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Remittiturs (and Additurs) in The Federal Courts: An Evaluation with Suggested Alternatives

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REMITTITURS (AND ADDITURS) IN THE FEDERAL COURTS: AN EVALUATION WITH SUGGESTED ALTERNATIVES

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The use of remittitur and additur in American jurisprudence is based upon Justice Story's "very limits of the law" in conjunction with the constraints of the seventh amendment. This author states that since additur is not presently being used as a procedural devise and remittitur is premised on the same principles, the current use of remittitur should be eliminated.

I. INTRODUCTION

AT THE CONCLUSION of a jury trial in a federal court, after the jury has rendered its verdict, the parties are afforded an opportunity to make post-trial motions.[1] Such motions often include a motion, by the verdict loser, for the entry of a judgment notwithstanding the verdict,[2] or, in the alternative, for a new trial.[3] The

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1. *See* FED. R. CIV. P. 50(b) (motion for judgment notwithstanding the verdict); FED. R. CIV. P. 59(a), (b) & (c) (motion for a new trial); FED. R. CIV. P. 59(e) (motion to alter or amend a judgment). *See also* FED. R. CIV. P. 60(a) (motion for relief from judgment based on mistakes); FED. R. CIV. P. 60(b) (motion for relief from judgment based on, *inter alia*, mistakes, inadvertence, excusable neglect, newly discovered evidence, and fraud.

2. FED. R. CIV. P. 50(b).

3. FED. R. CIV. P. 59(a), (b) & (c). *See also* FED. R. CIV. P. 50(b) (permitting joinder of a new trial motion with a motion for a judgment notwithstanding the verdict or with alternative motions); FED. R. CIV. P. 50(c)(1) (requiring the trial judge who grants a judg-

motion for a judgment notwithstanding the verdict[4] is based on the losing party's contention that no "reasonable jury" could have found for the verdict winner on the strength of the evidence adduced at trial; thus, as a matter of law, the verdict should be reversed through entry of a judgment favorable to the original loser.[5] Grounds for the new trial motion might include any of the following, singly or in combination: errors at trial,[6] jury misconduct,[7] im-

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ment notwithstanding the verdict to also rule conditionally on any motion for a new trial); FED. R. CIV. P. 50(c)(2) (permitting a "party whose verdict has been set aside on a motion for judgment notwithstanding the verdict" to serve a motion for a new trial). A party may also move for a partial new trial, by which the party seeks redetermination only as to a particular claim or a particular issue. FED. R. CIV. P. 59(a).

A defendant who moves for a new trial on the ground that the jury award is excessive, *see infra* notes 11-18 and accompanying text may also move, in the alternative, for a remittitur. *See infra* notes 14-18 and accompanying text (describing the procedural device of remittitur); *see, e.g.*, Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546, 1547 (D. Colo. 1985) (age discrimination action); Flores Caraballo v. Lopez, 601 F. Supp. 14, 15 (D.P.R. 1984) (civil rights action for damages from false arrest, unlawful search, and use of excessive force); Alaniz v. San Isidro Indep. School Dist., 589 F. Supp. 17, 19 (S.D. Tex. 1983) (civil rights action for wrongful discharge); Coburn v. Browning Arms Co., 565 F. Supp. 742, 744 (W.D. La. 1983) (products liability action); Rodgers v. Fisher Body Div., Gen. Motors Corp., 575 F. Supp. 12, 13 (W.D. Mich. 1982) (employment discrimination action); Walker v. KFC Corp., 515 F. Supp. 612, 615 (S.D. Cal. 1981) (breach of fiduciary obligation and constructive trust action); Starlings v. Ski Roundtop Corp., 493 F. Supp. 507, 508 (M.D. Pa. 1980) (personal injury action); Washington v. National R.R. Passenger Corp., 477 F. Supp. 1134, 1134 (D.D.C. 1979) (personal injury action based on F.E.L.A.); Thornton v. Equifax, Inc., 467 F. Supp. 1008, 1009 (E.D. Ark. 1979) (state libel action and federal action under Fair Credit Reporting Act); Norfin, Inc. v. International Business Machs. Corp., 81 F.R.D. 614, 615 (D. Colo. 1979) (patent infringement action); United States v. 534.28 Acres of Land, 442 F. Supp. 82, 83 (M.D. Pa. 1977) (condemnation action); Mullins v. Seals, 416 F. Supp. 1098, 1099 (W.D. Va. 1976) (wrongful death action). In fact, in the great majority of cases in which a defendant moves for a new trial on the ground of excessive jury verdict, he combines that motion with an alternative motion for a remittitur. Even if the defendant does not move in the alternative for a remittitur, however, a trial court may grant such relief. *See infra* notes 14-15 and accompanying text.

4. FED. R. CIV. P. 50(b).

5. *See, e.g.*, Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) (overturning Missouri Supreme Court's reversal of jury verdict, since evidence was sufficient to support verdict); Lavender v. Kurn, 327 U.S. 645 (1946).

6. *See, e.g.*, Westbrook v. General Tire and Rubber Co., 754 F.2d 1233 (5th Cir. 1985) (requiring new trial on issue of damages because trial judge allowed improper argument by plaintiff's counsel); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984) (requiring new trial on issue of damages because trial judge allowed improper speculation as to decedent's future income); Jamison Co. v. Westvaco Corp., 530 F.2d 34 (5th Cir. 1976) (requiring new trial because damages awarded plaintiff were excessive); Libco Corp. v. Dusek, No. 77 Civ. 4386 (N.D. Ill. Apr. 29, 1986) (Lexis, Genfed Library, Dist. file) (plaintiff's motion to revise the order granting a new trial was denied since the decision was not clearly erroneous or contrary to law and facts).

7. *See, e.g.*, United States v. Harry Barfield Co., 359 F.2d 120 (5th Cir. 1966) (reversing denial of new trial on ground that, during a recess, juror had engaged in a friendly conversation, unrelated to trial, with plaintiff); Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir.

proper argument by opponent's counsel,[8] admission of inadmissible evidence,[9] and a verdict which is against the substantial weight of the evidence.[10] If the losing party is a defendant against whom the

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1964) (reversing denial of new trial on ground that juror's answers to voir dire question which they misunderstood led to harmful error because of inclusion on the jury of those jurors); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir. 1947), *cert. denied*, 332 U.S. 764 (1947) (new trial on ground that jurors agreed to abide by majority votes because one juror wished to return home to deal with a family emergency). *See generally* Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958).

8. *See, e.g.*, Westbrook v. General Tire & Rubber Co., 754 F.2d 1233 (5th Cir. 1985) (requiring new trial on issue of damages because trial judge allowed improper argument by plaintiff's counsel); Evers v. Equifax, Inc., 650 F.2d 793 (5th Cir. 1981) (affirming grant of new trial where plaintiff's counsel appealed to jury to award sufficient damages to prevent recurrence of errors on credit report); City of Cleveland v. Peter Kiewirt Sons', 624 F.2d 749 (6th Cir. 1980) (granting new trial because of continued references by plaintiff's counsel to defendant's size and insurance coverage); Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367 (S.D.N.Y. 1982) (setting aside verdict for plaintiff on grounds that plaintiff's counsel tampered with evidence transmitted to deliberating jury, unless plaintiff agreed to remittitur).

9. *See, e.g.*, Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367 (S.D.N.Y. 1982); Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1 (E.D. Tenn. 1978) (granting new trial on issue of damages where jury award was excessive and the product of passion and prejudice).

10. *See, e.g.*, Altrichter v. Shell Oil Co., 263 F.2d 377 (8th Cir. 1959); Aetna Casualty & Sur. Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941); Balaska v. National Tea Co., 328 F. Supp. 147 (W.D. Pa. 1971). When a federal district court judge is deciding whether to grant a new trial on the ground that the jury verdict is against the substantial weight of the evidence, he is permitted to make his own evaluation of the credibility and significance of the evidence adduced at trial. *See, e.g.*, *Altrichter*, 263 F.2d at 380. In making this decision, the judge acts like a thirteenth juror, a person present at trial who is capable of evaluating demeanor evidence and deciding whether the jury believed the wrong people. As stated by the United States Court of Appeals for the Fourth Circuit:

> Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false . . . .

Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932).

The position stated by the Fourth Circuit—that a district court judge cannot reverse the jury by directing a verdict if he determines that, in his personal assessment, the jury verdict is against the weight of the evidence because such an action would constitute an unconstitutional reexamination of a "fact tried by a jury," U.S. CONST. amend. VII—has been articulated and generally accepted by federal judges. *See, e.g.*, Dyer v. MacDougall, 201 F.2d 265, 271 (2d Cir. 1952) (Frank, J. concurring); Marsh v. Illinois Cent. R.R. Co., 175 F.2d 498, 499-500 (5th Cir. 1949). These courts feel that the judge's only option would be to grant a new trial of some or all of the issues in the case (pursuant to Rule 59(a) of the Federal Rules of Civil Procedure). Yet in 1880 the Supreme Court, in *Bowditch v. Boston*, announced a seemingly different conclusion:

> It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would

jury has assessed money damages, the defendant might add excessiveness of the jury verdict to his list of reasons for moving for a new trial.[11] If the trial judge agrees that the jury verdict is excessive, he may order a whole new trial[12] or a partial new trial limited to damage assessment issues.[13] Trial judges also utilize an alternative method for dealing with some excessive verdicts—the trial judge calculates the amount of the verdict which he regards as excessive and then orders a conditional new trial (on some or all issues), to be held if the plaintiff refuses to give up (remit) the amount of the jury verdict deemed by the trial judge to be excessive.[14] This

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be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court.

101 U.S. 16, 18 (1880). *See generally*, James, *Sufficiency of the Evidence and Jury Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961) (giving fuller treatment to this issue). The impact of the seventh amendment on the device of remittitur is discussed below. *See infra* notes 55-93 and accompanying text.

A district court judge whose assessment of the evidence presented in a case runs contrary to that of the jury, as evidenced by its verdict, may grant a new trial on his own initiative, even though neither party has made a post-trial motion. FED. R. CIV. P. 59(d). Such grant of power reflects a federal attitude that rendering judgments consistent with the evidence adduced at a proper jury trial is more important than judicial economy. As noted below, such an attitude is not necessarily reflected by use of the remittitur procedure. *See infra* notes 115, 119-20 and accompanying text.

11. *See infra* note 32.

12. FED. R. CIV. P. 59(a). *See, e.g.*, Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367 (S.D.N.Y. 1982).

13. FED. R. CIV. P. 59(a). *See, e.g.*, Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 3 (E.D. Tenn. 1978).

14. The subsequent disposition of the following cases is not cited as authority for the substantive issues in the text or footnotes, rather, the cases are meant to provide examples of the language used by trial courts. The language and procedures of conditional new trial orders rendered by *federal* trial courts vary in several regards. In some cases, the defendant's new trial motion is granted conditioned on the plaintiff's subsequent refusal to remit the excess. *See, e.g.*, Harper v. Zapata Off-Shore Co., 563 F. Supp. 576, 585 (E.D. La. 1983) ("[W]e grant a new trial on this issue . . . unless plaintiff accepts a remittitur reducing the award to $250,000"), *rev'd on other grounds*, 741 F.2d 87 (5th Cir. 1984); Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168, 1191 (W.D. Wis. 1982), ("IT IS FURTHER ORDERED that defendants' motion for a new trial is GRANTED . . . unless plaintiff agrees to accept $10,000 in compensatory damages and $15,000 in punitive damages"), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983); Brink's Inc. v. City of New York, 546 F. Supp. 403, 415 (S.D.N.Y. 1982) ("the motion for a new trial is granted unless the City agrees to a remittitur . . . ."), *aff'd*, 717 F.2d 700 (2d Cir. 1983); Morgan v. Consolidated Rail Corp., 509 F. Supp. 281, 288 (S.D.N.Y. 1980) ("the $710,000 verdict is hereby set aside as to the amount of damages and a new trial granted Conrail on that issue unless . . . Morgan files . . . a remittitur of all damages in excess of $540,000 . . . ."); Uris v. Gurney's Inn Corp., 405 F. Supp. 744, 747 (E.D.N.Y. 1975) ("Defendant's motion for a new trial is granted . . . unless plaintiff . . . remits the amount of $200,000 . . . ."). Other courts reverse the language, ordering that the defendant's motion for a new trial be denied unless plaintiff refuses to remit. *See, e.g.*, Anglo-American Gen. Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41, 46 (N.D. Cal. 1979) ("Defendant's motion for judgment notwithstanding the verdict is denied, as is the motion for a new trial unless plaintiff declines

to remit $95,000 of the $100,000 award of punitive damages"). *See also* Smith v. City of Seven Points, 608 F. Supp. 458, 466 (E.D. Tex. 1985) ("[i]t is . . . ORDERED that defendants' Motion for New Trial be GRANTED on the following conditions: (1) If plaintiff agrees to a reduction in actual and punitive damages of $200,000.00, then defendants' motion will be DENIED . . ."). Other courts order entry of judgment in the remittitur-reduced amount, with the provision that such order be vacated and a new trial had if the plaintiff objects to entry of judgment in said amount. *See, e.g.*, United States v. 47.14 Acres of Land, 674 F.2d 722, 729 (8th Cir. 1982) ("[i]f . . . appellees consent to a remittitur of $169,934, the judgment will stand affirmed as of the date of judgment from which appeal was taken . . . [but] [i]n the absence of such remittitur, the district court will vacate its judgment and order a new trial"); Community Television Servs., v. Dresser Indus., 435 F. Supp. 214, 218 (D.S.D. 1977) ("[I]t will be ordered (1) that, if . . . plaintiff . . . shall serve . . . a remittitur in the sum of $110,370.01 upon the verdict found . . . the motion for a new trial be denied and the judgment confirmed for the remaining sum; but (2) that if such remittitur . . . be not so . . . filed . . ., the motion for a new trial be sustained, the judgment entered upon the verdict be vacated . . . and a new trial be granted"). *See also* Williams v. Ryder Truck Lines, Inc., 489 F. Supp. 430, 432 (E.D. Tenn. 1979) ("ORDERED . . . that a judgment in favor of Mr. Williams in the amount of $150,000.00 and a judgment in favor of Mrs. Williams in the amount of $5,000.00 be awarded . . . [i]n the event of rejection, a new trial is granted"). Still other courts postpone the matter of granting or denying a new trial motion, couching their orders in terms of the plaintiff's behavior.

> IT IS FURTHER ORDERED that if plaintiffs file a statement . . . accepting the remittitur of compensatory damages to $155,000 and of punitive damages to $10,000, defendants' motion for new trial shall be regarded as denied as of the date of such filing.
>
> IT IS FURTHER ORDERED that if no statement is filed by plaintiffs, the motion for new trial shall be regarded as granted as of the date of the expiration of the time period within which a statement could have been filed, and the Court will then set a new trial on the issue of damages only.

