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# Notes and Comments

## *Bichler v. Lilly: Applying Concerted Action To The DES Cases*

### I. Introduction

In *Bichler v. Eli Lilly & Co.*,<sup>1</sup> a unanimous New York Court of Appeals affirmed a lower-court ruling<sup>2</sup> which held that a plaintiff may bring an action for damages against a drug manufacturer without being able to identify such manufacturer as the actual maker of the drug which caused her injury.<sup>3</sup> The Court of Appeals decision, which accepted an expanded concerted action theory as the basis of liability,<sup>4</sup> removes a major obstacle faced by many of the "DES daughters,"<sup>5</sup> the victims of the synthetic estrogen ingested by their mothers when pregnant.<sup>6</sup> Due to the generic nature of the drug and the length of time between inges-

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1. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

2. 79 A.D.2d 317, 436 N.Y.S.2d 625 (1st Dep't 1981).

3. *Id.*

4. *Id.* at 329, 436 N.Y.S.2d at 632. The appellate court variously refers to the theory as concert of action and concerted action. *Id.* The principle of the theory, according to Prosser, is that:

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971) (footnotes omitted). The *Bichler* case expanded the theory by allowing a showing of conscious parallel activity to fulfill the requirement of agreement. See *infra* note 86 and accompanying text.

5. Many commentators use the phrase "DES daughters." See, e.g., Note, *A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement*, 42 U. PITT. L. REV. 669 (1981).

6. DES, or diethylstilbestrol, is a synthetic estrogen which was used in treating complications of pregnancy from 1947 to 1971. Daughters of women who used the drug, having been exposed *in utero*, developed cancerous and pre-cancerous abnormalities of the reproductive tract after onset of puberty. For a thorough discussion of the subject of DES litigation, see Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964 (1978) [hereinafter referred to as Comment].

tion by the mother and manifestation of injury in the daughter, most victims have been unable to identify the maker of the drug which injured them.<sup>7</sup> Without such identification, they fail to prove a crucial element of the traditional tort requirement of showing cause in fact,<sup>8</sup> and therefore have been precluded from seeking a remedy for an otherwise justiciable claim.<sup>9</sup> Although the narrowness of its ruling throws some doubt on the precedential value of the case, the Court of Appeals' decision, allowing plaintiffs to circumvent the identification requirement, marks a significant development in products liability law.

The plaintiff in *Bichler* brought an action against Eli Lilly, a DES manufacturer, for damages sustained by her as a result of her mother's ingestion of DES when pregnant with plaintiff.<sup>10</sup> Diagnosed as having vaginal and cervical cancer at age seventeen,<sup>11</sup> plaintiff underwent a radical hysterectomy, which rendered her sterile and impaired her sexual functioning.<sup>12</sup> Although she could not prove the identity of the maker of the particular drug taken by her mother, she claimed that the defendant should nevertheless be found liable.<sup>13</sup> She based her claim on an expanded theory of concert of action, alleging that the defendant was jointly and severally liable as one of the group of

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7. See Comment, *Market Share Liability Adopted to Overcome Defendant Identification Requirements in DES Litigation*, 59 WASH. U.L.Q. 571, 572 & n.10 (1981); See also Comment, *supra* note 6, at 972.

8. W. PROSSER, *supra* note 4, at § 41.

9. Cases in which drug companies prevailed on the basis of plaintiffs' failure to identify the manufacturer of the actual product which caused their injuries include: *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1007 (D.S.C. 1981)(partial summary judgment); *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 2d 77, 84, 150 Cal. Rptr. 730, 735 (1978); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 27, 427 A.2d 1121, 1125 (1981).

10. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 578, 436 N.E.2d at 184, 450 N.Y.S.2d at 778. Plaintiff originally joined as defendant the pharmacist who had supplied the medication to her mother. On motion by the pharmacist, the court dismissed the claim against him. *Bichler v. Willing*, 58 A.D.2d 331, 336, 397 N.Y.S.2d 57, 60 (1st Dep't 1977). When *Bichler* is used in this paper it will refer to *Bichler v. Eli Lilly & Co.*, not to *Bichler v. Willing*.

11. Since plaintiff was an infant, she had three years after her majority to bring her action in negligence or strict liability. For a general discussion of the problem of when the cause of action accrues, see Comment, *supra* note 6, at 970, n.23.

12. 79 A.D.2d at 319, 436 N.Y.S.2d at 627.

13. *Id.* A bifurcated trial was held at Lilly's request, with the first trial devoted to the issue of manufacturer identification. The jury found that plaintiff had not established that defendant was the manufacturer of the pills taken by her mother. *Id.*

DES manufacturers who had wrongfully tested and marketed the drug for use in pregnancy.<sup>14</sup> She asserted that the wrongful conduct of each company evidenced either the tacit agreement with or substantial encouragement of the others' conduct necessary to supply the requisite showing of concerted action.<sup>15</sup> The jury found that even though plaintiff had failed to establish that the defendant was the manufacturer of the DES taken by her mother, the defendant had engaged in concerted action with other manufacturers and could therefore be held liable for her damages.<sup>16</sup> The appellate court upheld the verdict, finding ample evidence from which a jury could determine that defendant had engaged in concerted action.<sup>17</sup> The Court of Appeals affirmed, holding that the trial court's instructions on concerted action liability were not erroneous and that the evidence before the jury was legally sufficient to support a verdict based on concerted action.<sup>18</sup>

In allowing plaintiff to bring her claim against the specifically unidentified manufacturer, New York became one of the few jurisdictions to sustain such actions when the cause in fact requirement has not been met.<sup>19</sup> Each of these jurisdictions, however, has relied on a different basis on which to predicate liability.<sup>20</sup> This note examines the theory adopted in *Bichler* and

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14. Plaintiff contended that the drug companies should have tested the effects of the drug on the offspring of pregnant mice and that two-generation testing was within scientific knowledge at the time. *Id.* at 322-24, 436 N.Y.S.2d at 629-30.

15. *Id.* at 320, 436 N.Y.S.2d at 628. See Amended Complaint, Record, vol. 1 at 45a. See *supra* note 4 for a definition of concerted action.

16. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 330, 436 N.Y.S.2d at 633.

17. *Id.*

18. 55 N.Y.2d at 579, 436 N.E.2d at 183, 450 N.Y.S.2d at 777.

19. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, cert. denied, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 76, 289 N.W.2d 20, 26 (1979); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 566-67, 420 A.2d 1305, 1312-13 (1980). The *Ferrigno* court extended the holding of *Anderson v. Somberg*, 67 N.J. 291, 302, 338 A.2d 17 (1975), to the DES situation. The court stated that "where a plaintiff, through no fault of his own, was not able to identify precisely who harmed him although he could say it was one member of a group, it was appropriate to shift the burden of proof." *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. at 566, 420 A.2d at 1312. The *Ferrigno* court's reading of *Anderson* was, however, rejected in *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. at 32 n.3, 427 A.2d at 1127 n.3.

20. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 145, cert. denied, 449 U.S. 912 (1980) (liability grounded on a modified alternative liability theory called market share liability); *Abel v. Eli Lilly & Co.*, 94 Mich.

compares it with those used in other jurisdictions. It concludes that the use of the concert of action theory as expanded in *Bichler* operates to impose a species of enterprise or industry-wide liability on the DES manufacturers.<sup>21</sup>

## II. Background

### A. *The Development of DES*

DES, or diethylstilbestrol, is a synthetic estrogen first developed in England in 1938.<sup>22</sup> Because its makers did not patent the drug,<sup>23</sup> it could be made and sold by any number of manufacturers under its generic name.<sup>24</sup> In 1939, several American manufacturers sought Food and Drug Administration (FDA) approval to market DES, proposing its use for a variety of estrogen disorders in women.<sup>25</sup> The first applications were rejected by the FDA because they were based solely on foreign studies.<sup>26</sup> At the FDA's suggestion, the companies joined together to pool their clinical data on the drug in order to expedite the approval process by a joint filing.<sup>27</sup> They also agreed to follow a uniform chemical formula and to use uniform labeling and product literature.<sup>28</sup> Initial FDA approval in 1941 did not include the use of DES to prevent miscarriage.<sup>29</sup> Supplemental applications for that use, first filed in 1947, were based primarily on two studies

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App. 59, 76, 289 N.W.2d 20, 26 (1979) (plaintiffs allowed to proceed on the traditional, unmodified theories of alternative liability and concert of action).

21. The term "enterprise liability" is often used in an economic context in reference to spreading the cost of risk. See *Klimas v. ITT*, 297 F. Supp. 937, 941 n.4 (D.R.I. 1969). For this reason, one commentator suggests using the term "industry-wide liability" in the legal context. Note, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980, 983 (1979).

22. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 321, 436 N.Y.S.2d at 628. Except as otherwise noted, the facts presented are drawn from the appellate division opinion. For an extensive account of DES's development, see Comment, *supra* note 6, at 963-65 & nn.1-10. For a more recent discussion, which recounts the role of the FDA in the approval process, see *Payton v. Abbott Laboratories*, 512 F. Supp. 1031, 1032-34 (D. Mass. 1981).

23. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 321, 436 N.Y.S.2d at 628.

24. *Id.* at 319, 436 N.Y.S.2d at 627.

25. *Id.* at 321-22, 436 N.Y.S.2d at 628.

26. *Id.* at 321, 436 N.Y.S.2d at 628.

27. *Id.*

28. *Id.* Defendant Lilly was one of the original twelve companies, together known as the "Small Committee," which filed jointly. Lilly's literature provided the model for the package inserts used by the companies. *Id.*

29. *Id.* at 321-22, 436 N.Y.S.2d at 628.

which were soon shown to be suspect for inadequate controls and unsubstantiated claims.<sup>30</sup> Nevertheless, FDA approval was granted. Serious questions regarding the efficacy and potential carcinogenic effect of DES existed before FDA approval and multiplied afterward, but at no time did the companies perform tests on laboratory animals to determine the possible effects of the drug on the human fetus.<sup>31</sup> After medical studies later revealed a link between maternal use of DES and subsequent development of vaginal cancer in daughters, the FDA in 1971 contraindicated the use of DES in pregnancy.<sup>32</sup>

Between 1947, when the FDA first approved the use of DES for preventing miscarriage, and 1971, when such use was discontinued, several hundred companies were involved in the manufacture and marketing of the drug.<sup>33</sup> During that period, possibly two million women took DES in the larger doses prescribed for prevention of miscarriage.<sup>34</sup> Years later, their daughters, exposed *in utero*, were discovered to have developed precancerous and cancerous vaginal tract abnormalities related to the use of the drug.<sup>35</sup> Discovery of the link led to an estimated one thousand suits being filed by DES victims,<sup>36</sup> with most suits still pending at the pre-trial stages.<sup>37</sup>

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30. *Id.* at 322 n.2, 436 N.Y.S.2d at 628-29 n.2.

31. *Id.* at 324, 436 N.Y.S.2d at 630. One of the studies cited in Lilly's supplemental application raised specific questions about possible carcinogenic effects on pregnant women and possible glandular imbalance in the fetus caused by the large doses of DES used to prevent miscarriage. *Id.* at 323, 436 N.Y.S.2d at 629. Scientists knew in 1947 that drugs given to a pregnant woman passed through the placental barrier and could affect the growing fetus. *Id.*

32. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 577, 436 N.E.2d at 184, 450 N.Y.S.2d at 778.

33. Estimates of the number of companies involved in the manufacture of DES vary from 94 to 300. Comment, *supra* note 6, at 964 n.3. The court in *Payton v. Abbott Laboratories* noted that 10 firms were involved in 1941, 71 firms in 1947, 151 in 1957, and 91 in 1967. *Payton v. Abbott Laboratories*, 512 F. Supp. at 1034.

34. N.Y. Times, Mar. 29, 1977, at 16, col. 2. The drug continues to be used at lower doses for other disorders. *Id.*

35. Recent studies indicate that males exposed prenatally to DES may also have been affected. See, e.g., Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 669 n.8 (1981).

36. Podgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980).

37. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 597, 607 P.2d 924, 927, 163 Cal. Rptr. 132, 135, cert. denied, 449 U.S. 912 (1980). The California Supreme Court noted that, at the time of its decision, all but two of the cases that had been decided had resulted in judgments in favor of the drug companies, solely on the basis of the failure of

## B. *The Identification Problem in DES Litigation*

DES plaintiffs face considerable problems of proof,<sup>38</sup> but the most significant problem thus far has been how to overcome the threshold requirement of identifying the defendant as the manufacturer of the product which is the cause in fact of their injury.<sup>39</sup> Proof of cause in fact is a fundamental requirement of an action in tort,<sup>40</sup> and implicit in the requirement is the necessity of identifying the defendant as the actual tortfeasor.<sup>41</sup> Most

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plaintiffs to identify the manufacturers of the DES taken by their mothers. The two exceptions were *Bichler and Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979).

