University of Baltimore Law Review

Volume 11
Issue 1 *Fall 1981*

Article 4

1981

Comment: Complex Federal Civil Litigation—Can Jury Trials Be Constitutionally Avoided?

Deidre W. Bastian Lee

Eugenia Cooper Wootton
University of Baltimore School of Law

COMMENT

COMPLEX FEDERAL CIVIL LITIGATION— CAN JURY TRIALS BE CONSTITUTIONALLY AVOIDED?

The seventh amendment to the United States Constitution affords the right to a jury trial to parties to a common law action when the value in controversy exceeds twenty dollars. In a select group of extremely lengthy cases involving complex factual and legal issues, however, several United States appellate and district courts have refused to permit trial by jury. This comment reviews and evaluates different theories that may be applied to preclude the granting of a jury trial. In addition, guidelines are proposed that may be utilized by a federal district court judge in determining whether a case is so complex and lengthy that a request for a jury trial should be denied.

I. INTRODUCTION

In December 1970, an American producer of consumer electric products filed a suit in a United States district court alleging antitrust violations against eight Japanese manufacturing companies and nine subsidiaries.[1] Four years later, a second plaintiff filed another suit naming, in addition to the same defendants, two American companies and five Japanese subsidiaries. The two actions were joined. Almost 100 alleged co-conspirators, representing dozens of Japanese companies and international industrial giants, were named in the consolidated action in which the plaintiffs claimed a world-wide conspiracy lasting over thirty years.[2] Among the defendants' responses were counterclaims based on three distinct theories.[3]

---

1. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
2. *Id.* at 893. The plaintiffs alleged violations of the following: (a) §§ 1 & 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976); (b) § 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1976); (c) the 1916 Revenue Act, 15 U.S.C. § 72 (1976) (a statute never construed in a trial situation in its 64 year history); (d) the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976); and (e) § 7 of the Clayton Act, 15 U.S.C. § 18 (1976). Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 893-94 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
3. The counterclaims involved the following: (1) counter-violations of the Robinson-Patman Act and §§ 1 & 2 of the Sherman Act; (2) interference with competitors; and (3) violation of the Lanham Act, 15 U.S.C. §§ 1051-1127 (1976 & Supp. IV 1980). Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 894-95 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

By 1979, most of the pretrial discovery had been completed.[4] Over the nine-year period, 20 million documents were produced, many of which had to be translated from Japanese. Pretrial conferences consumed three days each month, deposition transcripts numbered more than 100,000 pages, interrogatories came in "wave after wave," and the pretrial memoranda totalled 410 pages.

The plaintiffs demanded a jury trial and the defendants moved to strike the demand[5] based on the contention that the case was so complex that it was "beyond the practical abilities and limitations of a jury."[6] On June 6, 1979, a federal district court judge denied the defendants' motion.[7] On interlocutory appeal, the court of appeals reversed the district court, holding that a jury trial should be denied when the jury is unable to understand the evidence and issues and perform its task of rational decision making.[8] The court of appeals remanded the case to the district court for consideration of the degree of complexity of the case and whether a jury was capable of rationally deciding the case.[9] An adjudication on the merits, estimated to last one year,[10] has yet to occur.

The recurrence of cases similar to the one described above[11] forces the legal community to question the feasibility of juries in complex civil litigation.[12] Of particular concern are the problems a

---

4. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 895 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
5. *Id.* at 892 n.1.
6. *Id.* at 892. The defendants' proposed sample interrogatory illustrates the complexity of the case. In reference to the conspiracy claims alone, the interrogatories to be submitted to the jury in reference to each of 24 defendants contained 23 subparts. In reference to the entire action, the jury could be asked over 15,000 separate interrogatories for each relevant product market. *Id.* at 898.
7. *Id.* at 892.
8. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
9. *Id.* at 1091.
10. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 897 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
11. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978). *Bernstein* involved a class action in which there were 71 originally named plaintiffs and 16 defendants. Estimating the class of plaintiffs to be as large as 1,100, the plaintiffs asserted that, because each class member had to prove his own injuries and damages separately, over 1,000 mini-trials would be required. *Id.* at 62.
12. Examples of cases considered to be too complex to be fairly adjudicated by a jury are listed in the Chart, notes 290-309 and accompanying text *infra*. "Complexity" has been defined by the United States Court of Appeals for the Third Circuit as follows:

> A suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner. The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.

In re Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1079 (3d Cir. 1980).

typical juror may encounter in absorbing and assimilating thousands of documents and understanding intricate factual and legal issues. In addition to these practical concerns, a jury trial may act as an abridgement of the right to a fair trial and the guarantee of due process.[13] Therefore, if it is apparent that the trial will exceed the jury's capability, a review of the scope of the seventh amendment right to a jury trial[14] becomes mandatory.

In *Ross v. Bernhard*,[15] the United States Supreme Court noted that the capabilities of juries is one factor to be considered in deciding whether the seventh amendment applies and a jury trial should be allowed.[16] The implications of the *Ross* opinion, specifically the importance of jury capability in deciding whether to have a jury trial, is an issue "that strikes at the heart of this country's system of jurisprudence."[17] Federal courts of appeals[18] and district courts,[19] however, have dealt with this aspect of *Ross* in-

---

13. *See* notes 187-231 and accompanying text *infra*.
14. The seventh amendment provides:
    > 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 re-examined in any Court of the United States, than according to the rules of the common law.

    U.S. CONST. amend. VII.
15. 396 U.S. 531 (1970).
16. *Id.* at 538 n.10.
17. *In re* United States Financial Sec. Litigation, 609 F.2d 411, 413 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
18. *Compare In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980) (recognized that *Ross* limits the range of suits subject to the seventh amendment but did not use *Ross* as its basis for holding that jury trials should not be permitted in complex civil litigation) *with In re* United States Financial Sec. Litigation, 609 F.2d 411 (9th Cir. 1979) (held that complex cases did not constitute an exception to the seventh amendment right to a jury trial), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
19. The following United States district courts have applied *Ross* and have denied a jury because the case was so complex: ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); Polstorff v. Fletcher, 430 F. Supp. 592 (N.D. Ala. 1977); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980); Securities & Exch. Comm'n v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976).

    The following district courts have applied *Ross* and have allowed a jury because the case was not too complex for a jury to understand: Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977); Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977).

    At least one United States district court has held that, despite the complexity of the case, the Constitution allows a party the right to trial by jury. *See In re* IBM Peripheral EDP Devices Antitrust Litigation, 459 F. Supp. 626 (N.D. Cal.), *aff'd sub nom.* Transamerican Computer Co. v. International Business Machs. Corp., 573 F.2d 646 (9th Cir. 1978).

consistently, because the Supreme Court has yet to define *Ross* and the limits of the seventh amendment more clearly.[20] In order to alleviate disparate treatment by the federal courts, the Supreme Court must specify the meaning of this factor of *Ross* and give the courts manageable standards to follow in determining whether a jury trial is constitutionally required.

This comment evaluates the legal bases and policy considerations for a flexible approach to the propriety of a trial by jury in complex civil litigation. In addition, guidelines for application of the *Ross* test to a limited number of complex, lengthy cases are suggested.

II. MANDATE AND SCOPE OF THE SEVENTH AMENDMENT

A. The Origin of the Seventh Amendment

The seventh amendment preserves the right to trial by jury "in Suits at common law, where the value in controversy shall exceed twenty dollars."[21] In accordance with a literal interpretation of this mandate, the traditional view has been that unless a suit is brought in equity, admiralty, or pursuant to certain federal statutes,[22] either party has the right to demand a trial by jury.[23]

The common law concept of a jury, which was embodied in the Magna Carta, was that of a body of laymen selected either by lot or by some other impartial and fair means.[24] In both criminal and civil proceedings, the jurors' duty was to make factual determinations under the guidance of a judge.[25] This delineation of the jurors' responsibilities was preserved by the courts of England as

---

20. The Supreme Court recently refused to hear a case in which the effect of complexity on the seventh amendment issue was raised. *In re* United States Financial Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). In addition, there has been at least one instance subsequent to *Ross* when jury capability was argued in the lower court but not addressed when the case reached the Supreme Court. Rogers v. Loether, 467 F.2d 1110, 1118 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).
21. U.S. CONST. amend. VII. See note 14 *supra* for entire text of the amendment.
22. In addition, jury trials are not required in the following proceedings: eminent domain proceedings, United States v. Reynolds, 397 U.S. 14, 18-19 (1970); actions for civil contempt, Shillitani v. United States, 384 U.S. 364, 371 (1966); certain bankruptcy proceedings, Katchen v. Landy, 382 U.S. 323, 336-38 (1966); and actions to enforce arbitration awards, Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 373 F.2d 136, 142 (8th Cir.) (parties deemed to have waived right to jury trial), *cert. denied*, 389 U.S. 827 (1967).
23. *See* Curtis v. Loether, 415 U.S. 189, 192 (1974); Katchen v. Landy, 382 U.S. 323, 336-37 (1966); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Webster v. Reid, 52 U.S. (11 How.) 437, 459-60 (1850).
24. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1945); *see* Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 254-55 (1892).
25. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

an inherent part of the common law definition of a jury trial and was subsequently incorporated into the seventh amendment to the United States Constitution by the first Congress in 1791.[26]

Contrary to the prevailing notion that the original function of a jury was solely to protect litigants from the decisions of a corrupt judge,[27] the right to trial by jury was protected by the framers for two other equally important reasons.[28] First, the jury trial was a proceeding devised to protect debtors from inflated claims of British creditors[29] and second, it was intended to frustrate legislators from passing new tax laws that would specifically prohibit juries from adjudicating any tax protests.[30] The latter two protections have become obsolete, leaving only the fear of a corrupt judge as a valid reason for preserving the right to a jury trial, as that right was envisioned by the framers. Today, in complex civil litigation, another fear is arbitrary decision making by a jury. As the United States Court of Appeals for the Third Circuit noted, "A jury that cannot understand the evidence and legal rules to be applied provides no reliable safeguard against erroneous decisions."[31] Rigid adherence to the jury trial mandate in complex civil cases therefore increases the likelihood for specious decision making.

B. The Scope of Equity Jurisdiction

In addition to noting the common law purposes of a jury, it is important to ascertain the scope of equity jurisdiction because the right to trial by jury is not constitutionally guaranteed in courts of equity.[32] This rule originated in the United States Circuit Court for the District of Massachusetts when Judge Story construed the

---

26. *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 725-26 (1973) [hereinafter cited as Wolfram]. Little evidence can be gleaned, however, from debates of the constitutional conventions as to the intent of the Framers of the Constitution. *See* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 48 (1977) [hereinafter cited as Higginbotham].
27. Wolfram, *supra* note 26, at 708-10. *See also* THE FEDERALIST No. 83, at 562-63 (J. Cooke ed. 1965) (A. Hamilton), which indicates that both federalists and anti-federalists agreed that a jury trial was advisable for this reason.
28. *See* Wolfram, *supra* note 26, at 670-71.
29. *Id.* at 673-705. *See also* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).
30. Wolfram, *supra* note 26, at 705-08. *See also* THE FEDERALIST No. 83, at 561 (J. Cooke ed. 1965) (A. Hamilton), in which Hamilton discusses whether the absence of a jury trial guarantee would enhance the possibility of oppressive taxation. He concludes that a jury would be helpless to prevent unjust government taxation for several reasons: a jury could have no influence over the legislature as to the amount of taxes; taxes were usually levied in summary proceedings, which did not provide for juries; and improper conduct by revenue officers was taken care of through criminal proceedings. *Id.*
31. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1084 (3d Cir. 1980). The court also noted that if the jury is unable to function rationally and consistently with the law, it could become an arbitrary and unpredictable decision maker. *Id.*
32. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

seventh amendment right to extend only to those actions which would have been heard in the common law courts of England in 1791.[33] This proposition was expanded by the Supreme Court in *Parsons v. Bedford*:[34] "By common law, [the framers] meant . . . not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . ."[35] In accordance with *Parsons*, if a case, because of its complexity, is deemed to involve equitable rights or remedies, the seventh amendment right to trial by jury would not apply.

The determination of whether certain actions fall within the bounds of equity jurisdiction has evolved to the point where at least three different tests are applied by federal courts: (1) the historical test; (2) the adequacy of legal remedy test; and (3) the *Ross* test. An evaluation of each of these tests and their relationship to each other is essential to any seventh amendment inquiry.

1. The Historical Test

a. A Strict Approach

Under a strict historical test, all actions are triable before a jury except those in equity, admiralty, or maritime, as those actions existed in 1791.[36] Therefore, to ascertain what common law actions fall within an equity court's jurisdiction, courts look to the division between law and equity as it existed in England in 1791, the year the seventh amendment was adopted.[37] In addition to classifying as equitable those common law actions which were heard in English courts of equity in 1791, the historical test recognizes that the right to trial by jury also may be granted or denied in a federal statutory cause of action.[38] And, if a federal statute

33. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

34. 28 U.S. (3 Pet.) 433 (1830).

35. *Id.* at 447. *Accord,* Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 449 (1977); Pernell v. Southall Realty, 416 U.S. 363, 374-75 (1974); Ross v. Bernhard, 396 U.S. 531, 533 (1970).

36. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830); *In re* United States Financial Sec. Litigation, 609 F.2d 411, 421-22 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

37. This proposition was first announced in United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). *Accord,* Dimick v. Schiedt, 293 U.S. 474, 476 (1935); *In re* United States Financial Sec. Litigation, 609 F.2d 411, 421 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). *But cf.* Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 669 (1935) (seventh amendment construed to include common law of United States, not of England). *See also* Wolfram, *supra* note 26, at 734.

