Touro Law Review

Volume 8 | Number 3 Article 63

1992

Trial by Jury

federal courts, jury sequestration has no statutory predicate requiring sequestration during jury deliberations. Therefore, the trial judge may decline to sequester the jury without the defendant's consent.[1403] As in New York, it appears that there is no right to sequester the jury that is constitutionally guaranteed under the Federal Constitution.[1404] Under New York law, based on *Webb*, the defendant is given more protection than under federal law because a proper waiver of CPL section 310.10 is required before sequestration is denied.

SUPREME COURT, APPELLATE DIVISION

FOURTH DEPARTMENT

In re DES Market Share Litigation[1405]
(decided November 15, 1991)

The plaintiffs, children who sustained injuries caused by their mothers' ingestion during pregnancy of the drug diethylstilbestrol (DES), claimed that an order denying a trial by jury on the issue of "market share"[1406] violated their right to a jury trial pursuant to the New York State Constitution.[1407] The court held that because this was an action for money damages for personal injuries that raised an "issue of fact" and was a request for "legal relief,"[1408] the New York State Constitution[1409] required a jury trial.[1410]

1403. *See* Powell v. Spalding, 679 F.2d 163, 166 n.3 (9th Cir. 1982).

1404. *Id.* (citing Young v. Alabama, 443 F.2d 854, 856 (5th Cir. 1971), *cert. denied*, 405 U.S. 976 (1972)).

1405. 171 A.D.2d 352, 578 N.Y.S.2d 63 (4th Dep't 1991), *aff'd*, No. 87, 1992 WL 60498 (N.Y. Apr. 1, 1992).

1406. *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 511-12, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, Rexall Drug Co. v. Tigue, 493 U.S. 944 (1989).

1407. *DES*, 171 A.D.2d at 354, 578 N.Y.S.2d at 64; N.Y. CONST. art. I, § 2.

1408. N.Y. CIV. PRAC. L. & R. § 4101(1) (McKinney 1963).

1409. N.Y. CONST. art. I, § 2.

1410. *DES*, 171 A.D.2d at 356, 578 N.Y.S.2d at 66.

The plaintiffs brought separate actions to recover money damages, which were assigned to the same trial court.[1411] The trial court consolidated the actions and severed the issue of market share[1412] for a separate trial without a jury; and this appeal followed.[1413] The defendants argued that in adopting the market share theory for the apportionment of damages for injuries allegedly sustained by the plaintiffs, where the manufacturer of the DES ingested is impossible to determine,[1414] the court of appeals created a form of equitable relief.[1415] In a three to two decision, a divided appellate division rejected the defendant's contention, and concluded that rather than creating an equitable remedy, the court of appeals "modified a legal cause of action by changing the rules of personal injury liability in order to 'achieve the ends of justice in a more modern context.'"[1416] Additionally, the court stated that the court of appeals attempted "to overcome 'the inordinately difficult problems of proof' caused by contemporary products and marketing techniques."[1417]

The court supported its conclusion on two separate, but related, grounds. First, the court noted that the New York State Constitution provides that "'[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever.'"[1418] Because the constitutional guarantee of a jury trial has been extended to those cases under the common law prior to 1777 where the substance of the relief

1411. *Id.* at 353-54, 578 N.Y.S.2d at 64.

1412. *Id.* at 354, 578 N.Y.S.2d at 64.

1413. *Id.*

1414. *See Hymowitz*, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949-50.

1415. *DES*, 171 A.D.2d at 354, 578 N.Y.S.2d at 65.

1416. *Id.* (quoting People v. Hobson, 39 N.Y.2d 479, 489, 348 N.E.2d 894, 901, 489, 384 N.Y.S.2d 419, 425 (1976)).

1417. *Id.* (quoting *Hymowitz*, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947; Bichler v. Lilly & Co., 55 N.Y.2d 571, 579-80, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982); Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123, 417 N.E.2d 545, 549, 436 N.Y.S.2d 251, 255 (1981)).

1418. *Id.* at 354, 578 N.Y.S.2d at 64 (quoting N.Y. CONST. art. I, § 2) (alteration in original).

was legal,[1419] and because products liability actions are analogous to common law personal injury actions for money damages, the court determined that the parties were entitled to a jury trial.[1420]

The court found another constitutional justification for a right to a jury trial on the issue of market share in that "'all cases to which the Legislature extended a right to a jury trial prior to 1894 come within the present constitutional guarantee in article I, § 2.'"[1421] Prior to 1894, "the Legislature provided for the right to a jury trial of 'an issue of fact' in an 'action to recover a sum of money only.'"[1422] That provision was continued in substance and is currently embodied in New York Civil Practice Law and Rules (CPLR) section 4101(1), which provides, in pertinent part, that "the issues of fact shall be tried by a jury [in] an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only . . . ."[1423] Because the plaintiffs were demanding and setting forth facts which would permit judgment for a sum of money only, and the legislation was enacted prior to 1894, the court concluded that "plaintiffs' causes of action [were] within the constitutional guarantee in article I, section 2 of the State Constitution."[1424] Thus, the issue of market share constituted an issue of fact in a legal cause of action and, therefore, required a jury trial.