Strathmere v. Karavas, 100 F.R.D. 478, 479-80 (D. Ariz. 1984). *See also* Lux v. McDonnell Douglas Corp., 608 F. Supp. 98, 106 (N.D. Ill. 1984) ("Defendant's motion for a new trial will be denied if plaintiff agrees to remittitur of $1,000,000 . . . . Should plaintiff refuse remittitur, defendant's motion for a new trial will be granted"), *rev'd* 803 F.2d 304 (7th Cir. 1986).

The period of time within which the plaintiff who wishes to avoid a new trial must act on the remittitur order varies, with time periods of ten (10) days (the shortest period for a trial court's original order), *see, e.g.*, Strathmere v. Karavas, 100 F.R.D. 478, 479 (D. Ariz. 1984); Harper v. Zapata Off-Shore Co., 563 F. Supp. 576, 585 (E.D. La. 1983), *rev'd on other grounds*, 741 F.2d 87 (5th Cir. 1984); Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168, 1191 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983); Brinks Inc. v. City of New York, 546 F. Supp. 403, 415 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700 (2d Cir. 1983); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16, 19 (E.D. Tenn. 1980); fifteen (15) days, *see, e.g.*, Holman v. Mark Indus., 610 F. Supp. 1195, 1206 (D. Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986); Dixon v. Maritime Overseas Corp., 490 F. Supp. 1191, 1200 (S.D.N.Y. 1980), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 579 (D. Md. 1975); twenty (20) days, *see, e.g.*, Marcone v. Penthouse Int'l, 577 F. Supp. 318, 336 (E.D. Pa. 1983), *rev'd on other grounds*, 754 F.2d 1072 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 182 (1986); Akermanis v. Sea-Land Serv., Inc., 521 F. Supp. 44, 59 (S.D.N.Y. 1981), *rev'd on other grounds*, 688 F.2d 898 (2d Cir. 1982), *cert. denied*, 461 U.S. 927 (1983), *cert. denied*, 464 U.S. 1039 (1984); Morgan v. Consolidated Rail Corp., 509 F. Supp. 281, 288 (S.D.N.Y. 1980); Collins v. Retail Credit Co., 410 F. Supp. 924, 936 (E.D. Mich. 1976); and thirty (30) days, *see, e.g.*, Douglass v. Hustler Magazine, 607 F. Supp. 816, 822 (N.D. Ill. 1984), *rev'd on other grounds*, 769 F.2d 1128 (7th Cir. 1985); Plattner v. Strick Corp., 102 F.R.D 612, 619 (N.D. Ill. 1984); Lux v.

procedural device is called a remittitur.[15] If the plaintiff refuses to remit, the case is submitted to a new jury without further action by

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McDonnell Douglas Corp., 608 F. Supp. 98, 106 (N.D. Ill. 1984), *rev'd on other grounds*, 803 F.2d 304 (7th Cir. 1986); Dick v. Watonwan County, 562 F. Supp. 1083, 1110 (D. Minn. 1983), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984); Jeanneret v. Vichey, 541 F. Supp. 80, 86 (S.D.N.Y. 1982); Community Television Servs. v. Dresser Indus., 435 F. Supp. 214, 218 (D.S.D. 1977); Uris v. Gurney's Inn Corp., 405 F. Supp. 744, 747 (E.D.N.Y. 1975), being the standard time periods permitted. At least one court has given the plaintiff slightly more than thirty days to respond, Smith v. City of Seven Points, 608 F. Supp. 458, 466 (E.D. Tex. 1985), while upon denial of a plaintiff's motion for reconsideration of a remittitur order, the plaintiff was given only seven (7) days to respond. Marcone v. Penthouse Int'l, 577 F. Supp. 318, 338 (E.D. Pa. 1983), *rev'd on other grounds*, 754 F.2d 1072 (3d Cir. 1985). It is clear that, in some jurisdictions, such as the Southern District of New York, no single time period is prescribed by court rules; the period allotted must depend upon the judge and the factual circumstances of the case.

If the defendant has specifically requested a remittitur as alternative relief to a new trial, the court might rule separately on the specific remittitur request. *See, e.g.*, Holman v. Mark Indus., 610 F. Supp. 1195, 1206 (D. Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986) ("ORDERED . . . [t]hat the motion of defendant Patuxent Equipment Company for a partial new trial on damages or for a remittitur, be . . . granted."); Hodges v. Keystone Shipping Co., 578 F. Supp. 620, 625 (S.D. Tex. 1983) ("it is . . . ORDERED . . . that defendants' motion . . . for remittitur or new trial is . . . GRANTED as to compensatory damages unless plaintiff accepts remittitur of the compensatory damages to $12,500."); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16, 19 (E.D. Tenn. 1980) ("The Court . . . grants a remittitur of $250,000 . . .; [t]he plaintiff shall have 10 days in which to accept . . . and if he fails to accept, a new trial is granted."). *See also supra* note 3.

The language quoted below is an example of a plaintiff's written acceptance of a remittitur order:

> COMES NOW Plaintiff, LEWIS LEON HODGES, and, pursuant to the Court's Memorandum and Order dated October 4, 1983, agrees to accept the remittitur of compensatory damages to $12,500.00 expressly reserving any rights he may have to object to this remittitur on appeal. In light of his acceptance of this remittitur, Plaintiff moves that judgment in this case be made final.

Hodges, 578 F. Supp. at 625.

15. *See, e.g.*, Busch, *Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEF. L.J. 521 (1963); Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942); James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQ. L. REV. 143 (1963); Note, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976) [hereinafter Note, *Remittitur Practice*]; Comment, *Additur and Remittitur in Federal and State Courts: An Anomaly?*, 3 CUM. L. REV. 150 (1972) [hereinafter Comment, *Additur and Remittitur*]; Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150 [hereinafter Note, *Appealability of Judgments*]; Comment, *Statutory Authorization of Additur and Remittitur*, 43 MISS. L.J. 107 (1972) [hereinafter Comment, *Statutory Authorization*]; Comment, *Appellate Remittitur*, 33 MO. L. REV. 637 (1968); Comment, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases*, 43 U. CHI. L. REV. 376 (1976) [hereinafter Comment, *Remittitur Review*]; Note, *Constitutional Law—Right to Jury Trial— Judicial Use of Additurs in Correcting Insufficient Damage Verdicts*, 21 VA. L. REV. 666 (1935) [hereinafter Note, *Constitutional Law*]; Note, *Procedures to Lessen Remittitur's Intrusion on the Seventh Amendment Right to Jury Trial*, 1979 WASH. U.L.Q. 639 [hereinafter Note, *Procedures to Lessen Remittitur's Intrusion*]; Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934) [hereinafter Comment, *Correction of Damage Verdicts*].

the trial court.[16] If the plaintiff remits, the remittitur-reduced verdict is entered, and the defendant does not get his new trial.[17] Under current practice, the remitting plaintiff cannot then appeal the conditional new trial order.[18]

This conditional new trial device—remittitur—has been employed by state[19] as well as federal[20] trial courts (and, in some circumstances, appellate courts[21]) for more than one hundred years,[22] and the use of remittitur has increased continuously to the present day.[23] While the related conditional new trial device of additur—grant of plaintiff's motion for a new trial conditioned on the defendant's refusal to increase the jury verdict by the amount the trial judge deems necessary to cure an inadequate verdict[24]—is employed

16. *See supra* notes 14-15.

17. *See supra* notes 14-15.

18. *See infra* notes 168-70 and accompanying text.

19. *See, e.g.*, State v. Ferguson, 269 Ala. 44, 110 So. 2d 280 (1959); Grant v. Thomas, 254 Iowa 581, 118 N.W.2d 545 (1962); Slocum v. Kansas Power & Light Co., 190 Kan. 747, 378 P.2d 51 (1963); Ahlstrom v. Minneapolis, St. Paul & Sault Ste. Marie R.R. Co., 244 Minn. 1, 68 N.W.2d 873 (1955); Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960); Powers v. Allstate Ins. Co., 10 Wis.2d 78, 102 N.W.2d 393 (Wis. 1960).

20. *See, e.g.*, Holman v. Mark Indus., 610 F. Supp. 1195 (D. Md. 1985); Smith v. City of Seven Points, 608 F. Supp. 458 (E.D. Tex. 1985); Lux v. McDonnell Douglas Corp., 608 F. Supp. 98 (N.D. Ill. 1984), *rev'd on other grounds*, 803 F.2d 318 (7th Cir. 1986); Douglas v. Hustler Magazine, 607 F. Supp. 816 (N.D. Ill. 1984), *rev'd on other grounds*, 769 F.2d 1128 (1985); Korotki v. Goughan, 597 F. Supp. 1365 (D. Md. 1984); Hodges v. Keystone Shipping Co., 578 F. Supp. 620 (S.D. Tex. 1983); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16 (E.D. Tenn. 1980); Fratelli Gardino, S.P.A. v. Carribean Lumber Co., 447 F. Supp. 1337 (S.D. Ga. 1978); Collins v. Retail Credit Co., 410 F. Supp. 924 (E.D. Mich. 1976). *See also infra* note 31.

21. *See, e.g.*, Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985); K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148 (10th Cir. 1985); Martell v. Boardwalk Enter., 748 F.2d 740 (2d Cir. 1984); Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979). *See also infra* notes 149-62 and accompanying text.

22. *See, e.g.*, Woodworth v. Chesbrough, 244 U.S. 79 (1917); Hansen v. Boyd, 161 U.S. 397 (1896); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895); Clark v. Sidway, 142 U.S. 682 (1892); Kennon v. Gilmer, 131 U.S. 22 (1889); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889); Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1886); Eaton v. Jones, 107 Cal. 487, 40 P. 798 (1895); Johnson v. Duncan, 16 S.E. 88 (Ga. 1892); Young v. Englehard & Silverberg, 2 Miss. 19 (1834); McAlister v. Mullanphy, 3 Mo. 25 (1831); Fry v. Stowers, 36 S.E. 482 (Va. 1900). The historical development of the remittitur device is discussed below. *See infra* notes 51-93 and accompanying text.

23. *See, e.g.*, James, *supra* note 15, at 146 & n.16.

24. *See, e.g.*, Busch, *supra* note 15, at 551-58; Carlin, *supra* note 15, at 1-2; James, *supra* note 15, at 145-46; Note, *Remittitur Practice*, *supra* note 15, at 299 n.2; Comment, *Additur and Remittitur*, *supra* note 15, at 153-55; Comment, *Statutory Authorization*, *supra* note 15, at 110-19; Note, *Constitutional Law*, *supra* note 15, at 666-67; Comment, *Correction of Damage Verdicts*, *supra* note 15, at 322-26.

by some state courts,[25] federal courts are prohibited from using additur because the Supreme Court has ruled[26] that the procedure violates the seventh amendment of the Constitution.[27] Upon careful examination, the virtues extolled in support of these conditional new trial devices are generally reduced to economies of time, the parties and the judicial system, and money.[28] Trial judges usually assert that if the only error in a jury verdict is the jury's excessive generosity (in remittitur cases) or penuriousness (in additur cases), the time, effort and money that went into getting that original jury verdict could be saved by these simple devices.[29]

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25. *See, e.g.*, Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967); James v. Morey, 44 Ill. 352 (1867); Carr v. Miner, 42 Ill. 179 (1866); Marsh v. Kendall, 65 Kan. 48, 68 P. 1070 (1902); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957); Stahlheber v. American Cyanamid Co., 451 S.W.2d 48 (Mo. 1970); Fisch v. Manger, 24 N.J. 66, 130 A.2d 815 (1957); O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956); Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826 (1958); Claising v. Kershaw, 224 P. 573, 129 Wash. 67 (1924).

26. Dimick v. Scheidt, 293 U.S. 474 (1935). *See also infra* notes 56-93 and accompanying text.

27. *See infra* notes 56-93 and accompanying text.

28. *See, e.g.*, Carlin, *supra* note 15, at 3-4 ("[t]he desirability of [remittitur's] use, to avoid the expense, delay and prolongation of litigation incident to a new trial, would seem to be beyond controversy"); Comment, *Additur and Remittitur*, *supra* note 15, at 160 ("[r]emittitur and additur have developed through the years to help alleviate the situation of crowded dockets brought about by the necessity of new trials on the issue of excessive or inadequate jury awards"); Comment, *Correction of Damage Verdicts*, *supra* note 15, at 318 ("efficiency of judicial administration is hampered by the granting of new trials, with their concomitant delays in final adjudication and increased costs to litigants"). Clearly, with an overburdened judicial system, avoidance of unnecessary new trials is a desirable goal. However, current remittitur practice is not the fairest method for achieving this goal, and this Article suggests alternative methods for reducing the potential for excessive verdicts without acting on such verdicts. *See infra* notes 166-263 and accompanying text.

29. *See*, Lewis v. Elliott, 628 F. Supp. 512, 524 (D.D.C. 1986) (court orders new trial conditioned on plaintiff's refusal to remit part of compensatory damages, stating, "[t]he Court concludes that the jury's damage award exceeded the maximum limit . . . [and] [a]ccordingly, a remittitur is appropriate . . . ."); Holman v. Mark Indus., Inc., 610 F. Supp. 1195, 1206 (D. Md. 1985) (court orders new trial conditioned on plaintiff's refusal to remit part of compensatory damages and damages for loss of consortium, stating, "[t]he principle of remittitur is ancillary to the right of a trial judge to grant a new trial, and a remittitur may be assessed in an amount that will bring the verdict on damages to the maximum amount which the jury could have awarded under the evidence introduced at trial"); Douglass v. Hustler Magazine, 607 F. Supp. 816, 821-22 (N.D. Ill. 1984), *rev'd on other grounds*, 769 F.2d 1128 (7th Cir. 1985) (court orders new trial conditioned on plaintiff's refusal to remit part of award of punitive damages, stating, "$1,500,000 in punitive damages . . . far exceeds the necessary and permissible level . . .[;] $100,000 . . . is a reasonable amount . . . [and] [t]he Court . . . will grant Hustler's motion for a new trial unless Douglass agrees to remittitur . . . ."); Hodges v. Keystone Shipping Co., 578 F. Supp. 620, 624 (S.D. Tex. 1983) (court orders new trial conditioned on plaintiff's refusal to remit part of award of compensatory damages, stating, "[w]hen a motion for new trial is premised on the issue of excessive damages, the court may, if the verdict is not judged to have been the result of the jury's passion or

Although the frequency of use of these devices varies from jurisdiction to jurisdiction,[30] the remittitur device has been and continues to be employed in every federal circuit,[31] and most state courts

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prejudice, offer the plaintiff the options of new trial or remittitur"); Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40-41 (D. Colo. 1983) (court orders new trial conditioned on plaintiff's refusal to remit part of award of punitive damages, stating, "[h]ad the entire trial been tainted [by jury passion or prejudice], the Court would have no choice but to order a new trial . . .[,] but finding no defect in the liability determination], the Court will order a remittitur . . . ."), *rev'd*, 785 F.2d 849, 856 (10th Cir. 1986) (on ground that district court erred in denying defendants' motions for a directed verdict on issue of punitive damages and in submitting this issue to the jury); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 103 (D.S.C 1979) (court orders new trial conditioned on plaintiff's refusal to remit part of award of actual damages, stating, "[t]he practice of remittitur . . . allows a court to condition denial of a motion for a new trial upon plaintiff filing a remittitur in a stated amount"); Jehl v. S. Pac. Co., 427 P.2d 988, 994-95, 59 Cal. Rptr. 276, 282-83 (1967) (court adopts additur as a method for achieving "economy and efficiency in judicial proceedings" by which trial court can order new trial conditioned on defendant's refusal to increase the jury verdict to a court-fixed amount); Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957) (court adopts additur); O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956) (court adopts additur); Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958) (court adopts additur). The issue of jury passion or prejudice as affecting a court's decision to grant a remittitur will be discussed below. *See infra* notes 101-03 and accompanying text.