38. *See, e.g.,* Curtis v. Loether, 415 U.S. 189, 193-94 (1974); Duignan v. United States, 274 U.S. 195, 198 (1927); *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1078 (3d Cir. 1980); *In re* United States Financial Sec. Litigation, 609 F.2d 411, 422 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980); FED. R. CIV. P. 38(a) ("The right of trial by jury . . . as given by a statute of the United States shall be preserved to the parties inviolate.").

does not specifically indicate whether to allow a jury trial, courts will look to the nearest historical analogy[39] to the statutory cause of action to ascertain whether a jury trial should be allowed.[40]

Although there is support for retaining the strict historical test,[41] there are inherent problems with this approach. First, the reasons for confining the seventh amendment inquiry to the common law as it existed in England in 1791[42] are unclear.[43] More im-

---

39. If a case concerns only one claim and no counterclaims are asserted, the action should be more readily deemed the same or analogous to one in existence in 1791. Liberal joinder rules, FED. R. CIV. P. 18, 19, 20, allow one or more parties and several claims and counterclaims to be joined in a single action, thereby making it more difficult to analogize the entire case to one existing in 1791.

40. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974) (jury allowed in action for repossession of real property brought under D.C. CODE ANN. §§ 16-1501 to -1505 (1973), because right to repossess real property was recognized at common law); Curtis v. Loether, 415 U.S. 189 (1974) (seventh amendment right applies in action for violation of the fair housing provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, 3604(a), 3612 (1976), because action was to enforce legal rights). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2302, 2316 (1971); James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 656 (1963) [hereinafter cited as James].

41. Arguments in favor of the strict historical test include: "(1) its greater protection of the jury trial right from inroads by active courts which would restrict the right; (2) the curb it would put upon equally active courts bent on enlarging the scope of jury trials; and (3) its greater certainty." James, *supra* note 40, at 664.

42. It is noteworthy, because of the seventh amendment's reliance on England's common law, that jury trials are largely nonexistent in civil trials in England today, except in suits alleging libel, slander, malicious prosecution, false imprisonment, or fraud. Ward v. James, [1965] 1 All E.R. 563 (C.A.). In 1918, because of the manpower shortage during the war, Parliament left the decision whether to grant a jury trial to the court's discretion, except in six specified categories of cases and actions based on fraud. *See* Juries Act, 1918, 8 & 9 Geo. 3, c. 23, § 1 (1918). The act was repealed seven years later. *See* Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 3, c. 49, § 99(1)(h) (1925). Forty years later, in Ward v. James, [1965] 1 All E.R. 563 (C.A.), trial by judge was asserted to be the normal mode of trial.

The two reasons that have been given for the disuse of juries in England are its gradual decline following World War I and the desirability of greater uniformity and predictability in verdicts. Uniformity among the damage awards for a particular class of injury is viewed as essential to justice, and it is believed that this uniformity can be better accomplished by a judge. Zander, *The Jury in England: Decline and Fall?*, in THE AMERICAN JURY SYSTEM 32-33 (1977). For a more thorough development of the decline of the jury system in England, see Delvin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 95 (1979) [hereinafter cited as Delvin]; Higginbotham, *supra* note 26, at 52.

43. It has been noted that "[n]o federal case decided after [United States v. Wonson, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750), see text accompanying note 33 *supra*] seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious." Wolfram, *supra* note 26, at 641, *cited with approval in In re* United States Financial Sec. Litigation, 609 F.2d 411, 419 n.21 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). Professor Wolfram discussed the debates prior to the adoption of the seventh amendment and concluded that "it is hardly 'obvious' that a reference to the common law of England at one particular point in time was the only satisfactory method of resolving the admitted differences in the jury trial practices in the states." Wolfram, *supra* note 26, at 710.

portantly, there was little correlation between the development of separate causes of action in law and equity and the granting and denying of trial by jury.[44] As explained by one commentator:

> At no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice between issues which were better suited to a court or jury trial. . . . The procedure of each tribunal had to be taken as a package, and each procedure had substantial limitations which the other did not share . . . .[45]

Finally, the most compelling argument against the application of the historical test is that it is temporally static.[46] The test ignores the Framer's intent to make the Constitution responsive to society's future needs.[47] As one federal district court judge explained, the test requires the courts to read "twentieth-century meanings into eighteenth-century terms."[48] In recognition of these shortcomings, the strict historical test should be applied with caution.

b. A Flexible Approach

Criticism of the strict historical test has led some courts to either reject it[49] or to use it only in conjunction with other tests.[50]

---

44. James, *supra* note 40, at 661-62; Wolfram, *supra* note 26, at 731; *see In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980), in which the court said,

> If developments since 1791 have so changed the character of a suit at law to make trial of particular suits to a jury unjust, then perhaps the historically recognized boundary between law and equity should not govern the extent of the seventh amendment right. If so, then deviations from this approach to the seventh amendment should be based on the current policies and present circumstances of the federal courts.

Id. at 1083.

45. James, *supra* note 40, at 661-62.
46. Professor Wolfram refers to this argument as "[t]he most objectionable feature of the historical test." Wolfram, *supra* note 26, at 731.
47. The test has been described by one commentator as "hardly seem[ing] consistent with the traditions of the principled constitutionalism that have guided the Supreme Court in the interpretation of other commands of the Bill of Rights." *Id.*
48. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 904-05 (E.D. Pa. 1979) (footnote omitted), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
49. *E.g., In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1078 (3d Cir. 1980) ("The Court has never relied on [a] static view of history to confine the seventh amendment guarantee to causes of action recognized by the common law of 1791.").
50. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506 (1959).

A flexible approach would look to factors other than solely whether an action was classified as legal or equitable in England in 1791. The Ninth Circuit, in *In re United States Financial Securities Litigation*,[51] recognized such an approach, stating that "the historical test is not static, rather it is more in the nature of an historical inquiry, an inquiry which is guided by the statutory expansion of legal rights, and the procedural developments which have both expanded and retracted the role of the civil jury."[52]

A flexible approach is preferable to a strict approach to the historical test because the common law rationales for classifying an action as one at law or in equity have largely dissipated.[53] Originally, rights and remedies were developed in courts of equity as an attempt to alleviate injustices imposed by the rigidity of the writ system in courts of law.[54] Today, the merger of law and equity in federal courts[55] allows a single judge, sitting in a single courtroom,

---

51. 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
52. *Id.* at 422-23. Professor Wolfram has labelled this the dynamic approach. Wolfram, *supra* note 26, at 745. Three reasons have been given to support the position that the framers of the seventh amendment intended to adopt a dynamic approach. First, "common law" could have meant the common law of the states. *Id.* at 734. Second, "[w]hat is said to be preserved is not the institution of jury trial as it then existed (or words to like effect), but rather the 'right' to jury trial." *Id.* at 735 (footnote omitted). Third, in 1791, "a commonly understood concept of 'common law' had become that of a process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures, rather than that of a fixed and immutable body of unchanging rules." *Id.* at 736 (footnote omitted). The author further notes that "[w]hat remains constant over the history of this process, however, is the tendency toward expansion and enrichment of the remedies provided by the law courts." *Id.* at 738 (footnote omitted).
53. D. DOBBS, REMEDIES § 2.3, at 34-45 (1973). Even in 1791 there was a significant amount of overlap of remedies between the law and equity forums. James, *supra* note 40, at 658.
54. D. DOBBS, REMEDIES § 2.2 (1973).
55. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty . . . ."); FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action' ".). *But see* Kennedy v. Lasko Co., 414 F.2d 1249, 1251 (3d Cir. 1969) (the merger did not affect the distinction between law and equity for purposes of the seventh amendment). *See also* FED. R. CIV. P. 38(a). Rule 38(a) "requires only that the right 'as declared by the Seventh Amendment to the Constitution or as given by a statute . . . shall be preserved to the parties inviolate.' " Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 911 (E.D. Pa. 1979), *rev'd on other grounds sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

to apply any substantive rule and provide any appropriate remedy, regardless of whether the rule or remedy originated in equity or in law.[56] The decision to grant either monetary relief or specific performance, for example, is based upon the nature of the claim itself and the particular needs of the parties.[57] It is not based solely upon whether, in 1791, the action would have been heard in law or equity. Likewise, the right to trial by jury should not depend solely on whether an action was heard in a court of equity or law in 1791.

There is a second reason for abandoning the strict historical test in favor of a flexible test. Until 1959,[58] the common practice, when the jurisdiction of law and equity was concurrent, was for the forum in which the action was originally filed to retain jurisdiction of the entire case.[59] In other words, if the original pleading in an action raised equitable issues, all issues in that action, both legal and equitable, would be heard in an equity court without a jury. This procedure also increased the likelihood that trial by jury of legal issues could be lost by collateral estoppel if the case were originally filed in a court of equity.[60] Therefore, when related legal and equitable claims were tried together, a jury trial was not an option for the defendant if the plaintiff won the race to the courthouse and filed a complaint in equity.[61] The likelihood of a race determining the seventh amendment right has now been diminished by the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover.*[62] *Beacon Theatres* confirmed, in the wake of the merger of law and equity in federal courts, that "only under the most imperative circumstances"[63] can trial by jury be abrogated by prior adjudication of equitable claims.[64] Owing to the nature of modern procedure in federal courts, a flexible approach is essential to the viability of the historical test.

---

56. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959).
57. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959).
58. *See id.* at 509.
59. 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 179, at 251-52 (5th ed. 1941).
60. For a discussion of the equity court's practice of hearing all legal and equitable issues presented, see Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).
61. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 909 (E.D. Pa. 1979), *rev'd on other grounds sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). "[T]he merger of law and equity in the federal courts casts considerable doubt on the survival of the plaintiff's historical ability to choose a non-jury trial . . . ." *Id.* at 907.
62. 359 U.S. 500 (1959).
63. *Id.* at 510-11.
64. *Id. Accord,* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

c. Application of the Historical Test in Complex Cases

Whether a strict or flexible approach to the historical test is utilized, it can be deduced that complex and lengthy cases should be heard in courts of equity without a jury. Because the historical test's foundation is the classification of cases as legal or equitable in England in 1791,[65] the pertinent question to ask is whether, in 1791, some cases, because of their complexity, were heard before a chancellor in an equity court rather than before a jury in a court of law.

There is evidence that complex cases were heard in equity rather than at law, especially if the action were for an accounting, because accounts were written and members of a "jury of ploughmen" were unable to read the written accounts.[66] As early as 1887, the United States Supreme Court held that, at least in cases where an accounting is prayed for, complexity will suffice to render an action equitable and to have a trial before a judge.[67] More recently, however, the Third and Ninth Circuits, while recognizing this as a possible construction of the historical test, refused to cite early cases from English courts of chancery as evidence that an equity court could assume jurisdiction solely because a case was complex.[68] Similarly, the United States District Court for the Eastern District of Pennsylvania concluded: "We . . . see no basis for find-

---

65. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

66. *See, e.g.*, Clench v. Tomley, 21 Eng. Rep. 3 (Ch. 1603) (action based on occurrences sixty years before trial and only a court of chancery could adequately discern the relevant deeds and accounts); *cf.* Wedderburn v. Pickering, 13 Ch. D. 767 (1879) (matter of construing deeds and ascertaining title to be decided by chancellor).

67. Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130 (1887). The Court in *Kirby* stated:

> The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties. . . . Justice could not be done except by employing the methods of investigation peculiar to courts of equity.

Id. at 134. In Fowle v. Lawrason, 30 U.S. (5 Pet.) 495 (1831), the Court noted, "[G]reat complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." *Id.* at 503. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962). It has been contended that equity took cognizance of complex actions only if they were for an accounting. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 918 (E.D. Pa. 1979), *rev'd on other grounds sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). Many complex cases heard by equity courts were accounting actions because lawyers labelled their suits as such to ensure equity jurisdiction. Delvin, *supra* note 42, at 72.

68. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1083 (3d Cir. 1980); *In re* United States Financial Sec. Litigation, 609 F.2d 411, 423 n.39 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). Although there is no longer a division between courts at law and courts in equity in the federal judicial system, for purposes of the seventh amendment, this distinction remains. Throughout this article, "equity courts" is used to represent the forum in the federal court system in which jury trial is not allowed.

ing in the complex accounting cases a rationale, policy, or 'implicit belief' that complex and difficult questions of fact, whether of liability or of damages, must be decided by judges rather than juries."[69]

Even if such reliance on early equity cases in England is disfavored, it must still be remembered that equity courts were committed to combating the rigidity of the legal system by providing flexible approaches to the solution of controversies and by developing procedural and substantive rules in response to either inadequate or unduly strict legal doctrines.[70] In light of this basic function of equity courts,[71] the United States District Court for the Southern District of New York[72] recognized that the "*traditional equity powers* of the Court certainly include the power to strike a jury demand when to allow it to stand would work an injustice."[73]

Based on their traditional powers, equity courts under a merged system should likewise take cognizance of those cases so complex that a jury is incapable of rational decision making.[74] This argument was rejected,[75] however, by the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation.*[76] The court noted that no federal courts "have looked to the chancellor's concern for justice and his perception of the common-law jury of 1791 in order to conclude that he would have decided a matter outside of the categories of suits specifically recognized as within that jurisdiction."[77] Similarly, at least one legal scholar has argued that the flexible approach favors trial by jury in complex cases be-

---

69. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 921 (E.D. Pa. 1979), *rev'd on other grounds sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
70. D. DOBBS, REMEDIES § 2.1, at 24 (1973). In this respect, it has been observed that equity courts have an "inherent capacity of expansion, so as to keep abreast of each succeeding generation and age." 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 67, at 89 (5th ed. 1941).
71. Equity courts have not always been viewed favorably. Two commentators equate the development of equity with "one of the greatest legal accidents of all times." G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 41 (1978). The authors likely feel the "legal system" could have been more responsive to the needs of the people by not requiring strict conformity to the writ system.
72. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978).
73. *Id.* at 66 (emphasis added). *Contra,* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 942 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
74. For a complete analysis of how history may support this contention, see Delvin, *supra* note 42, at 65-77. Delvin concluded that "it is unquestionable that by 1791 accounts were being taken in equity simply because they were complicated." *Id.* at 68. Moreover, he found support for the contention that complex cases generally were heard before the chancellor. *Id.* at 72-77.
75. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). The court described this argument as "a deduction of the likely reaction of an English chancellor to a hypothetical complex suit filed at law in 1791." *Id.* at 1083.
76. 631 F.2d 1069 (3d Cir. 1980).
77. *Id.* at 1083.

cause, without the public scrutiny afforded by the jury, justice may be "lost in the maze."[78] It seems more likely, however, that justice will be "lost in the maze" if the jurors cannot understand the issues and evidence and are thus precluded from reaching a rational verdict.

