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# Trial by Jury

# TRIAL BY JURY

*N.Y. CONST. art. I, § 2:*

*Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . .*

*N.Y. CONST. art. I, § 6:*

*In any trial in any court whatever the party accused shall be allowed to appear and defend in person . . . and shall be informed of the nature and the cause of the accusation . . . .*

*. [W]aiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel.*

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .*

## COURT OF APPEALS

*In re* DES Market Share Litigation[1997]
(decided March 31, 1992)

Defendants, manufacturers of diethylstilbestrol (DES), a synthetic hormone marketed for the prevention of miscarriages in pregnant women, claimed that plaintiffs, daughters who sustained injuries caused by their mothers' ingestion of DES during pregnancy, were not entitled to a jury trial pursuant to the New York State Constitution[1998] on the issue of "market share."[1999] The

1997. 79 N.Y.2d 299, 591 N.E.2d 226, 582 N.Y.S.2d 377 (1992).

1998. *See* N.Y. CONST. art. I, § 2 (providing in pertinent part that "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever").

court of appeals held that a market share approach to liability is neither an equitable remedy,[2000] nor preliminary or collateral,[2001] but instead is part of "plaintiffs' cause of action for money damages," and as such, plaintiffs are entitled to a jury trial.[2002]

After the court of appeals' decision in *Hymowitz v. Eli Lilly & Co.*,[2003] the market share issue in DES cases pending in New York courts was severed and consolidated for trial.[2004] Plaintiffs requested a jury trial of the market share issue. The trial court denied their request, stating that since the market share theory was a remedy unknown at common law, plaintiffs had no right to a jury trial.[2005] The trial court also held that the market share trial was more like a pretrial proceeding.[2006] In a 3-2 decision, the appellate division reversed the trial court's decision, holding that the market share theory is not a form of equitable relief, as defendants argued, but a modification of a preexisting legal basis for relief.[2007] The court of appeals, in affirming the appellate division, traced the history of the right to a jury trial in a civil proceeding as provided in article I, section 2 of the New York

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1999. *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 (holding that where identification of a particular DES manufacturer is impossible, apportioning liability on the basis of percentage of national market is an equitable means of providing plaintiffs with relief, while fairly distributing responsibility among defendants), *cert. denied*, Rexall Drug Co. v. Tigue, 493 U.S. 944 (1989).

2000. *DES Market Share*, 79 N.Y.2d at 306, 591 N.E.2d at 230, 582 N.Y.S.2d at 381.

2001. *Id.* at 307, 591 N.E.2d at 230-31, 582 N.Y.S.2d at 381-82.

2002. *Id.* at 307-08, 591 N.E.2d at 231, 582 N.Y.S.2d at 382.

2003. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, Rexall Drug Co. v. Tigue, 493 U.S. 944 (1989).

2004. *DES Market Share*, 79 N.Y.2d at 303, 591 N.E.2d at 228, 582 N.Y.S.2d at 379.

2005. *Id.*

2006. *Id.* at 303-04, 591 N.E.2d at 228, 582 N.Y.S.2d at 379.

2007. *Id.* at 304, 591 N.E.2d at 228, 582 N.Y.S.2d at 379.

State Constitution[2008] to determine that plaintiffs were entitled to a jury trial on the market share issue.[2009]

The Constitution of 1777 embodied the right to trial by jury as it existed at that time in common law,[2010] where the nature of the relief requested was legal, not equitable.[2011] The language of subsequent Constitutions of 1821, 1846, and 1894 extended constitutional protection to the right to a jury trial "guaranteed by statute between 1777 and 1894."[2012]

As it now stands, the language of the 1938 Constitution guarantees the right to a jury trial in cases where a jury trial would have been granted under the common law before 1777, and in cases guaranteed a jury trial by statute between 1777 and 1894.[2013] However, the constitutional right to a jury trial extends not only to cases recognized as of 1894, but also to new cases "analogous to those traditionally tried by a jury."[2014] The court also noted that in addition to constitutional protection, the right to a jury trial is codified in New York Civil Practice Law and Rules (CPLR) section 4101(1).[2015]

In rejecting defendants' argument that the market share theory is a new equitable remedy unknown at common law, the court

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2008. N.Y. CONST. art. I, § 2.

2009. *DES Market Share*, 79 N.Y.2d at 304, 591 N.E.2d at 228-29, 582 N.Y.S.2d at 379-80.

2010. *Id.* at 304, 591 N.E.2d at 229, 582 N.Y.S.2d at 380.

2011. *See* Motor Vehicle Mfrs. Ass'n v. State, 75 N.Y.2d 175, 181, 550 N.E.2d 919, 921, 551 N.Y.S.2d 470, 472 (1990).