Other courts make conditional new trial orders without discussing the benefits or bases of these orders. *See, e.g.*, Smith v. City of Seven Points, 608 F. Supp. 458, 466 (E.D. Tex. 1985) (court finds actual damage award "could not have exceeded $50,000.00" and then, without discussion of the basis for, or the propriety of remittitur, orders a new trial conditioned on plaintiff's refusal to remit); Lux v. McDonnell Douglas Corp., 608 F. Supp. 98, 105 (N.D. Ill. 1984) (court finds compensatory damage award excessive and, after stating "that a remittitur of $1,000,000 is appropriate," enters a conditional new trial order), *rev'd*, 803 F.2d 304 (7th Cir. 1986) (on grounds that evidence of decedent's income tax liability was not allowed by district court and would have altered size of pecuniary damage amount awarded by jury); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16, 19 (E.D. Tenn. 1980) (court finds amount of compensatory damages over $1,000,000 to be excessive and, without further discussion, "grants a remittitur of $250,000, which will reduce the verdict to $1,000,000").

30. *See infra* notes 101-21 and accompanying text. Some federal jurisdictions have less rigorous requirements than do other jurisdictions for use of remittitur. Moreover, some federal circuits, such as the Second and Fifth Circuits, decide many more cases involving remittitur requests or orders than do other circuits, such as the First, Ninth and Tenth Circuits. *See infra* note 31. The additur device is not employed by federal courts. *See infra* notes 56-93 and accompanying text.

Most states employ remittitur to some extent, but not all states employ additur. *See generally*, Busch, *supra* note 15; Carlin, *supra* note 15; Comment, *Statutory Authorization*, *supra* note 15; Note, *Constitutional Law*, *supra* note 15; Comment, *Correction of Damage Verdicts*, *supra* note 15.

31. First Circuit: *See, e.g.*, Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982); Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir. 1980).

Second Circuit: *See, e.g.*, Martell v. Boardwalk Enter., 748 F.2d 740 (2d Cir. 1984); Stratis v. Eastern Air Lines, 682 F.2d 406 (2d Cir. 1982); Evans v. Calmar S.S. Co., 534 F.2d 519 (2d Cir. 1976); Brink's Inc. v. City of New York, 546 F. Supp. 403 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700 (2d Cir. 1983); Jeanneret v. Vichey, 541 F. Supp. 80 (S.D.N.Y. 1982), *rev'd on other grounds*, 693 F.2d 259 (2d. Cir. 1982); Morgan v. Consolidated Rail Corp., 509 F. Supp. 281 (S.D.N.Y. 1980); Dixon v. Maritime Overseas Corp., 490 F. Supp. 1191

(S.D.N.Y. 1980); Garzelli v. Howard Johnson's Motor Lodges, 419 F. Supp. 1210 (E.D.N.Y. 1976); Uris v. Gurney's Inn Corp., 405 F. Supp. 744 (E.D.N.Y 1975).

Third Circuit: *See, e.g.*, Walters v. Mintec/Int'l, 758 F.2d 73 (3d Cir. 1985); Kazan v. Wolinski, 721 F.2d 911 (3d Cir. 1983); Marcone v. Penthouse Int'l, 577 F. Supp. 318 (E.D. Pa. 1983), *rev'd on other grounds*, 754 F.2d 1072 (3d Cir. 1985); Marsh v. Interstate & Ocean Transp. Co., 521 F. Supp. 1007 (D. Del. 1981); Schreffler v. Board of Educ., 506 F. Supp. 1300 (D. Del. 1981); Starlings v. Ski Roundtop Corp., 493 F. Supp. 507 (M.D. Pa. 1980); Marder v. Conwed Corp., 75 F.R.D. 48 (E.D. Pa. 1977); Keystone Floor Prods. Co. v. Beattie Mfg., 432 F. Supp. 869 (E.D.Pa. 1977); Meyer v. W.R. Grace & Co., 421 F. Supp. 1331 (E.D. Pa. 1976); Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972).

Fourth Circuit: *See, e.g.*, Martin v. Fleissner GMBH, 741 F.2d 61 (4th Cir. 1984); Daskarolis v. Firestone Tire & Rubber Co., 651 F.2d 937 (4th Cir. 1981); Holman v. Mark Indus., 610 F. Supp. 1195 (D. Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986); Korotki v. Goughan, 597 F. Supp. 1365 (D. Md. 1984); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975), *aff'd in part, rev'd in part on other grounds*, 544 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

Fifth Circuit: *See, e.g.*, Knight v. Texaco, Inc., 786 F.2d 1296 (5th Cir. 1986); Enterprise Ref. Co. v. Sector Ref., Inc., 781 F.2d 1116 (1986); Giancontieri v. Pan Am. World Airways, Inc., In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311 (5th Cir. 1984); Harper v. Zapata Off-Shore Co., 741 F.2d 87 (1984); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); Maxey v. Freightliner Corp., 722 F.2d 1238 (5th Cir. 1984), *modified*, 727 F.2d 350 (5th Cir. 1984); Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143 (5th Cir. 1983); Higgins v. Smith Int'l, 716 F.2d 278 (5th Cir. 1983); Sam's Style Shop v. Cosmos Broadcasting Corp., 694 F.2d 998 (5th Cir. 1982); Carlton v. H.C. Price Co., 640 F.2d 573 (5th Cir. 1981); Keyes v. Lauga, 635 F.2d 330 (5th Cir. 1981); Geyer v. Vargas Prods., Inc., 627 F.2d 732 (5th Cir. 1980); Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980); Miles v. Vicksburg Chem. Co., 588 F.2d 512 (5th Cir. 1979); Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978); Adams v. Ford Motor Credit Co., 556 F.2d 737 (5th Cir. 1977); Davis v. Safeway Stores, Inc., 532 F.2d 489 (5th Cir. 1976); Villar v. Wilco Truck Rentals, 627 F. Supp. 389 (M.D. La. 1986); Smith v. City of Seven Points, 608 F. Supp. 458 (E.D. Tex. 1985); Hodges v. Keystone Shipping Co., 578 F. Supp. 620 (S.D. Tex. 1983); Coburn v. Browning Arms Co., 565 F. Supp. 742 (W.D. La. 1983); Faulkner v. Western Elec. Co., Inc., 98 F.R.D. 282 (N.D. Ga. 1983).

Sixth Circuit: *See, e.g.*, American Anodco, Inc. v. Reynolds Metals Co., 743 F.2d 417 (6th Cir. 1984); Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Smith v. John Swafford Furniture Co., 614 F.2d 552 (6th Cir. 1980); Jones v. Wittenberg Univ., 534 F.2d 1203 (6th Cir. 1976); Merkel v. Scovill, Inc., 573 F. Supp. 1055 (S.D. Ohio 1983), *modified*, 787 F.2d 174 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 585 (1986); Williams v. Ryder Truck Lines, 489 F. Supp. 430 (E.D. Tenn. 1979); Collins v. Retail Credit Co., 410 F. Supp. 924 (E.D. Mich. 1976).

Seventh Circuit: *See, e.g.*, Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985); Durant v. Surety Homes Corp., 582 F.2d 1081 (7th Cir. 1978); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); Lux v. McDonnell Douglas Corp., 608 F. Supp. 98 (N.D. Ill. 1984), *rev'd on other grounds*, 803 F.2d 304 (7th Cir. 1986); Douglass v. Hustler Magazine, 607 F. Supp. 816 (N.D. Ill. 1984), *rev'd on other grounds*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1489 (1976); Plattner v. Strick Corp., 102 F.R.D. 612 (N.D. Ill. 1984); Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983).

Eighth Circuit: *See, e.g.*, Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1635 (1986); Dabney v. Montgomery Ward & Co., 761 F.2d 494 (8th Cir.), *cert. de-*

use one or both devices.[32] Moreover, the versatility of the devices is demonstrated by the wide variety of cases in which they have been used, including tort cases,[33] contract cases,[34] civil rights actions,[35]

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nied, 106 S. Ct. 233 (1985); Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984); Vanskike v. Union Pac. R.R., 725 F.2d 1146 (8th Cir. 1984); Ouachita Nat'l Bank v. Tosco Corp., 716 F.2d 485 (8th Cir. 1983); Everett v. S.H. Parks & Assocs., 697 F.2d 250 (8th Cir. 1983); Central Microfilm Serv. v. Basic/Four Corp., 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1982), *cert. denied*, 459 U.S. 1204 (1983); United States v. 47.14 Acres of Land, 674 F.2d 722 (8th Cir. 1982); Stineman v. Fontbonne College, 664 F.2d 1082 (8th Cir. 1981); Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); Kropp v. Ziebarth, 601 F.2d 1348 (8th Cir. 1979); Richardson v. Communications Workers of Am., 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); Bankers Life & Casualty v. Kirtley, 307 F.2d 418 (8th Cir. 1962); Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *modified*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986); Dick v. Watonwan County, 562 F. Supp. 1083 (D. Minn. 1983), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984); Tribble v. Westinghouse Elec., 508 F. Supp. 14 (E.D. Mo. 1980), *aff'd*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983).

Ninth Circuit: *See, e.g.*, 999 v. C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985). *Cf.* Walker v. KFC Corp., 515 F. Supp. 612 (S.D. Cal. 1981) (trial court refuses to grant remittitur), *modified*, 728 F.2d 1215 (9th Cir. 1984); Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Cal. 1976) (trial court refuses to grant remittitur).

Tenth Circuit: *See, e.g.*, K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148 (10th Cir. 1985); Alley v. Gubser Dev. Co., 569 F. Supp. 36 (D. Colo. 1983), *rev'd on other grounds*, 785 F.2d 849 (10th Cir. 1986). *Cf.* Frank v. Bloom, 634 F.2d 1245 (10th Cir. 1980) (court refuses to grant remittitur); Brown v. Skaggs-Albertson's Properties, 563 F.2d 983 (10th Cir. 1977) (court refuses to grant remittitur); Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546 (D. Colo. 1985) (court refuses to grant remittitur).

Eleventh Circuit: *See, e.g.*, Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985); T.D.S., Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520 (11th Cir. 1985); Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984); Dempsey v. Auto Owners Ins. Co., 717 F.2d 556 (11th Cir. 1983); Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253 (11th Cir. 1983); Warren v. Ford Motor Credit Co., 693 F.2d 1373 (11th Cir. 1982).

District of Columbia Circuit: *See* Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305, 24 Empl. Prac. Dec. (CCH) ¶ 31,385 at 18,292 (D.D.C. Oct. 24, 1980) (motion for remittitur denied); Washington v. National R.R. Passenger Corp., 477 F. Supp. 1134 (D.D.C. 1979) (court refuses to grant remittitur).

32. *See supra* note 19. *See generally*, Busch, *supra* note 15; Carlin, *supra* note 15; Comment, *Additur and Remittitur*, *supra* note 15; Comment, *Statutory Authorization*, *supra* note 15; Note, *Constitutional Law*, *supra* note 15; Comment, *Correction of Damage Verdicts*, *supra* note 15.

33. *See, e.g.*, Walters v. Mintec/Int'l, 758 F.2d 73 (3d Cir. 1985) (wrongful death action by survivors of decedent killed in accident at place of employment); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984) (wrongful death action by survivors of decedent who allegedly died from employment-related exposure to asbestos products); Holman v. Mark Indus., 610 F. Supp. 1195 (D. Md. 1985) (personal injury and loss of consortium suit arising from accident at place of employment), *aff'd*; 796 F.2d 473 (4th Cir. 1986); Faulkner v. Western Elec. Co., 98 F.R.D. 282 (N.D. Ga. 1983) (action for physical and emotional injuries allegedly sustained because of a neck injury); Starlings v. Ski Roundtop Corp., 493 F. Supp. 507 (M.D. Pa. 1980) (personal injury action arising from skiing accident); Uris v. Gurney's Inn. Corp., 405 F. Supp. 744 (E.D.N.Y. 1975) (personal injury and loss of consortium action arising from dune buggy accident).

34. *See, e.g.*, Durant v. Surety Homes Corp., 582 F.2d 1081 (7th cir. 1978) (action for fraud and breach of express and implied warranties against housing contractor); Geyer v.

eminent domain proceedings,[36] and antitrust actions.[37] Basically, any jury trial at which money damages can be awarded is a potential candidate for a conditional new trial order.

Enthusiastic adoption of remittitur, however, has not completely dispelled doubts about the constitutionality of its use by the federal courts.[38] Moreover, many commentators[39] question whether the distinctions drawn by the Supreme Court between remittitur (as constitutional) and additur (as unconstitutional) are really sound in historical as well as practical terms.[40] Some believe

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Vargas Prods., 627 F.2d 732 (5th Cir. 1980) (action for breach of employment contract); Plattner v. Strick Corp., 102 F.R.D. 612 (N.D. Ill. 1984) (action for breach of warranty in sale of flat-bed truck); Jeanneret v. Vichey, 541 F. Supp. 80 (S.D.N.Y. 1982), *rev'd on other grounds*, 693 F.2d 259 (2d Cir. 1982) (action for breach of contract and breach of implied warranty of title in sale of painting); Marder v. Conwed Corp., 75 F.R.D. 48 (E.D. Pa. 1977) (action for wrongful termination of oral employment contract); Keystone Floor Prods. Co. v. Beattie Mfg., 432 F. Supp. 869 (E.D. Pa. 1977) (action for breach of distributorship agreement); Meyer v. W.R. Grace & Co., 421 F. Supp. 1331 (E.D. Pa. 1976) (action for breach of employment contract).

35. Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) (civil rights action against city and former mayor for damages arising from arrest of plaintiffs); Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985) (civil rights action against city for damages arising from strip search of plaintiff); Smith v. City of Seven Points, 608 F. Supp. 458 (E.D. Tex. 1985) (civil rights action against city and police officers for injuries sustained in engagement with police when plaintiff's automobile was stopped by police to determine whether plaintiff was intoxicated); Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168 (W.D. Wisc. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983) (civil rights action for sexual harassment of plaintiff in his place of employment); Tribble v. Westinghouse Elec. Corp., 508 F. Supp. 14 (E.D. Mo. 1980), *aff'd*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1982) (civil rights action for age discrimination in employment).

36. *See* United States v. 47.14 Acres of Land, 674 F.2d 722 (8th Cir. 1982) (action for just compensation in eminent domain case).