One inherent problem with the flexible approach to the historical test is the possibility of a large margin of error in its application. Even though it could be inferred that equity courts took cognizance of some cases because of their complexity, it is impossible to determine what factors triggered the courts' determinations that the complex nature of the case required trial by the court instead of by a jury.[79] The historical approach must be examined in any seventh amendment inquiry, but one must apply it with caution and recognize that it is the practice of equity courts to hear cases in which the legal remedy is inadequate.[80]

2. The Adequacy of Legal Remedy Test

In addition to the historical test, courts have looked to the adequacy of legal remedy before deciding if a case should be heard in equity. For example, courts at law cannot grant specific performance or injunctions and, therefore, such actions must be

---

78. Wolfram, *supra* note 26, at 747. Wolfram stated:

> The dynamic approach to the seventh amendment would . . . reject the notion that the guarantee of jury trial should be determined by reference to matters of trial convenience or the relative "difficulty" of the legal or factual issues in the case. To the contrary, the alleged difficulty of issues in a case might argue more strongly than otherwise for the intervention of a jury, for this would permit some form of public scrutiny of the proceedings in order to assure that the "justice" of the case is not permitted to be lost in the maze.

Id. at 746-47.

79. As one commentator noted, the factors utilized in deciding whether to have a trial before a jury in 1791 may be quite different from the factors considered today:

> The real change, which makes comparison impossible, is perhaps the change in the relationship between trial by jury and trial by judge alone as it was in 1791 and as it is today. Today in England the non-jury trial has, to the regret of some, triumphed in civil litigation because it is quicker, more economical, and more predictable than the jury trial. The latter is now thought of as something to be used when more than money, *e.g.*, reputation, is at stake; it has become a more elaborate form of trial, deluxe, tailormade; the ordinary litigant, it is felt, should be content with the standard model.
>
> In 1791 it was just the reverse. It was the non-jury trial in Chancery that was thought of as elaborate and long drawn out. "Speed and simplicity" were what Hamilton claimed for the jury in 1787.

Delvin, *supra* note 42, at 106 (footnotes omitted).

80. "The adequacy of legal remedy test is not a test of jurisdiction; it is a test of the jury trial right." D. DOBBS, REMEDIES § 2.7, at 82 (1973).

heard in equity courts because the legal remedy, that is damages, is inadequate.[81] The legal remedy is also inadequate if an extremely complex case is tried before a jury incapable of comprehending the issues.

The United States Supreme Court has confirmed that inadequacy of legal remedy is a "viable prerequisite" to equity jurisdiction.[82] Such jurisdiction, however, is not confined to those cases in which the requested remedy at law, usually monetary damages, is inadequate to redress the wrong.[83] Instead, the pertinent question is whether a court of law is able to respond to an alleged wrong.[84] The Supreme Court has succinctly stated that "jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief *and the mode of obtaining it*, is as efficient as the remedy which equity would confer under the same circumstances."[85] If the mode of obtaining a remedy is by jury trial, and the jury cannot understand the issues and reach a verdict based on the evidence, the remedy provided by a court at law is inadequate.

Traditionalists argue that classification of an otherwise "legal" action as an equitable action solely because of its complexity does violence to the basic purpose of the seventh amendment.[86] An early Supreme Court case, *United States v. Bitter Root Development Co.*,[87] is an example of the Court's refusal to consider the

---

81. *Id.* § 2.5, at 57-65. *Accord*, 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 33 (Boston 1836). As Story noted:
> Perhaps the most general, if not the most precise, description of a Court of Equity, in the English and American sense, is, that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.

Id. at 32.

82. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962).

83. The procedure as well as the relief available must be adequate. Kilbourn v. Sunderland, 130 U.S. 505, 514-15 (1889). *Kilbourn* involved an action brought in a court of equity for breach of fiduciary duty. An objection to equity jurisdiction, made after the answer and counterclaim and based on adequacy of legal remedy, was denied. *Id.* at 514.

84. 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 51, at 65-67 (5th ed. 1941). Moreover, "the sufficiency and completeness of the legal remedy must be certain; if it is doubtful, equity may take cognizance." *Id.* § 176, at 241 (footnote omitted).

85. Kilbourn v. Sunderland, 130 U.S. 505, 514-15 (1889) (emphasis added). *See also* Delvin, *supra* note 42, at 54, where the author states that a plaintiff had a right to discovery in a court of equity if the necessary proof was unavailable in a court of law.

86. *See* Curriden v. Middleton, 232 U.S. 633, 636 (1914) (action for fraud and misrepresentation concerning patent is legal not equitable). The Court in *Curriden* held that the "mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction." *Id. Accord*, Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir.) (order striking a jury demand vacated in patent infringement case), *cert. denied*, 404 U.S. 852 (1971). The *Tights, Inc.* court noted that "[t]o the extent that resolution of . . . issues entails determinations of fact, either party is entitled to demand trial by jury." *Id.* at 338.

87. 200 U.S. 451 (1906).

legal remedy inadequate solely on the basis of complexity. Even though the case involved numerous conspiracies and the conversion of millions of feet of timber, the defendant's contention that the facts were so complex that the case should be tried before a judge was rejected.[88] The Court stated that "[t]he principle ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants."[89] Complication of facts alone is therefore insufficient to render the legal remedy inadequate and deny a party his right to a trial by jury. Complex facts, however, combined with a large volume of evidence, a lengthy trial, and complex legal issues can limit a juror's comprehension of the issues and should be considered in a determination of the adequacy of the legal remedy and the availability of a jury trial under the seventh amendment. Moreover, a growing number of courts[90] and commentators[91] assert that when a case is so complex that it precludes fair, rational adjudication by the jury, the due process clause operates to preclude a jury trial.

In discussing legal and equitable relief, the United States Supreme Court has not directly addressed complexity[92] of the litigation, as opposed to complication of facts alone, as a factor in determining adequacy of legal remedy. In fact, the Supreme Court has recognized that federal courts, due to the merger of law and equity, are more able to provide adequate remedies today than federal courts of law could in the past.[93] For example, the Supreme Court, in *Beacon Theatres, Inc. v. Westover*,[94] found adequacy of legal remedy to be a "practical term" and, as such, to "be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules."[95]

---

88. *Id.* at 472. *Cf.* Curriden v. Middleton, 232 U.S. 633, 636 (1914) (complication of facts alone was insufficient to warrant equity jurisdiction after a finding that the facts of the case were not complicated). *See also* Delvin, *supra* note 42.
89. 200 U.S. 451, 472 (1906).
90. *See, e.g., In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
91. *E.g.*, Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976). "If, in the course of events, a traditional mode of trial makes it impossible for a case to be comprehended and the law understandingly applied, due process requires that that mode be replaced." *Id.* at 208. *Accord*, Kane, *Civil Jury Trial: The Case For Reasoned Iconoclasm*, 28 HASTINGS L. REV. 1 (1976); Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96 (1976).
92. See note 12 *supra*.
93. As the Court noted in *Beacon Theatres*, "Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity." 359 U.S. 500, 509 (1959) (footnote omitted).
94. 359 U.S. 500 (1959).
95. *Id.* at 507 (footnote omitted).

Beacon Theatres involved claims of antitrust violations and unfair competition. Issues common to the plaintiff's equitable complaint for declaratory and injunctive relief and the defendant's legal counterclaim and cross-claim existed.[96] The Supreme Court held that the dispute, in light of the merger of law and equity, should be settled before a jury in one suit at law because the underlying nature of the issues presented was legal.[97] In confirming the preference for jury trials, the Court recommended that only inadequate legal remedy or irreparable harm could justify collateral estoppel of legal issues and the attendant right to trial by jury by prior adjudication of equitable claims.[98] The *Beacon Theatres* Court cautioned, however, that the seventh amendment right may be expanded only to the extent permitted by the Federal Rules of Procedure. Simultaneously, a litigant's "substantive rights"[99] must be retained and a "fair and orderly adjudication of the controversy"[100] must be guaranteed. When a jury is incapable of rational decision making due to the complexity of issues presented to it, these safeguards have been impaired because first, a party's due process rights have been violated, and second, he has been denied a fair trial.

The seventh amendment issue presented in *Beacon Theatres* was before the Supreme Court three years later in *Dairy Queen, Inc. v. Wood.*[101] In that case, the plaintiff brought an action for an accounting of monies due under its contract with the defendant and for an injunction to prevent further dealings under the contract, because continued dealings by an unauthorized dealer constituted patent and trademark infringement.[102] The Court held that, despite the use in the pleadings of the terms "accounting" and "injunction," the action was actually one for debt or damages and was therefore legal.[103] The Court set forth the following standard to determine whether an action is equitable or legal:

> The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres,* the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at

---

96. *Id.* at 503-04.
97. *Id.* at 504. The Court stated: "It follows that if [the defendant] would have been entitled to a jury trial in a treble damage suit against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first." *Id.*
98. *Id.*
99. *Id.* at 508-09. A violation of due process is an example of an infringement of "substantive rights." See notes 255-59 and accompanying text *infra.*
100. 359 U.S. 500, 507 (1959).
101. 369 U.S. 469 (1962).
102. *Id.* at 474.
103. *Id.* at 477-78.

> law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.[104]

Applying this standard to the facts in *Dairy Queen*, the Court concluded that "[a] jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two."[105]

It is apparent that the Supreme Court is eroding the traditional distinction between law and equity for the purpose of granting or denying trial by jury.[106] Supreme Court cases indicate that the Court prefers to classify an action as one at law and thereby preserve trial by jury[107] if it can do so within the bounds of the Federal Rules.[108] The Court's approach to the seventh amendment, however, leaves open the possibility that complexity could be considered in deciding whether the legal remedy is inadequate and the case should be heard in a federal court without a jury.[109] In

---

104. *Id.* at 478 (footnotes omitted).
105. *Id.* at 479.
106. The Supreme Court, in several cases in addition to *Dairy Queen*, considered and rejected the traditional differences between law and equity when faced with the seventh amendment issue. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974) (defendant's demand for trial by jury was allowed in a landlord's suit brought under a District of Columbia statute to recover possession of real property, because the right of recovery was established and protected at common law); Curtis v. Loether, 415 U.S. 189 (1974) (suit for violation of fair housing provision of the Civil Rights Act of 1968, although not an action at common law in 1791, was essentially legal in nature and, therefore, the right to trial by jury attached); Ross v. Bernhard, 396 U.S. 531 (1970) (jury demand by plaintiff granted in shareholder's derivative action because, although the shareholder's right to sue originated in equity, the right to trial by jury attached to those issues that would have been heard at law in a suit brought by the corporation).
107. *E.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).
108. The Court retreated from this position to some extent in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). *Parklane Hosiery* was a stockholders' class action suit alleging issuance of a materially false proxy statement. Before the action came to trial, the Securities and Exchange Commission sued the plaintiffs in *Parklane* in an administrative proceeding on essentially the same charges. *Id.* at 324. The plaintiffs in *Parklane* moved for partial summary judgment based on the ruling at the administrative proceeding. *Id.* at 325. This use of offensive collateral estoppel was upheld by the Supreme Court. *Id.* at 335. Although the defendant's right to trial by jury on the issues decided at the administrative hearing was thus denied, the Court maintained that the defendant, who had vigorously defended at the hearing before the Commission, was deprived of no procedural opportunities. The Court stated that "the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum." *Id.* at 332 n.19. This decision is perhaps indicative of the Court's desire to minimize the role of the jury, at least in appeals from administrative decisions.
109. *Cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478-79 (1962) (Court discussed complicated nature of accounts as a rationale for equity jurisdiction and found that accounts in case before it could be understood by the jury).

Beacon Theatres, it was held that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[110] In the twenty years since *Beacon Theatres* was decided, "imperative circumstances" have emerged, as evidenced by complex cases.[111] Such circumstances were likely not anticipated because the adequacy of legal remedy, in light of the jury's inability to understand issues presented to them, was not at issue in *Beacon Theatres* and *Dairy Queen.*

The jury's role in civil litigation is "to assure a fair and equitable resolution of the factual issues,"[112] based on "common sense, common understanding and fair beliefs, grounded on evidence."[113] The jurors must be able to understand the evidence and then, by deductive reasoning, be able to sift through conflicting facts and reach reasonable conclusions concerning a sequence of events.[114] Clearly, adequacy of remedy is lacking when jurors are unable to perform their function as fact finders because of their inability to understand the complex issues presented.

