Adapting Due Process to Match Your Tort: In re DES: A Novel Approach to Jurisdiction

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COMMENT

ADAPTING DUE PROCESS TO MATCH YOUR TORT: IN RE DES: A NOVEL APPROACH TO JURISDICTION

Prior to the adjudication of an issue, a court must inquire into its jurisdiction,1 for without jurisdiction, a court’s holding is not binding.2 Before a court can decide a case, it must have jurisdic-

1 See Arrowsmith v. United Press Int’l., 320 F.2d 219, 221 (2d Cir. 1963) (en banc) (“Not only does logic compel initial consideration of the issue of jurisdiction over the defendant—a court without such jurisdiction lacks power . . . .”). In Arrowsmith, the Maryland resident plaintiff brought a libel action in the federal district court in Vermont concerning a story which originated in Atlanta. Id. at 220-21. The defendant moved to dismiss under Federal Rule of Civil Procedure 12 for lack of personal jurisdiction, improper venue, and failure to state a claim for which relief may be granted. Id. The judge sustained the last, but did not rule on the other two motions. Id. at 221. On appeal, Judge Friendly held that the issue of personal jurisdiction must be decided first, and the venue issue second. Id. Judge Friendly reasoned that “dismissal for lack of jurisdiction or improper venue does not preclude a subsequent action in an appropriate forum, whereas dismissal for failure to state a claim upon which relief can be granted is with prejudice.” Id.

2 See Pennoyer v. Neff, 95 U.S. 714, 732-33 (1877) (stating that judgments lacking jurisdiction are not binding). In Pennoyer, Neff’s property had been attached after a default judgment was entered against him. However, Neff was never personally served; he was only given notice by publication. See Jack H. Friedenthal et al., Civil Procedure § 3.3, at 97 (2d ed. 1993). Neff sued Pennoyer in ejectment, arguing that there was no personal jurisdiction in the original action. Id. at 97-98. Justice Field stated that “no State can exercise direct jurisdiction and authority over persons or property without its territory.” Pennoyer, 95 U.S. at 722. “[E]xcept as restrained and limited by [the Constitution], [states] possess and exercise the authority of independent States . . . .” Id. After Pennoyer, a state court could obtain personal jurisdiction over a non-resident defendant if (1) the defendant was personally served within the state or voluntarily appeared in court or (2) the defendant owned property within the state which was attached before commencing the lawsuit. See Friedenthal et al., supra, at 98-99; see also International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (noting inability to make binding personal judgment against corporate defendant without satisfying jurisdictional test). International Shoe Company was a Delaware corporation headquartered in St. Louis, Missouri. Id. at 311-12. The company had no office in Washington; their “salesmen resided in Washington;
tion over both the parties (personal jurisdiction) and the subject matter. Rule 4 of the Federal Rules of Civil Procedure governs personal jurisdiction in federal courts, extending jurisdiction within the territorial boundaries of the state in which the district court is located, as well as anywhere service is amenable under

[the salesmen’s] principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales." Id. at 313. The salesmen had limited authority to make decisions, as the headquarters fixed the shoe prices and all goods were "shipped f.o.b. from points outside Washington . . . ." Id. at 314. International Shoe claimed that these activities did not constitute a presence within Washington and that they were not subject to personal jurisdiction in that state’s courts. Id. at 315. The Supreme Court held that a defendant only needs “minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’” and that such contacts existed in that case. Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

There are two categories of subject matter jurisdiction which will permit a federal court to hear a case. The first is the existence of a federal question. 28 U.S.C. § 1331. “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Id. The second type of subject matter jurisdiction is diversity jurisdiction. 28 U.S.C. § 1332. The amount in controversy must exceed $50,000, and the parties to the action must be citizens of different states or of a foreign state. 28 U.S.C. § 1332(a). Article III, section 2 of the Constitution limits the ability of federal statutes to define permissible subject matter in federal courts. See FRIEDENTHAL ET AL., supra note 2, § 2.2, at 10-12. Within those limits, Congress may expand or limit the subject matter which a federal court may hear. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (“When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”). States develop their own rules with respect to subject matter jurisdiction. See FRIEDENTHAL ET AL., supra note 2, § 2.1, at 9-10.

