Asahi* decision).

²³¹ The defendant must perform some action "purposefully directed toward the forum state. . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state." *Asahi*, 480 U.S. at 112.

²³² The Supreme Court in *World Wide Volkswagen* stated that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction . . . [.] " because if this were the rule then "amenability to suit would travel with the chattel." 444 U.S. at 295-96.

²³³ The cost of insurance for even the smallest manufacturer would have to reflect the risk of being sued in every jurisdiction in which it may cause "ripple effects" and, therefore, become amenable to personal jurisdiction. In addition, under the pond theory, the number of states in which a product will have measurable effects changes as more manufacturers enter the market.

ket was a result of market forces, not a concerted effort on the part of all DES manufacturers to create a national market or somehow to divide the market among themselves. The unfortunate national popularity of DES, although largely attributable to the early DES manufacturers and medical literature, should not be used as a predicate to establish foreseeability of suit on the part of all future manufacturers. Subsequent producers have little control over the effect that prior marketing and publicity, whether favorable or unfavorable, may have on the success of their entrance into the market. While it is true that prudent companies will take advantage of the existence of a propitious or fertile market, such sound capitalism should not be made unfairly burdensome to the local merchant. Although the corporation that distributed its product in thirty-five states may be minimally affected if held accountable in all fifty states, under Judge Weinstein's theory the regional producer that targets one or two markets may face prohibitive insurance, liability and litigation costs. Ultimately, Boyle could not have reasonably foreseen that the sale of DES west of the Mississippi would affect residents of New York, and it should not have been subject to a law suit there.

C. *Federal Due Process*

1. Traditional Concepts

The final obstacle preventing Judge Weinstein from exercising personal jurisdiction over Boyle was the Due Process Clause of the Fourteenth Amendment. New York's exercise of personal jurisdiction, whether general or long-arm, is restricted by the defendant's right to due process. Due process is an elusive term that one commentator has defined as "the process to which one is entitled; the process to which one has a right; the process which it would be wrong to deprive one of."²³⁴ Yet, as Judge Weinstein noted, "[T]here is considerable doubt about the current existence of a unitary, coherent jurisdictional due process standard."²³⁵ This being so, Judge Weinstein chose

²³⁴ Morton, *supra* note 9, at 3.

²³⁵ Ashley v. Abbott Lab., 789 F. Supp. 552, 573 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

the *Ashley* decision not only to proffer his pond theory and to reinterpret New York's long-arm statute and the purpose underlying New York's substantive law, but also to craft a new theory of federal due process applicable to mass torts.

For the past 120 years, the Supreme Court has struggled to define a workable standard of personal jurisdiction consistent with its interpretation of the Due Process Clause. The difficulty stems, in large part, from its vacillation between two competing interpretations of due process—a federalism analysis and a fairness analysis. The federalism analysis seeks to prevent the encroachment of a state's sovereign power by limiting the adjudicatory power of each state's court. This analysis focuses on whether a defendant has contacts with a state sufficient to grant that state the authority to command obedience from the defendant. Conversely, the fairness analysis of due process determines whether it is fair and reasonable to subject a party to the jurisdiction of the court. Under this analysis, courts examine the burden on the defendant to defend in the forum, the interest the state has in resolving the dispute and the plaintiffs' interest in obtaining redress. Inconsistent application of these analyses and a shift in emphasis from the sovereignty to the fairness analysis has hindered the evolution of a single, coherent theory of personal jurisdiction and produced a murky body of *in personam* law.

Traditionally, a state's power to adjudicate disputes was dictated by its borders; only if the defendant could be found within the state's borders could the court exercise its power over that defendant.²³⁶ This territorial limitation on a state's adjudicatory power was established in 1878 in the famous case of *Pennoyer v. Neff*.²³⁷ "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power."²³⁸ The theoretical underpinnings of this limitation rested on the notion that each state in a system of federalism retains

²³⁶ Due process, in addition to requiring personal jurisdiction, also requires service of process and an opportunity to be heard.