38. In any products liability case, the plaintiff must prove three elements. First, that he was injured by the product. Second, that the injury occurred because the product was unsafe. Last, that the danger or defect existed when the product left the hands of the defendant. W. PROSSER, *supra* note 4 at § 103.

39. See 1 PROD. LIAB. REP. (CCH) § 11.01[4] (1981); See also 1 R. HURSH & S. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 1:41 (2d ed. 1974); 63 AM. JUR. 2d *Products Liability* § 5 (1972).

A number of commentators have addressed the DES identification problem. See, e.g., Comment, *supra* note 6; Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); Note, *Proof of Causation in Multi-party Drug Litigation*, 56 TEX. L. REV. 125 (1977); Note *A Remedy for the "DES Daughters": Products Liability Without the Identification Requirement*, 42 U. PITT. L. REV. 669 (1981); Note, *Industry-Wide Liability: Solving the Mystery of the Missing Manufacturer in Products Liability Law*, 38 WASH. & LEE L. REV. 139 (1981). See also Annot., 51 A.L.R. 3d 1344 (1973) (a general discussion of the problem of identifying the manufacturers of defective products).

40. E.g., W. PROSSER, *supra* note 4, at § 41.

41. *Id.* Prosser notes that the proof required of a plaintiff seeking to recover for injuries from an unsafe product is largely the same whether the suit rests on negligence, warranty, or strict liability in tort. On any of these bases, plaintiff has the initial burden of proof that the defect which resulted in his injury existed when the product left the hands of the particular defendant. *Id.* § 103. See *supra* note 38. There are many cases where plaintiff's failure to identify defendant as the manufacturer of the defective product was fatal to recovery. See, e.g., *Wetzel v. Eaton Corp.*, 62 F.R.D. 22 (D. Minn. 1973) (summary judgment for defendant manufacturer granted where impossible to identify which of two manufacturers had supplied defective component); *Garcia v. Joseph Vince Co.*, 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978) (judgment of nonsuit affirmed where evidence was equally divided as to which of two sabre manufacturers supplied defective blade); *Kinsey v. Coca-Cola Bottling Co.*, 137 Ga. App. 681, 225 S.E.2d 96 (1976) (directed verdict for defendant held proper where store from which plaintiff had purchased bottle, although within defendant's distribution area, also obtained bottles from other areas and where there was no proof that the defective bottle was manufactured and sold by defendant); *Shanks v. Oneita Knitting Mills*, 58 A.D.2d 741, 395 N.Y.S.2d 856 (1977) (summary judgment affirmed where there was no evidence that defendant had manufactured the T-shirt in question). For a more complete collection of cases, see 1 R. HURSH & S. BAILEY, *supra* note 39, at §§ 1:41-43 (2d ed. 1974 & Supp. 1981).

DES plaintiffs are unable to determine the identity of the maker of the product used by their mothers, because of two factors beyond their control.<sup>42</sup> First, the generic nature of the drug makes its manufacturer extremely difficult to trace, and second, in most cases considerable time has passed since ingestion, so that crucial medical and pharmaceutical records have long since been lost or destroyed. The lack of proof of identification leaves the plaintiff open to motions to dismiss for failure to state a claim or motions for summary judgment.<sup>43</sup> Until very recently, this identification requirement acted as an effective bar to recovery in most DES cases.<sup>44</sup>

To defeat this identification problem, plaintiffs have sought to impose joint and several liability on every DES manufacturer.<sup>45</sup> In the few cases where plaintiffs have been successful, two theories have emerged as means by which the identification barrier may be circumvented: concerted action, and alternative liability.<sup>46</sup>

The ancient doctrine of concerted action<sup>47</sup> is employed when two or more parties are alleged to have acted in pursuance of a common plan to commit a tortious act.<sup>48</sup> Each participant can be held liable for the damage done by his co-participants, even though his own acts have not caused the injury.<sup>49</sup> Express

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42. See Comment, *Market Share Liability Adopted to Overcome Defendant Identification Requirement in DES Litigation*, 59 WASH. U.L.Q. 571, 572 & n.10 (1981); see also Comment, *supra* note 6, at 972.

43. See, e.g., *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 35, 427 A.2d 1121, 1129 (1981), where the New Jersey appellate court affirmed the granting of summary judgment as to all 44 defendants due to the lack of identification.

44. See cases cited *supra* note 9.

45. E.g., *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 324-25, 436 N.Y.S.2d at 630; *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 595, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134, cert. denied, 449 U.S. 912 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20, 22 (1979).

46. Comment, *supra* note 6, at 973. These theories derive from the law of joint tortfeasors. See Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 414 (1937).

47. In *Sir John Heyden's Case*, 11 Co. Rep. 5, 6, 77 Eng. Rep. 1150, 1151 (1613), the court declared that "all coming together to do an unlawful act, and of one party, the act of one is the act of all of the same party being present."

48. W. PROSSER, *supra* note 4, at § 46. See RESTATEMENT (SECOND) OF TORTS § 876 (1977).

49. See Comment, *supra* note 6 at 978-79. The doctrine seems to have evolved to deter anti-social activity rather than to solve cause in fact problems of identity; *id.* at

agreement to pursue the plan is not necessary; a tacit understanding is enough.<sup>50</sup> The classic illustration of this doctrine is the case where two or more cars participate in a spontaneous drag race, and one car injures a bystander. Each driver will be considered jointly and severally liable for that injury, although only one car actually struck the plaintiff.<sup>51</sup> The element of tacit agreement necessary to prove such liability may be inferred from the parallel conduct of the participants.<sup>52</sup>

The theory of alternative liability applies in situations where each defendant, acting independently, has behaved tortiously, but only one unidentifiable defendant actually caused the injury.<sup>53</sup> The theory originated in the case of *Summers v. Tice*.<sup>54</sup> There, plaintiff's two hunting companions fired their guns carelessly in his direction.<sup>55</sup> Although only one bullet injured plaintiff, it was impossible to determine from whose gun it was fired.<sup>56</sup> The court considered the application of the concert of action theory, but refused to strain the concept since an inference of tacit agreement to pursue a common plan would be an obvious fiction in this case.<sup>57</sup> Instead, the court allowed the burden of proof of causation to be shifted to the defendants on the grounds of fairness to the injured party. Since both defendants

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979 & n. 71; cf. *Hall v. Du Pont De Nemours & Co.*, 435 F. Supp. 353, 371 (E.D.N.Y. 1972).