A court must also have jurisdiction over the parties to a lawsuit. See Fed. R. Civ. P. 4 (prescribing permissible methods of serving defendants). The Constitution provides the “outer limits” of a state’s power over non-residents of the state. See U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property without due process of law . . . .”); see also FRIEDENTHAL ET AL., supra note 2, § 3.1, at 94 (“The federal Constitution . . . defines the outermost limits of a state’s power over persons . . . outside its borders, [and the state may impose] any additional limitations [beyond those in the Constitution] . . . .”); Maryellen Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 Nw. U. L. Rev. 3, 4 (1984) (arguing that Fifth and Fourteenth Amendments require courts to determine if location of lawsuit will be unfair to defendant).

Stafford v. Briggs, 444 U.S. 527, 534-35 (1980) (recognizing that Congress has power to expand choice of legal judicial district in which suit may be brought, but can limit circumstances under which choice is available); see Fed. R. Civ. P. 4. Rule Four grants and explains the courts’ power of service of process over potential defendants. Id. See generally Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946) (acknowledging that Congress has ability to provide for service of process anywhere in United States). But cf. Fullerton, supra note 3, at 31-32 (observing that Constitution protects defendants from litigation at distant locations).
the state’s long-arm provision. In addition, Rule 4 confers jurisdiction in certain third-party actions under the “bulge provision” and in any action expressly proscribed by statute. However, any assertion of personal jurisdiction over a non-resident defendant must satisfy the due process standards of the Fourteenth Amendment.

The Supreme Court interpretation of due process for jurisdictional purposes has evolved from a strict test of physical presence to a liberal test based on “minimum contacts” and fairness.

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5 See Fed. R. Civ. P. 4(e). A long-arm statute permits the exercise of state court jurisdiction over persons not physically present in the state at the time of service. As Rule 4 states:

Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

Id. This provision allows a federal court sitting in the forum state to adopt the forum’s long-arm statute as a basis for extraterritorial service. See David D. Siegel, Practice Commentaries, Fed. R. Civ. P. 4, 28 U.S.C.A. Rule 4, at 135-36 (West 1992). For example, New York’s long-arm statute, inter alia, allows service upon non-domiciliaries transacting business within the state, committing torts within the state, committing torts out of the state causing injury within New York, or owning property within the state. See N.Y. Civ. Prac. L. & R. 302 (McKinney 1990).

6 Fed. R. Civ. P. 4(f). Rule 4(f) states:

Persons who are brought in as parties pursuant to Rule 14 [third party defendants], or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19 [indispensable parties], may be served . . . at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced . . . .

Id.

7 Id. Jurisdiction is available “within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.” Id.

8 U.S. Const. amend. XIV, § 1. The Fourteenth Amendment reads as follows: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

9 See Pennoyer v. Neff, 95 U.S. 714, 733 (1877). According to the Court’s earlier test, jurisdiction could only be attained through defendant’s voluntary appearance or presence within the forum state.

10 See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). A state may not make a binding personal judgment against a defendant who has “no contacts, ties, or relations” with the state. Id. at 319. In cases in which the defendant is a corporation and suit is brought to enforce obligations that arise from the corporation’s activities within a state, the proceeding is considered fair and reasonable because the
valid exercise of jurisdiction under the Due Process Clause requires minimum contacts between the non-resident and the forum state, as well as fairness and reason in requiring the defendant to litigate in the forum at issue.\textsuperscript{11} To establish minimum contacts, "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State" is necessary.\textsuperscript{12} Recently, however, in \textit{Ashley v. Abbott Laboratories (In re Des)},\textsuperscript{13} a mass tort diethylstilbestrol (DES) action,\textsuperscript{14} the United States District Court for the Eastern District of New York held that a non-resident defendant corporation, lacking traditional minimum contacts, was within the jurisdictional grasp of the forum.\textsuperscript{15}