²³⁷ *Ashley*, 789 F. Supp. at 573.

²³⁸ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

its sovereignty. "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."²³⁹ The *Pennoyer* Court, however, never linked territorial jurisdiction to the Due Process Clause.²⁴⁰ Rather, the sovereignty analysis was based on principles derived from international law.²⁴¹ According to these principles, the several states of the United States are to be treated as separate, independent countries.²⁴² As a result, the original analysis of personal jurisdiction centered around a physical connection or territorial nexus between the defendant and the state.

The *Pennoyer* framework, requiring a state to have physical power over a defendant, frustrated courts' efforts to exert personal jurisdiction for some fifty years. The rise of a national economy and advances in travel and communication, however, generated a need for jurisdiction over non-residents and corporations.²⁴³ But, according to *Pennoyer* the court only had the authority to render a binding personal judgment against a defendant if the defendant: was served with process while physically present within the state,²⁴⁴ was served while outside the state, provided the defendant was domiciled within the state,²⁴⁵ or had consented to be sued in that state.²⁴⁶

²³⁹ *Id.* at 722.

²⁴⁰ Morton, *supra* note 9, at 459-60.

²⁴¹ *Pennoyer*, 95 U.S. at 722.

²⁴² *Id.*

²⁴³ Allan R. Stein, *Styles of Argument and interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 695 (1987).

²⁴⁴ *Pennoyer*, 95 U.S. at 714.

²⁴⁵ *Pennoyer* alluded to permitting a state to exert jurisdiction over its domiciliaries. *Id.* at 734. Jurisdiction over domiciliaries, however, was not explicitly recognized until *Milken v. Meyer* in 1940. The state's authority over its citizens, even if absent from the state, was premised on the concept that "the state which accords [its citizens] privileges and affords protection to [them] and [their] property by virtue of [there] domicile may also exact reciprocal duties." *Milken v. Meyer*, 311 U.S. 457, 462-64 (1940).

²⁴⁶ The consent theory was explicitly provided for in *Pennoyer* where the court noted, "Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process" 95 U.S. at 735; see also *McDonald v. Mabey*, 243 U.S. 90 (1917) (submission to the jurisdiction by appearance sufficient to confer jurisdic-

The last two situations were based on the theory that the state and the defendant had entered into a relationship that rendered the defendant "present" within the state for purposes of jurisdiction. Courts developed the notion that defendants could consent to the jurisdiction of a state in order to overcome the strict presence requirement of *Pennoyer*, while still retaining *Pennoyer's* basic framework.²⁴⁷

In 1945, the Supreme Court finally appeared ready to rid due process of the encumbrances of *Pennoyer's* territorialism in the landmark case of *International Shoe Co. v. Washington*.²⁴⁸ The *International Shoe* Court provided the famous "minimum contacts" test:

Due process requires only that in order to subject a defendant to a judgement in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²⁴⁹

The broad language and general applicability of the test led to a plethora of subsequent cases interpreting its scope.²⁵⁰ Considerable confusion has resulted from the joining of the concepts of fairness and contacts. As one commentator asked, "[W]as the ultimate inquiry intended to be whether the defendant had certain objective contacts with the forum, such that if they were present, fairness would be presumed, or was the ultimate inquiry intended to be whether the assertion of jurisdiction was fair?"²⁵¹ Courts in subsequent cases have struggled to answer this question.²⁵²

tion).

²⁴⁷ Stein, *supra* note 243, at 696. States were permitted to require out-of-state businesses to consent to jurisdiction within a state as a pre-condition to conducting commercial activity there. See *St. Clair v. Cox*, 106 U.S. 350, 356 (1882). The Court expanded this concept even further by holding that the use of a state's highways by non-resident drivers effectuated an implied consent to be amenable to jurisdiction in that state. *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). These expanded notions of personal jurisdiction, however, still remained faithful to the *Pennoyer* concept that the defendant was, somehow "present" (literally or metaphorically) within the state.

²⁴⁸ 326 U.S. 310 (1945).

²⁴⁹ *Id.* at 316 (quoting *Millikin*, 311 U.S. at 465).