3. The *Ross* Test

a. Analysis of the Ross *Test*

Recognizing that equity courts hear cases either for historical reasons or because the remedy at law is inadequate, the Supreme Court took the opportunity in *Ross v. Bernhard*[115] to propose, in a footnote, a viable test that combines both an historical analysis and the adequacy of legal remedy. The *Ross* test can be used to distinguish legal and equitable issues when dealing with the right to trial by jury. Initially, one must look to the "nature of the issues to be tried rather than the character of the overall action."[116] The

---

110. 359 U.S. 500, 510-11 (footnotes omitted). The Federal Rules of Civil Procedure provide certain procedural devices to help jurors understand complex cases. For example, rule 53(b) allows special masters to help jurors understand the evidence. However, "[e]ven this limited inroad upon the right to trial by jury 'should seldom be made, and if at all only when unusual circumstances exist.' " Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 n.18 (1962) (quoting La Buy v. Howes Leather Co., 352 U.S. 249, 258 (1957)).
111. It has been concluded that "[t]he rule of *Beacon Theatres* and *Dairy Queen* is itself 'an equitable doctrine' . . . , and the traditional equity powers of the Court certainly include the power to strike a jury demand when to allow it to stand would work an injustice." Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66 (S.D.N.Y. 1978) (citing Katchen v. Landy, 382 U.S. 323, 339 (1966)).
112. Colgrove v. Battin, 413 U.S. 149, 157 (1973).
113. Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956).
114. Peters v. Kiff, 407 U.S. 493, 501 (1972); *see* Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 HARV. L. REV. 898, 907 (1979).
115. 396 U.S. 531 (1970).
116. *Id.* at 538 (footnotes omitted). *See also* Dairy Queen, Inc. v. Wood, 369 U.S. 496, 473 n.8 (1962).

nature of the issue is determined by considering a three-prong test: first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries.[117]

Ross was a shareholder's derivative action for conversion of corporate assets, breach of contract, gross breach of fiduciary duty, and gross negligence.[118] The Supreme Court in *Ross* held that

> [t]he heart of the action is the corporate claim. If it represents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court.[119]

As in *Beacon Theatres*[120] and *Dairy Queen*,[121] the *Ross* Court did not address whether the issues were too complex for the jury to understand. Unlike *Beacon Theatres* and *Dairy Queen*, however, in *Ross* the parties argued the issue of complexity on appeal.[122]

The *Ross* test has been applied in decisions concerning the right to a jury trial by several federal courts of appeals[123] and district courts.[124] The *Ross* opinion, however, is not the final word concerning the seventh amendment right. The Supreme Court has demonstrated, in cases both before and after *Ross*, a general reluctance to deny jury trial demands.[125] One federal district court judge has characterized the right to a jury trial, where it exists, as

---

117. 396 U.S. 531, 538 n.10 (1970).
118. *Id.* at 531-32.
119. *Id.* at 539. In other words, "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury." *Id.* at 532-33.
120. 359 U.S. 500 (1959); *see* text accompanying notes 94-100 *supra*.
121. 369 U.S. 469 (1962); *see* text accompanying notes 101-05 *supra*.
122. *See* Brief for Petitioner at 18-20, Ross v. Bernhard, 396 U.S. 531 (1970); Brief for Respondent at 17-20, Ross v. Bernhard, 396 U.S. 531 (1970). In Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980), the court stated: "The omission of any discussion of the jury's ability to deal with the complex issues presented in *Ross* implies strongly that the Court did not deem it relevant to the Seventh Amendment issue there." *Id.* at 927-28. A preferable analysis is that the Court did not have to decide the issue.
123. *See* note 18 *supra*.
124. *See* note 19 *supra*.
125. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974) (statutory action for recovery of real property); Curtis v. Loether, 415 U.S. 189 (1974) (action brought under Civil Rights Act of 1968); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (action for an accounting based on trademark infringement and breach of contract); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (action for declaratory judgment and injunction in anticipation of defendant's suit under the Sherman and Clayton Acts).

"so central to our system of jurisprudence that abrogation of that right must be regarded as an extreme measure of last resort."[126] The *Ross* Court, nonetheless, was aware that complex litigation could be a catalyst for jury incompetence, and the Court made a long overdue clarification that, in such cases, jury incompetence is a sufficient reason for placing a case within the scope of equity jurisdiction.[127]

The first prong of the *Ross* test, the pre-merger custom, is inherently troublesome because it is unclear what custom the Court was referring to. The historical test requires a review of the common law in England in 1791,[128] rather than a random searching through state and federal practices prior to the merger of law and equity in federal courts as the name implies.[129] If this latter type of review were the Court's intent, the pre-merger custom prong could be viewed as a partial abandonment of the strict historical test and an incorporation of the flexible historical inquiry.[130]

The second prong of the *Ross* test, the remedy sought, has acquired new significance in light of the status of law and equity in federal courts.[131] Courts of law have gradually increased their exercise of jurisdiction over actions and remedies that originally developed in courts of equity.[132] Few remedies, therefore, may still be classified as purely equitable.[133] One commentator has con-

126. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978). The *Bernstein* court eventually denied the jury demand, citing *Ross* and finding the antitrust action to be beyond the practical abilities and limitations of the jurors.

127. 396 U.S. 531, 538 n.10 (1970). The three-prong test in *Ross* is introduced by the clause "as our cases indicate." *Id.* It is likely therefore that the Supreme Court in *Ross* was only clarifying a previously expounded concept. On the other hand, the clause has been labeled as vague and unsupported. *In re* United States Financial Sec. Litigation, 609 F.2d 411, 425 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

128. *See* text accompanying notes 36-37 *supra.*

129. Wolfram, *supra* note 26, at 643. The author explained that the pre-merger reference may be a recognition of the effect of *Dairy Queen* and *Beacon Theatres* on the historical test. For example, these two cases indicate that the merger of law and equity allows a party the right to trial by jury in cases where the right did not exist in 1791. If this is the intent of the Supreme Court, this historical test "might be subject to substantial modification in future cases." *Id.*

130. *Id.* at 739-45.

131. Remedies once available only in courts of equity are now available before a merged forum in federal courts. D. DOBBS, REMEDIES § 2.6 (1973).

132. *Id.* at 73.

133. Only one United States court of appeals has denied a jury trial based largely on the second prong. Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974). The *Hyde* court held that the remedy for fraudulent conveyance of promissory notes, setting aside the transfer, is equitable. *Id.* at 306. *Hyde* involved an interpleader action in which the federal government claimed arrearages in the defendant corporation's tax payments. *Id.* at 304. These payments were allegedly avoided by a fraudulent conveyance of promissory notes by the defendant corporation in exchange for an outside corporation's release of all interest in its property. In addition to the second prong, the court also utilized the third prong, but to a lesser degree. *Id.* at 306. It found "that a jury is not especially well-qualified to dispose of such issues and that a non-jury trial of the issues is both more efficient and more likely to produce a just result." *Id.*

cluded that equitable remedies are still available in only two situations: (a) where the action is "too complex for a jury so that the legal remedy is inadequate, or (b) where an *in personam* order is required, as with an injunction, or specific performance."[134]

The third prong of the *Ross* test clearly asserts that "the practical abilities and limitations of juries" are necessary considerations in ascertaining the legal or equitable nature of a claim.[135] The impact of the third prong, however, has caused considerable debate in the courts. Four United States district courts have denied jury trial demands based solely on this prong.[136] One of these courts asserted that the *Ross* test is of "constitutional dimensions,"[137] and another labeled it as a "restatement of the Court's traditional equity powers."[138] The importance placed on the third prong of the *Ross* test by these district courts, however, has not been adopted by any of the federal courts of appeals.[139] The controversy may be illustrated by comparing the district court's and court of appeals' decisions in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[140] The district court stated:

> We next examined the Supreme Court's recent decisions in order to determine whether questions of jury competence had been elevated to constitutional stature by the mention in *Ross v. Bernhard* of "the practical abilities and limitations of juries." We determined that to so read the *Ross* dictum would be inconsistent with the intentions of the Supreme Court, with settled principles of jurisprudence, and with the very policies expressed in the Seventh Amendment itself.[141]

---

134. D. DOBBS, REMEDIES § 2.6, at 78 (1973).
135. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).
136. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (jury demand denied in suit alleging conspiracy to restrain trade and monopolization); ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978) (jury trial denied in action brought for monopolization of the computer industry), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (D.C. Cal. 1977) (jury demand denied in complex securities antitrust litigation), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976) (jury trial denied in securities fraud action).
137. *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash. 1976). The court held the *Ross* test to be a limitation to or an interpretation of the seventh amendment. *Id.*
138. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67 (S.D.N.Y. 1978).
139. *Cf.* Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974) (finding that the issues were complex and likely to confuse the jury and that a judge would be more efficient and just, the court denied a jury trial based on the second and third prongs of the *Ross* test combined).
140. 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd on other grounds sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
141. *Id.* at 942.

Conversely, on appeal the Third Circuit,[142] holding that a jury trial would violate due process,[143] stated that "at the very least, the Court has left open the possibility that the 'practical abilities and limitation of juries' may limit the range of suits subject to the seventh amendment and has read its prior seventh amendment decisions as not precluding such a ruling."[144] This diversity of opinion among the courts mandates clarification of the third prong by the Supreme Court.

Although the Court has never commented on the weight to be assigned each of the prongs, it can be argued that any one prong is sufficient to classify an action as equitable. Thus, if an analysis of the first two prongs suggests that an issue is legal, the court must nonetheless decide whether, given the practical limitations of juries, a jury adequately can perform its function of deciding a particular issue.[145] If not, then the claim should be equitable in nature. Furthermore, in order to preserve a litigant's due process rights,[146] this prong must be given added weight.

It is apparent that there is some overlap between the second and third prongs. In complex civil litigation, when the jurors are unable to understand the issues presented or unravel the evidence, the legal remedy is inadequate[147] and the second prong of the *Ross* test, as well as the third, suggest an "equitable" classification. As explained in *Bernstein v. Universal Pictures, Inc.*,[148]

> [W]here the "remedy sought" necessarily involves determination of complexities that "only a court of equity can satisfactorily unravel" the "practical abilities and limitations of juries" are also necessarily involved and must be considered in evaluating the right to a jury trial. The adequacy of the legal remedy necessarily involves the adequacy of the jury and its competence to find the facts.[149]

---

142. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
143. *See* text accompanying notes 244-49 *infra*.
144. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1080 (3d Cir. 1980). The court also said that the "inclusion [of the third prong] in the three prong test strongly suggests that jury trial might not be guaranteed in extraordinarily complex cases . . . ." *Id.* at 1079.
145. *Id.; see* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 911 (1979). The Court's three-prong test recognizes factors to consider and does not require that each prong lead to the same conclusion in reference to a law/equity classification. Meeting the third prong alone is sufficient to classify an action as equitable. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978). Additionally, Polstorff v. Fletcher, 430 F. Supp. 592, 594 (N.D. Ala. 1977) stands for the proposition that no jury trial is permitted unless all three prongs of the *Ross* test are met. Moreover, the court in Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977) stated, after granting a jury trial, that the 900,000 marked documents submitted in *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976), alone were sufficient to weigh against a jury trial. 73 F.R.D. at 606.
146. See text accompanying notes 208-29 *infra*.
147. *See* notes 109-14 and accompanying text *supra*.
148. 79 F.R.D. 59 (S.D.N.Y. 1978).
149. *Id.* at 66.

By construing the second and third prongs together, it may be discerned that the jurors' ability to understand a claim and make findings of fact is the basis of the *Ross* test.

b. Criticism of the Ross *Test*

The *Ross* test has not been universally accepted and, in fact, has been much criticized. For example, the United States District Court for the Eastern District of Pennsylvania[150] asserted that the *Ross* test should not be viewed as establishing a new constitutional standard,[151] noting that such an important step would not have been relegated to a footnote.[152] In addition, the Supreme Court failed both to give authority in support of the test[153] and to explain or mention the test in subsequent seventh amendment cases.[154] Finally, it has been noted that the test's purpose cannot be fulfilled because judges are not necessarily more capable than jurors of deciding complex issues.[155]

Critics of the *Ross* test fail to acknowledge that the three-prong test probably was placed in a footnote because of the Supreme Court's deference to the district court's finding that the

---

150. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

151. *Id.* at 942. The court, however, did concede that

> in no decision of which we are aware has a court reached the conclusion that we reach here — that the *Ross* footnote may not be read as requiring or permitting the consideration of "the practical abilities and limitations of juries" in determining whether the constitutional right to trial by jury extends to matters committed by Congress or the common law to federal district courts.

Id. at 926. Three reasons were given for the court's conclusion that the practical abilities and limitations of juries cannot limit the seventh amendment right:

> (1) the available evidence shows that the Supreme Court never intended that the *Ross* footnote be a "test" for Seventh Amendment questions; (2) the proposed "test" is unworkable; and (3) application of the *Ross* "test" in the manner proposed would be fundamentally inconsistent with the policies underlying the role of the jury in civil actions in the United States.

Id.

152. *Id.*

153. *See, e.g.*, ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423, 445 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).

154. *E.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Lorillard v. Pons, 434 U.S. 575 (1978); Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977); Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974).

155. Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974); *see* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 140-42 (1978). It has been stated that "apart from the occasional situation in which a judge possesses unique training, . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion." Higginbotham, *supra* note 26, at 53.

issues in the case were not too complicated for the jury to comprehend.[156] In addition, the Supreme Court cases involving the seventh amendment and decided subsequent to *Ross* were not conducive to utilization of the *Ross* test because the issues involved were not deemed so complex that the jury could not function adequately.[157]

It would be difficult for a court to define precisely either "complexity" or "practical abilities and limitations of juries." The determination that a case will be incomprehensible to a jury so that equity jurisdiction will be invoked pursuant to the *Ross* test is not an easy one to make.[158] The district court judge is in the best position to make this determination and guidelines must be established to facilitate his decision making.[159] Factors such as complexity of facts and length of trial can be utilized to determine if a case is complex and are either well-known or predictable with a fair degree of accuracy. The definition of complexity must be developed and tested by the judiciary as well as the legislature. The *Ross* test is only the beginning of a long-overdue clarification of whether a case is equitable or legal for seventh amendment purposes.