In Ashley, the plaintiff class was comprised entirely of New York residents. The defendant, Boyle & Co. ("Boyle"), was a California-based pharmaceutical corporation, which operated west of the Mississippi River and was involved in the manufacture and distribution of DES between 1949 and 1960. Boyle occupied less than one-half of one percent of the DES market and never shipped any products to New York. Furthermore, Boyle was never licensed to do business in New York, nor had any agents or offices within the state. For purposes of determining jurisdiction under the New York long-arm statute, the court found that, absent any proof to the contrary, the "situs of the injury" must be New York, where the plaintiffs' mothers probably had ingested DES consistent with the national market share rationale and the adoption of several liability.

16 Id. at 559-60. Initially, New York residents comprised approximately half of the plaintiff class; however, the class was later limited to only New York residents. Id. By limiting the plaintiff class in this way, the court was able to apply both the substantive and jurisdictional law of New York. Id. at 576; see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816-17 (1985) (citing injustice of state court application of own law despite insignificant contacts with each class member); Allstate Ins. v. Hague, 449 U.S. 302, 308 (1981) (stating choice-of-law is determined by significance of state contacts); Russell J. Weintraub, Methods for Resolving Conflict-of-Law Problem in Mass Tort Litigation, 1989 U. ILL. L. REV. 129, 131-40 (1989) (analyzing different approaches to choice-of-law rules in mass tort litigation).

17 See Ashley, 789 F. Supp. at 559.

Co-defendant Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer"), a Delaware corporation with its principal place of business in Connecticut, moved with Boyle to dismiss the action for lack of personal jurisdiction. Id. In 1979 Boehringer merged with Stayner Corporation, a California company. Id. Stayner manufactured and sold DES in west coast states between 1949 and 1956, with yearly DES sales that averaged about $5,000 per year. Id. Stayner was never licensed in New York, never had an agent or office in New York, and never shipped or sold DES in New York. Id.

18 Id. at 593. Boyle's share of the market never exceeded one-half of one percent in any one year. Id.

19 Id. at 559.

20 Id.


(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: (3) 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.
the DES. In addition, the court concluded that any DES manufacturer should "reasonably expect" its act to have ... consequences in [New York]," merely by participating in "the national marketing of a generic drug . . . ." Finally, since Boyle had "received substantial revenue from commerce in several states," jurisdiction under the long-arm statute was established.

In deciding whether such an application of New York law satisfied the Due Process Clause of the Constitution, Judge Weinstein recognized that traditional due process analysis precludes state assertions of jurisdiction over non-resident defendants having no physical, territorial nexus with the forum, that is, having committed no voluntary act within the state. Judge Weinstein concluded, however, that "the territorial nexus requirement is, at least in mass tort cases, an unnecessary and debilitating element of the fairness inquiry." Through its interpretation of Hymowitz

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22 See Ashley, 789 F. Supp. at 570. In its choice-of-law analysis, the court stated that the relevant last event of the tort occurred at ingestion of the DES or at birth, both of which presumably took place in New York. Id. at 567. By analogy, the court considered New York to be the presumed place of the tort. Id.

23 Id. at 572 (quoting N.Y. Civ. Prac. L. & R. 302(a)(3)(ii) (McKinney 1990)). According to Judge Weinstein, the defendants entered into the national market through the marketing of a generic good which was protected by every state's law. Id. at 576. Due to this national market participation, the court reasoned that each defendant-manufacturer "purposefully derive[d] benefit[s] from [its] interstate activities," and therefore could not avoid the interstate obligations each had thus "voluntarily assumed." Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74 (1985)).

24 Id. at 570. The court found co-defendant Boehringer amenable to service under section 301 of the CPLR, which incorporates the "consent" common law basis of jurisdiction. Id. at 569, 591. Since Boehringer was licensed to conduct business in New York, it consented to being sued there. Id. at 569. According to the court, the lack of contacts with New York by Boehringer's predecessor, Staymer, were immaterial to Boehringer's jurisdictional arguments. Id. at 591.