37. *See, e.g.*, Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009 (D.N.J. 1976), *rev'd on other grounds*, 570 F.2d 72 (3rd Cir. 1977) (antitrust action by automobile dealers against automobile manufacturer and some of its wholly owned subsidiaries), *cert. denied*, 436 U.S. 913 (1978); Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972) (antitrust suit brought by independent automobile dealer and its major stockholders against automobile manufacturer), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).

38. *See infra* notes 51-93 and accompanying text.

39. *See, e.g.*, Carlin, *supra* note 15, at 29 (The functional application of additur and remittitur rests upon the distinction between what the jury "may" award and what "ought" to be awarded. Use of the term "may" allows some element of discretion to be exercised by the judge.); Comment, *Additur and Remittitur*, *supra* note 15, at 163 (No credible rationale exists for the general acceptability of remittitur while the equally effective additur has been roundly dismissed.); Note, *Constitutional Law*, *supra* note 15, at 673-74 (distinction between remittitur and additur is unsound in view of the laudable ends served by the application of each); Comment, *Correction of Damage Verdicts*, *supra* note 15, at 324 (argument that use of additur should be declared constitutional despite possible seventh amendment problems).

40. *See infra* notes 56-93 and accompanying text.

that both procedures should be endorsed and utilized,[41] while others question the constitutionality of either.[42] Finally, some commentators question whether any benefits provided by the conditional new trial procedures are not outweighed by considerations in other than potential constitutional conflict.[43]

The purpose of this Article is to explore the efficacy and constitutionality of the remittitur device,[44] with some consideration of whether additur should be included in the already extensive arsenal of the federal trial judge.[45] Discussion will focus almost exclusively on the federal courts because state courts do not face the chimera of seventh amendment limitations on reexaminations of jury verdicts.[46] The evaluation will include not only examination of trial court remittitur practice,[47] but also the effects of its use by appellate courts.[48] Finally, the Article will suggest alternative methods[49] which might achieve some of the asserted benefits of the conditional new trial device absent some of the unfairness and inefficiency, as well as the usurpation of the jury function, which are currently employed in the device.[50]

II. DEVELOPMENT AND CHARACTERISTICS OF CONDITIONAL NEW TRIAL ORDERS IN THE UNITED STATES

A. *Historical Development*

Authorities agree that the use in the United States federal courts of the remittitur procedure was initiated by Mr. Justice Story, while sitting on circuit, in the case of *Blunt v. Little*.[51] In a single paragraph devoted to the issue of excessive damages, in which the sole

41. *See, e.g.*, Note, *Constitutional Law*, *supra* note 15, at 673-74; Comment, *Correction of Damage Verdicts*, *supra* note 15, at 324.

42. *See, e.g.*, Carlin, *supra* note 15, at 36-37.

43. *See generally* Busch, *supra* note 15. *See also infra* notes 166-247 and accompanying text.

44. *See infra* notes 166-247 and accompanying text.

45. *See infra* notes 91-92 and accompanying text and text accompanying note 248.

46. *See infra* notes 56-58 and accompanying text.

47. *See infra* notes 94-148 and accompanying text.

48. *See infra* notes 149-64 and accompanying text.

49. *See infra* notes 248-63 and accompanying text.

50. *See infra* notes 166-247 and accompanying text.

51. 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1,578). *See, e.g.*, Dimick v. Scheidt, 293 U.S. 474, 482 (1935); Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47 (1885); Note *Remittitur Practice*, *supra* note 15, at 300-01; Comment, *Additur and Remittitur*, *supra* note 15, at 151-52; Note, *Appealability of Judgments*, *supra* note 15, at 1158 n.61; Comment, *Statutory Authorization*, *supra* note 15, at 107-08; Comment, *Remittitur Review*, *supra* note 15, at 376 n.1; Note, *Constitutional Law*, *supra* note 15, at 667; Note, *Procedures to Lessen Remittitur's Intrusion*, *supra* note 15, at 642-43.

authorities cited were two English cases upholding a judge's authority to grant a new trial on the grounds of excessiveness of the jury verdict, Justice Story approved of and used the remittitur device.[52]

> I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that *I go to the very limits of the law.* After full reflection, I am of opinion, that it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere further.[53]

Although referring to "the very limits of the law," Justice Story did not mention the possible source of such limits, that is the seventh amendment of the Constitution, which proscribes any reexamination of a "fact tried by a jury"—in remittitur cases, the jury's assessment of the proper amount of damages—"otherwise . . . than according to the rules of the common law."[54]

In only a handful of cases[55] has the United States Supreme

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52. 3 F. Cas. at 761-62.

53. 3 F. Cas. at 762 (emphasis added).

54. *See infra* note 58.

55. *See* Donovan v. Penn Shipping, 429 U.S. 648 (1977) (question whether a plaintiff may appeal from a remittitur order which he has accepted); Neese v. Southern Ry., 350 U.S. 77 (1955) (question whether, on the records of this case, district court's denial of a new trial upon plaintiff's remitting excessive part of verdict should have been disturbed by the court of appeals); Dimick v. Schiedt, 293 U.S. 474 (1935) (question whether a federal court could constitutionally employ the additur procedure; dictum as to possible unconstitutionality of the remittitur procedure); Woodworth v. Chesbrough, 244 U.S. 79 (1917) (question whether plaintiff who had accepted an appellate remittitur could appeal the remittitur order); Gila Valley, G & N Ry. v. Hall, 232 U.S. 94 (1914) (question whether the large amount remitted in an unliquidated damage case established passion or prejudice on the part of the jury, thus requiring a new trial rather than remittitur); German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911) (did not directly address remittitur practice but tacitly approved use of appellate remittitur); Hansen v. Boyd, 161 U.S. 397 (1896) (question whether, upon finding that a lower court judgment was valid except for certain damages awarded because of improper jury instruction, the Court could order remittitur); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895) (question whether plaintiff who had accepted an appellate remittitur order could appeal the remittitur order); Lewis v. Wilson, 151 U.S. 551 (1894) (question whether a plaintiff who had accepted a remittitur under a new trial-remittitur order, made at a time when the trial judge could no longer grant a new trial, could appeal the remittitur order more than two years after his acceptance of the order); Clark v. Sidway, 142 U.S. 682 (1892) (question whether order of remittitur was appropriate); Kennon v. Gilmer, 131 U.S. 22 (1889) (question whether a federal appellate court could enter judgment absolutely, for an amount less than that awarded by the jury, without the plaintiff's agreement); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889) (question whether remittitur denied the defendant his rights under the seventh amendment); Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1885) (question whether it was error for a trial court to order a new trial unless the plaintiff agreed to remit the amount the court determined to be excessive). *See also* Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) (question whether Supreme Court would review appellate court's grant of a new trial when such grant was conditioned on the parties not agreeing to entry of an increased verdict); Minneapolis, St. P & S. Ste. M. Ry. v. Moquin,

Court dealt with issues relating to the question of federal court new trial orders conditioned on a party's refusal to accept a court-reduced or court-increased verdict—remittitur or additur. Its most famous (and most direct) decision involving these procedures was *Dimick v. Schiedt*,[56] a 1935 opinion in which the Court, per Mr. Justice Sutherland, in a 5-4 decision,[57] concluded that additur could not be utilized by federal courts because the procedure involved an unconstitutional reexamination of a jury verdict in violation of the

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283 U.S. 520 (1931) (question whether a state court in a F.E.L.A. action, could use remittitur to cure an excessive verdict where the excessiveness of the verdict was a product of passion and prejudice).

56. 293 U.S. 474 (1935). Arguably, in other cases, the Supreme Court implicitly or explicitly approved the remittitur procedure. *See supra* note 51. Those cases, however, included little or no analysis. For example, the earliest case in which the Supreme Court approved remittitur, Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1886), included only the following discussion of the issue:

> The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. *Hayden v. The Florence Sewing Machine Co.*, 54 N.Y. 221, 225 (1873); *Doyle v. Dixon*, 97 Mass. 208, 213 [93 Am. Dec. 80, 87 (1867); *Blunt v. Little*, 3 Mason, 102, 107.

116 U.S. at 646-47 (emphasis in original). This language, which is conclusory and which, for support, relies on two state court cases and one federal circuit court case (decided by Mr. Justice Story while sitting on circuit), is often cited for the proposition that the Supreme Court had approved remittitur at an early date. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 483 (1935); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 73 (1889). The only case before *Dimick* in which the Court addressed the seventh amendment issue was Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 72 (1889). *See infra* note 58. The Court's assessment of the defendant's allegation that the remittitur "is in effect a re-examination by the court, in a mode not known at the common law, of facts tried by the jury," 130 U.S. at 72, consisted of the following analysis:

> The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint.

Id. at 74 (citations omitted) (emphasis in original).

57. Justices Butler, McReynolds, Roberts, and Van Devanter joined Mr. Justice Sutherland in the majority opinion. Chief Justice Hughes and Justices Brandeis and Cardozo joined in a dissent written by Mr. Justice Stone.

seventh amendment.[58] After a review of what it considered to be relevant historical data, the only review of such materials conducted by the Supreme Court in regard to the question of the constitutionality of remittitur, the Court concluded:[59]

> In the last analysis, the sole support for the decisions of this court . . . , as far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution, which we have been able to find.

In the next paragraph, in rather startling dictum, the Court went on to note:[60]

> In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be

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58. 293 U.S. at 486. 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. While sometimes misinterpreted as prohibiting *any* reexamination of a fact tried by a jury, the generally accepted interpretation of the seventh amendment is that (1) it requires federal courts to afford jury trials in circumstances in which such trials would have been available in England at the time of the adoption of the seventh amendment in 1791, and (2) it forbids federal courts from reexamining the fact-finding of a jury, except as such reexamination would have been available in England at the time of the adoption of the seventh amendment. *See, e.g.*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2303 (1971); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). The additur and remittitur procedures compromise the seventh amendment proscription against unlimited reexaminations of facts found by a jury. When a trial judge (or, possibly, an appellate judge) concludes that the jury verdict is excessive (or inadequate) by $X, one must necessarily ask whether the judge's action in conditioning a new trial order on the plaintiff's refusal to agree to accept a verdict of $X less than the jury awarded (or on the defendant's refusal to agree to increase the verdict to $X more than the jury awarded) involves such a prohibited reexamination of a fact found by a jury (the amount of damages to which the recovering party is entitled). In effect, the trial judge (or appellate judge) *is* substituting his own evaluation of the appropriate quantum of damages for that found by the jury by granting a remittitur (or additur), rather than merely granting a new trial on the ground of excessiveness (or inadequacy) of the jury verdict. If an unconditional new trial is granted, the determination of damages is relegated to a new jury rather than, arguably, the usurpation of a judge. If, however, it could be established that similar reexaminations of facts found by a jury were sanctioned at the common law, remittitur and additur practice would not violate the seventh amendment, and no other Constitutional barrier would stand in the way of adopting of these procedures. Thus, the Court in *Dimick* embarked on a lengthy historical evaluation of practices at the common law in 1791. 293 U.S. at 477-84. The dissenting opinion of Mr. Justice Stone also included extensive historical analysis. 293 U.S. at 490-98.

59. *Id.* at 484.

60. *Id.* at 484-85.

> decided otherwise. But . . . the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Thereafter, the court further referred to the general federal acceptance of remittitur as a "doubtful precedent" that should "not [be] extended by mere analogy" to additur.[61] This grudging acceptance of the remittitur procedure, using only an "estoppel" or "tradition" argument to meet, at least in part, what the majority considered to be rather compelling evidence of unconstitutionality, seems like a rather rocky foundation on which to continue a procedure which has, in recent years, proliferated in the federal courts.[62] Although the question of remittitur was not directly before the court in *Dimick*, the Supreme Court has never again questioned the use of the remittitur procedure by federal courts.[63] In other words, a procedural device of relative importance in the federal courts received its constitutional imprimatur in dictum and on the basis of a faulty argument. If the procedure is unconstitutional, tradition or precedent cannot make it constitutional nor allow the procedure to continue once its constitutional defect has been identified. In 1938, after approximately one hundred years of "tradition," the Supreme Court in *Erie Railroad Co. v. Tompkins*[64] reversed the doctrine of *Swift v. Tyson*.[65] This reversal was compelled by "the unconstitu-

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61. *Id.* at 485.

62. Recently, thousands of federal court defendants have, almost as a matter of course, made motions for the alternative relief of remittitur or new trial based on the excessiveness of the damages awarded by juries. *See infra* note 170 and accompanying text. It is doubtful whether a procedural device extolled as accomplishing economies of time, effort and money can really achieve these admirable ends when it has become the subject of an automatic post-trial motion rather than an extraordinary device to be employed in special circumstances. It is also doubtful, as noted in the text, whether such a prevalent procedure should be grounded on what may be considered to be questionable analytical grounds.

63. In the few post-1935 cases in which the Supreme Court has dealt with remittitur-related issues, the propriety of the basic procedure has been assumed by the Court. *See* Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (In deciding whether a plaintiff could appeal from a remittitur order he had already accepted the court did not question the fact that the role of the courts in the federal system in reviewing a jury verdict was a matter of federal law.); Neese v. Southern Ry., 350 U.S. 77 (1955) (the Supreme Court stated that the court of appeals was not justified in regarding the denial of a new trial, upon remittitur of part of the verdict, as an abuse of discretion, thus implicitly accepting the procedure).

64. 304 U.S. 64 (1938).

65. 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the Supreme Court, per Mr. Justice Story, construed the Rules of Decision Act to require federal courts which were vindicating state-created rights to apply "the positive statutes of the state, and the construction thereof

tionality of the course pursued,"[66] rather than prevented by ideas of tradition and precedent. This action amply illustrates the bankruptcy of the "tradition" argument made in *Dimick*.[67]

Dimick includes, however, more than just tacit approval of remittitur because of its tradition of acceptance. The Court also distinguished remittitur from additur in several regards, thereby buttressing its position that one procedure might be accepted while the other was rejected. First, the Court noted that an arguable, al-

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adopted by the local tribunals, and to rights and titles to things having a permanent locality" but to not require that such federal courts follow the general case law of the state. 41 U.S. at 18. Thus, federal courts were free to fashion their own general federal law to "questions of a . . . general nature . . . as, for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law . . . ." *Id.* at 18-19.

In *Erie*, the Supreme Court "disapproved" the doctrine of *Swift v. Tyson*, arguing that *Swift* permitted an unconstitutional usurpation of state functions by federal courts. The Court concluded that "[t]here is no federal general common law" and that federal courts would hereforth be required to follow state substantive law, as declared by the courts of the state, when these federal courts were vindicating state-created rights. 304 U.S. 64, 78 (1938).

66. 304 U.S. at 77-78.