C. *The Fair Cross Section Requirement*

If the action is deemed to be one at law and there is a right to trial by jury, an examination of jury competence must still be made. The United States Supreme Court has outlined the two requirements of a competent jury for both civil[160] and criminal[161] pro-

156. Ross v. Bernhard, 275 F. Supp. 569, 570 (S.D.N.Y. 1967), *rev'd on other grounds*, 403 F.2d 909 (2d Cir. 1968), *rev'd on other grounds*, 396 U.S. 531 (1970). This argument was rejected by the district court in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 914-15 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). The issue of complexity, however, can best be ascertained at the district court level, and it is preferable for appellate courts to defer to that judgment.

157. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (no issue of complexity in case holding that use of offensive collateral estoppel, based on prior suit heard in a court of equity, did not infringe on seventh amendment right to trial by jury); Lorillard v. Pons, 434 U.S. 575 (1978) (no issue of complexity in case holding that legislature's determination of right to trial by jury should not be abridged); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977) (complexity not involved and seventh amendment right was granted in accordance with legislative mandate); Pernell v. Southall Realty, 416 U.S. 363 (1974) (the Court made no mention of complexity, but looked to pre-merger custom and remedy sought in granting jury trial); Curtis v. Loether, 415 U.S. 189 (1974) (the Court allowed a jury trial after looking to the remedy requested, complexity not being at issue).

158. For a discussion of the pros and cons of a case-by-case determination, see Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 931-34 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).

159. *See* Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y. L. SCH. L. REV. 611, 637 (1979). *But see* James, *supra* note 40, at 690-93.

160. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

161. Smith v. Texas, 311 U.S. 128, 130 (1940).

ceedings: impartiality and representation by a fair cross section of the community.[162] Undoubtedly, it is difficult for these criteria to be met in jury trials that involve complex issues and that are expected to last several months.[163] The impartiality of a jury is difficult to gauge in any case, whether or not complex. On the other hand, the fair cross section requirement can be used accurately to judge jury competence in complex civil litigation.

The fair cross section rule requires a method of jury selection that eliminates prejudice and arbitrary decision making.[164] It was originally developed to protect criminal defendants from being tried by a jury that was unrepresentative of the community at large.[165] This rule, now codified in the Jury Selection and Service Act of 1968,[166] concerns the jury selection procedures in both civil and criminal trials.

---

162. Any argument that a "blue ribbon" jury (one consisting of a panel of individuals with above average intelligence) can better adjudicate complex issues than a jury drawn from average citizens, thereby being a means of preserving the right to a jury trial, is inconsistent with the fair cross section requirement outlined by the Supreme Court. This is true even if a blue ribbon jury were capable of rendering a rational verdict. Moreover, the sole use of professionals would inhibit citizen participation in government, which takes place through the jury, because a limited number of people would be suitable. *See* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 65-66 (1978). *But see* Fay v. New York, 332 U.S. 261 (1947) (state statute allowing blue ribbon juries, which was later repealed, held not to be unconstitutional on its face). Although the *Fay* Court upheld the statute, it stressed that this might not be the case if a federal statute were involved, because the seventh amendment right to a jury trial was not applicable to the states through the fourteenth amendment, whereas it did apply in federal trials. *Id.* at 283.

163. *See* Kane, *Civil Jury Trial: The Case For Reasoned Iconoclasm*, 28 HASTINGS L. REV. 1 (1976); Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176 (1961). Both authors criticize a strict interpretation of the application of the seventh amendment, even though it might be technically justified. *See also* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1 (1967).

164. *See* Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1976). This statute was enacted to ensure that the venire represents a "fair cross section of the community."

165. *See* Taylor v. Louisiana, 419 U.S. 522, 533-35 (1975); Patton v. United States, 281 U.S. 276, 296 (1930). In *Taylor v. Louisiana*, the fair cross section rule was found by the Supreme Court to be "fundamental to the American system of justice." 419 U.S. at 530. Although *Taylor* was a criminal case involving the sixth amendment jury trial right, there is no reason why this fundamental rule should not also apply to civil litigation. The United States District Court for the Southern District of Georgia has ruled that the fair cross section rule, being a fundamental right, is applicable in civil proceedings. Simmons v. Jones, 317 F. Supp. 397, 403 (S.D. Ga. 1970), *rev'd on other grounds*, 478 F.2d 321 (5th Cir. 1973). In *Simmons*, all civil and criminal prosecutions against the defendant were enjoined until violations of the fair cross section rule, such as over-representation of retired persons and public employees, were corrected. The court noted that a violation could occur from inclusion, as well as from exclusion, of designated groups from the jury panel. *Id.* at 404 (citing Cassell v. Texas, 339 U.S. 282, 287 (1950)). The court's concern was that parties in civil and criminal litigation be assured of the opportunity and the right to strike jurors from a panel drawn from a jury pool as provided by FED. R. CIV. P. 47 and 28 U.S.C. § 1870 (1976).

166. 28 U.S.C. §§ 1861-1875 (1976 & Supp. III 1979).

Although the original pool, the total number of eligible jurors in the community, is intended to represent a fair cross section of the population, when potential jurors are informed that a trial may last several months, many must be excused because of the personal hardship a long trial would cause.[167] Although the Jury Selection and Service Act was amended in 1978 by the Jury System Improvements Act to limit hardship excuses,[168] it remains possible for a significant number of potential veniremen to be removed from the representative group simply because the length of trial precludes their service.[169] Those individuals least likely to raise hardship excuses because of the length of the trial will be retired and unemployed persons.[170] Moreover, the jurors most likely to be excused will be those with demanding business, family, or professional obligations.[171] When a significant number of the potential jurors are excused, the remaining jury panel may no longer be a representative sample of the community at large. Although a party is not entitled to a jury of any particular composition or to one that is representative of all segments of the population,[172] de-

---

167. *See* notes 274-76 and accompanying text *infra*.
168. 28 U.S.C. §§ 1863(b), 1866(c) (Supp. III 1979) (amending 28 U.S.C. §§ 1863(b), 1866(c) (1976)).
169. *Id.* §§ 1866(c), 1869(j). Although § 1866(c) was amended to eliminate distance of travel as an excuse for not serving, it still allows a potential juror to be excused by the court "upon a showing of undue hardship or extreme inconvenience." These terms, as used in 28 U.S.C. § 1866(c) (Supp. III 1979), are defined by the Act to mean

> [g]reat distance, either in miles or traveltime, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, *or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror.*

Id. § 1869(j) (emphasis added). Thus, the court retains the discretion to excuse a juror due to the length of a trial.
170. ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).
171. *See* C. JOINER, CIVIL JUSTICE AND THE JURY 77-80 (1962). The author surveyed judges and jurors and found that most juries are not composed of a fair cross section of the community. For instance, one researcher found that women and housewives are overrepresented (approximately 63%) while the employed, including white collar and self-employed individuals, are under-represented (approximately 8%). A large portion of the remaining pool (approximately 27%) were retired persons. *Id.* at 196. In addition, 48% of the jurors were found to be in the 40-59 age group, 31% in the 21-39 age group, and 21% in the 60-70 age group. *Id.* at 198. An occupational grouping of jurors revealed that 41% were housewives, 13% were clerical workers, 10% were craftsmen, 9% were retired, 7% were executives, and 7% were professionals. *Id.* at 200.
172. Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Swain v. Alabama, 380 U.S. 202, 208 (1965) (peremptory challenges to exclude veniremen solely on basis of race is not unconstitutional); Fay v. New York, 332 U.S. 261, 270 (1947) (party entitled to a fair trial but jury need not be of any particular composition). *Accord*, United States v. Newman, 549 F.2d 240, 248-49 (2d Cir. 1977); Hall v. United States, 168 F.2d 161, 164 (D.C. Cir.), *cert. denied*, 334 U.S. 853 (1948).

pletion of the pool due to hardship can amount to a fair cross section violation if identifiable groups are systematically excluded.[173]

Peremptory strikes[174] may also increase the likelihood of a fair cross section violation in complex cases. A party may use each of his three peremptory challenges to exclude jury members for any reason.[175] It is unlikely that these strikes alone would result in the exclusion of all individuals who represent a distinct segment of the population. When a significant number of people have already been excused due to hardship, however, peremptory strikes could eliminate an ascertainable group that had already been virtually eliminated from the panel due to hardship excuses.[176]

The likelihood of a fair cross section violation was discussed in *In re Boise Cascade Securities Litigation*,[177] a 1976 decision of the United States District Court for the Western District of Washington. *Boise* involved five consolidated securities fraud actions and was the first case in which a federal court denied a jury demand solely because of the anticipated complexity and length of the trial.[178] More than 900,000 documents were expected to be introduced at trial, and the anticipated trial length was four to six months.[179] In denying a jury trial demand, the *Boise* court noted that neither the Federal Rules of Civil Procedure nor the United States Code mandated a jury in that particular situation.[180] The court found that, because of the length of the trial, it would be im-

---

173. *See* ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423, 446-48 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).

174. A peremptory strike gives a party the right to challenge without assigning a reason for the challenge. BLACK'S LAW DICTIONARY 1023 (5th ed. 1979).

175. 28 U.S.C. § 1870 (1976). *See also id.* § 1866(c)(3) (Supp. III 1979); FED. R. CIV. P. 47.

176. This problem can become more serious when multiple parties are involved. Under 28 U.S.C. § 1870 (1976), the court has discretion to allow additional peremptory challenges for multiple parties or to consider the litigants as a single party for the purpose of peremptory challenges. Additionally, when actions are consolidated for trial and multiple parties result on one or both sides of the action, each party is entitled to three challenges. It is not difficult to imagine the large numbers of panel members who could be eliminated by these challenges in extremely complex litigation. For example, in Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978), there were 11 defendants and 65 plaintiffs and, therefore, 228 potential jurors could have been eliminated solely by peremptory challenges under 28 U.S.C. § 1870 (1976).

177. 420 F. Supp. 99, 104 (W.D. Wash. 1976).

178. *Cf.* Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974) (jury trial denied for combined reasons of complexity and equity jurisdiction); Securities & Exch. Comm'n v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977) (same).

179. 420 F. Supp. 99, 104-05 (W.D. Wash. 1976).

180. *Id.* at 105.

possible for the composition of a jury to be a collection of impartial minds from diverse backgrounds.[181]

Two years later, the United States District Court for the Northern District of California, in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*,[182] discussed the fair cross section rule in a trial that was expected to be unusually lengthy. The plaintiff alleged monopolization or attempted monopolization of markets in the computer industry.[183] Because the trial was expected to last ten months, a special panel of 175 prospective jurors was called. Only 29 prospective jurors remained after all other jurors had presented legitimate hardship excuses. After declaring a mistrial because the jury was deadlocked, the court granted the defendant's motion for a directed verdict and denied the plaintiff's jury trial demand in the event of a retrial. The *ILC* court stated that "[t]he 11 jurors to whom this case was submitted probably represented a random cross section of people in the community *who could afford to spend 10 months serving on a jury,* but it is open to question whether they were a true cross-section of the community."[184] This violation of the fair cross section rule was a significant factor in the *ILC* court's denial of the plaintiff's jury demand in the event that the case was remanded on appeal for retrial.[185]

Both *Boise* and *ILC* illustrate the courts' awareness of the possibility of disparate and improper jury composition in complex, lengthy civil litigation. When systematic exclusion of certain classes from a jury occurs because of the pragmatic limitations imposed by a lengthy trial, the fundamental precept of fair representation is defeated. Because the seventh amendment has been interpreted to require a jury representing a fair cross section of

---

181. *Id.* This decision was reached with "the necessity for the appearance and the fact of fairness" as the paramount concern, and the court held that a judge would be superior to a jury because a jury lacked procedural tools used by a judge to manage, organize, and review large amounts of evidentiary materials. *Id.* The court cited Ross v. Bernhard, 396 U.S. 531, 539-40 (1970), and the *Ross* test, see text accompanying notes 115-49 *supra*, in support of its decision.

182. 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).

183. *Id.* at 448.

184. *Id.* (emphasis added).

185. *Id.* at 446-47. The decision to strike a jury trial demand in the event of a remand for retrial was also based on the court's finding that the case was so complex that it must be placed within the scope of equity, thereby defeating a jury demand. *Id.* at 444-46.

the community, such exclusion is not constitutionally permissible.[186]

III. FIFTH AMENDMENT CONSIDERATIONS

In addition to examining the mandate and scope of the seventh amendment, the requirements of the fifth amendment must be considered when deciding whether a complex case should be tried before a jury. Both procedural and substantive aspects of the due process clause of the fifth amendment require a fair trial before a fair tribunal. When a case is unusually complex and lengthy, a jury may be incapable of fairly reaching a verdict based on the facts at issue.