25 See id. at 584-85; see also supra notes 10-12 and accompanying text (discussing Supreme Court cases which define constitutional limits of exercising personal jurisdiction over non-residents).

26 Ashley, 789 F. Supp. at 585. Judge Weinstein outlined the features of a mass tort as follows: (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 plaintiff's 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.
v. Lilly & Co., the seminal New York case apportioning liability severally among DES manufacturers according to each manufacturer's market share, the district court determined that a "direct link" was drawn between the "jurisdictional and substantive components of DES litigation" since a DES plaintiff's recovery under a theory of several liability would be thwarted if all the manufacturers were not brought into court. The Ashley court reasoned that since the substantive law of Hymowitz "empowers plaintiffs [in mass tort DES cases] to bring in all industry participants to achieve a full and economical resolution," jurisdictional law should not prevent the "result[s] envisioned." Judge Weinstein further found that prior precedent must not be a barrier to rational decision making. Thus, the court fashioned a new due process test for mass DES torts, eliminating the territorial nexus requirement, yet preserving the fairness inquiry.

This Comment examines the Ashley decision and suggests that state substantive law should not be allowed to control "due process" interpretation. First, it reviews prior case law on personal jurisdiction. It then explores the substantive DES law of Hymowitz, in connection with the jurisdictional analysis of Ashley. Finally, this Comment evaluates Judge Weinstein's "new" due process test for mass DES torts, discussing the potential implications of inconsistent application of this standard by the courts.

I. CONSTITUTIONAL STANDARDS OF PERSONAL JURISDICTION

The Supreme Court initially interpreted the Due Process Clause very narrowly. In Pennoyer v. Neff, the Court questioned the validity of judgments over non-resident defendants absent their presence or consent and held that such jurisdictional assertions are precluded by the Fourteenth Amendment. Re-

\[\text{id. at 587 (outlining court's jurisdictional test for mass DES torts).}\]

\[\text{See Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975) (noting that early interpretations "condoned all state procedural rules which were in conformity with 'settled usage'" (citing Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884))).}\]

\[\text{95 U.S. 714 (1877).}\]

\[\text{Id. at 733. "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, . . . [and] to}\]
Regarding corporations, presence was originally restricted to the place of incorporation and later expanded to include principal and other places of business. Attempting to create fair jurisdictional boundaries, the Court utilized the theories of implied consent, corporate presence, and domicile.

The modern view of jurisdiction over foreign corporations, however, derives mainly from *International Shoe Co. v. Washington,* in which the Court established a due process standard, based on the defendant's "minimum contacts" with the forum state. The minimum contacts must be judged by the "relationship among the defendant, the forum, and the litigation," and the quality and nature of the defendant's activity must be deemed reasonable to require defending a suit in the forum. In other words, the exercise of jurisdiction must relate to the "fair and orderly administration of the laws," and not offend traditional no-pass upon the subject-matter of the suit;... [the defendant] must be brought [into the State] by service of process within the State, or his voluntary appearance." 

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35 *See* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1885) (explaining that corporation is capable of being treated as citizen for jurisdictional purposes because it is created by state and therefore deemed inhabitant); see also *Marshall v. Baltimore & Ohio R.R.,* 57 U.S. (16 How.) 314, 326-29 (1853) (stating corporation is within state court's jurisdiction because it is created by state legislature).

36 *See* Ohio River Contract Co. v. Gordon, 244 U.S. 68, 72 (1916) (doing business sufficient to establish jurisdiction); *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 266 (1898) (same); *Berner & Engel Brewing Co. v. Dryfus,* 172 Mass. 154 (1898).