50. W. PROSSER, *supra* note 4, at § 46.

51. The doctrine has been used in New York since horse and buggy days. See, e.g., *De Carvalho v. Brunner*, 223 N.Y. 284, 119 N.E. 563 (1918). For a more recent discussion, see *Finn v. Morgan*, 46 A.D.2d 229, 362 N.Y.S.2d 292 (1974). The *Finn* court ruled that, if, on retrial, the jury determined that the defendant was participating in a race at the time of the accident, he would be guilty of negligence causing injury to plaintiff although his vehicle was not directly involved in the collision. In such a situation, "participation in the race was the equivalent of participation in the accident." *Id.* at 232, 362 N.Y.S.2d at 297. To establish such participation, the court noted, the facts must support an inference of some agreement to race, such as a challenge, answered by a change in speed and position. *Id.* at 232, 362 N.Y.S.2d at 297-98.

For a collection of cases from other jurisdictions, see *Annot.*, 13 A.L.R. 3d 431 (1967).

52. See W. PROSSER, *supra* note 4, § 46 at 292.

53. See W. PROSSER, *supra* note 4, at § 41. Prosser calls the doctrine "double fault and alternative liability." *Id.*

54. 33 Cal. 2d 80, 199 P.2d 1 (1948).

55. *Id.* at 82-83, 199 P.2d at 2.

56. *Id.* at 83, 199 P.2d at 2.

57. *Id.* at 85-86, 199 P.2d at 3-4.

were wrongdoers, and since it was their conduct that had placed plaintiff in the unfair position of having to prove the cause of his injury, the court determined that shifting the burden was justified.<sup>58</sup> Rather than leave plaintiff remediless, policy reasons compelled the court to hold each defendant jointly and severally liable if he could not exculpate himself.<sup>59</sup> This theory has traditionally been available only when plaintiff has joined all possible tortfeasors.<sup>60</sup>

Both theories were successfully asserted in a Michigan DES case, *Abel v. Eli Lilly & Co.*,<sup>61</sup> where plaintiff joined as defendants all manufacturers who had distributed DES in the area during the time the drug had been prescribed to her mother. The Michigan Court of Appeals,<sup>62</sup> in refusing to grant defendants' motion for summary judgment, held that plaintiff's allegations that defendants had acted in concert to produce and market ineffective and dangerous products, without adequate testing or warning, were sufficient to state a cause of action.<sup>63</sup> The court also permitted a reliance on the alternative liability theory, noting that in special circumstances "policy and fairness" dictate a shifting of the burden to the wrongdoer.<sup>64</sup>

The unmodified use of the alternative liability theory was

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58. *Id.*

59. *Id.* *Summers v. Tice* is codified at RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. *Id.* § 433b(3) comment g.

60. *Id.* § 43B(3) comment h. Although the rule has traditionally been applied only when all actors are joined as defendants and where the conduct of all was simultaneous, the comment notes that cases might arise in which some modification of the rule would be necessary because "one of the actors involved is not or cannot be joined as a defendant, or because of the effect of the lapse of time . . . . The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it." *Id.* No New York cases relying on *Summers* have been found. *But see* *Thrower v. Smith*, 62 A.D.2d 907, 913, 406 N.Y.S.2d 513, 517 (1978). In *Thrower*, the dissent recognizes that the *Summers v. Tice* rationale is generally accepted. *Id.* at 920, 406 N.Y.S.2d at 521; the majority does not comment upon this view because the case is distinguishable from *Summers* and deals primarily with an evidentiary question. *See also* the discussion of *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), *infra* note 88 and accompanying text.

61. 94 Mich. App. 59, 71-72, 289 N.W.2d 20, 24 (1979).

62. *Id.* at 67, 289 N.W.2d at 22.

63. *Id.* at 72, 289 N.W.2d at 24-25.

64. *Id.* at 75-76, 289 N.W.2d at 26.

rejected by the California Supreme Court, in *Sindell v. Abbott Laboratories*,<sup>65</sup> where plaintiff had not joined every possible manufacturer.<sup>66</sup> The Court stated that unless all were joined, there would be no basis for inferring that the product of any one defendant was the cause in fact.<sup>67</sup> The *Sindell* court also rejected the concerted action theory<sup>68</sup> because the requisite element of implied agreement was not, in that court's opinion, supplied by a showing of conscious parallel conduct by the manufacturers.<sup>69</sup> The court reasoned that stretching the doctrine to encompass a common industry practice would not only go far beyond the intended scope of the doctrine, but would hold virtually any manufacturer liable for the defective products of an entire industry, even if the defendant could prove that his product was not the cause in fact of the injury.<sup>70</sup> Although it rejected the traditional doctrines, the *Sindell* court felt compelled by reasons of policy and fairness to find a basis for allowing the claim.<sup>71</sup> Recalling Justice Traynor's famous concurrence in *Escola v. Coca Cola Bottling Co.*,<sup>72</sup> the court reaffirmed its rejection of a rigid adherence to traditional tort law in the face of the complex problems created by modern technology.<sup>73</sup> When fungible goods which harm consumers cannot be traced to any specific producer, the *Sindell* court noted, "some adaptation of the rules of causation and liability may be appropriate . . . ."<sup>74</sup> The court chose to modify the *Summers* theory of alternative liability by

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65. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

66. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39. *But cf. supra* note 60.

67. *Id.* at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.

68. *Id.* at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.

69. *Id.* The court's reasoning echoes its earlier refusal in *Summers* to stretch the concert of action theory. *See supra* text accompanying note 57.

70. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

71. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

72. 24 Cal. 2d 453, 467-68, 150 P.2d 436, 433 (1944). Urging the adoption of a strict liability standard, Justice Traynor in his concurrence said, "The manufacturer's obligation to the consumer must keep pace with the changing relationships between them; it cannot be escaped because the marketing of a product has become so complicated . . . ." 24 Cal. 2d at 467, 150 P.2d at 443.