A. Procedural Due Process

One of the guarantees of the fifth amendment is that no person may be deprived of life, liberty, or property without due process of law.[187] The concept of procedural due process, declared by the Supreme Court to be synonymous with fairness, ensures that the parties are guaranteed a fair trial by a fair tribunal.[188] Moreover, the Court has said that a fair trial cannot exist when arbitrary[189] or irrational verdicts are rendered by the finder of fact.[190]

As the United States Court of Appeals for the Third Circuit recognized in *In re Japanese Electronic Products Antitrust Litigation*,[191] a jury performs two important functions in the legal system in rendering a fair and just verdict. The first is "black box"

---

186. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 936 n.83 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). In *Zenith*, the district court refused to strike a jury trial demand on the basis of the fair cross section issue, noting: "It may well be that . . . 'undue hardship or extreme inconvenience' . . . will persuade the court to excuse many business executives and professionals, but this certainly does not mean that the defendants will be forced to submit their case to a jury selected from society's incompetents and misfits." *Id.* Even though the court's refusal to strike a jury trial in *Zenith* would not necessarily result in a pool composed solely of "incompetents and misfits," the absence of educated individuals and professionals would be a clear violation of the fair cross section rule. The Third Circuit's reversal of the district court's decision in *Zenith* lends support to this contention. The Third Circuit noted: "The long time periods required for most complex cases are especially disabling for a jury. . . . The prospect of a long trial can also weed out many veniremen whose professional background qualifies them for deciding a complex case but also prohibits them from lengthy jury service." 631 F.2d at 1086.

187. U.S. CONST. amend. V.

188. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (jury trial in juvenile proceedings not mandated by Constitution); *In re* Murchison, 349 U.S. 133, 136 (1955).

189. Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956).

190. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); *cf.* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (irrational legislation is violative of due process).

191. 631 F.2d 1069 (3d Cir. 1980).

decision making, which entitles a jury to render a verdict unaccompanied by any explanation.[192] Because the basis of decisions remains secret, a jury can shade or modify harsh points of law whereas a judge is forced to apply the same law rigidly.[193] Secondly, in a case where line drawing is necessary, such as the determination of whether degrees of certain conduct constitute negligence, a group of community members lend more credence to a decision than does a single judge. The Third Circuit concluded, however, that these functions cannot be performed by a jury that can neither apply the law to the facts nor understand the evidence or the issues because of the complexity of the case.[194] In such a situation, the parties may be deprived of a fair resolution of the issues involved if a jury trial is permitted. Some federal courts have recognized that due process requires a reversal when cases include such voluminous evidence that a jury could not have rationally assimilated the material presented.[195]

Moreover, the United States Supreme Court has indicated that the basic purposes of a fair trial are to ascertain the truth, to administer justice,[196] and to "minimize the risk of erroneous decisions."[197] In light of the potential infringement of these due process rights, the traditional seventh amendment jury trial procedures should be altered in complex litigation because the jury no longer provides a reliable safeguard against erroneous decisions.[198]

B. Substantive Due Process

The fifth amendment guarantee of substantive due process requires that the law not be administered in an unreasonable, arbitrary, or capricious fashion.[199] This guarantee could be violated by the verdict of a jury faced with a large volume of evidence and

---

192. *Id.* at 1085.
193. *Id.* The court calls this process "jury equity," which allows a jury to modify the law to conform to community values.
194. *Id.*
195. *See* Citron v. Aro Corp., 377 F.2d 750 (3d Cir.) (action for damages, accounting for profits, and an injunction alleging conversion of trade secrets and counterclaim based on trade libel; 11-day intermission affected party's substantive rights; implicit in ruling was the fact that due process guarantees a comprehending fact finder), *cert. denied*, 389 U.S. 973 (1967); Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954) (consolidated condemnation proceedings brought by United States to condemn large number of tracts of land; owners of 236 tracts were represented by 12 attorneys, and evidence took seven weeks to present). *Accord*, United States v. Central Supply Ass'n, 6 F.R.D. 526 (N.D. Ohio 1947) (defendants indicted for conspiracy to violate the Sherman Antitrust Act; 217 defendants were named and court granted judgments of acquittal because case was unmanageable by a single court).
196. Estes v. Texas, 381 U.S. 532, 540 (1965).
197. Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979).
198. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1086 (3d Cir. 1980).
199. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Nebbia v. New York, 291 U.S. 502, 525 (1934).

faced with complex multi-issue cases, such as those involving patent or trademark infringement.[200] Justice Black, in *In re Murchison*,[201] declared any unfairness inherent in the fact finder's verdict to be a violation of a basic endeavor of our system of law.[202]

The due process clause was the basis of the denial of a jury trial in *In re Japanese Electronic Products Antitrust Litigation*.[203] Therein the court emphasized the presumption that a jury will decide issues rationally, based upon a "fair and reasonable assessment of the evidence and a fair and reasonable application of relevant legal rules."[204] Finding that the complexities of the legal and factual issues[205] would prevent a jury from performing its decision-making task rationally, the court held that, in the interest of "evenhanded justice,"[206] due process precluded a trial by jury.[207]

C. *Federal District Court Decisions*

In at least five instances, United States district courts have agreed that complex and lengthy litigation must be heard before a judge in order to protect due process rights.[208] In *Bernstein v. Universal Pictures, Inc.*,[209] a class action was brought by 65 lyricists and composers, representing 400 to 900 other musicians.[210] Alleging infringement of copyrights, restraint of trade, illegal monopolization, and violation of antitrust laws, the suit involved more than 1,000 contracts against eleven defendants. District Court Judge Brieant issued a show cause order with respect to the plaintiffs' jury demand and subsequently decided that a jury would be unable to comprehend the case and to decide the issues rationally.[211]

---

200. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978).
201. 349 U.S. 133 (1955) (case addressed situation in which same judge sat as "judge-grand jury" before which witnesses testified and presided at contempt hearings for same witnesses).
202. *Id.* at 136.
203. 631 F.2d 1069 (3d Cir. 1980).
204. *Id.* at 1084.
205. See notes 1-10 and accompanying text *supra*.
206. 631 F.2d 1069, 1084 (3d Cir. 1980).
207. *Id.* at 1085.
208. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980); Securities & Exch. Comm'n v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976). All of these courts utilized the Supreme Court's three-prong test outlined in Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), in deciding that a jury trial was not proper.
209. 79 F.R.D. 59 (S.D.N.Y. 1978). The district court dismissed the original action finding that the National Labor Relations Board had exclusive jurisdiction over the case, and on appeal the case was remanded for improper dismissal. *Id.* at 60.
210. *Id.* at 62.
211. *Id.* at 70.

The court stated: "[T]o hold that a jury trial is required in this case would be to hold that the Seventh Amendment gives a single party at its choice the right to an irrational verdict."[212] Furthermore, Judge Brieant noted that *Bernstein* was the "exceptional case" and "any role that a Special Master might be able to play in [a jury trial] is so peripheral that the underlying complexities will necessarily remain."[213] Although the court conceded that more is involved in the function of a jury than rational competence,[214] the decision to deny the jury trial was based upon the overriding due process consideration.[215]

The United States District Court for the Northern District of California addressed the fifth amendment's conflict with the seventh amendment in a thorough opinion, *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*[216] The case involved a 96 day trial, 87 witnesses, and 2,300 exhibits.[217] After a mistrial was declared because the jury was unable to reach a verdict after 19 days of deliberations, a retrial was ordered. The defendant's motion to strike the jury demand was granted because the judge observed that at the first trial[218] the jury was having trouble grasping the concepts discussed by the expert witnesses.[219] The foreman confirmed the judge's observations, remarking that this type of case should not be tried before a jury: "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."[220]

Similarly, the United States District Court for the Western District of Washington in *In re Boise Cascade Securities Litigation*[221] held, based partially on the due process requirements of the fifth amendment, that a non-jury trial was required.[222] The court

---

212. *Id.* at 71.
213. *Id.* at 70; *see* FED. R. CIV. P. 53 (allows the court to appoint a special master to assist the fact finder by presenting the factual issues in a simplified form). *See also* note 268 and accompanying text *infra*.
214. 79 F.R.D. 59, 70 (S.D.N.Y. 1978); *see* text accompanying notes 191-94 *supra*. *See also* Note, *The Right to a NonJury Trial*, 74 HARV. L. REV. 1176 (1961).
215. 79 F.R.D. 59, 71 (S.D.N.Y. 1978).
216. 458 F. Supp. 423, 444-48 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).
217. *Id.* at 444.
218. Judge Conti had denied a pretrial motion to strike the plaintiff's jury demand at the first trial on the ground of complexity. *Id.*
219. *Id.* at 447.
220. *Id.*
221. 420 F. Supp. 99 (W.D. Wash. 1976). For a discussion of the case with respect to the fair cross section rule, see notes 177-81 and accompanying text *supra*.
222. 420 F. Supp. 99, 104 (W.D. Wash. 1976).

stated that an impartial, capable fact finder is central to a fair resolution of a civil action.[223] The court further noted that the fair cross section rule, as applied to the seventh amendment right to a jury trial, is encompassed in the notion of due process. This is because the fair cross section rule is intended to preserve a jury composed of impartial minds from diverse backgrounds. The *Boise* court noted that the jury was not a qualified fact finder because the inherent complexities of the case rendered the jury unable to decide facts fairly.[224] In addition, the court stated that

> at some point, it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner; at this point, no verdict is within the meaning of due process as envisioned by the fifth and fourteenth amendments.[225]

In *In re United States Financial Securities Litigation*,[226] the United States District Court for the Southern District of California applied a flexible approach to the seventh amendment to avoid a clash with the fifth amendment. This class action suit was brought for alleged violations of federal securities laws.[227] More than five million documents and 150,000 pages of depositions were produced in discovery and at least an additional 100,000 pages of other documentary evidence were anticipated. Denying a jury trial, the court reasoned that the demands of the trial, expected to last two years, were beyond the practical limitations of any juror who would be asked to serve.[228] The court found that a judge would be a more appropriate finder of fact because he would have procedural tools at his disposal that were unavailable to a jury, such as the right to interrupt the trial and to question witnesses.[229]

As these United States district court cases illustrate, some cases are so complex that a fair trial can only be had before a judge. On the other hand, an analysis of the seventh amendment leads to the conclusion that a jury trial is required in actions at law. In a complex case where the underlying nature of the issues is legal, the mandates of the fifth and seventh amendments clash. If

---

223. *Id.* The court emphasized that the fifth and fourteenth amendments measure the legitimacy of government action in terms of fairness.
224. *Id.*
225. *Id.*
226. 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
227. *Id.* at 706. Eighteen cases were consolidated and five classes certified. *Id.* at 705.
228. *Id.* at 714.
229. *Id.* at 713.

the Supreme Court does not classify such lengthy, complex cases as equitable, it may not be able to maintain its policy of avoiding constitutional issues whenever possible[230] and may be forced to balance the fifth and seventh amendments.[231]

IV. BALANCING THE FIFTH AND SEVENTH AMENDMENTS

Whenever possible, all of the amendments to the Constitution are to be construed together,[232] and no one amendment is favored.[233] If a conflict between two amendments occurs, however, it must be resolved by balancing the competing rights protected by the respective amendments.[234] Since the adoption of the seventh amendment, several procedural devices have been used to usurp the jury's function. It has never been maintained, however, that a litigant's right to a fair trial as required by the fifth amendment can be infringed upon procedurally or substantively. It can be inferred, therefore, that if an irreconcilable clash between the two amendments occurs, the fifth amendment should be favored.[235]

---

230. *See* Alexander v. Louisiana, 405 U.S. 625, 633 (1972) ("[W]e follow our usual custom of avoiding decision of constitutional issues unnecessary to the decision of the case before us."); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 576 (1947) ("To [clarify the ambiguity of the pleadings] would be directly contrary to the policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty.").

231. If the Court refuses to grant certiorari in a case involving fifth and seventh amendment issues, other possibilities remain for obtaining a Court decision. First, a constitutional amendment could be adopted in which certain classes of cases, such as trademark violations, patent infringements, or antitrust claims, must be adjudicated solely before the Court. Alternatively, Congress could pass a statute removing the right of trial by jury in the above-mentioned classes of cases, as has been done with other statutory causes of action. If either of these two approaches is adopted, the Supreme Court eventually would be forced to determine the constitutionality of these measures. If the jury issue were clarified, the lower federal courts would be provided with long-overdue jury guidelines in complex civil litigation. It is difficult to predict when the Supreme Court will make such a move, in light of its reluctance to do so in the past.

232. Patton v. United States, 281 U.S. 276, 298 (1930). *See also* Callan v. Wilson, 127 U.S. 540 (1888).

233. Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U.S. 8, 15 (1907).

234. Gannett Co., Inc. v. DePasquale, 433 U.S. 368, 391-98 (1979) (conflict between first and sixth amendments); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (same). The Supreme Court in *Nebraska Press* emphasized that even where balancing is necessary, the resulting priority is only applicable to the particular case under consideration:

> But if the authors of these guarantees [The Bill of Rights], fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

Id. at 562.

235. *See* Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y. L. SCH. L. REV. 611, 624 (1979).

A. The Erosion of the Seventh Amendment

Although the Supreme Court has traditionally held that the right to a jury trial in civil litigation is a basic right to be jealously guarded,[236] the Court has also held that "exceptional cases" and "specified causes" can constitute sufficient grounds for erosion of the seventh amendment guarantee.[237] The complex, lengthy cases described in this comment satisfy the "exceptional" requirement and nullify the purposes behind the seventh amendment.

Even if the seventh amendment is viewed as a substantive right, it has been subjected to several procedural limitations. The Constitution allows courts to impose restrictions on the right to trial by jury as evidenced by the alteration of the common law role of a jury for both practical reasons and to preserve one's due process rights. The Supreme Court, in *Galloway v. United States*,[238] recognized that the jury's role could be circumvented without violating the seventh amendment by employing directed verdicts[239] and motions for a new trial.[240] The Court deemed these procedural devices to be constitutional because, when the seventh amendment was adopted, the procedure governing trials varied greatly among the common law jurisdictions.[241] The Supreme Court has also held that there is no constitutional bar to a judgment notwithstanding the verdict, a procedural device that infringes upon the function of a jury by allowing a judge to overrule the jury's verdict.[242] These procedural tools, which negate a jury's traditional function as fact finder, are available to a judge faced with the possibility of an unjust or unnecessary verdict. The judge should also have the discretion to deny a jury trial in cases where the facts are so complex that a jury is incapable of rationally rendering a verdict.