37 *See,* e.g., *St. Clair v. Cox,* 106 U.S. 350, 356 (1882). In general, a corporation cannot conduct business within a state unless it is granted approval. *Id.* Ordinarily, in order to obtain this approval, a corporation must designate an agent for service of process. *Id.* If a corporation fails to appoint an agent, yet conducts business within a state, there is nevertheless jurisdiction based upon the corporation's "implied consent." *Id.*

38 *Philadelphia & Reading Railway v. McKibbin,* 243 U.S. 264 (1917). A foreign corporation is amenable to service of process, absent consent, "only if it is doing business within the State in such [a] manner... as to warrant the inference that it is present there." *Id.* at 265.


40 326 U.S. 310 (1945).

41 *Id.* at 316.


44 *Id.* at 319.
tions of "fair play and substantial justice." Although *International Shoe* expanded the basis for jurisdiction, it still maintained a certain physical nexus requirement between the forum and defendant.

In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court elaborated on the fairness requirement and set forth five interests which should govern such an inquiry: the burden on the defendant to litigate in the forum; the interest of the interstate judicial system in resolution of the action; the interest of the forum state in the litigation; the plaintiffs interest in obtaining "convenient and effective" results; and the shared interests of the states in promoting substantive social policies.

II. The DES Dilemma

A. New York Substantive DES Law

Modern jurisdictional standards have developed based on traditional tort actions and other small-scale litigation. Not surprisingly, mass torts and complex litigation present additional

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45 Id. at 320 (indicating casual or "irregular" presence in forum not enough to subject corporation to suit).
49 Id. at 292 (stating burden on defendant is always primary concern, but may be considered differently in light of other interests in certain circumstances).
50 See *World-Wide Volkswagen*, 444 U.S. at 292; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that state had "manifest interest" in residents' claims against out of state insurance company which refused to pay).
52 See *World-Wide Volkswagen*, 444 U.S. at 292; *Kulko*, 436 U.S. at 93, 98.
53 *Ashley*, 789 F. Supp. at 584-85. The Supreme Court has never articulated the two-step jurisdictional due process test in the area of mass torts involving nationwide product marketing. Id. at 585. The Court has only addressed this type of situation once before in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in which the Court displayed a willingness to expand existing jurisdictional standards in the mass tort context. Id. In *Shutts*, the applicable class action statute authorized joinder of plaintiffs with an "opt-out" provision. Id. at 803. While the opt-out provision provided detailed notice to all potential class members, it allowed the joinder of each member who did not return the "request for exclusion." Id. at 801. In upholding the constitutionality of the provision, the court employed an implied consent theory. Id. at 811-14. The Court, however, stressed that its holding applied only to class-action plaintiffs. *Id.* at 808-11.
problems and concerns, as evinced by nationwide recognition of the DES problem.\(^5\)

In *Hymowitz v. Lilly & Co.*,\(^6\) the New York Court of Appeals was faced with the issue of how to apportion liability among manufacturers of DES in cases in which the identification of the particular manufacturer whose product caused plaintiffs’ injuries was “generally impossible.”\(^7\) After rejecting several methods, the court established a “new” market theory approach,\(^8\) which gives plaintiffs the ability to recover damages caused by DES without specifically identifying the defendant that manufactured the drug which caused the injury.\(^9\) This approach allocates liability severally based upon each defendant’s share of the national market for

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\(^{56}\) Id. at 1069 (N.Y.), cert. denied, 493 U.S. 944 (1989).

\(^{57}\) Id. at 1072. The reasons for this type of identification problem in DES cases are numerous. Id. Approximately 300 manufacturers produced the drug, with companies frequently entering and leaving the market. Id. All DES was made from identical chemical components, and due to the long latency period of injury from DES, women who took the drug did not try to identify the manufacturers until many years after ingestion. Id. During this period, “memories fade, records are lost or destroyed, and witnesses die.” Id.