67. In *Erie*, the Supreme Court noted: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Id.* at 77-78.

The distinction between the result in *Erie* and that in *Dimick* might be explained on the ground that *Erie* reversed the *Swift* doctrine, which had been the target of growing dissatisfaction, while *Dimick* upheld the procedural device of remittitur which had proven useful to the federal courts. In *Erie*, the Supreme Court noted that, "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue." Erie R. R. v. Tompkins, 304 U.S. at 74. In *Dimick*, on the other hand, the Supreme Court noted that remittitur had proven a useful procedural device which federal courts would have been loathe to lose while "no federal court . . . ha[d] ever undertaken . . . to increase . . . damages" by employing an additur procedure. Dimick v. Schiedt, 293 U.S. 474, 487 (1935). *See generally* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Thompkins*, 55 YALE L.J. 267, 271-80 (1946) (questioning the constitutional nature of *Erie*, and arguing that the inconsistencies of justice caused by *Swift* made its overruling predictable); Friendly, *In Praise of Erie - And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (supporting the constitutional nature of *Erie*, and arguing that *Erie* was necessary because *Swift* failed to achieve its aim of creating uniformity in a general federal common law); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 197 (1957) (arguing that the constitutional basis for *Erie* is unclear and courts should not rule on its constitutional aspects until resolved by the Supreme Court); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L. J. 1336, 1346-47 (1938) (arguing that *Erie* was dictated by considerations of policy and the widespread criticism of *Swift*); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271, 294-95 (1939) (considering the constitutional argument in *Erie* dictum); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678 (1976) (arguing that most cases can be determined by the Rules of Decision Act and *Erie's* constitutional questions need not be reached). The usefulness and salubrious effects of a procedure, however, should not serve as justification for the Supreme Court's willingness to overlook potential constitutional defects.

beit weak, case could be made for remittitur on historical grounds as having some roots in the common law while, in the Court's opinion, no such support could be found for additur.[68] Moreover, the Court noted that while federal courts had regularly utilized remittitur for over a hundred years, no federal court had sought to use additur, another form of the "tradition" argument.[69] Another major distinction which the majority identified was the fact that in additur the judge would be conditioning denial of a new trial on the defendant's agreement to increase the verdict to an amount greater than that found by the jury, clearly a substitution of the judge's evaluation of the evidence for that of the jury, while in remittitur the judge would be conditioning denial of a new trial on the plaintiff's agreement to accept a verdict smaller than that found by the jury, arguably not a substitution of the trial judge's evaluation for that of the jury. As the majority argued:[70]

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in the sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescense. But where the verdict is too small, an increase by the court is a bold addition of something which in no sense can be said to be included in the verdict.

The historical argument will be addressed below in considering the dissenting opinion.[71] The "established use" argument was rejected above.[72] A distinction between remittitur and additur on grounds that a remittitur-reduced verdict is included in the jury verdict while an additur-increased verdict is not so included is specious. The verdict of a federal jury is supposed to be the amount which the jury determined to be the appropriate measure of the plaintiff's recoverable damages.[73] It is quite as unreasonable to say that the jury verdict impliedly included lesser amounts as it would be to find an implication that greater amounts were also included.

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68. Dimick v. Schiedt, 293 U.S. 474, 482 (1935).

69. *Id.* at 487. *See supra* notes 60-67 and accompanying text.

70. 293 U.S. at 486.

71. *See infra* notes 77-84 and accompanying text.

72. *See supra* notes 60-67 and accompanying text.

73. *See generally* Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353 (1967) (committee's draft of a bill to assure nondiscrimination in federal and state jury selection and service); Note, *Invasion of Jury Deliberations: Existing Rules and Suggested Changes*, 23 BAYLOR L. REV. 445 (1970); Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258 (1970); Note, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 U. ILL. L.F. 388.

The jury does not provide a "range" of appropriate jury-found verdicts, with its announced verdict being the maximum in the range. If such a view were adopted, a more reasonable conclusion would be that the announced jury verdict formed the midpoint of some allowable range of verdicts. In the United States jury system, however, one function of the jury is to agree on a single amount which either each member of the jury (if a unanimous verdict is required) or the required majority of the jury, determined to be *the* amount necessary to compensate the plaintiff.[74] Both decreasing and increasing this amount involve a trial judge's substitution of his own evaluation of the facts for that of the jury. The above description of the function of a civil jury derives from interpretations of the seventh amendment;[75] therefore, the underlying question at hand is whether either procedure violates the seventh amendment proscription of reexamining facts tried by a jury in a manner other than that recognized at the common law.[76]

The dissenters in *Dimick* maintained that proper historical analysis would lead to the conclusion that neither remittitur nor additur violate the seventh amendment.[77] Noting that "[t]here is nothing in its history or language to suggest that the amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law,"[78] the dissenting opinion went on to point out that the amendment had not been interpreted to "confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791."[79] New procedural devices, unknown at the common law, had been employed without constitutional objection; "this court has found in the seventh amendment no bar to the adoption by the federal courts of . . . novel methods of dealing with the verdict of a jury . . . ."[80] Viewing the term "common law" to refer to a decision-making process rather than a freeze-frame photograph of the practices and procedures of English courts in 1791,[81] the dissenters concluded that

74. *See supra* note 73. *See also supra* note 7.

75. *See supra* note 73. *See also supra* note 7.

76. *See supra* note 58.

77. 293 U.S. 474, 488-98 (1935).

78. *Id.* at 490.

79. *Id.* at 491.

80. *Id.* at 492.

81. Prior to *Dimick*, the Supreme Court had frequently asserted that the purpose of the seventh amendment was to preserve the substance of a common law jury trial, not the forms of procedure employed at the common law. *See, e.g.*, Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); Walker v. N.M. & S. Pac. R.R., 165 U.S. 593, 596 (1897).

additur would not affect the essentials of the jury's function.[82] Because of the structure of the common law courts, the question before the court was "one unknown to the common law," and, thus, the dissenters saw no reason to search the common law for analogous or contrary cases.[83] The dissenters further buttressed their position by noting that the Supreme Court had not found difficulty in "modernizing" the rules in regard to admissibility of evidence in federal courts:[84]

> The common law is not one system when it, or some part of it, is adopted by the Judiciary Act, and another if it is taken over by the seventh amendment. If this court could thus, in conformity with the common law, substitute a new rule for an old one because it was more consonant with modern conditions, it would seem that no violence would be done to the common law by extending the principle of remittitur to the case where the verdict is inadequate, although the common law had made no rule on the subject in 1791 . . . .

Some commentators[85] and judges,[86] after considering the historical data, have concluded that the seventh amendment should not bar either remittitur or additur. Some have based their conclusions on the dissent's argument that neither remittitur nor additur was a recognized procedure at the common law, and that the common law was not meant to be a static set of rules and precedents, but rather a dispute-resolution approach to which new procedures could be added when new problems arose.[87] Under the structure of the judicial system at the common law, conditional new trial orders could never be required because the situation in which such orders could be made would not arise. On the other hand, under the substantially different structure adopted in the United States federal courts, such orders were a natural result of the functioning of the trial process.[88] This argument, which makes very good sense, could

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82. 293 U.S. at 492.

83. *Id.* The dissent noted that appellate court review of a trial court's discretionary action, such as the one at issue, would not have been available at the common law. *Id.* at 491-92, 492 n.2.

84. *Id.* at 496.

85. *See, e.g.*, Comment, *Additur and Remittitur*, *supra* note 15, at 163; Comment, *Correction of Damage Verdicts*, *supra* note 15, at 323-24. *But see* Comment, *Remittitur Review*, *supra* note 15, at 386-91, 400 (maintaining that remittitur is unconstitutional in cases in which "damages are unliquidated and no clear rules of law apply").

86. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 488-98 (1935) (dissenting opinion); Schiedt v. Dimick, 70 F.2d 558, 563 (1st Cir. 1934) (dissenting opinion).

87. *See, e.g.*, Comment, *Correction of Damage Verdicts*, *supra* note 15, at 323-24.

88. The dissenting opinion in Sunray Oil Corp. v. Allbritton, 187 F.2d 475 (5th Cir. 1951), a case dealing with the authority of appellate courts to require that a successful plain-

be summarized as follows: If the federal courts had been structured identically with the common law system, it would be reasonable to search the common law for precedents for remittitur and additur. When, however, the system changed substantially in the transportation from England to the United States, the search for specific cases to support a new procedure in a new system is nonsensical.

Some authorities have gone beyond the dissent in *Dimick* by finding, in the common law, historical antecedents for remittitur and additur.[89] These commentators would ascribe the *Dimick* majority's analysis to incorrect interpretation of the historical data.

Some authorities further question the result in *Dimick*, not on its constitutional analysis but on the defensibility of treating additur differently from remittitur.[90] These courts and commentators argue that both procedures should be employed or both should be rejected, there being no real conceptual distinction between them in terms of the inviolability of the verdict of the jury.

The dissenters in *Dimick* had the better position both in logic and in constitutional analysis. Despite the seventh amendment, both procedural devices should be available to federal courts. On the other hand, however, the manner in which some federal courts use the device creates a violation of the right to a trial by jury, not because of historical precedent, but because of current abuse of the procedure by overzealous trial and appellate court judges.[91] Moreover, for reasons other than the seventh amendment, the procedure of remittitur, as currently employed by the federal courts, should be

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tiff remit the excessive part of a verdict or submit to a new trial, included detailed historical analysis. *Id.* at 477-84 (Holmes, J. dissenting). Judge Holmes pointed out that, according to Blackstone, common law courts not only had jurisdiction to, but were obligated to, amend jury verdicts in regard of errors of law and fact and, if the trial court was unable to make the correction, "it was referred to a higher tribunal." *Id.* at 480 (quoting Bracton, as quoted in Blackstone's Commentaries). Moreover, "[l]ike the earlier inferior courts of the United States that exercised both original and appellate jurisdiction, the King's Bench was presided over by one or more judges, who sat together in courts that were mutually connected." *Id.* at 480. The major procedural difference between current United States courts and the common law courts, is that at the common law a motion for a new trial was not heard by the trial judge but in a separate proceeding before the King's Bench *en banc*. *Id.* at 484 n.10. Thus, at the common law there would have been no opportunity for a trial judge to grant a new trial at all, so the possibility of a conditional new trial could not be contemplated.

89. *See, e.g.*, Sunray Oil Corp. v. Allbritton, 187 F.2d 475, 477-84 (5th Cir. 1951) (Holmes, J. dissenting); Comment, *Correction of Damage Verdicts*, *supra* note 15, at 323-24.

90. *See, e.g.*, Comment, *Additur and Remittitur*, *supra* note 15, at 160-63; Comment *Statutory Authorization*, *supra* note 15, at 113; Note, *Constitutional Law*, *supra* note 15, at 673-74.

91. *See infra* notes 180-233 and accompanying text.

substantially changed, curtailed or eliminated entirely.[92] Instead of adopting additur wholesale, if additur is to be used, its practice should also be substantially limited along lines similar to those described below for remittitur. The house of cards, which started with Mr. Justice Story in *Blunt v. Little*, should be toppled and a new, more efficacious structure erected.[93]

B. *Current Remittitur Practice*

Before an examination of current remittitur practice, with a view toward suggesting remedial alternatives, the basics of the procedural device, as now employed by federal courts, must be outlined. As noted above,[94] a defendant who thinks that the jury verdict against him is excessive, may move for a new trial on that ground. The defendant may, in addition, move for a remittitur—a new trial conditioned on the plaintiff's refusal to remit the excess part of his verdict.[95] The trial judge may make a conditional new trial order even if the defendant has merely asked for a new trial on the ground of excessiveness.[96] The defendant's agreement to this remittitur procedure is neither necessary nor sought, because, in theory at least, he cannot complain—if the plaintiff refuses to remit, the defendant will get the desired new trial, and if the plaintiff agrees to remit, the defect in the verdict will be cured and any need for the desired new trial will be eliminated.[97] In fact, in view of the federal trial judge's power, under Rule 59(d) of the Federal Rules of Civil Procedure, to order a new trial on his "own initiative . . . for any reason for which [he] might have granted a new trial on motion of a party,"[98] the trial judge should also have the power to order a remittitur on his own initiative.[99] Of course, a defendant who had

92. *See infra* notes 248-63 and accompanying text.

93. *See infra* notes 248-63 and accompanying text.

94. *See supra* note 11 and accompanying text.

95. *See supra* notes 14-18 and accompanying text.

96. Remittitur practice has not evolved as a device sought by defendants, but as a device available to a trial judge who wanted to circumvent the need to grant a total or partial new trial. *See supra* notes 14-37 and accompanying text.

97. *See, e.g.*, Carlin, *supra* note 15, at 12-13; Note, *Constitutional Law*, *supra* note 15, at 672.

98. FED. R. CIV. P. 59(d).

99. *See* Marder v. Conwed, 75 F.R.D. 48, 70 (E.D. Pa. 1977). A conditional new trial order on the court's own initiative might be viewed as an inappropriate intrusion on the adversary system. Note, *Remittitur Practice*, *supra* note 15, at 302 n.23. Moreover, a trial judge should be wary of his own assessment of damages as being excessive if the defendant has not objected. *Id.* Those arguments, however, do not recognize that the defendant may not be aware of the excessive nature of the verdict. The trial judge's power to order a new trial on his own initiative should function to protect each party from the possibility that a

not moved for a new trial could hardly complain of such a boon. The plaintiff, on the other hand, would certainly feel slighted if a trial judge took such action in the absence of a defendant's request.[100]

Only certain excessive verdicts can be "cured" by the proper application of remittitur. Most federal courts do not employ remittitur if the trial judge finds that the excessiveness of the jury verdict is a result of "passion or prejudice" on the part of the jury.[101] In

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harmful error which occurred at trial was not recognized by him or by his attorney. The trial process should not be a game in which the party must "say the magic word" or suffer the consequences of a verdict which is the product of prejudicial error. Moreover, the defendant might have tactical reasons for not seeking a new trial even though he views the damages as excessive. The trial judge has the responsibility to correct prejudicial errors by granting a new trial. If the defendant does not want the new trial (assuming that the plaintiff has refused to remit), he can enter into a post-trial settlement with the plaintiff.

100. As noted above, *see supra* note 99, not only should the trial judge have the power to enter such a new trial order on his own initiative, but he also has an affirmative duty to the judicial system to do so. If he did not so act, a plaintiff might obtain the fruits of an illegally excessive verdict (a verdict which is excessive as a matter of law) just because the defendant and his attorney did not appreciate the relevant law.

This Article, proposes elimination of current remittitur practice in favor of alternative procedures. *See infra* notes 247-62 and accompanying text. This proposal would not, however, affect the trial judge's power to order a whole new trial on his own initiative on the ground of excessiveness of the jury verdict.