The United States District Court for the Eastern District of Pennsylvania found that the use of directed verdicts and judg-

---

236. *See* Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484, 492 (1939); Hodges v. Easton, 106 U.S. 408, 412 (1882); Webster v Reid, 52 U.S. (11 How.) 437, 459 (1850).

237. Grand Chute v. Winegar, 82 U.S. (15 Wall.) 373, 375 (1872). *Winegar* does not define these phrases. For examples of federal district court cases that are "exceptional," see note 208 and accompanying text *supra* and Chart, notes 290-309 and accompanying text *infra*. However, none of the cases included mentioned *Winegar* as support for denying a jury trial.

238. 319 U.S. 372 (1943).

239. *Id.* at 390-92; *see* FED. R. CIV. P. 50(a); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2522, at 539 (1971).

240. 319 U.S. 372, 390-92 (1943); *see, e.g.*, FED. R. CIV. P. 59.

241. 319 U.S. 372, 389-92. *See generally* Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

242. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967); *accord*, Manaia v. Potomac Elec. Power Co., 268 F.2d 793 (4th Cir. 1959).

ments notwithstanding the verdict is sufficient to protect litigants in complex cases from irrational jury verdicts.[243] This argument was labeled fallacious when the case was appealed to the Third Circuit.[244] In addition, the Third Circuit stated that these procedural devices do not protect all elements of due process, such as the need to minimize the risk of erroneous decisions[245] and the demand that the verdict rest solely on the legal rules and evidence adduced at trial.[246] The court pointed out that these devices permit a court to enter a verdict against any party who has failed to submit a minimum amount of evidence that would allow a jury to find in its favor. However, the court noted that although a jury verdict that satisfies this standard is rational in one sense, an irrational verdict can still exist under specific elements of due process in extremely complex cases.[247] Pointing out that a directed verdict or judgment notwithstanding the verdict may be granted where a possible jury verdict is only minimally supported by the evidence, the court stated that due process requires the elimination of the risk of error, hence the giving of some "fair assurance that the jury's findings of fact and applications of legal rules are reasonably correct."[248] Consequently, when a jury can comprehend neither the legal issues nor the evidence, there is no measure of assurance of a correct decision based on the evidence, as required by due process.[249] Thus, a judge should be empowered to deny a jury trial altogether where irrational verdicts are likely.

B. Composition and Decisions of Juries

The common law concept of a jury composed of twelve members was altered by the Supreme Court in *Patton v. United States,*[250] a criminal case in which the defendant waived his right to twelve jurors and the trial proceeded with eleven jurors. On appeal, the defendant contended error. The Court stated that in the eighteenth century a defendant could not waive the right to trial by jury because there was fear of a judge's corrupt judgment of inflicting the severe punishment of forfeitures of official titles and powers upon conviction.[251] Noting that the original justification

---

243. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 937-38 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980).
244. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1087 (3d Cir. 1980).
245. *Id.* at 1087 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976), where the Court held that administrative procedures were sufficient to minimize risk of error).
246. 631 F.2d 1069, 1084 (3d Cir. 1980) (citing Goldberg v. Kelly, 397 U.S. 254, 271 (1970)).
247. 631 F.2d 1069, 1087 (3d Cir. 1980).
248. *Id.* at 1088.
249. *Id.*
250. 281 U.S. 276 (1930).
251. *Id.* at 296.

for the rule no longer existed, the Court held that a defendant could waive his right to a jury of twelve and proceed before fewer jurors or before the court.[252] Because the Constitution allows the composition of the jury to be altered and the decision of the jury to be less than unanimous,[253] further changes could also be made in light of difficulties presented by complex, lengthy civil litigation. Such changes are necessary in order to preserve the viability of the Constitution, which is dependent on its adaptability to situations that may not have been foreseen at the time the Constitution was adopted.[254] One such change could be total elimination of the jury when the jury is presented with a complex, lengthy case.

C. *The Overriding Concerns of the Fifth Amendment*

Even if the seventh amendment trial by jury is regarded as a fundamental right,[255] it is arguable that there should be no right to a jury if the jury is incapable of fairly deciding a case. The due process right to a competent and impartial tribunal must be separated from the right to any particular form of proceeding. Due process is an inherent right in all proceedings, whether before a judge,[256] an administrator,[257] or a jury. The seventh amendment,

252. *Id.* at 307-09. *Accord*, FED. R. CIV. P. 48. *Cf.* Colgrove v. Battin, 413 U.S. 149 (1973) (six-member jury did not violate the seventh amendment). *But cf.* Ballew v. Georgia, 435 U.S. 223 (1978) (five-person jury in a criminal trial was inadequate). The Court went even further in Apodaca v. Oregon, 406 U.S. 404 (1972), holding that a guilty verdict in a state criminal case rendered by less than a unanimous vote of the jurors did not violate the defendant's right to trial by jury. *Id.* at 406. The opinion indicated that unanimity is still required by the sixth amendment in federal prosecution.

A jury trial is more jealously guarded for criminal defendants than it is for civil litigants, as evidenced by the fact that the sixth amendment, and not the seventh amendment, has been made applicable to the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

253. *See* note 252 *supra*.

254. *E.g.*, Estes v. Texas, 381 U.S. 532, 559-60 (1965) (Warren, J., concurring). *See also In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1086 (3d Cir. 1980), where the court stated: "In lawsuits of this complexity, the interests protected by this procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial." *Id.*

255. Some might argue that further support for the superiority of the fifth amendment is evidenced by the fact that the seventh amendment is not deemed a fundamental right incorporated into the fourteenth amendment's due process clause and applied to the states, as is the fifth amendment. G. GUNTHER, CONSTITUTIONAL LAW 541-42 (9th ed. 1975). It is possible that the seventh amendment has been subject to various procedural limitations, such as directed verdicts, judgments notwithstanding the verdict, and fewer than twelve jurors, because it is not a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937); *accord*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see* Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y. L. SCH. L. REV. 611, 624 (1979). On the other hand, others may note that incorporation of the seventh amendment into the fourteenth amendment is unnecessary because most state constitutions provide for a trial by jury in civil cases. *See, e.g.*, MD. CONST., DECL. OF RIGHTS art. 23.

256. Tumey v. Ohio, 273 U.S. 510, 522 (1927).

257. Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970).

however, does not extend to administrative hearings[258] or actions in equity.[259] The conclusion must be that, although there is always a right to due process in the adjudication of a claim, one party cannot request a jury trial and thereby subject the other party to an unfair trial. This situation could arise if a jury heard a case that is both complex and lengthy.

Several federal courts faced with the competing constitutional claims have granted a jury trial in instances when one of the parties raised the issue of complexity.[260] These decisions have been based upon a rigid application of the seventh amendment, despite opposing due process arguments. Most of these cases, however, may be distinguished from complex cases in which a court has denied a jury trial because they do not satisfy both of the requirements necessary to activate the fifth amendment's overriding power: extraordinary length and complexity.[261]

In *Jones v. Orenstein*,[262] the United States District Court for the Southern District of New York considered only the length of the trial in allowing a jury trial. *Jones* was a class action involving securities fraud. The court compared *Jones* to *In re Boise Cascade Securities Litigation*,[263] and found that *Jones* involved an estimated trial length of six to eight weeks, whereas *Boise* involved a projected four to six month trial.[264] Moreover, the *Jones* court noted that the 900,000 documents submitted in the *Boise* case were sufficient in themselves to weigh against a jury trial. Conversely, in *Jones* there was no indication that certain judicial tools, such as access to daily transcripts or admissions of depositions into evidence, would make the court a more effective trier of fact than the jury.[265] It is an illusion of justice to afford the opportunity to present evidence and argument only before an uncom-

---

258. McElrath v. United States, 102 U.S. 426, 440 (1862).
259. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).
260. *E.g.*, Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977); Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977); Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971).
261. See notes 208-29 and accompanying text *supra*.
262. 73 F.R.D. 604 (S.D.N.Y. 1977).
263. 420 F. Supp. 99 (W.D. Wash. 1976).
264. 73 F.R.D. 604, 606 (S.D.N.Y. 1977).
265. *Id.* Similarly, in Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977), the court used *Boise Cascade* as a comparison. The court noted that Boise's financial records spanned five years and involved more than a billion dollars. *Id.* at 228. In *Radial Lip*, only a small number of documents were offered into evidence, only two corporations were named as parties, and the validity of the patents involved was undisputed. Additionally, the *Radial Lip* trial was anticipated to last three weeks, in comparison to *Boise Cascade's* four to six month duration. *Id. See also* Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971), in which a jury trial was granted because the court found that the patent for pantyhose under dispute "d[id] not present the opaque technicalities which might cause a jury particular difficulty. It involve[d] no abstract scientific theories, no intricate mechanical devices, no complex chemical compounds." *Id.* at 342.

prehending body. Therefore, if there is no constitutional right to a non-jury trial,[266] there should be a court-created right when the fifth amendment so requires.[267] Cases such as *Jones* illustrate that either length or complexity alone are insufficient to negate the application of the seventh amendment. If a case is both complex and lengthy, the fundamental fifth amendment right to a fair trial must override the seventh amendment right to a jury trial.

V. POLICY CONSIDERATIONS

In addition to constitutional considerations, the practical concerns in complex, lengthy cases render a trial before the court more appropriate.[268] For instance, while a jury trial in complex civil litigation can be prohibitively expensive,[269] a trial before a judge can be more efficient[270] and therefore less burdensome to the

---

266. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959).

267. As Alexander Hamilton observed: "I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases . . . . The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty." THE FEDERALIST No. 83, at 561-62 (J. Cooke ed. 1965) (A. Hamilton).

268. Pro-jury commentators argue that the problems of jury adjudication of complex civil litigation can be alleviated by using special masters, allowing a jury to take notes during trial, or allowing a jury to retire with exhibits and transcripts. *In re* United States Financial Sec. Litigation, 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). *But see* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 908 & n.60 (1979) (citing Record at 19,490-91, ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam)). One juror's understanding of the facts in *ILC* can be seen from the court's interrogation of the juror:

> The Court: And what is — do you know what an interface is? [An interface is the connection between a computer and an auxiliary piece of equipment.]
>
> . . . .
>
> Juror [D]: Well, if you take a blivet, turn it off one thing and drop it down, it's an interface change; right?

Id. at 908 n.60.

269. ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978) (cost of jury was $32,000; despite efforts made by judge and jury at trial, court declared a mistrial), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam); *see* Center for Jury Studies Newsletter, No. 2-2 (Mar. 1980), stating that all persons on jury duty at all jurisdictional levels cost $750 million in wages alone in 1979. *But see* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 73 (1978) ("A comparison of the cost of the jury system and the three-judge system (necessitating three times as many judges as there are at present) . . . would show that the jury's expense is not greater and may be in fact substantially less.").

270. *See In re* Japanese Elec. Prods. Antitrust Litigation, 609 F.2d 1069, 1087 (3d Cir. 1980), in which the court pointed out the advantages of a judge: greater ability to allocate time to deciding a complex case; colloquies with expert witnesses; and capability to reopen trial to clarify or obtain additional evidence pursuant to FED. R. CIV. P. 59(a).

judicial system.[271] Unlike a jury, the judge has more control over the presentation of a case because he can interrupt the trial to question witnesses, call recess to review documents, dictate the order in which evidence is presented, reach a decision without the time constraints imposed on a jury, and utilize law clerks to research fine points.[272] Finally, a mistrial can impose particular problems if a case is heard before a jury. Because a jury does not submit findings of fact with its verdict, a retrial of the entire case will be necessary.[273]

Complex civil litigation can also present problems for individual jurors. In complex litigation, many educated or employed jurors are excused during voir dire due to hardship or employment demands.[274] "Few employers would tolerate such a period of absence; few careers would not be materially and permanently retarded in terms of promotions, seniority, maintenance of professional proficiency, etc., by such a long absence."[275] In addition, lengthy, complex trials would probably increase the number of

---

271. *See* Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1059 n.12 (1964) (on the average, bench trials in civil cases were 40% less time-consuming than cases tried before a jury).

272. *E.g.*, *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104-05 (W.D. Wash. 1976). The court in *Boise* noted:

> In addition to the Court's experience in presiding over other complicated cases involving commercial matters, the Court has available to it tools that are unwieldy in the possession of a jury. Among these tools are review of daily transcripts; admission of depositions into evidence instead of reading relevant portions aloud; review of selected portions of testimony from the reporter's notes and flexibility in scheduling trial activities. In addition, the Court is able to study exhibits in depth and carry on colloquies with witnesses, expert and non-expert alike, in an orderly and systematic manner. Of course, this is in addition to the Court's knowledge of the litigation resulting from its review of the record since the cases were filed.

Id.

273. ILC Peripherals Leasing Corp. v. International Business Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam). *See also* Annot., 18 A.L.R. Fed. 690, 697 (1974).

274. *E.g.*, *In re* United States Financial Sec. Litigation, 75 F.R.D. 702, 713-14 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). In commenting upon the unreasonable demands placed upon a juror in a complex case, the court stated:

> Any experienced trial judge knows that there is an enormous difference between asking an average citizen to sit for a few days or even for a few weeks on a jury, on the one hand, and asking the same citizen to sit for two years on the other hand. It would be unconscionable to demand of any gainfully employed person — even a civil servant, who normally will be excused from his regular duties to participate as a juror — that he abandon his career for two years.

Id. at 713.