²⁵⁰ See Stein, *supra* note 243, at 694 (suggesting that various interpretations of "minimum contacts" can be grouped into three categories: regulatory need, exchange and convenience).

²⁵¹ Morton, *supra* note 9, at 454.

²⁵² *Burnham v. Superior Court*, 495 U.S. 604 (1990) (physical presence in-state

2. The Weinstein "Formulation"

In *Ashley*, Judge Weinstein chose to provide a unique solution to the question of what the proper due process inquiry should be in mass torts cases. He opined that "[w]hereas there is a plausible rationale for the continued reliance on the 'forum state interest' component . . . the territorial nexus requirement is, at least in mass tort cases, an unnecessary and debilitating element of the fairness inquiry."²⁵³ Judge Weinstein acknowledged that courts continue to use two separate inquiries—sovereignty and fairness.²⁵⁴ According to Judge Weinstein, however, the territorial notions of sovereignty, which continue to play an important role in due process analysis, "must be regarded as an historical accident."²⁵⁵ In addition, he argued that the territorial nexus was enunciated in *Pennoyer* without the foresight of mass torts.²⁵⁶ Relying on

still sufficient to confer general jurisdiction over individuals); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (the assertion of jurisdiction, even if 'minimum contacts' exist, must be fair) (plurality opinion); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (plaintiffs need not have "minimum contacts" with the forum); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (contractual relations by non-resident franchisee with in-state franchisor, *inter alia*, should make franchisee reasonably anticipate out-of-state litigation); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (mere purchases are not enough to warrant jurisdiction for acts unrelated to forum activities where in-state acts are not systematic and continuous); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (sale of magazines in forum sufficient to confer jurisdiction for a libel claim arising from the sale of those magazines); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (mere fact that product finds its way into a state where it causes injury is not enough without some direct or indirect effort by manufacturer to market product in forum); *Hanson v. Denckla*, 357 U.S. 235 (1958) (unilateral acts of plaintiff insufficient to make defendant amenable in forum where defendant otherwise would have no contacts); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (assumption of an insurance obligation by foreign insurance company, *inter alia*, sufficient minimum contacts to haul foreign insurer in state); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (systematic and continuous in-state activity by defendant is sufficient to confer general jurisdiction for acts not arising from those acts).

²⁵³ *Ashley v. Abbott Lab.*, 789 F. Supp. 552, 584 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

²⁵⁴ *Id.*

²⁵⁵ *Id.* The fact that *Pennoyer* relied on principles of international law, and not Constitutional Due Process interpretation, was to Judge Weinstein a historical accident. See also Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 735 (1981).

²⁵⁶ *Ashley*, 789 F. Supp. at 584.

these considerations, Judge Weinstein decided that the territorial nexus requirement was inapplicable to mass tort cases because it only hindered their resolution.²⁵⁷ The crucial factor, according to Judge Weinstein, was whether the forum had a substantial interest in adjudicating the dispute.²⁵⁸ "A court must consider the burden on the defendant, the interest of the forum State, and the plaintiff's interest in obtaining relief."²⁵⁹ Judge Weinstein completely dismissed the "minimum contacts" prong of the analysis and, instead, focused solely on the fairness to the defendant. Moreover, in determining whether the assertion of jurisdiction was fair, rather than focusing solely on the actual effect it would have on the defendant, Judge Weinstein included considerations of the forum's and the plaintiffs' interests in adjudicating the dispute.

Such an interpretation of fairness is inconsistent with the Supreme Court's assertion in *International Shoe* that fairness to the defendant should be measured by the defendant's presence in the forum.²⁶⁰ The *International Shoe* test indicated a relationship between the concepts of "minimum contacts" and fairness: "[W]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of due process to insure."²⁶¹ Whether two separate inquiries are required, or fairness is to be measured simply by reference to minimum contacts is debatable.²⁶² What is clear, however, is that fairness alone—without any minimum contacts—has never been sufficient to confer jurisdiction.²⁶³

²⁵⁷ *Id.* at 586.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 574.