101. *See*, Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1241 (5th Cir. 1985) (court orders new trial rather than remittitur because the jury was influenced by an erroneous argument, noting that "[w]hen a jury verdict results from passion or prejudice, a new trial is the proper remedy rather than remittitur"); Howell v. Marmpegaso Compania Naviera, 532 F.2d 1032, 1034 (5th Cir. 1976) (court remands to district court for that court to calculate and order a remittitur of part of excessive award for past and future pain and loss of earning capacity, noting that "we do not believe the jury was actuated in its verdict by passion or prejudice, and it is thus appropriate for us to consider ordering a conditional remittitur" (footnote omitted)); Smith v. City of Seven Points, 608 F. Supp. 458, 463, 465 (E.D. Tex. 1985) (court orders remittitur of actual and punitive damages, noting that "[t]rial courts should employ remittiturs for those verdicts that are so large as to be contrary to right reason, while requiring a new trial on issues infected by passion or prejudice" and finding that "the jurors in this case were not infected by passion or prejudice"); Hodges v. Keystone Shipping Co., 578 F. Supp. 620, 624 (S.D. Tex. 1983) (court orders remittitur of compensatory damages, noting that "[w]hen [considering] a motion for new trial on the issue of excessive damages, the court may, if the verdict is not judged to have been the result of the jury's passion or prejudice, offer the plaintiff the options of new trial or remittitur" and concluding that "the jury verdict was not the result of passion or prejudice"); Dick v. Wantonwan County, 562 F. Supp. 1083, 1107-08 (D. Minn. 1983) (court orders remittitur of compensatory damages, noting that "[a] new trial is mandatory when the excessive verdict results from passion and prejudice on the part of the jury because of the possibility that these influences affected the jury's findings on liability as well as on damages" and concluding that the verdict "is not so excessive as to give rise to the inference that the jury was motivated by passion and prejudice"); Schreffler v. Board of Educ., 506 F. Supp. 1300, 1308 (D. Del. 1981) (court orders remittitur of compensatory and punitive damages, noting that "where the verdict is so grossly excessive as to admit of no other conclusion than that it was the result of passion or prejudice, the proper remedy is a new trial and not remittitur" and that "[w]here . . . the

such circumstances, trial judges should order a new trial because passion or prejudice renders defective the entire verdict and not just the jury's assessment of the proper measure of damages. The trial judge must determine, however, whether the jury acted with passion or prejudice, usually a difficult determination based on inferences. Often the defendant will argue that the size of a large verdict, in itself, demonstrates passion or prejudice by the jury.[102] The defendant may also focus on improprieties in the conduct of the plaintiff's case, such as improper arguments by the plaintiff's coun-

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verdict is not patently the product of bias, passion or prejudice, but simply is 'just too much' for the Court conscionably to tolerate, the verdict may be modified by granting a remittitur," concluding that the jury award was "too much" but apparently not "so grossly excessive"); Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 2 (E.D. Tenn. 1978) (court orders a new trial on the issue of compensatory and punitive damages, noting that jury verdict based on passion or prejudice must result in a new trial because to try to assess and correct the defect by remittitur would be speculative and finding that the relative circumstances of the parties—the plaintiff being a sick, old woman and the defendant being a large corporation—and an appeal by the plaintiff to the jury for compassion combined to bias the jury); Collins v. Retail Credit Co., 410 F. Supp. 924, 933-34 (E.D. Mich. 1976) (court orders remittitur of punitive damages, concluding that the excessive jury verdict was "based on sufficient evidence and reason and was not the result of passion and prejudice."). Some courts seem to use "passion or prejudice" as a threshold for those situations in which any interference with a jury verdict, including remittitur, would be appropriate. *See*, Brink's Inc. v. City of New York, 546 F. Supp. 403, 413 (S.D.N.Y. 1982) (court orders remittitur of punitive damage award, stating, "[t]he court may intervene and set aside a verdict when the amount of the award is so excessive that it shocks the judical conscience or it appears that it is the result of passion and prejudice.").

Most appellate courts articulate a strict standard for interfering with jury verdicts, and some courts base the standard on passion or prejudice. These courts, however, generally indicate that, upon finding passion or prejudice, the court has the option of remittitur or new trial, thereby taking upon themselves the job of "curing" the tainted verdict. *See*, Martin v. Fleissner GMBH, 741 F.2d 61, 65 (4th Cir. 1984) (court refuses to order new trial or remittitur on actual damages, stating, "[t]he amount of damages is peculiarly within the discretion of the jury and subject to correction by the trial court when it is convinced an award is over liberal, and by an appellate court only . . . in those extreme cases in which the amount assessed is so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion, or prejudice.") (quoting Hicks v. Herring, 246 S.C. 429, 436, 144 S.E. 2d 151, 154 (1965)); Adams v. Ford Motor Credit Co., 556 F.2d 737, 740 (5th Cir. 1977) (court refuses to order new trial or remittitur on damages, stating, "the right of a plaintiff to have this fact issue decided by a jury devolves from the seventh amendment . . . and it is only in case the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias or prejudice that the appellate court considers it appropriate to intervene."). *See also, e.g.*, Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 281-82 (5th Cir. 1975); Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1043 (5th Cir. 1970).

102. In Dick v. Watonwan County, 562 F. Supp. 1083 (D. Minn. 1983), a case arising from involuntary commitment of plaintiffs for alcoholism treatment, the court noted: "The defendants contend that the size of the verdict— $1 million in compensatory damgages and $12,000 in punitive damages—automatically gives rise to an inference that the jury was motivated by passion and prejudice." *Id.* at 1107. *See also* Schreffler v. Board of Educ., 506 F. Supp. 1300, 1308 (D. Del. 1981) (suggesting that a verdict could be "so grossly excessive as to admit of no other conclusion than that it was the result of passion or prejudice . . . .").

sel, as mandating the conclusion that the entire trial was tainted by jury passion or prejudice.[103] The trial judge, in an effort to preserve as much of the original trial as possible, will often rule against the defendant on these arguments, describing the misconduct as harmless error and ascribing the excessiveness of the verdict to immoderate zeal on the part of the jury.[104] Some judges, however, order remittiturs even though they find that prejudicial error occurred at

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103. Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984), was a wrongful death action arising from an airplane crash. The district court ordered a remittitur of $4,274,500, on the grounds that testimony adduced at trial was flawed and should not have been admitted and that defects in discovery had denied the defendants a fair trial. The court of appeals reversed and ordered a new trial, stating:

> We need not choose among these various [remittitur] rules, however, for these formulations are not appropriate for use in the instant case. These formulations are designed for circumstances in which a properly instructed jury hearing properly admitted evidence nevertheless makes an excessive award. They are not designed for a case such as the present one, in which prejudicial error has infected the jury's entire consideration of plaintiff's pecuniary loss.

Id. at 50. *See also* Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1238-43 (5th Cir. 1985) (court remands for new trial rather than grant remittitur because of improper argument by plaintiff's attorney which was not corrected by trial judge and thus amounted to prejudicial error); Evers v. Equifax, Inc., 650 F.2d 793, 797-98 (5th Cir. 1981) (plaintiff objected to new trial order at the trial court level, arguing that a remittitur should have been granted; court of appeals rejects argument, noting that remittitur is discretionary and that verdict in first trial was tainted by a combination of circumstances including two improper appeals to the jury by the plaintiff's attorney, and the jury's apparent desire, as indicated in a note to the judge, to punish the defendant); City of Cleveland v. Peter Kiewit Sons', 624 F.2d 749, 755 (6th Cir. 1980) (Action instituted by city for damages to public dock. District court ordered remittitur of 50% of jury award, and city refused to remit. At second trial, the city obtained judgment for full amount sought, and the court of appeals reversed, granting a new trial on all issues because of "pervasive misconduct of counsel for the City" at the trial.); Jamison Co. v. Westvaco Corp., 530 F.2d 34, 34 (5th Cir. 1976) (court of appeals finds verdict excessive and orders a new trial because it was "unable to determine the theory of liability on which the jury premised its overly generous verdict . . . [and thus could not] limit . . . remand to a remittitur or a partial new trial."); Libco Corp. v. Dusek, No. 77 Civ. 4386 (N.D. Ill. Apr. 29, 1986) (trial court ordered new trial on its own initiative based on excessive damages. After various procedural events, a different trial court affirmed the new trial order, rather than opting for remittitur, because of jury confusion arising from trial court's instructions); Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367, 369 (S.D.N.Y. 1982) (court grants "motions to set aside or reduce the verdict . . . by reason of the excessiveness of the jury's award and the willful misconduct of plaintiff's counsel in tampering with the evidence transmitted to the deliberating jury."); Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 1-2 (E.D. Tenn. 1978) (court grants new trial on damages because excessive jury verdict was a product of passion or prejudice produced, at least in part, by the plaintiff's improper appeal to the jury's compassion); Uris v. Gurney's Inn Corp., 405 F. Supp. 744, 747 (E.D.N.Y. 1975) (although trial court finds that "[t]he excessiveness of the verdict was undoubtedly the result of [plaintiff's] counsel's suggestion of specific amounts to the jury," the court orders remittitur.).

104. *See, e.g.*, Walters v. Mintec/Int'l, 758 F.2d 73, 82 (3rd Cir. 1985); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1047 (5th Cir. 1984); Schreffler v. Bd. of Educ., 506 F. Supp. 1300, 1308 (D. Del. 1981).

trial.[105] These judges seek to identify the manner in which the error affected the jury verdict, and to cure the error by asking the plaintiff to remit the "infected" amount.[106] In so doing, however, the trial judge might be overstepping the allowable limits on protecting the fruits of his labors. The defendant can point to the error and claim that other defendants in similar circumstances have been granted new trials instead of having the trial judge try to "correct" the jury verdict in this piecemeal way.[107] The defendant can further argue that the whole course of the trial might have been different had the error not occurred. On the other hand, where the prejudicial error amounts to an identifiable element in the verdict, such as the trial judge's incorrect inclusion in his instructions to the jury of an unallowable element of damages,[108] such as incorrect valuation of interest, remittitur of the calculable amount ascribable to the error would be appropriate and would benefit everyone involved.[109] The line drawn by courts in such cases has varied from court to court and from case to case.[110]

The trial judge must, of course, also decide whether the jury verdict is excessive at all. If the court decides that the verdict is not excessive, the court will deny the defendant's new trial motion on

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105. *See* Red Star Towing & Transp. Co. v. "Ming Giant," 552 F. Supp. 367, 369 (S.D.N.Y. 1982) (court grants remittitur even though excessive verdict is the result of "willful misconduct of plaintiff's counsel"); Uris v. Gurney's Inn Corp., 405 F. Supp. 744, 747 (court grants remittitur even though the excessive verdict is the result of improper arguments by plaintiff's counsel).

106. *See supra* note 105. If the source of prejudicial error is the conduct of the plaintiff or his attorney, a remittitur would attempt to save a defective proceeding by curing only one manifestation of the defect, the excessive verdict. Such an approach is extremely unfair to the defendant and encourages the plaintiff to engage in unfair trial tactics.

107. *See* Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1238-43 (5th Cir. 1985) (court orders new trial in excessive verdict case because of improper argument by plaintiff's attorney); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 50 (2d Cir. 1984) (court orders new trial in excessive verdict case because of plaintiff's improper introduction of flawed testimony and because of defective discovery); Evers v. Equifax, Inc., 650 F.2d 793, 797-98 (5th Cir. 1981) (court confirms new trial order in case involving improper appeals to the jury by the plaintiff's attorney); City of Cleveland v. Peter Kiewit Sons', 624 F.2d 749, 760 (6th Cir. 1980) (court orders new trial on ground of misconduct of plaintiff's attorney); Jamison Co. v. Westvaco Corp., 530 F.2d 34, 34 (5th Cir. 1976) (court orders new trial because of confusing trial court jury instructions as to differing theories of liability); Libco Corp. v. Dusek, No. 77 Civ. 4386 (N.D. Ill. Apr. 29, 1986) (court confirms new trial on ground of confusing jury instructions); Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 1-2 (E.D. Tenn. 1978) (court orders new trial, in part because of plaintiff's improper appeal to the jury).

108. *See infra* notes 117-18, 130-32 and accompanying text. *See also infra* text accompanying notes 127, 181-82, 257-60.

109. *See infra* notes 117-18.

110. *See infra* notes 117-18.

the ground of excessiveness, and will deny the defendant's motion for a remittitur.[111] In making such a decision, the trial courts usu-

111. *See*, Union Oil Co. v. Rainey, 777 F.2d 705, 709 (Temp. Emer. Ct. App. 1985) (court refuses to disturb jury award as to punitive or compensatory damages, finding the awards supported by ample evidence in the record); Pucalik v. Holiday Inns, 777 F.2d 359, 363-64 (7th Cir. 1985) (court refuses to disturb jury award of $1,250,000 in wrongful death case, basing its decision on the elements of damage allowable under the Indiana wrongful death statute and the circumstances of the case); Smith v. Rowe, 761 F.2d 360, 368 (7th Cir. 1985) (court refuses to disturb compensatory damage award of $80,770 for prior prison inmate, finding the award "considering the circumstances of this case [not] . . . shocking."); Alaniz v. San Isidro Indep. Sch. Dist., 742 F.2d 207, 209 (5th Cir. 1984) (court refuses to disturb jury award of $101,016.96 for lost wages and compensatory damages in civil rights action for wrongful discharge, finding "sufficient evidence in the record to support the jury's findings."); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 502-03 (10th Cir. 1984) (court refuses to disturb jury award of $80,000 for actual and compensatory damages in products liability suit, finding the award not excessive and supported by the evidence.); Blevins v. Cessna Aircraft Co., 728 F.2d 1576, 1579-82 (10th Cir. 1984) (court refuses to disturb jury award of $2,000,000 in actual damages and damages for pain and suffering arising from injuries sustained during emergency landing, noting that "we cannot say that the jury's award for pain, suffering and disability 'shocks the judicial conscience' "); Martin v. Texaco, Inc., 726 F.2d 207, 217 (5th Cir. 1984) (court refuses to disturb jury award of $1,000,000 in exemplary damages to decedent's widow, finding that "[t]he award was based on a jury finding of gross negligence, and the amount was not inappropriate"); Vanskike v. Union Pac. R.R., 725 F.2d 1146, 1150 (8th Cir. 1984) (court refuses to disturb jury award of $1,811,177 for compensatory damages for personal injury, finding that "the verdict is not grossly excessive"); McDonald v. Federal Laboratories, Inc., 724 F.2d 243, 246-48 (1st Cir. 1984) (court refuses to disturb jury award of $949,000 in damages for breach of warranty and negligent design of mace cannister, finding that on "[v]iewing the evidence on damages in the light most favorable to [plaintiff], we do not regard the jury verdict as grossly excessive"); Whiteley v. OKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983) (court refuses to disturb jury award of $151,700 for breach of warranties, finding "we are not shocked by the size of the verdict awarded"); Shows v. Jamison Bedding, Inc., 671 F.2d 927, 934-35 (5th Cir. 1982) (court refuses to disturb jury award of $600,000 to estate of automobile passenger injured in crash, finding that the award did not "clearly exceed . . . that amount that any reasonable man could feel [he] is entitled to"); Frank v. Bloom, 634 F.2d 1245, 1254 (10th Cir. 1980) (court refuses to disturb jury award of $85,000 in suit for attorney's fees, finding that the jury verdict did not reach the point at which it "clearly appear[ed] that the jury [had] reached a seriously erroneous result."); Del Casal v. Eastern Airlines, 634 F.2d 295, 301 (5th Cir. 1981) (court refuses to disturb jury award of $35,000 against union for breach of its duty of fair representation, finding that "[t]he jury's award was well within the limits of the proof"); Crador v. Louisiana Dep't. of Highways, 625 F.2d 1227, 1230 (5th Cir. 1980) (court refuses to disturb jury award of $250,000 for loss of income and pain and suffering because of back injury, finding themselves "not prepared to say that it is 'certain indeed that the award is contrary to all reason' "); Huff v. White Motor Corp., 609 F.2d 286, 295-97 (7th Cir. 1979) (court refuses to disturb jury award of $700,000 in compensatory damages in wrongful death action, finding that although they thought the verdict was "too high," it was not so high as to be "grossly excessive"); Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1123 (10th Cir. 1978) (court refuses to disturb jury award of $200,000 for injuries sustained in a skiing accident, finding that while "it might strike us that the award . . . is high," the court was "unable to say in this instance that it was" so high as to be "grossly excessive"); Brown v. Skaggs-Albertson's Properties, 563 F.2d 983, 988 (10th Cir. 1977) (court refuses to disturb jury award of $20,000 in actual damages and $10,000 in punitive damages arising from damages suffered because defendant falsely reported to a check verification association that plaintiff's check

ally distinguish between verdicts which are merely larger than the trial judge would have granted had he been given the task of assess-