275. *Id.*

jurors excused during the trial.[276] The severe psychological burdens imposed upon the jurors by a lengthy, factually complex case affect the willingness of jurors to reach a verdict rationally. Frustration, due to the jurors' inability to understand the issues,[277] evidence, and testimony, as well as boredom with a seemingly endless parade of experts undoubtedly alter their unbiased perception of the proceedings.[278]

The Federal Rules of Civil Procedure provide aids to the jury. For example, rule 53(b) allows special masters to assimilate the issues and explain them to the jury. Also, rule 49 allows the court to submit special interrogatories to the jury to determine the extent of the jury's understanding of the issues. Pretrial formulation and simplification of issues is allowed pursuant to rule 16. These rules are limited in their effectiveness, however, one court noting that with extremely complex cases, "[A]ny role that a Special

---

276. *See The Jury System in the Federal Courts*, 26 F.R.D. 409, 485 (1960). While alternates may help alleviate this problem, rule 47(b) of the Federal Rules of Civil Procedure sets the maximum number of alternates at six and gives the court discretion to allow fewer or no alternates. Even if the maximum number of alternates is provided, the length of a trial could still force all six alternates to serve and perhaps further reduce the original number of jurors. *See, e.g., In re* United States Financial Sec. Litigation, 75 F.R.D. 702, 708 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980), in which the court discussed a case similar to *Financial Securities* in which three months after trial began, two of the four alternates allowed by the court had to be excused because of the length of the trial. Fearing similar depletion of the jury members in *Financial Securities*, the court was persuaded to deny a jury trial. *Id.*

277. *See In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1086 (3d Cir. 1980).

278. The United States District Court for the Southern District of California made the following statement, which illustrates the burden placed upon jurors in extremely complex cases:

> The fact finder will not only have to read, but will have to comprehend, the contents of these thousands of documents. It will have to analyze the USF accounts and the accounts of many subsidiaries, not only as they exist, but as the plaintiffs contend they should have existed. It will have to listen to, understand, and remember — throughout the trial — months upon months of highly technical and often boring testimony about various aspects of the USF accounts, including the testimony of the various expert witnesses who inevitably will be called by many of the parties to give their theories of whether the accounting standards actually used were correct, and, if not, what the correct standards should have been. After receiving and evaluating all of the evidence, the fact finder will then have to apply this mass of information to all of the asserted causes of action, each of which is based on different laws and different standards. The finder of fact must consider, separately, the evidence pertaining to each of the 100 or so defendants so as to reach a correct decision as to each. Finally, the fact finder will have to figure out which of the 100 or so defendants are liable to which of the plaintiffs, and which of those defendants are consequently liable to which of the other defendants who cross-complained, and for how much money.

In re United States Financial Sec. Litigation, 75 F.R.D. 702, 707 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

Master might be able to play . . . is so peripheral that the underlying complexities will necessarily remain."[279]

If a complex and lengthy case is deemed neither to be within the scope of equity nor to be such that the fifth amendment due process requirements preclude the right to a jury trial, policy considerations could be used by a court to deny a jury trial demand. Although the Federal Rules assist the jury in most cases, these rules can be somewhat ineffective in complex litigation. Thus, the possibility of an irrational verdict remains. The procedure guaranteed by the seventh amendment should only apply when the jury is capable of rendering a rational verdict.

VI. GUIDELINES FOR DENYING A TRIAL BY JURY

There is support for the contention that the only practical way to determine systematically whether a jury trial is appropriate in a particular case is to exclude designated classes of actions, such as all antitrust or patent litigation.[280] This approach, however, could undoubtedly preclude jury trials in some cases in which the jury would adequately resolve the dispute.[281] A preferable approach, designed to preserve the seventh amendment right, is a case-by-case analysis, which would give the district court judge discretion to determine whether a jury or court trial would be appropriate in complex cases. Fears of abuse of judicial discretion should be allayed because the Supreme Court has demonstrated a strong presumption in favor of jury trials.[282] It has also been noted that trial judges overwhelmingly support preservation of the civil jury.[283]

In determining whether a jury is capable of comprehending the issues in a case, the United States Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*[284] proposed a three-factor test.[285] The Third Circuit's test

279. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978). *See also* Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 388 nn.2, 3 (1954).

280. *E.g.*, Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 226 (N.D. Ill. 1977).

281. *Compare* Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977) (six to eight week trial) *with In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976) (four to six month trial and 900,000 marked documents). Both cases involved securities fraud.

282. *See* Simler v. Conner, 372 U.S. 221, 222 (1963); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959); Scott v. Neely, 140 U.S. 106, 109-10 (1890). Further, any objections to the case-by-case approach, due to the wide discretion it affords judges to decide jury trial motions, should be quelled by the fact that the Supreme Court has declared that complicated facts alone do not preclude a jury trial. United States v. Bitter Root Dev. Co., 200 U.S. 451, 472-73 (1906). See text accompanying notes 87-89 *supra*.

283. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1072-74 (1964).

284. 631 F.2d 1069 (3d Cir. 1980).

285. *Id.* at 1088.

addresses the degree of complexity necessary for a district court judge to deny a jury trial by considering

> [f]irst, the overall size of the suit, the primary indicia of which are the estimated length of trial, the amount of evidence to be introduced and the number of issues that will require individual consideration; second, the conceptual difficulties in the legal issues and the factual predicates to these issues, which are likely to be reflected in the amount of expert testimony to be submitted and the probable length and detail of jury instructions; and third, the difficulty of segregating distinct aspects of the case, as indicated by the number of separately disputed issues related to single transactions or items of proof.[286]

In addition to the Third Circuit's test, the following chart indicates when various federal courts have granted or denied jury trials. As can be seen, some types of cases are particularly susceptible to a non-jury determination under *Ross*.[287] For example, antitrust cases, securities violations, patent infringement cases, and trade secret thefts should alert the district court judge to a potential jury trial problem. In these types of cases, a weighing of the complexity of the issues, the anticipated length of the case, and the number of documents to be submitted must be considered. The chart reflects a preference for a trial before the court if the case is expected to last three months or more and if 2,000 documents are anticipated. Even if the issues to be litigated do not involve antitrust or other traditionally complex issues, the potential length of the trial, the number of documents, and the number of parties involved should be considered when the appropriateness of trial by jury is addressed. These factors hinder the "practical abilities and limitations of juries";[288] moreover, "a court is fully organized and competent for the transaction of business without a jury."[289]

---

286. *Id.* at 1088-89.
287. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970); *see* notes 208-29 and accompanying text *supra*.
288. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).
289. Schick v. United States, 195 U.S. 65, 71 (1904).

CHART

CASE	AT ISSUE
NO JURY	
In re Boise Cascade Securities Litigation[290]	Securities fraud
In re United States Financial Securities Litigation[292]	Securities law violation
Bernstein v. Universal Pictures, Inc.[293]	Class action for copyright infringement and antitrust violations
ILC Peripherals Leasing Corp. v. International Business Machines Corp.[294]	Antitrust violations
Citron v. Aro Corp.[295]	Conversion of trade secrets; counterclaim of trade libel
In re Japanese Electronic Products Antitrust Litigation[297]	Thirty year long conspiracy involving antitrust violations
CASE SPLIT FOR SEPARATE JURIES	
Gwathmey v. United States[299]	Condemnation proceedings
JURY ALLOWED	
SCM Corp. v. Xerox Corp.[302]	Antitrust violation
Jones v. Orenstein[303]	Class action alleging concealment of information by a corporation[304]
Tights, Inc. v. Stanley[307]	Patent infringement[308]

290. 420 F. Supp. 99 (W.D. Wash. 1976).
291. One hundred thousand pages is equivalent to a forty foot high stack, or a three-story building, or 90 volumes of the Federal Reporter 2d series, including headnotes. *In re* United States Financial Sec. Litigation, 75 F.R.D. 702, 707 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
292. 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).
293. 79 F.R.D. 59 (S.D.N.Y. 1978).
294. 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Machs. Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam).
295. 377 F.2d 750 (3d Cir. 1967).
296. Total trial time was thirty-two days, but due to recesses the trial actually encompassed three months. *Id.* at 752.
297. 631 F.2d 1069 (3d Cir. 1980).
298. Reflecting nine years of discovery, many of these documents were submitted in Japanese and had to be translated into English. *Id.* at 1073.
299. 215 F.2d 148 (5th Cir. 1954). This case involved condemnation proceedings concerning 236 tracts of land. The case was remanded due to the trial judge's abuse of discretion in allowing one jury to hear the entire case. *Id.* at 157. On remand, a jury trial was permitted, but the case was split so that separate juries would hear different portions of the case. *Id.* at 157–58. Although a pre-*Ross* case, the *Gwathmey* court recognized the practical limitations and abilities of jurors in effectively dealing with the case. *Id.* at 153–56.

LENGTH	NUMBER OF DOCUMENTS
4-6 months	900,000 documents of discovery[291]
2 years	5,000,000 documents; 100,000 pages of testimony anticipated
4 months	1,050 contracts in evidence; 2,500 pages of accounting work sheets; 1,200 trial exhibits
5 months	2,300 exhibits; 19,000 pages of transcripts
3 months[296]	4,000 pages of testimony; 200 exhibits
1 year	20,000,000 documents; 100,000 pages of depositions[298]
7 weeks[300]	6,248 page record in 12 volumes[301]
14 months	46,802 pages of trial transcripts
6-8 weeks[305]	——— [306]
1 year [309]	———

300. This reflects only the time within which evidence was heard on the issue of the value of the land. *Id.* at 152.
301. The record, likewise, reflects testimony only on value. *Id.*
302. 463 F. Supp. 983 (D. Conn. 1978).
303. 73 F.R.D. 604 (S.D.N.Y. 1977).
304. Although the court stated that "[t]here appears to be little doubt that this is a complex litigation," *id.* at 605, the court found the case not to be beyond the practical abilities and limitations of juries. *Id.* at 606.
305. This time period reflects estimated trial time on the issue of liability and, as the court noted, this was not an unusually long period of time for securities fraud litigation. *Id.*
306. While the opinion does not reflect the exact number of documents, the court remarked that "hundreds of documents had been marked for trial." *Id.* at 605. However, the court distinguished *Boise Cascade*, where the sheer volume of documents precluded the right to trial by jury. *Id.* at 606.
307. 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971).
308. The court noted that infringement on the pantyhose patent "involved no abstract scientific theories, no intricate mechanical devices, [and] no complex chemical compounds." *Id.* at 342.
309. This year represented the time between the filing of the complaint and the motion to strike the jury. *Id.* at 337.

VII. CONCLUSION

The seventh amendment must be reevaluated in order to preserve the integrity of the litigation process in complex, lengthy cases. Unless the Supreme Court is willing to define precisely whether trial by jury is a right that exists in such cases, the United States district courts and courts of appeals will be permitted to continue their disparate treatment of this issue. In response to this problem, there are two potential tacks the Supreme Court could take in holding that the seventh amendment right to trial by jury does not extend to cases that involve complex legal issues and are expected to last months or more.

First, the Supreme Court could find that these cases are not within the scope of the seventh amendment. Because the right to trial by jury exists only in actions at law, a classification of complex, lengthy cases as equitable would foreclose the seventh amendment right. This can be accomplished by looking to the historical functions of juries and of equity courts. In addition, equity courts assume jurisdiction of a case when the legal remedy is inadequate. An adequate remedy at law cannot be rendered in a trial before a jury when the jury is incapable of understanding the issues and evidence presented. In 1970, the Supreme Court, in *Ross v. Bernhard*,[310] established a viable test to ascertain whether the seventh amendment should apply in a given case. The Court noted that the practical abilities and limitations of juries should be considered before a jury trial can be allowed. Although *Ross* attempted to establish the boundaries of the seventh amendment right, it failed to enunciate manageable standards for its application. As a result, the *Ross* test has not been universally adopted by federal courts.

Further, in order to meet the common law definition of a jury, the venire must be composed of individuals who represent a fair cross section of the community. If a case is particularly complex and is anticipated to be extremely lengthy, many jurors could be excused due to personal hardship. A violation of the fair cross section rule could occur in this situation, because those excluded due to hardship are most often highly educated professionals or individuals with demanding business or personal pursuits. Consequently, a jury trial in a lengthy, complex case may violate the seventh amendment's requirement for the composition of a jury.

The Supreme Court could take a second tack if it finds the seventh amendment right does extend to complex, lengthy cases. The Court could find that the fifth amendment's due process requirements are fundamental and must override the competing seventh amendment concerns. Due process requires that a litigant

---

310. 396 U.S. 531 (1970).

be given a fair trial before a fair tribunal. A fair trial cannot be had when a jury is neither capable of applying the law to the facts nor of understanding the evidence or the issues. There can be no fair tribunal when an arbitrary verdict is rendered by a jury faced with confusing and incomprehensible numbers of documents and expert witnesses. A trial by jury would, in this situation, enhance the risk of erroneous decisions and would therefore violate due process.

Finally, policy considerations mandate a non-jury trial in extremely complex, lengthy cases. A judge has more familiarity with and control over the trial than the jury and will less likely be faced with the psychological burden of reaching a verdict in a forum in which issues hard to understand are presented and procedures beyond the jury's control are practiced.

In light of these legal and policy considerations, an attempt has been made to formulate factors a district court judge should utilize in deciding whether a case is sufficiently complex so that a jury will be incapable of rational decision making. The Supreme Court, with reasonable certainty, can establish such factors and guidelines for use by the district court judges should it decide that the right to jury trial does not extend to complex, lengthy cases or that, in such cases, the mandates of the fifth amendment override any seventh amendment right.

Deidre W. Bastian Lee
Eugenia Cooper Wootton