73. *Sindell v. Abbott Laboratories*, 26 Cal. 2d 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

74. *Id.*

permitting an action when a substantial number of the manufacturers were joined as defendants.<sup>76</sup> Each manufacturer, however, would be liable only for its proportionate "market share" of the judgment.<sup>76</sup> Further, each defendant would also have the opportunity to fully exculpate itself by proving that it did not manufacture the product which actually caused the injury.<sup>77</sup>

### III. *Bichler v. Lilly*: The Lower Court Decision

The issue presented in the *Bichler* case was whether an injured plaintiff who cannot identify the actual manufacturer of the drug which caused her injury, and thus cannot satisfy the traditional tort requirement of showing cause in fact, may impose joint and several liability on a single DES manufacturer.<sup>78</sup>

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75. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

76. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court, in its discussion of "market share" liability, cites directly to the Comment, *supra* note 6, at 996. *Id.* This acknowledgement is significant, since the court is in effect adopting an element of the Comment's suggested theory of enterprise liability. Enterprise liability, also referred to as "industry-wide" liability, is a hybrid theory, combining elements of both concert of action and alternative liability. See *supra* note 21. First suggested by a federal district court in *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 378 (1972), the theory was fully developed in the Comment, where the following elements are suggested in addition to market share apportionment of liability:

- 1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of defendant's conduct.
- 2) A generically similar defective product was manufactured by all the defendants.
- 3) Plaintiff's injury was caused by this product defect.
- 4) The defendants owed a duty to the class of which plaintiff was a member.
- 5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
- 6) There existed an insufficient, industrywide standard of safety as to the manufacture of this product.
- 7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.

Comment, *supra* note 6, at 995. Once plaintiff proves these elements, the burden of proving causation shifts to the defendants, any of whom may individually exculpate himself by showing that his product could not have injured plaintiff. *Id.* Although the theory has yet to be openly adopted by any court, it clearly influenced the *Sindell* and *Bichler* courts in their modifications of traditional theories.

77. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

78. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 324, 436 N.Y.S.2d at 630. The court noted that plaintiff's inability to identify the manufacturer was through no fault of her own, but rather as a result of the industry practices in marketing and distribution of

A unanimous New York appellate division court, adopting an expanded concert of action theory, held that, in the "special circumstances" of the DES cases, joint and several liability could be imposed without proof of identity as an element of cause in fact.<sup>79</sup> The court cited several factors in support of its holding. First, the court found sufficient evidence to justify the jury finding that the defendant and the other manufacturers of DES had wrongfully tested and marketed the drug.<sup>80</sup> Reservations about the efficacy of DES for treatment of complications of pregnancy, doubts about the adequacy of the two studies relied on,<sup>81</sup> and concerns about the potential carcinogenic effect of the drug on mother and fetus were shown to have all been raised prior to 1953, when plaintiff's mother used DES.<sup>82</sup> Yet none of the companies producing or marketing DES responded to these issues by performing any tests on either humans or animals.<sup>83</sup> The court also found that the evidence of "conscious parallel activity" by the drug companies amply supported an inference of a tacit understanding among the companies to wrongfully market the drug for use in preventing miscarriage without first performing laboratory tests upon pregnant mice.<sup>84</sup> The original cooperation and pooling of data by the first twelve applicants set the pattern for later manufacturers, who used the same basic chemical formula and literature. When FDA approval was later sought for the use of DES in pregnancy, the companies relied on the same research studies and prescribed the same dosages. On these facts, the court found "ample evidence" of concerted action.<sup>85</sup>

The court admitted that it was doing what the *Sindell* court had found unacceptable: it was stretching concert of action to encompass the common practice of an entire industry by al-

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drugs. *Id.*

79. *Id.* at 328, 436 N.Y.S.2d at 632.

80. *Id.* at 333, 436 N.Y.S.2d at 635. The jury was specifically asked whether a reasonably prudent DES manufacturer, given the state of scientific knowledge, should have foreseen that DES use by a pregnant user might cause cancer in offspring, and if so, whether a prudent manufacturer would have tested DES on pregnant mice. *Id.*

81. *Id.* at 322 n.2, 436 N.Y.S.2d at 628 n.2.

82. *Id.* at 322, 436 N.Y.S.2d at 629.

83. *Id.* at 324, 436 N.Y.S.2d at 630.

84. *Id.* at 330, 436 N.Y.S.2d at 633.

85. *Id.*

lowing "conscious parallelism" to evidence the required element of tacit agreement.<sup>86</sup> The *Bichler* court, however, characterized this as only a "limited expansion" of the doctrine, justified by both legal precedent and equitable considerations.<sup>87</sup>

As legal precedent, the court pointed to a previous tailoring of the doctrine in *Hall v. E.I. Du Pont De Nemours & Co.*<sup>88</sup> In *Hall*, plaintiffs were children injured in separate blasting cap explosions. Unable to identify the manufacturers of the product which caused their injuries, they joined six manufacturers, who comprised virtually the entire domestic industry.<sup>89</sup> The court, in *Bichler*, noted that *Hall* had fashioned a theory which combined elements of concerted action and alternative liability.<sup>90</sup> Concerted action was shown both by express agreement among the defendant blasting-cap manufacturers not to warn of their product's danger,<sup>91</sup> and by the companies' reliance on industry-wide safety standards.<sup>92</sup> The alternative liability doctrine was invoked to allow a shifting of the burden of proof of causation to the defendants, permitting them to exculpate themselves if they could show that their product did not cause the injury.<sup>93</sup> As further support for its theory the court pointed to the fact that "conscious parallel behavior" without express agreement had long been accepted by the Supreme Court as a basis for finding conspiracy in antitrust cases.<sup>94</sup>

In addition to the legal justifications cited, the court also emphasized the policy considerations which mandated expansion of traditional doctrines "to adapt to the exigencies of trying a case in the rapidly developing area of the law of strict products liability."<sup>95</sup> The complexity of modern products, the court noted,

86. *Id.* at 326-27, 436 N.Y.S.2d at 631.

87. *Id.* at 329, 436 N.Y.S.2d at 632.

88. 345 F. Supp. 353 (E.D.N.Y. 1972). See *supra* note 76 for a discussion of *Hall's* contribution to the theory of industry-wide liability.

89. *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. at 359.

90. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 329, 436 N.Y.S.2d at 633.

91. *Id.*

92. *Id.* at 330, 436 N.Y.S.2d at 633.

93. *Id.* at 329, 436 N.Y.S.2d at 633.

94. *Id.* at 330, 436 N.Y.S.2d at 633.

95. *Id.* at 326, 436 N.Y.S.2d at 630-31. New York adopted its version of strict products liability in *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461, (1973):

[U]nder a doctrine of strict products liability, the manufacturer of a defective

often means that the manufacturer is the only party who can know if the product is safe.<sup>96</sup> The court refused to allow such a manufacturer to escape liability by hiding behind the "shroud of anonymity" created by the generic nature of his product and the parallel practices of his industry. Citing *Abel*<sup>97</sup> and *Sindell*<sup>98</sup> as examples of the responses by other courts to the "special circumstances" facing the DES plaintiffs, the New York Appellate Division joined the Michigan and California courts in refusing to bar an otherwise valid claim when the traditional requirement of causation was impossible to prove.<sup>99</sup>

The court found no unfairness in imposing liability on the sole defendant.<sup>100</sup> Plaintiff had the option of going against any joint tortfeasor; as a participant in concerted tortious action, defendant was jointly and severally liable. Furthermore, defendant could proceed against the other manufacturers for contribution under the theory of *Dole v. Dow Chemical Co.*,<sup>101</sup> which allows allocation of the judgment according to equitable share.<sup>102</sup>

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product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided:

(1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended,

(2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and

(3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

*Id.* at 343, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

96. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 328-39, 436 N.Y.S.2d at 632.