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had bounced, finding that the jury award was not "so excessive as to 'strike mankind, at first blush, as being beyond all measure unreasonable and outrageous' "); Adams v. Ford Motor Credit Co., 556 F.2d 737, 739-41 (5th Cir. 1977) (court refuses to disturb jury award of $20,000 as compensatory and punitive damages for wrongful repossession of an automobile, finding that while "other judges might well conclude that a much less substantial sum would be adequate . . . , we are simply unable to say that this falls into the very exceptional class of cases in which we can determine that the trial court abused its discretion"); Sadowski v. Bombardier Ltd., 539 F.2d 615, 624-25 (7th Cir. 1976) (court refuses to disturb jury award of $100,000 for damages arising from snow-mobile accident, finding that "[u]pon the basis of the evidence in this case considered in the light of present day verdict ranges held to be not excessive, we are unable to say that the district court should have ordered a remittitur"); Menard v. Penrod Drilling Co., 538 F.2d 1084, 1088-89 (5th Cir. 1976) (court refuses to disturb jury award of $250,000 for personal injuries sustained on a submersible drilling rig, finding that "[g]iving due weight to the verdict of the jury and to the rulings of the trial judge, we cannot, under the applicable rules of review, hold the jury's verdict excessive"); Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546, 1553 (D. Colo. 1985) (court refuses to disturb jury award for $19,000,000 for actual damages, damages for pain and suffering, and exemplary damages for age discrimination, finding that the award was not excessive in view of the evidence and circumstances of the case); Jacobson v. Pitman-Moore, Inc., 582 F. Supp. 169, 178-79 (D. Minn. 1984) (court refuses to disturb jury award of $54,000 for actual damages from employment discrimination, finding that the award correctly reflected plaintiff's actual damages and that plaintiff made an effort to mitigate damages); Kelly v. Illinois Cent. Gulf R.R., 552 F. Supp. 399, 401-03 (W.D. Mo. 1982) (court refuses to disturb jury award of $1,250,000 under FELA for injuries sustained in railroad yard accident, finding that "[e]ven though the result may have been too generous and was doubtless surprising [and] . . . presses allowable limits, I am unable to declare the verdict 'shocking' or to announce a 'firm conviction' that a 'clear miscarriage of justice' has occurred"); Vaughn v. Hardemon, 508 F. Supp. 97, 99-100 (N.D. Miss. 1980) (court refuses to disturb compensatory jury awards of $409,647 for injured truck driver and $100,000 for his spouse, finding that "[w]hile the award is probably more than the court would have awarded . . . . the verdict is supported by the evidence in the case"), *aff'd*, 622 F.2d 574 (D.C. Cir. 1980); Milos v. Sea-Land Serv., Inc., 478 F. Supp. 1019, 1024-25 (S.D.N.Y. 1979) (court refuses to disturb jury award of $360,000 in compensatory damages for injuries sustained when plaintiff slipped and injured himself, finding that "[t]he total trial record demonstrates sufficient evidentiary support of the verdict"); Washington v. National R.R. Passenger Corp., 477 F. Supp. 1134, 1135 (D.D.C. 1979) (court refuses to disturb jury award of $378,890.39 in a FELA suit, finding that "[t]he verdict is consistent with and is supported by evidence adduced by the plaintiff"); Norfin, Inc. v. International Business Machs., 81 F.R.D. 614, 616-17 (D. Colo. 1979) (court refuses to disturb jury award of $7,500,000 as lost profits on patent infringement, finding that the "verdict . . . is within the range of the evidence [and] . . . the dollar amount is [not] of such a magnitude as to shock the conscience of the court"); Thornton v. Equifax, Inc., 467 F. Supp. 1008, 1011-12 (E.D. Ark. 1979) (court refuses to disturb jury awards of $5,000 compensatory damages and $250,000 punitive damages under Fair Credit Reporting Act and state libel law, finding that the actual damage award was reasonable and, further, that, in view of the defendant's massive assets, the puntive damage award would stand), *rev'd on other grounds*, 619 F.2d 700 (8th Cir.), *cert. denied*, 449 U.S. 835 (1980); Murray v. Beloit Power Systems, 79 F.R.D. 590, 591-92 (D.V.I. 1978) (court refuses to disturb jury award of $1,747,855.60 for personal inujuries, finding that "the jury's award was [not] the product of irrational behavior"); United States v. 534.28 Acres of Land, 442 F. Supp. 82, 86 (M.D. Pa. 1977) (court refuses to disturb jury award of $61,500 in favor of landowners, finding that "[t]he verdict in this case was not so against the weight of the credible evidence as to require a new trial or remittitur"). The above cited cases

ing damages but are still within the allowable range of verdicts possible on the facts adduced at trial,[112] and verdicts which are "clearly excessive," "grossly excessive," or the like.[113] Most courts state

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demonstrate the frequency with which, in the last ten years, remittiturs have been sought in federal courts. *See also supra* note 31.

112. The United States Court of Appeals for the Tenth Circuit expressed this attitude, from an appellate court's point of view, in Rosen v. LTV Recreational Dev., Inc.:

> The fixing of damages is peculiarly the function of the jury, or of the trial judge if there has been no jury. The appellate court is at a disadvantage in considering whether an award is excessive because the standards are vague, requiring as they do that the verdict be the product of passion, prejudice or improper motive. The fact that it might strike us that the award of $200,000 is high is not sufficient. To find that it was the product of passion or prejudice on the part of the jury, it has to be manifest that the amount awarded was grossly excessive. We are unable to say in this instance that it was.

569 F.2d 1117, 1123 (10th Cir. 1978). *See also, e.g.*, Huff v. White Motor Corp., 609 F.2d 286, 295-97 (7th Cir. 1979); Adams v. Ford Motor Credit Co., 556 F.2d 737, 739-41 (5th Cir. 1977); Rodgers v. Fisher Body Div., Gen. Motors Corp., 575 F. Supp. 12, 16-17 (W.D. Mich. 1982), *rev'd*, 739 F.2d 1102 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); Kelly v. Illinois Cent. Gulf R.R., 552 F. Supp. 399, 401-03 (W.D. Mo. 1982); Thornton v. Equifax, Inc., 467 F. Supp. 1008, 1011-12 (E.D. Ark. 1979), *rev'd on other grounds*, 619 F.2d 700 (8th Cir.) *cert. denied*, 449 U.S. 835 (1980).

113. For appellate standards of review for the granting of remittitur, see Hollins v. Powell, 773 F.2d 191, 197 (8th Cir. 1985) (standard for grant of appellate remittitur is "a plain injustice, or a monstrous or shocking result"), *cert. denied*, 106 S. Ct. 1635 (1986); Joan W. v. City of Chicago, 771 F.2d 1020, 1023, 1025 (7th Cir. 1985) (standard for appellate remittitur is "abuse of discretion" by trial judge in not granting remittitur; appellate remittitur granted because "the jury award . . . is flagrantly extravagant and out of line with the other [similar] cases"); Walters v. Mintec/Int'l, 758 F.2d 73, 80 (3d Cir. 1985) (standard for appellate remittitur is a verdict "so grossly excessive as to shock the judicial conscience"); Martin v. Fleissner GMBH, 741 F.2d 61, 65 (4th Cir. 1984) (standard for appellate remittitur is that "the amount assessed is 'so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion or prejudice' " (quoting Hicks v. Herring, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965)); Caldarera v. Eastern Airlines, 705 F.2d 778, 784 (5th Cir. 1983) (standard for appellate remittitur "require[s] such awards to be so large as to 'shock the judicial conscience,' 'so gross or inordinately large as to be contrary to right reason' (quoting Complete Auto Transit, Inc. v. Floyd, 249 F.2d 396, 399 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958), so exaggerated as to indicate 'bias, passion, prejudice, corruption, or other improper motive' (quoting Allen v. Seacoast Prods., 623 F.2d 355, 365 (5th Cir. 1980), or as 'clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to' " (quoting Bridges v. Groendyki Transp., 553 F.2d 877, 880 (5th Cir. 1977) (emphasis in original)); Sam's Style Shop v. Cosmos Broadcasting Corp., 694 F.2d 998, 1006 (5th Cir. 1982) (standard for appellate remittitur is "abuse of discretion" by the trial court, there being "no such abuse . . . unless there is a complete absence of evidence to support the verdict . . . [or the verdict] is so excessive that no reasonable juror, unswayed by passion or prejudice, could have awarded that amount . . . [or that] the award was contrary to all reason"); Howell v. Marmpegaso Compania Naviera, 536 F.2d 1032, 1034 (5th Cir. 1976) (court grants remittitur because amount awarded by the jury "is simply not in the universe of rational awards on the evidence in this record"); Smith v. City of Seven Points, 608 F. Supp 458, 463 (E.D. Tex. 1985) (trial court standard for remittitur is "verdicts that are so large as to be contrary to right reason"); Marcone v. Penthouse Int'l, 577 F. Supp. 318, 335 (E.D. Pa. 1983) (trial court standard for remittitur is "when the trial judge is convinced that the damages are so excessive as to shock his sense of justice"); Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo.

that remittitur is only appropriate in cases in which the jury verdict is so large that it "shocks the conscience of the court,"[114] while a few judges find that shockingly large verdicts are necessarily the product of passion or prejudice and order a new trial on that ground.[115] Some judges, on the other hand, seem to grant remittiturs in any case in which the judge disagrees with the verdict, even if the amount of disagreement is relatively insubstantial.[116] Again,

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1983) (quoting Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962) (trial court standard for remittitur is that verdict is "so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice . . . or other improper cause invaded the trial . . ."); Dick v. Watonwan County, 562 F. Supp. 1083, 1108 (D. Minn. 1983) (court grants remittitur because it "finds that the verdict is excessive and must be reduced in order to avoid an unconscionable result"); Huebschen v. Department of Health & Social Serv., 547 F. Supp. 1168, 1183 (W.D. Wis. 1982) ("court finds the verdict as to damages to be so excesssive as to shock the judicial conscience"), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983); Morgan v. Consolidated Rail Corp. 509 F. Supp. 281, 286 (S.D.N.Y. 1980) ("the jury's resolution of the question of damages is not to be disturbed unless there is reason to believe it was the result of passion, bias or prejudice, or that it is so excessive as to shock the conscience of the court as a 'denial of justice' "); Starlings v. Ski Roundtop Corp., 493 F. Supp. 507, 511 (M.D. Pa. 1980) (standard is "grossly excessive" or "so clearly excessive as to shock the conscience of the court"); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 578 (D. Md. 1975) ("it is the duty of the trial court to grant a new trial when confronted with an excessive verdict, . . . or when the verdict shocks the conscience of the court").

114. *See* cases cited *supra* note 113.

115. In Proler v. Modern Equip. Co., 602 F. Supp. 1388 (E.D. Wis. 1985), a patent infringement suit in which the jury awarded $75,000,000 in compensatory damages and $1 in punitive damages, the court concluded that remittitur would be out of the question.

> As to damages, the case is . . . a fairy tale. If one closes one's eyes to reality, perhaps it can be said that there is testimony in the record to support it. However, the testimony given by Dr. Elliott is based for the most part on sheer speculation . . . .
>
> Common sense is offended by the verdict.
>
> . . . .
>
> If the jury award in this case had been $1.00 for compensatory and $75,000,000.00 for punitive damages it would still be excessive as a whole, but at least it would be somewhat more understandable. As it is, however, the award for compensatory damages is clearly excessive. It simply cannot be sustained. Because I find the damages to be excessive, I could grant a limited new trial or offer Mr. Proler a remittitur option, as the award does not appear to have been motivated by any prejudice on the part of the jury against Modern. A remittitur, however, would only be in the $100,000-$200,000 range, and because a sum in that area is so far removed from what the jury awarded, I decline to offer an option.

602 F. Supp. at 1393-94.

Another district court has stated that "[t]echnically, where the verdict is so grossly excessive as to admit of no other conclusion than that it was the result of passion or prejudice, the proper remedy is a new trial and not a remittitur." Schreffler v. Board of Educ., 506 F. Supp. 1300, 1308 (D. Del. 1981). *See also, e.g.*, Lowe v. General Motors, 624 F.2d 1373, 1383 (5th Cir. 1980); Perfect Fit Indus. v. Acme Quilting Co., 494 F. Supp. 505, 509 (S.D.N.Y. 1980), *modified*, 646 F.2d 800 (2d Cir. 1981). *But see, e.g.*, Wilson v. Taylor, 733 F.2d 1539, 1547-50 (11th Cir. 1984) (appellate court orders remittitur of 90% of verdict rather than finding extreme excess requires new trial).

116. Knight v. Texaco, 786 F.2d 1296, 1299-1301 (5th Cir. 1986) (court affirms district court remittitur of 17.6% of jury verdict); Harper v. Zapata Off-Shore Co., 741 F.2d 87, 93

distinctions should be drawn between cases in which the erroneously excessive portion of the jury verdict is a liquidated amount—that is where the source of error is identifiable and the measure of damages traceable to the error is calculable, hereinafter "liquidated amount cases"[117]—and those cases in which the trial judge cannot identify any particular source of error or cannot calculate an exact

(5th Cir. 1984) (appellate court reverses award of punitive damages and attorney's fees, while ordering remittitur of 20% of compensatory damage award); Stineman v. Fontbonne College, 664 F.2d 1082, 1090 (8th Cir. 1981) (appellate court orders remittitur of 25% of compensatory damages); Carlton v. H.C. Price Co., 640 F.2d 573, 582 (5th Cir. 1981) (appellate court orders one plaintiff to remit 29.6% of award for future medical expenses); Dullard v. Berkeley Assoc., 606 F.2d 890, 896 (2d Cir. 1979) (appellate court orders remittitur of 23.5% of award of damages for wrongful death); Kropp v. Ziebarth, 601 F.2d 1348, 1355 (8th Cir. 1979) (appellate court orders remittitur of 21.8% of damages for breach of contract); Community Television Servs. v. Dresser Indus., 435 F. Supp. 214, 218 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (court orders remittitur of 8% of jury verdict for breach of warranty); Meyer v. W.R. Grace & Co., 421 F. Supp. 1331, 1336 (E.D. Pa. 1976), *aff'd in part, rev'd in part*, 565 F.2d 152 (3d Cir. 1977) (court orders remittitur of 5.7% of jury verdict for breach of employment contract); Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009, 1019-23 (D.N.J. 1976), *rev'd on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (court orders remittitur of 15.5% of damages for antitrust violation).

