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COURT URGED NOT TO EXPAND TORT SUITS BY ADOPTING "MARKET SHARE" LIABILITY

(Hamilton v. Fox)

The Washington Legal Foundation (WLF) last week asked the New York Court of Appeals (New York's highest court) not to subscribe to a radically expanded view of tort law liability by adopting a "market share" theory of liability in run-of-the-mill tort cases.

In a brief filed in *Hamilton v. Fox*, WLF argued that "market share" liability undermines a bedrock principle of tort law that a manufacturer can be held liable in product liability actions only when the plaintiff can demonstrate that the manufacturer actually made the product that injured the plaintiff. Under a "market share" theory of liability, plaintiffs seek to impose liability on a manufacturer based on its share of the market for the product in question when there is no evidence regarding which manufacturer's product caused the injury.

WLF argued that to the extent that market share liability is *ever* imposed, it should be limited to situations in which the plaintiff can demonstrate: (1) proof of a close causal connection between the allegedly defective product and the plaintiff's injury; and (2) proof that all products within the market at issue present the identical risk of injury. WLF argued that "market share" liability has never been applied outside of DES pregnancy cases. In such cases, some courts have permitted the children of mothers who ingested the drug DES during pregnancy (but who did not recall which drug company made the pills they took) to sue all drug manufacturers based on a "market share" theory of liability. WLF argued that "market share" liability should not be applied in cases arising outside of the unusual factual setting of the typical DES case.

This case arose from the shooting and wounding of Stephen Fox by his friend, Alfred Adkins. Adkins has pleaded guilty to criminal charges. The gun used in the shooting has never been found, and its make is unknown. The bullet suggests that the weapon was likely a .25 caliber handgun.

Fox filed suit in federal district court in New York against all major makers of .25 caliber handguns. His theory was that the manufacturers had distributed their products in a negligent manner, with the result that the gun got into the hands of Adkins, who should not have had a gun. After trial, the jury found three manufacturers liable for

Fox's injuries, based on a "market share" theory of liability. The trial judge apportioned the \$4 million damages verdict among the three manufacturers found liable, based on their respective shares of the .25 caliber handgun market.

The manufacturers appealed that judgment to the U.S. Court of Appeals for the Second Circuit. The Second Circuit in turn "certified" the market share liability question to the New York Court of Appeals: it asked the New York court to determine whether New York tort law recognizes market share liability under the facts of this case. WLF filed its brief in an effort to assist the New York Court of Appeals in answering that question.

WLF argued that it would be wholly inappropriate to apply market share liability to this case because not all .25 caliber handguns are marketed in precisely the same manner, and there was no close causal relationship between the defendants' allegedly tortious conduct and the injury suffered by Fox. WLF argued that the criminal acts committed by Adkins (his intentional shooting of Fox) broke whatever causal connection might otherwise have existed between the defendants' marketing practices and Fox's injuries.

WLF filed its brief with the *pro bono* assistance of Barry R. Ostrager, Mary Beth Forshaw, and Gerald E. Hawxhurst of the New York law firm of Simpson, Thacher & Bartlett.

WLF is a public interest law and policy center with supporters in all 50 states, including New York. It devotes a significant portion of its resources to defending the rights of businesses who have become the target of unwarranted government regulation.

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