²⁶⁰ *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

²⁶¹ *Id.* at 319.

²⁶² See Morton, *supra* note 9, at 9 (arguing that only one test combining the two concepts is the correct interpretation of *International Shoe*); cf. *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383 (5th Cir. 1989) (two-part test used).

²⁶³ Judge Weinstein relied on *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), as indicative of the Supreme Court's willingness to alter personal jurisdiction in extremely large cases. *Ashley*, 789 F. Supp. at 576. Shutts, however, held that minimum contacts between the forum and the plaintiffs were unnecessary because the plaintiffs' due process rights were not in question; in fact, they chose the forum. This is not analogous to the DES context since the defendants had not chosen New York as a forum or market and, thus, their due process rights were jeopardized.

Moreover, evaluating fairness to the defendant based on the state's and plaintiffs' interests not only ignores the defendant's contacts, but renders the defendant amenable to jurisdiction based on the unilateral acts of the plaintiff—a principle that the Supreme Court has specifically rejected.²⁶⁴

In addition, by focusing on the forum's interest in protecting its residents and ignoring the defendant's contacts with the forum, the analysis shifts from that of personal jurisdiction to one of subject-matter jurisdiction. The forum state will always have an interest in adjudicating a dispute involving its residents. That interest, however, focuses on the connection between the plaintiff and the forum, not the defendant and the forum. When a court deems a particular case or controversy sufficiently important to give rise to an "important state interest," it makes a substantive determination that the case is the type that the court ought to decide, which is unrelated to the defendant's forum-related contacts.²⁶⁵ Due process protects individual rights, not state rights. States do not have individual rights that should enter into the due process analysis. Such an analysis violates the central role of a court in our adversarial system. As one commentator has noted, "The court, in our system of jurisprudence, is traditionally a neutral, unbiased arbiter, not a quasi-party having concerns and interests to be vindicated during the course of, and perhaps at the expense of, the interests of private parties to a dispute."²⁶⁶ Whether a defendant should be amenable to suit in a state cannot turn on a unilateral decision by the state any more than it can turn on the unilateral act of the plaintiff.²⁶⁷

Finally, by creating a special due process analysis, one supposedly applicable only to mass tort defendants, Judge Weinstein ignores an inherent assumption in our constitutional system—that all defendants are equally entitled to due process of law. Merely because one class of defendants appears to have caused an exceptionally far-reaching mass injury does not—and should not—give the court the right to violate those

²⁶⁴ *Hanson v. Denckla*, 357 U.S. 235 (1958) (unilateral acts of plaintiff insufficient to make defendant amenable in forum with which defendant would otherwise have no contacts).

²⁶⁵ Morton, *supra* note 9, at 493.

²⁶⁶ *Id.* at 494.

²⁶⁷ *Hanson*, 357 U.S. at 235.

defendants' right to due process. If our adversarial system operated on such an *ad hoc* basis, then the Fourth and Fifth Amendments would have been discarded long ago, for example, to curb the rampant crime and drug abuse in American cities. To remain true to the due process clause and fair to defendants and plaintiffs, however, the only proper focus is to examine objectively the purposeful contacts between the defendant and the forum.

CONCLUSION

While the complex problems that mass torts pose to our society and legal system cannot be ignored, the *Ashley* decision represents an extreme and unnecessary departure from existing sound legal principles. It is troublesome that Judge Weinstein felt the need to distort the personal jurisdiction issue to such a degree simply to ensure that the plaintiffs received full recovery. It is even more problematic that such a drastic departure from existing state law took place at the federal district court level. No doubt that reform needs to take place to deal effectively with mass torts, and that Judge Weinstein is a pioneer in that area. At the same time, however, judicial modification of existing law should proceed cautiously and fairly so that the due process rights of future defendants and the recovery of future plaintiffs will not hinge on the creativity of the presiding judge. Drastic and sudden changes in existing law, by contrast, can cause uncertainty and unfairness and, thus, should be left to the legislature.

Michael F. Marchetti