97. *Abel v. Eli Lilly & Co.*, 99 Mich. App. 59, 289 N.W.2d 20 (1979).

98. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

99. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 329, 436 N.Y.S.2d at 632.

100. *Id.* at 331, 436 N.Y.S.2d at 634. *Eli Lilly & Co.*, unsuccessfully protested its being singled out for liability in light of testimony by Mrs. Bichler's pharmacist that he stocked DES manufactured by four or five producers. *Id.*

101. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *Dole v. Dow Chem. Co.* has been codified in N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976).

102. *Dole v. Dow Chem. Co.* 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

#### IV. The Court of Appeals Decision

##### A. The Decision

The New York Court of Appeals unanimously affirmed the lower-court ruling.<sup>103</sup> The opinion was so narrowly drawn, however, as to leave undefined the scope of the expanded concerted action theory. Limiting itself only to those issues preserved for its review,<sup>104</sup> the court held that the trial court's instructions on the concerted action theory were "not erroneous as a matter of law," and that the jury's verdict in light of those instructions was not without sufficient evidentiary support.<sup>105</sup>

The court refused to address Lilly's claim on appeal that it was "jurisprudentially unsound" to permit recovery against it on a concerted action theory.<sup>106</sup> Noting that Lilly had not raised this claim at any prior stage of the proceedings, the court held that the theory of concerted action therefore became the "controlling law" of the case.<sup>107</sup> Having made this determination, it

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103. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

104. *Id.* at 576, 436 N.E.2d at 183, 450 N.Y.S.2d at 777. The New York Court of Appeals has narrower powers of review than the appellate division. *See, e.g.*, N.Y. CIV. PRAC. LAW § 5501 (a)(3) (McKinney 1978), which provides that an appeals court may review "any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected." If proper objection is not made, the appellate division may nevertheless reverse a judgment and grant a new trial on the basis of error which it deems fundamental; the court of appeals, however, may not do so, nor may it review the appellate division's exercise of such discretion. *See, e.g.*, *Jeminson v. Goodman*, 49 A.D.2d 1011, 1012, 373 N.Y.S.2d 926, 928 (4th Dep't 1975); 7 J. WEINSTEIN, H. KORN & A. MILLER, N.Y. CIVIL PRACTICE ¶ 5501.11 (1981); N.Y. CIV. PRAC. LAW § 5501, commentary at 21 (McKinney 1978). *See infra* notes 126-29 and accompanying text.

105. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 576, 436 N.E.2d at 183, 450 N.Y.S.2d at 777.

106. *Id.* at 581, 436 N.E.2d at 186, 450 N.Y.S.2d at 780. The court noted that motions appropriate to this claim, such as a motion to dismiss the complaint for failure to state a cause of action, or a motion to join other manufacturers as necessary parties, were never made by Lilly, nor was the issue raised in the motions Lilly did make. *Id.*

107. *Id.* The doctrine of the "law of the case" refers to a judicial determination made in a prior stage of an action which becomes controlling; its purpose is to prevent relitigation of issues. *See generally* D. SIEGEL, NEW YORK PRACTICE § 448 (1978), where the doctrine is described as "a kind of intra-action *res judicata*." Although the doctrine has been invoked where an erroneous charge was not objected to and thus was considered the law of the case, *e.g.*, *Olsen v. Saint Margaret of Scotland Roman Catholic Church*, 21 A.D.2d 827, 828, 251 N.Y.S.2d 512, 514 (2d Dep't 1964), the line of cases so holding have been discredited by *Martin v. City of Cohoes*, 37 N.Y.2d 162, 332 N.E.2d 867, 371 N.Y.S.2d 687 (1975), which expressly limited the doctrine to issues which were

only remained for the court to decide whether, to the extent the issue was preserved,<sup>108</sup> the trial court's instructions on concerted action were erroneous,<sup>109</sup> and if not, whether the evidence was sufficient to support the verdict.<sup>110</sup>

The court first considered the trial court's instructions to the jury on concerted action.<sup>111</sup> The instructions specified two theories of concerted action upon which defendant's liability could be premised: first, concerted action by agreement, in which an express or implied understanding is manifested by "consciously parallel conduct" on the part of the drug companies in failing to test DES on pregnant mice; and, second, concerted action by substantial assistance, in which the companies acted independently of each other in failing to test but with the result that such independent actions had the effect of substantially encouraging the failure to test by the others.<sup>112</sup> Although the court enumerated Lilly's challenges to these instructions,<sup>113</sup> it refused to explore the merits of Lilly's claims, holding that such exploration was precluded by the fact that none of the challenges had been preserved for review by appropriate request of exception.<sup>114</sup> The sole exception to the concerted action charge which Lilly had made concerned the issue of intent,<sup>115</sup> an

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"judicially determined." *Id.* at 165, 332 N.E.2d at 869, 371 N.Y.S.2d at 689. See generally 7 J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 104, ¶ 5501.10; Julien, *The Law of the Case*, N.Y.L.J., June 23, 1982 at 1, col. 1; Note, *Successive Appeals and the Law of the Case*, 62 HARV. L. REV. 286 (1948).

108. See *supra* note 104.

109. *Bichler v. Eli Lilly & Co.*, 55 N.Y.S.2d at 581, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

110. *Id.* at 584, 436 N.E.2d at 188, 45 N.Y.S.2d at 782.

111. *Id.* at 581-82, 436 N.E.2d at 186-87, 450 N.Y.S.2d at 780-81.

112. *Id.*

113. *Id.* at 582, 436 N.E.2d at 187, 450 N.Y.S.2d at 781. In its appeal, Lilly addressed the two branches of the charge separately. With respect to concerted action by agreement, Lilly contended that the jury should have been instructed that (1) direct evidence was needed in addition to conscious parallelism to support a finding of agreement; (2) every drug company whose product might have been the one taken by plaintiff's mother had to be a party to the agreement; and (3) the agreement had to concern either affirmative commission of a negligent act or intentional omission of a nonact. With respect to concerted action by substantial assistance, Lilly contended that (1) a finding of agreement was necessary; and (2) Lilly itself must have injured plaintiff. Lilly also contended that the court did not adequately define "substantial assistance." *Id.*

114. *Id.* at 583, 436 N.E.2d at 187, 450 N.Y.S.2d at 781.