2012. *DES Market Share*, 79 N.Y.2d at 304, 591 N.E.2d at 229, 582 N.Y.S.2d at 380. *See also In re* Luria's Estate, 63 Misc. 2d 675, 677, 313 N.Y.S.2d 12, 14 (Sur. Ct. King's County 1970).

2013. *DES Market Share*, 79 N.Y.2d at 304, 591 N.E.2d at 229, 582 N.Y.S.2d at 380. *See also Motor Vehicle Mfrs. Ass'n*, 75 N.Y.2d at 181, 550 N.E.2d at 921, 551 N.Y.S.2d at 472.

2014. *DES Market Share*, 79 N.Y.2d at 305, 591 N.E.2d at 229, 582 N.Y.S.2d at 380. *See also* Colon v. Lisk, 153 N.Y. 188, 193, 47 N.E. 302, 303 (1897); Independent Church of the Realization of the Word of God, Inc. v. Board of Assessors, 72 A.D.2d 554, 420 N.Y.S.2d 765 (2d Dep't 1979).

2015. N.Y. CIV. PRAC. L. & R. § 4101(1) (McKinney 1992) (providing in pertinent part that "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 . . . .").

stated that "*Hymowitz* simply relaxed the DES plaintiffs' burden of proof on that portion of the causation requirement which would have obligated the plaintiffs to establish the identity of the manufacturer of the drug their mothers ingested."[2016] By alleviating the plaintiffs' almost impossible task of identifying a particular DES manufacturer, the market share theory aids the plaintiffs on the issue of causation. However, even though plaintiffs do not need to prove which defendants' DES was involved, identification is still an issue to be resolved in a trial since market share must be shown before damages can be apportioned.[2017] Consequently, the court held that market share is only an issue within plaintiffs' legal cause of action for money damages, and plaintiffs are thus entitled to a jury trial pursuant to article I, section 2 of the New York State Constitution and CPLR 4101.[2018]

Although there is also a federal right to a jury trial in a civil action,[2019] it should be noted that the right to a jury trial in a civil action afforded by a state constitution is distinct and separate from the federal right. The Supreme Court has held that the Seventh Amendment right to a jury trial is not applicable to state courts.[2020] Yet, the analysis used by the Supreme Court when determining whether a jury trial is required is similar to that used by the New York Court of Appeals in *DES Market Share*. The

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2016. *DES Market Share*, 79 N.Y.2d at 306, 591 N.E.2d at 230, 582 N.Y.S.2d at 381.

2017. *Id.* at 306-07, 591 N.E.2d at 230, 582 N.Y.S.2d at 381.

2018. *Id.* at 307-08, 591 N.E.2d at 231, 582 N.Y.S.2d at 382.

2019. *See* U.S. CONST. amend. VII (providing that "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 a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); FED. R. CIV. P. 38 (providing that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate").

2020. *See* Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916) ("[T]he Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same.").

Seventh Amendment "require[s] a jury trial on the merits in those actions that are analogous to 'Suits at common law.'"[2021] The Supreme Court has also concluded that when a "complaint requests a money judgment it presents a claim which is unquestionably legal."[2022] Additionally, whether a jury trial is required in a federal court "depends on the nature of the issue to be tried rather than the character of the overall action."[2023]

## People v. Callahan[2024]
(decided October 27, 1992)

This case was a consolidation of the appeals of three defendants[2025] who sought to appeal guilty pleas which included a bargained-for waiver of the right to appeal. Defendant Sutton claimed that his bargained-for waiver was invalid because impaired his ability to obtain review of his right to a speedy trial, as guaranteed by the state[2026] and federal[2027] constitutions, as a

2021. Tull v. United States, 481 U.S. 412, 417 (1987) (quoting U.S. CONST. amend VII).

2022. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962).

2023. Ross v. Bernhard, 396 U.S. 531, 538 (1970). The Court also stated that "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at n.10.

2024. 80 N.Y.2d 273, 604 N.E.2d 108, 590 N.Y.S.2d 46 (1992).

2025. Defendant Callahan's appeal is not addressed here because he did not claim that his bargained-for waiver violated the New York State Constitution. The court of appeals stated that while defendant Callahan categorized his challenge as questioning the legality of the sentence, in reality, he was questioning the adequacy of procedures used by the court to determine the sentence. *Id.* at 278, 604 N.E.2d at 110, 590 N.Y.S.2d at 49. The court found that appeals based upon challenges to procedures used in the determination of a sentence are waived if not raised before the trial court, as provided by Criminal Procedure Law section 470.05. *Id.* at 281, 604 N.E.2d at 112-13, 590 N.Y.S.2d at 50-51 (citing N.Y. CRIM. PROC. LAW § 470.05 (McKinney 1983)). The court held that the defendant "voluntarily and intelligently" waived the right to appeal by entering his guilty plea. *Id.* at 281, 604 N.E.2d at 112-13, 590 N.Y.S.2d at 50-51.

2026. N.Y. CONST. art. I, § 6.