\(^{58}\) Id. at 1073-78. Declining to adopt a theory of concerted action, the court stated that “parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim.” Id. at 1074. But see Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 186 (N.Y. 1989), in which the New York Court of Appeals applied the concerted action theory of liability. The *Hymowitz* court looked to decisions of the highest courts of three states in structuring their market share approach to recovery. *Hymowitz*, 539 N.E.2d at 1076-78. Although the New York Court of Appeals incorporated ideas from the other states in their approach, the standard adopted most closely resembled the one set forth by the California Supreme Court. Id. Under the California standard, a manufacturer’s liability is deemed to be several. See Brown v. Superior Court, 751 P.2d 470, 486 (Cal. 1988). Therefore, if a plaintiff does not join all manufacturers with a substantial share of the DES market, the plaintiff would not be entitled to a full recovery. Id.

\(^{59}\) See *Hymowitz*, 539 N.E.2d at 1075-78 (stating that DES litigation is unique and singular scenario which justifies burdening each DES producer even if precise manufacturer unknown). The *Hymowitz* court further explained:
DES at the time of exposure, thus approximating the amount of risk each defendant created for the public at large. Each defendant is absolutely liable for its market share unless it can prove it never manufactured the DES for use during pregnancy. Therefore, causation is not a required element of the “new” market share analysis, and in its absence, defendants are not exculpated from liability. By adopting this “new” market share approach, while imposing only several liability, the Hymowitz court developed “an equitable way to provide plaintiffs with relief they deserve while also rationally distributing the responsibility for the plaintiffs’ injuries among the defendants.”

We are confronted here with an unprecedented identification problem, and have provided a solution that rationally apportions liability. We have heeded the practical lessons learned by other jurisdictions, resulting in our adoption of a national market theory with full knowledge that it concedes the lack of a logical link between liability and causation in a single case.

Id. at 1078 n.3.

60 Id. at 1077-78. (observing that national market adopted for practical reasons despite resulting disproportion between liability and injury); see also Paul D. Rheingold, *The Hymowitz Decision-Practical Aspects of New York DES Litigation*, 55 Brook. L. Rev. 883, 893 (1989) (citing appellate attorney in Hymowitz who contended that choice of national market, as opposed to New York market, was based on statement that all counsel favored such market).

61 *Hymowitz*, 539 N.E.2d at 1077-78. The court concluded that “[u]nder the circumstances, this is an equitable way to provide plaintiffs with relief they deserve, while also rationally distributing the responsibility for plaintiffs’ injuries among defendants.” Id. at 1078.

62 See id. (explaining that liability is based on “risks created,” rather than potential cause of injury); see also Abrams, *supra* note 55, at 511 (stating that Hymowitz goes beyond absolute liability by holding manufacturers liable even if they were not cause of injury).

63 See *Hymowitz*, 539 N.E.2d at 1078. “It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill. . . . These for- tuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.” Id.; see also Abrams, *supra* note 55, at 507-08 (asserting that Hymowitz clearly departed from previous market share analysis by applying liability based on overall risk created without allowing defendants to exonerate themselves); Aaron D. Twerski, *Market Share-a Tale of Two Centuries*, 55 Brook. L. Rev. 869, 873 (1989) (stating that causation and exculpation are incongruous). “That Hymowitz has refused to play this charade (to potential causation in a market share analysis by allowing exculpation) is to its credit. It has honestly faced the fact that market share cannot be reconciled with traditional causation theory.” Id.

64 *Hymowitz*, 539 N.E.2d at 1078. The Hymowitz market share test allowed each manufacturer to avoid liability if either its product was not marketed for pregnancy use, or it was sold in a form unsuitable to pregnant woman. Id. at 1078 n.2.
B. A New Due Process Test for Mass DES Torts

In Ashley, Judge Weinstein traced the evolution of the territorial nexus requirement of minimum contacts from its roots in Pennoyer to its subsumption in International Shoe. This linked the examination of a defendant’s “in-forum activity,” or territorial nexus, to both state sovereignty and fairness analyses. Eventually, however, the territorial nexus requirement was relegated to the fairness inquiry, and state sovereignty reduced to demanding only that the defendant’s acts give rise to a sufficient state interest, thus, “the inquiry has shifted from a territorial to an interest nexus analysis.” The element of territorial minimum contacts, which according to the court must be regarded as a “historical accident,” does not fit within the context of DES litigation. Further, the court observed that such a test has become outdated over time and must be modified to address mass tort suits.