115. *Id.*

issue which the court stated did not "even arguably relate" to any of the claimed errors urged on appeal.<sup>116</sup> Without proper objection having been taken, the trial court's charge on concerted action therefore became the law of the case.<sup>117</sup>

The court then addressed the issue of whether the evidence was legally sufficient to support the jury's finding of concerted action, either by agreement or by substantial assistance.<sup>118</sup> With regard to concerted action by agreement, the court held that the jury could infer, solely from evidence of "consciously parallel behavior," an implied agreement by the drug companies not to test DES on pregnant mice.<sup>119</sup> Similarly, the court found that the charge on concerted action by substantial agreement allowed the jury to infer from Lilly's failure to test that other manufacturers were substantially encouraged to do the same.<sup>120</sup> Confining its review of the evidence to events beginning in 1947,<sup>121</sup> the court held that the conduct of Lilly and the other companies in filing new drug applications for use of DES for treatment of problems of pregnancy "was sufficient to support jury findings of both conscious parallelism and substantial assistance or encouragement under the jury instructions to which no exception was taken."<sup>122</sup>

### B. *Analysis of the Court of Appeals Decision*

The Court of Appeals decision, characterized by a deliberate emphasis on the procedural aspects of the appeal and a corresponding narrowness in the scope of its review, provides little

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116. *Id.* at 584, 436 N.E.2d at 188, 450 N.Y.S.2d at 782.

117. *Id.* See *supra* note 107 for a discussion of the "law of the case" doctrine.

118. *Id.* Because it was impossible to determine upon which theory — concerted action by agreement or concerted action by substantial assistance — the jury had relied, the court needed to evaluate the sufficiency of the evidence to support recovery under either theory. *Id.* See *Davis v. Caldwell*, 54 N.Y.2d 176, 179-80, 429 N.E.2d 741, 743, 445 N.Y.S.2d 63, 65 (1981).

119. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 584, 436 N.E.2d at 188, 450 N.Y.S.2d at 782.

120. *Id.*

121. *Id.* at 585, 436 N.E.2d at 188, 450 N.Y.S.2d at 782.

122. *Id.* The court held, with respect to the two remaining issues raised by Lilly, that (1) the evidence was sufficient to support a finding that cancer in the offspring was a foreseeable risk of prenatal DES exposure; and (2) that plaintiff's theory of liability did not necessitate a jury charge as to Lilly's duty to warn. *Id.* at 585-87, 436 N.E.2d at 189-90, 450 N.Y.S.2d at 783-84.

guidance as to the acceptability of the concerted action theory. After stating positively that “[p]roducts liability law cannot be expected to stand still where innocent victims face inordinately difficult problems of proof,”<sup>123</sup> the court avoided every opportunity to set forth a clear rule on concerted action. Further, the court refused to consider, even in passing, the other theories of liability proposed for application in the DES cases;<sup>124</sup> instead, the court stated that it was expressly leaving “for another day consideration of whether other theories of liability may in the DES context establish a cause of action.”<sup>125</sup> Announcing that it would address only the basis of liability pleaded, concerted action, the court further narrowed its review of that basis only “to the extent that the issue was preserved for our review.”<sup>126</sup>

Throughout the decision, the court repeatedly emphasized the limited nature of its scrutiny. First, although it allowed concerted action to form the basis of a full recovery against Lilly, it did so almost grudgingly, giving as its only reason the fact that Lilly had allowed the case to proceed on that basis.<sup>127</sup> Furthermore, it considered the trial court’s instructions with regard to concerted action only in light of whether proper exception had been taken; by this test, it found them to be “not erroneous as a matter of law,”<sup>128</sup> hardly an enthusiastic endorsement. Finally, in its review of the sufficiency of the evidence, the court found the evidence to be sufficient, but emphasized that it had only measured the sufficiency under the “jury instructions to which no exception was taken.”<sup>129</sup>

The penurious nature of the court’s endorsement of the concerted action theory may have a purely procedural explanation. Section 5501 of New York’s Civil Practice Law and Rules provides that an appeal brings up for review “any charge to the

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123. *Id.* at 579-80, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 (quoting *Caprara v. Chrysler*, 52 N.Y.2d 114, 123, 417 N.E.2d 545, 549, 436 N.Y.S.2d 251, 255 (1981)).

124. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 580, 436 N.E.2d at 186, 450 N.Y.S.2d at 780. See *supra* notes 45-77 and accompanying text for a discussion of theories of liability proposed for use in the DES context.

125. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 580, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

126. *Id.* at 576, 436 N.E.2d at 183, 450 N.Y.S.2d at 777.

127. *Id.* at 581, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

128. *Id.* at 576, 436 N.E.2d at 183, 450 N.Y.S.2d at 777.

129. *Id.* at 585, 436 N.E.2d at 188, 450 N.Y.S.2d at 782.

jury, or failure or refusal to charge as requested by the appellant, to which he objected.”<sup>130</sup> Section 4017 further provides that “[f]ailure to . . . make known objections . . . may restrict review upon appeal . . . .”<sup>131</sup> The court of appeals, struggling with a huge caseload,<sup>132</sup> cannot be expected to knowingly expand its scope of review to embrace issues not properly raised on appeal.

Although the precedential value of the court of appeals decision in *Bichler* remains open to question, there are oblique indications in the opinion which suggest that New York will remain a sympathetic forum for a DES plaintiff who relies on the concerted action theory. First, the court’s express declaration that “[p]roducts liability law cannot be expected to stand still where innocent victims face inordinately difficult problems of proof”<sup>133</sup> indicates the court’s willingness to entertain new theories or, as in *Bichler*, new applications of old theories.<sup>134</sup> Furthermore, the court found that there was sufficient evidence of conscious parallelism among the first group of companies who sought approval of the use of DES for problems of pregnancy in 1947 and 1948, basing its finding on the facts that the companies filed their applications within a short span of time, relied on the same studies, and requested approval for the same dosages.<sup>135</sup> Moreover, the court found that Lilly’s participation in this first wave of filings could fairly be found by the jury to substantially encourage the other companies who subsequently manufactured

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130. N.Y. CIV. PRAC. LAW § 5501(a)(3) (McKinney 1978). See *supra* note 104.