Justice Lawton's dissent, joined by Justice Doerr, characterized market share as a "narrow preliminary issue that involves a party's status [as to which] there is no constitutional right to a jury trial,"[1425] because CPLR section 4101(1) applies only to the actual cause of action and not to preliminary matters.[1426]

1419. *See* Motor Vehicle Mfrs. Ass'n of United States v. State of New York, 75 N.Y.2d 175, 181, 550 N.E.2d 919, 921, 551 N.Y.S.2d 470, 472 (1990).

1420. *DES*, 171 A.D.2d at 354, 578 N.Y.S.2d at 65.

1421. *Id.* at 354, 578 N.Y.S.2d at 65 (quoting *Motor Vehicle Mfrs. Ass'n*, 75 N.Y.2d at 181, 550 N.E.2d at 921, 551 N.Y.S.2d at 472).

1422. *Id.* at 355, 578 N.Y.S.2d at 65 (citations omitted).

1423. N.Y. CIV. PRAC. L. & R. § 4101(1) (McKinney 1963).

1424. *DES*, 171 A.D.2d at 355, 578 N.Y.S.2d at 66 (Lawton, J., dissenting).

1425. *Id.* at 356, 578 N.Y.S.2d at 66 (Lawton, J., dissenting).

1426. *Id.* (Lawton, J., dissenting).

Because plaintiffs were entitled to a jury trial on the essential elements of their "causes of action, viz., defect, causation and damages,"[1427] the dissenters concluded that the plaintiffs were not denied their constitutional right to a jury trial.[1428]

The right to a jury trial in civil actions under the New York State Constitution is separate and independent from the federal right. The federal right, guaranteed by the Seventh Amendment of the United States Constitution,[1429] applies only to federal courts and is not extended to state courts.

Although federal courts have not had the occasion to resolve the specific issue of whether the United States Constitution requires a jury trial on the issue of market share in DES litigation, there exists a full body of federal law on the issue of the right to a jury trial. Under the United States Constitution, federal litigants have a right to trial by jury "[i]n suits at common law, where the value in controversy shall exceed twenty dollars . . . ."[1430] In a long line of decisions, the Supreme Court has construed "common law" in the Seventh Amendment to refer to the jurisdiction of English common law courts in 1791, the year the amendment was ratified.[1431] Moreover, the Federal Rules of Civil Procedure provide that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . .

1427. *Id.* at 356, 578 N.Y.S.2d at 66 (Lawton, J., dissenting).

1428. *Id.* (Lawton, J., dissenting).

1429. U.S. CONST. amend. VII. ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.")

1430. *Id.*

1431. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531 (1970) (holding that, historically, the seventh amendment requires a jury trial in a derivative suit in federal court); Thompson v. Utah, 170 U.S. 343 (1898) (stating that "the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . ."), *overruled by* Williams v. Florida, 399 U.S. 78 (1970); Charles W. Wolfrour, *The Constitutional History of the Seventh Amendment* 57 MINN. L. REV. 639, 640 (1973) (explaining that the "Historical Test" requires that "[i]f the case is one of those in which a jury would not have sat -- in England in 1791 -- then none is required by the seventh amendment").

shall be preserved to the parties inviolate."[1432]

Similar to the New York State Legislature, Congress has created many causes of action that were unknown to English common law in 1791. In determining whether a constitutional right to a jury trial exists for such statutory causes of action, federal courts, similar to New York courts, determine whether the issue at hand is analogous to a common law cause of action.[1433] In addition, the Supreme Court has concluded that when a "complaint requests a money judgment it presents a claim which is unquestionably legal."[1434] Therefore, if we apply the federal court analysis to DES, a product liability action is analogous to a common law personal injury action for money damages and, therefore, the United States Constitution would appear to require a jury trial on the issue of market share in DES litigation.

In the federal arena, following *Beacon Theaters v. Westover*[1435] and its progeny,[1436] "[t]he Seventh Amendment . . . [right to a jury trial] depends on the nature of the issue to be tried rather than the character of the overall action."[1437] In *Ross v. Bernhard*,[1438] the most recent of the Supreme Court decisions in the *Beacon Theaters* line of cases, the Court may have broadened the civil right to a jury trial in federal courts. The Court, in *Ross*, outlined a three part test for determining when a jury trial is appropriate.[1439] The third criterion of this test is "the

1432. FED. R. CIV. P. 38.

1433. *See, e.g.*, Tull v. United States, 481 U.S. 412 (1987) (holding that in a suit brought under the Clean Water Act, plaintiff was entitled to a jury trial pursuant to the seventh amendment because the action was analogous to an English common-law civil penalty suit).

1434. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962).

1435. 359 U.S. 500 (1959).

1436. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970).

1437. *Ross*, 396 U.S. at 538; *see Dairy Queen*, 369 U.S. at 472-73.

1438. 396 U.S. 531 (1970).

1439. *Id.* at 538 n.10. The Court stated that: "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such question; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.*

practical abilities and limitations of juries . . . ."[1440] Although this seems to be a fairly straightforward consideration, the Supreme Court has failed to expand upon the significance of this criterion. The federal circuit courts, therefore, have been less than consistent when confronted with this issue, and its significance remains vague.

Although federal precedent is not binding on state courts in the area of a civil right to a jury trial, it may nonetheless have persuasive value on state court decisions. In the present case, however, the court did not consider federal law. It is interesting to speculate, however, on how this third consideration would be viewed by the New York courts. Based on the appellate division's decision, it seems likely that this criterion would have no application under the New York State Constitution because of the independent requirements that have been adopted by the New York State Legislature.

1440. *Id.*