“Conservative[ly]” viewing precedents, Judge Weinstein set forth a two-prong test. Under the first prong, as long as the “forum state has an appreciable interest in the litigation, . . . the assertion of jurisdiction is [deemed] prima facie constitutional.”

65 See Ashley, 789 F. Supp. at 583. “[I]t is only when a non-resident defendant’s contacts with a state reach a certain level that the state has authority to assert jurisdiction over that defendant.” Id. at 579.

66 See id. at 583 (quoting International Shoe, 326 U.S. at 316). The court stated that International Shoe lightened the burdens imposed by Pennoyer, but was unable to completely free itself from them. Id. at 582.

67 Id. at 584-85. The court stated that this independent sovereignty inquiry was formally acknowledged in World-Wide Volkswagen, 444 U.S. at 291-92, but later retracted in Insurance Corp. v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982). Id. In comparison, later cases have consistently maintained that the forum’s interest in litigation is a crucial component in asserting jurisdiction. See id. at 584.

68 See id.; see also Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 114 (1987) (explaining that “[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum will justify even serious burdens placed on the alien defendant”); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482-83 (1985) (noting state has interest related to contacts established there); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1983) (holding that plaintiff’s lack of contact with forum state not imperative where state has legitimate interest in holding defendants answerable to claim).

69 See Ashley, 789 F. Supp. at 585 (contending that initial adoption of territorial notions of sovereignty in Pennoyer was dubious even when first enunciated).

70 Id. at 586.

71 Id. at 587.

72 Id. Under the first prong of the test, a court must determine “whether the litigation raises issues whose resolution would be affected by, or have a probable impact
Under the second prong, the exercise of jurisdiction is 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." The test must be applied flexibly to the facts of the case with the assumption of fairness, unless the defendant informs the court of potential burdens.

III. THE DUE PROCESS IMPLICATIONS OF ASHLEY

According to traditional and accepted standards, before addressing issues of substantive law, a court must initially inquire into its power to adjudicate a case. It is submitted that the Ashley court, by altering jurisdictional norms to suit DES litigation, stepped far beyond judicial constraints and produced an ad-hoc, jurisdictional synthesis of procedural and substantive law—an undertaking best reserved for the legislature. The judiciary cannot adequately resolve a nationwide policy problem by merely extending the outer bounds of personal jurisdiction, which will

on the vindication of policies expressed in the substantive, procedural or remedial laws of the forum." Id. This interest test is incorporated from cases such as Keeton, Burger King and Asahi, and includes a "proximate cause inquiry [which] impos[es] some limitations on the causal chain between a particular litigation and the state's interest." Id. The burden is on the plaintiff to establish an interest. Id.

73 Id. The court lists five non-inclusive considerations to determine the relative burden imposed by the assertion of jurisdiction: (1) defendant's available assets; (2) whether the defendant is or was engaged in substantial interstate commerce; (3) whether the defendant is sharing the cost with an indemnitor or co-defendant; (4) the comparative hardship incurred by defending suit in another forum; and (5) the comparative hardship to the plaintiff if the case was dismissed. Id.

74 Ashley, 789 F. Supp. at 589. The court stated that this analysis will, in some regards, parallel the analysis controlling discovery under Rule 26(b)(1)(iii). Id. at 588-89.