131. N.Y. CIV. PRAC. LAW § 4017 (McKinney Supp. 1981). See *Guaspari v. Gorsky*, 29 N.Y.2d 891, 891-92, 278 N.E.2d 913, 914, 328 N.Y.S.2d 679, 680 (1972); *Miles v. R. & M. Appliance Sales*, 26 N.Y.2d 451, 454, 259 N.E.2d 913, 916, 311 N.Y.S.2d 491, 494 (1970).

132. Margolick, *Top State Court Is Called Unable to Perform Role*, N.Y. Times, July 30, 1982, at 1, col. 2.

133. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 579-80, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 (quoting *Caprara v. Chrysler*, 52 N.Y.2d 114, 123, 417 N.E.2d 545, 549, 436 N.Y.S.2d 251, 255 (1981)).

134. See *supra* note 47 and accompanying text.

135. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 585, 436 N.E.2d at 188-89; 450 N.Y.S.2d at 782-83. The appellate division had relied on the conduct of the manufacturers over the period of time beginning with the initial filings in 1939. See *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 321-22, 436 N.Y.S.2d 625, 628. *Contra, e.g.*, *Morton v. Abbott Laboratories*, 538 F. Supp. 593, 597-98 (summary judgment granted on a finding of no concerted activity in the 1947 filings).

and marketed DES for the same purpose in 1953,<sup>136</sup> the year the drug was ingested by plaintiff's mother.<sup>137</sup>

### C. *Analysis of Ramifications of Bichler*

The precedential value of the use of the concerted action theory in DES cases must remain unclear. Until the court of appeals deals with a case in which the issues have been fully preserved for its examination, its endorsement of the theory is questionable. Nevertheless, its decision represents a significant development in products liability law.

The most obvious result of this decision is that a New York plaintiff, unlike her counterparts in California and Michigan, need not join all or even most DES manufacturers; one defendant is enough.<sup>138</sup> This frees the New York plaintiff from the necessity of serving out-of-state defendants or trying to assert jurisdiction over them, and from the expensive, time-consuming business of determining which of the hundreds of DES manufacturers might have supplied the relevant geographical area at the time of ingestion. The defendant may be held liable for the entire judgment even if it can prove that it did not manufacture the particular product ingested. Further, a manufacturer who made only one pill will be held fully liable.

At first glance, the *Sindell* court's shifting of the burden and limiting the extent of liability to market share seem to lead to a fairer result. The inequities which seem to result in *Bichler* are not really meaningful, however, in light of the nature of concerted action liability. Unlike alternative liability, which holds only one actor as truly culpable, under concerted action all the participants in a wrongful activity are considered as culpable as the actual producer of the product which inflicted the injury.<sup>139</sup> In a sense, the wrongful activity becomes the cause in fact, so that any participant in the activity is also a participant in the

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136. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d at 585, 436 N.E.2d at 189, 450 N.Y.S.2d at 783.

137. *Id.* at 578, 436 N.E.2d at 184, 450 N.Y.S.2d at 778.

138. See *supra* note 100 and accompanying text. The lone defendant may implead other manufacturers at the outset rather than go against them for contribution after the judgment. N.Y. CIV. PRAC. LAW § 1007 (McKinney 1976).

139. See *supra* note 89 and accompanying text.

causation of the injury.<sup>140</sup> On the practical level, the *Sindell* shifting of the burden will likely prove a hollow victory for defendants, since they face as insurmountable a problem in disproving cause in fact as plaintiffs face in proving it.<sup>141</sup>

Aside from the arguably unfair placement of liability on one manufacturer, the *Bichler* doctrine's most vulnerable element is the nature of the showing required to prove tacit agreement.<sup>142</sup> The conscious parallel activity of the drug companies is largely a function of standard industry practice, and probably the inevitable result of producing generically identical products. By holding the entire industry liable on the basis of this parallel conduct, the *Bichler* court is really endorsing a species of enterprise, or industry-wide, liability.<sup>143</sup> The court clearly feels that such extended liability is appropriate in certain circumstances, for much the same reasons that justify imposing strict liability. Since the manufacturer is often the only one who can know if a product is safe for its intended use, it is fair to hold it strictly liable, without proof of fault or privity. By the same reasoning, if all the manufacturers in an industry negligently produce identical, and identically defective, products, it is fair to extend liability across the whole industry. In adapting concerted action to the DES situation, the *Bichler* court furthers the original two-fold goals of the doctrine: to assure a deserving plaintiff of a remedy, and to deter dangerous group behavior.<sup>144</sup> By accepting plaintiff's bold adoption of a little-used theory,<sup>145</sup> the *Bichler*

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140. See *supra* note 51 and accompanying text.

141. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 601, 607 P.2d at 930, 163 Cal. Rptr. at 138.

142. See *supra* note 69 and accompanying text; see also Birnbaum, *DES Concert-of-Action Theory: New Cases Bring New Confusion*, NAT'L L.J., May 4, 1981, at 31, col. 1, col. 3.

143. See *supra* note 76. The court stops well short of imposing an industry-wide strict liability. By predicated liability on concerted tortious action (the industry-wide failure to test), the court preserves the element of fault which strict liability lacks. See *supra* note 95.

144. See *supra* note 49 and accompanying text.

145. See, e.g., *Steinberg v. Goldstein*, 51 Misc. 2d 825, 274 N.Y.S.2d 46 (1966), *aff'd*, 27 A.D.2d 955, 279 N.Y.S.2d 140 (1967), an action for assault, where plaintiff tried to allege concert of action liability against defendant's wife, who had merely driven defendant to and from the scene. The court, in wrestling with the elements of the concert of action theory, remarked upon the "dearth of case law in this jurisdiction on the question." *Id.* at 826, 274 N.Y.S.2d at 48.

court lifts the "shroud of anonymity"<sup>146</sup> which had protected the manufacturers of DES.

### V. Conclusion

In *Bichler*, the New York courts responded to the identification problem faced by the DES plaintiffs by allowing the concert of action theory to establish joint and several liability on an industry-wide basis. The *Bichler* courts accepted a showing of parallel conduct in the drug manufacturers' testing and marketing procedures as sufficient evidence of the tacit agreement element of concerted action. A drug manufacturer who produces a generic product may thus be found liable even if his own product did not cause the injury. To the extent that the lower court's opinion was affirmed by the court of appeals, the decision represents a significant development in products liability law.

*Andrea Riger Potash*

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146. *Bichler v. Eli Lilly & Co.*, 79 A.D.2d at 329, 436 N.Y.S.2d at 632.