75 See supra notes 1-8 and accompanying text; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (stating that choice-of-law concerns should not complicate or distort jurisdictional inquiry); Hanson v. Denckla, 357 U.S. 235, 254 (1958) ("The issue is personal jurisdiction, not choice of law."); see also Bruce Posank, The Court Doesn't Know its Asahi from its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law, 41 SYRACUSE L. REV. 875, 877 (1990) ("The choice of law issue generally is more important to parties and the state than the jurisdictional issue.").

only lead to greater expense, inequities, and hardships for both plaintiffs and defendants.\textsuperscript{77} The Ashley decision, while supported by the desired objective of compensating injured plaintiffs,\textsuperscript{78} can only be viewed as an abuse of judicial powers.\textsuperscript{79}

By altering jurisdictional barriers, the Ashley decision released an economic hydra into the stream of commerce. The elimination of the territorial nexus requirement between the defendant and the forum state disregards the significance of foreseeability, leaving interstate commerce at the mercy of a remote, unforeseeable plaintiff.\textsuperscript{80} To permit state substantive law to control jurisdictional standards subordinates the constitutional protection of due process, as well as the traditional forum-defendant relationship,\textsuperscript{81} to the transient and malleable standard of the state's interest in the litigation.\textsuperscript{82} The result will be variable and conflicting state jurisdictional guidelines based upon differing tort theories that will arguably expose interstate manufacturers to inconsistent and burdensome liabilities.\textsuperscript{83}

\textsuperscript{77} See Weinstein & Hershenov, \textit{supra} note 76, at 317. Undoubtedly, "[t]he end product will . . . be the bankruptcy of many defendants and the depletion of available insurance and other assets well before all claimants are compensated." \textit{Id.}.

\textsuperscript{78} See Fine, \textit{supra} note 76, at 902 (citing compensation as human objective of Hymowitz decision).

\textsuperscript{79} Fine, \textit{supra} note 76, at 903 (asserting that creation of expansive remedies in DES cases is responsibility of legislature only). "When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems." \textit{Id.}.

\textsuperscript{80} Cf. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 111-12, 117 (1987). The Asahi Court held that in order to assert jurisdiction over a defendant who places a product in the stream of commerce, the Due Process Clause demands at the very least the element of foreseeability. \textit{Id.} at 117.

\textsuperscript{81} But see Ashley, 789 F. Supp. at 586-87. The court explained:

Given that New York law has evolved to promote the efficient resolution of mass DES torts, and given the problem of applying prevailing traditional jurisdictional concepts to such cases, a modification of established standards to determine the constitutionality of jurisdictional statutes that incorporates an interest nexus inquiry but not a territorial nexus inquiry is necessary in the DES context-and perhaps in other mass tort cases. \textit{Id.} at 587 (emphasis added).

\textsuperscript{82} \textit{Id.} According to Ashley, the primary requirement for a mass tort defendant being hauled into court is the state's interest as manifested by its substantive, procedural, or remedial laws. \textit{Id.} Consequently, the power vests solely in the state, and the only remaining jurisdictional shield is the inability of that particular defendant to mount a defense. \textit{Id.}

It is suggested that due process restrictions on personal jurisdiction must remain consistent regardless of the type of action at issue. This can only be achieved by following the traditional interpretation of due process. This will assure a foreseeable scope of jurisdiction for all potential defendants, uniformity in the application of substantive law, and a degree of certainty in the overall tort system.

CONCLUSION

Over the past 115 years, personal jurisdiction has evolved due to innovative judicial decisions modifying standards in response to a growing nation. Historically, the defendant's conduct and relationship to the forum state have been the basis for establishing jurisdiction. The increasing number of mass tort suits, however, has introduced new and troubling legal questions in this area. The solution to policy concerns posed by mass DES torts is not to base jurisdictional standards on state substantive law. The creation of a "new" due process test grounded on state policy will inevitably lead to increased litigation and confusion in our legal system.

In the words of Judge Weinstein, "[W]e have reached a critical period when more stability and predictability through legislation is desirable." The Ashley decision, however, fails to recognize that mass torts, and DES cases in particular, present complicated problems of national magnitude whose solutions lie far beyond the limited power of the judiciary.

John Howard

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Rev. 199, 237-38 (1986) (arguing that conflicting market share analysis may lead to double liability).

84 Ashley, 789 F. Supp. at 559.