117. Such cases would include not only circumstances in which the jury miscalculated the damages (for example, because of a typographical error in papers submitted to the jury or because of some clear mechanical error in the damage calculation), but also, cases in which the elements of damage are established by law, thus requiring a certain result, but in which the jury came up with a different figure. In the first category of cases, excessive verdict based on mechnical errors probably could not be avoided. In the second category of cases, where the elements of a damage calculation are established as a matter of law, however, such problems could be eliminated if the trial judge sought a special verdict, pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, in which the court would submit specific questions of fact to the jury but would then calculate damages, according to the jury's allocation of liability, based on the appropriate legal formula. In Hobson v. Wilson, 737 F.2d 1, 57-58 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court remanded for a new trial on the issue of damages, noting, "had . . . particularized special verdicts been returned . . . as to damages . . . both our task, and that of the parties and the District Court on remand, would have been greatly facilitated."

Many recent remittitur cases have either been "liquidated amount cases" or the court has treated the case as such by making a mechanical calculation, usually based on prior awards in similar cases, of allowable damages. *See* Enterprise Ref. v. Sector Ref., 781 F.2d 1116, 1120 (5th Cir. 1986) (remittitur or new trial in breach of service contract case because jury awarded $731,600 while court found that "[t]here is nothing to be balanced and nothing to be weighed; the record is wholly devoid of any support for any figure in excess of $422,220.00," a figure suggested by plaintiff's own expert witness); Deakle v. John E. Graham & Sons, 756 F.2d 821, 826-34 (11th Cir. 1985) (court orders remittitur of part of jury award for lost wages, calculating, on the basis of the facts, the maximum allowable recovery on those facts for lost wages); Haley v. Pan Am. World Airways, 746 F.2d 311, 318-19 (5th Cir. 1984) (in wrongful death action for loss of adult son, court orders remittitur of award in excess of sum of high recent award granted plus one third); American Anodco, Inc. v. Reynolds Metals, 743 F.2d 417, 425 (6th Cir. 1984) (court orders remittitur of amount attributable to one element of damages not properly proven at trial, noting that "[w]hen evidence of damages has been admitted erroneously and the effect of the error can be reasonably approximated to a

amount traceable to the error. In "liquidated amount cases," a re-

definite portion of the verdict, this court may condition its affirmance on the plaintiff remitting that portion of the verdict"); Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143, 150 (5th Cir. 1983) (court affirms district court order of remittitur of $800,000 to correct jury error in taking a number "off the wrong line" in a chart sent into the jury room, noting that "remittitur should be awarded when the jury has made a clear oversight and the correction is mechanical"); Everett v. S.H. Parks and Assocs., 697 F.2d 250, 253-55 (8th Cir. 1983) (court orders remittitur of part of damages awarded for breach of oral employment contract, calculating the "maximum amount reasonably supported by [plaintiff's] evidence" and noting that "[w]here the discrepancy between the award and the maximum amount reasonably supported by the evidence is apparent and the correction basically mechanical . . . the correction can be made at the appellate level"); Kolb v. Goldring, Inc., 694 F.2d 869, 871-75 (1st Cir. 1982) (court orders remittitur of part of damage award in breach of contract case, calculating remittitur-reduced damages based on upper limits of allowable elements of damages and noting that "[a]lthough the jury's award was excessive as a matter of law, a new trial may not be necessary [because t]he deficits in the award are readily identified and measured"); United States v. 47.14 Acres of Land, 674 F.2d 722, 728-29 (8th Cir. 1982) (court orders remittitur of part of compensation award in eminent domain proceeding, basing its remittitur on expert calculations); Geyer v. Vargas Prods., 627 F.2d 732, 735 (5th Cir. 1980) (court affirms trial court remittitur in breach of contract case, the remittitur being based on the jury's error in failing to subtract the plaintiff's expenses avoided by not having to perform the contract); Kropp v. Ziebarth, 601 F.2d 1348, 1355 (8th Cir. 1979) (court orders remittitur based on its estimate, in a breach of contract case, "of the effect on the verdict of the inflated and duplicative damage figures" adduced at trial); Durant v. Surety Homes Corp., 582 F.2d 1081, 1083, 1087 (7th Cir. 1978) (trial court had required remittitur of certain elements of compensatory damages which it concluded should not have been submitted to the jury; appellate court orders new trial or additional remittitur down to an amount "as to which there was no dispute"); Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81, 86 (3d Cir. 1977) (district court had granted a remittitur to correct a mechanical error by the jury in damages assessment; appellate court reverses on other grounds), *cert. denied*, 436 U.S. 913 (1978); Palmer Coal & Rock Co. v. Gulf Oil Co. 524 F.2d 884, 887 (10th Cir. 1975) (appellate court confirms trial court remittitur order based on "computations supported by the evidence"), *cert. denied*, 424 U.S. 969 (1976); Plattner v. Strick Corp., 102 F.R.D. 612, 618-19 (N.D. Ill. 1984) (remittitur order used to cure faulty verdict which could be "traced to a specific misconception on the part of the jury and the effect of that misconception is readily calculable"); Jeanneret v. Vichey, 541 F. Supp. 80, 85-86 (S.D.N.Y. 1982), (court orders remittitur in breach of implied warranty of title case by calculating the present value of the thing lost (the painting to which defendant did not have title) plus interest on money borrowed); *rev'd on other grounds*, 693 F.2d 259 (2d Cir. 1982); Marsh v. Interstate & Ocean Transp. Co., 521 F. Supp. 1007, 1010 (D. Del. 1981) (court orders remittitur of part of award for future medical expenses, basing its calculation on the maximum damages allowable under the evidence adduced at trial); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 102-03 (D.S.C. 1979) (court orders 25% remittitur on compensatory damage award for replacement of roof, such remittitur representing the value to the plaintiff of five years of satisfactory use of roof which had been represented as a "20-year roof"), *aff'd*, 664 F.2d 877 (4th Cir. 1981); Tribble v. Westinghouse Elec. Corp., 508 F. Supp. 14, 15-16 (E.D. Mo. 1980)(court orders remittitur in age discrimination in employment case, based on readily identifiable fact that jury had neglected to subtract, from its calculation of lost wages, "benefits and earnings received by the plaintiff" after his employment was terminated), *aff'd*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); Dixon v. Maritime Overseas Corp., 490 F. Supp. ju1191, 1193-94 (S.D.N.Y. 1980) (court orders remittitur of seaman's award for maintenance and cure, the recoverable amount being established by union contract), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981); Community Television Servs., Inc. v.

mittitur of a small portion of the jury verdict would be appropriate because the error can be identified and corrected.[118] In other cases in which the trial judge expresses a more generalized dissatisfaction with the size of the verdict, he should not be authorized to chip off small bits of the jury verdict; he should allow for the strong possibility that the jury's assessment of damages is within the legally permissible range of verdicts.[119] Otherwise, he would seem to be substituting his own verdict for that of the jury rather than merely correcting a mathematical error made by the jury. This caveat is especially applicable in cases in which part of the damages are allocated to pain and suffering or some other form of damages which cannot be determined with mathematical precision.[120] In these ar-

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Dresser Indus., Inc., 435 F. Supp. 214, 216-18 (D.S.D. 1977) (court orders small remittitur based on its finding that the jury award was more than the maximum allowable on the facts and on its calculation of an appropriate award), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); Keystone Floor Prods. v. Beattie Mfg., 432 F. Supp. 869, 884 (E.D. Pa. 1976) (court orders a remittitur of difference between the incentive bonus actually established at trial to have received by plaintiff in a prior year and the amount awarded by the jury which was based on a figure provided in one of the plaintiff's exhibits); Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009, 1023 (D.N.J. 1976) (court orders remittitur which would remove from jury verdict "certain identifiable sums . . . which were improper"), *rev'd on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

118. *See* Community Television Servs. v. Dresser Indus., 435 F. Supp. 214 (D.S.D. 1977) (remittitur of 8%), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932; Meyer v. W.R. Grace & Co., 421 F. Supp. 1331 (E.D. Pa. 1976) (remittitur of 5.7%), *aff'd in part, rev'd in part*, 565 F.2d 152 (3d Cir. 1977); Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009 (D.N.J. 1976) (remittitur of 15.5%), *rev'd on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

119. *See, e.g.*, Knight v. Texaco, Inc., 786 F.2d 1296 (5th Cir. 1986); Harper v. Zapata Off-Shore Co., 741 F.2d 87 (5th Cir. 1984); Stineman v. Fontbonne College, 664 F.2d 1082 (8th Cir. 1981); Dullard v. Berkeley Assocs., 606 F.2d 890 (2d Cir. 1979).

120. As one district court stated in the personal injury case Marsh v. Interstate & Ocean Transport Co.:

> Damages cannot be calculated in a strict mathematical formula, and jurors and judges often differ in their estimates of the appropriate amount to be awarded in a given case. Here, the Court cannot say that the general damages, while high, were so excessive as to warrant the Court's intervention into the Jury's findings. There is evidence in the record to justify the Jury's finding. The award of general damages must, therefore, be permitted to stand.

521 F. Supp. 1007, 1011 (D. Del. 1981) (citation omitted).

The United States Court of Appeals for the First Circuit, in a contract case, observed a difference in the treatment by federal courts of jury verdicts in tort cases and in contract cases:

> Generousness of a jury's award does not alone justify an appellate court in setting it aside. In tort cases, where the damges are given to compensate for losses not susceptible of arithmetical calculation, such as pain and grief, we have declined to second-guess a jury unless its verdict is "grossly excessive" or "shocking to the conscience." In contract or other cases involving only economic loss, the standard of review is somewhat different, although still deferential to the jury. In cases of that type, in the words of Judge Wisdom, a verdict is excessive as a matter of law if

eas the jury performs one of its most important functions—bringing the collective experiences of the group to bear on the consideration of the damages to be awarded for such a loss.[121]

After a trial judge has decided that the jury verdict is excessive, he must then determine the amount to be remitted by the plaintiff if the plaintiff wishes to avoid a new trial. Most courts make the calculation of the amount to be remitted by using a "reasonable jury" standard, with some courts determining the amount to be remitted as that necessary to reduce the verdict to the amount which the trial judge thinks a reasonable jury would have granted.[122] Other courts, reluctant to interfere with the jury verdict any more than is necessary, ask the plaintiff to remit the amount necessary to reduce the jury verdict to the "maximum amount" that a reasonable jury would have awarded.[123] These "maximum recovery" courts conclude that the trial judge tampers least with the intentions of the jurors, who by implication wanted to fully compensate the plaintiffs, if he allows remittitur up to the maximum verdict he considers supportable.[124]

In these calculations, the trial judge is often covert in his calculation of a reasonable jury award or a maximum reasonable jury

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shown to exceed "any rational appraisal or estimate of the damages that could be based upon the evidence before the jury." *Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831, 88 S. Ct. 100, 19 L.Ed.2d 90 (1967).

Kolb v. Goldring, 694 F.2d 869, 871 (1st Cir. 1982) (citation omitted). *See, e.g.*, Kelly v. Illinois Cent. Gulf R.R., 552 F. Supp. 399, 401 (W.D. Mo. 1982).

121. *See infra* notes 219-20 and accompanying text.

122. *See* Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168, 1187 (W.D. Wis. 1982) (court determined "as a matter of law that $10,000 in compensatory damages and $15,000 in punitive damages is reasonable"), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983); Uris v. Gurney's Inn Corp., 405 F. Supp. 744, 747 (E.D.N.Y. 1975) ("[a]s a guideline in determining how much of the verdict is excessive, the court adopts the approach favored by Professor Moore, *i.e.*, the excess over the amount the court believes a properly functioning jury should have found"). *See also* Brink's Inc. v. City of New York, 546 F. Supp. 403, 415 (S.D.N.Y. 1980) (court merely sets a figure without applying any standard), *aff'd*, 717 F.2d 700 (2d Cir. 1983).

123. *See, e.g.*, Deakle v. John E. Graham & Sons, 756 F.2d 821, 827 (11th Cir. 1985); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1046 (5th Cir. 1984); Sam's Style Shop v. Cosmos Broadcasting Corp., 694 F.2d 998, 1008 (5th Cir. 1982); Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982); Holman v. Mark Indus., 610 F. Supp. 1195, 1206 (D. Md. 1985); Smith v. City of Seven Points, 608 F. Supp. 458, 463 (E.D. Tex. 1985); Merkel v. Scovill, Inc., 573 F. Supp. 1055, 1068 (S.D. Ohio 1983); Dick v. Wantowan County, 562 F. Supp. 1083, 1108 (D. Minn. 1983); Morgan v. Consolidated Rail Corp., 509 F. Supp. 281, 288 (S.D.N.Y. 1980); Schreffler v. Board of Educ., 506 F. Supp. 1300, 1309 (D. Del. 1981); Community Television Servs. v. Dresser Indus., 435 F. Supp. 214, 218 (D.S.D. 1977); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 578 (D. Md. 1975).

124. *See, e.g.*, Dick v. Wantowan County, 562 F. Supp. 1083, 1108 (D. Minn. 1983); Morgan v. Consol. Rail Corp., 509 F. Supp. 281, 288 (S.D.N.Y. 1980).

award.[125] In many cases, the trial judge states the standard to be applied in assessing the amount to be remitted, and then, without revealing the analysis behind his decision, conclusively states that on the basis of the stated standard, no reasonable jury could have awarded more than $X, and, thus, the plaintiff must remit the amount by which the actual jury verdict exceeds $X.[126] Again, a distinction should be made in regard to "liquidated amount cases" in which the court is always very explicit as to the exact calculations and arguments necessary to reach $X, the appropriately sized verdict.[127]

Once the trial court determines how much should be remitted in order for a new trial order on the grounds of excessiveness, the court will enter some sort of conditional new trial order, with the denial of a new trial on the ground of excessiveness being conditioned on the plaintiff's agreement to remit the amount calculated by the court.[128] The courts have uniformly held that the plaintiff *must* be given the opportunity to elect between a new trial and a remittitur-reduced verdict.[129] Even if the trial judge is convinced that the only problem with the entire trial process was the excessive enthusiasm of the jury in calculating damages, and that he has precisely calculated the correct damages (a never-never land possibility), the trial judge cannot simply enter the remittitur-reduced verdict as a final verdict; the trial judge must leave the choice between reduced verdict and new trial to the plaintiff.

This limitation on the trial judge must, however, be distinguished from his authority to "correct" or "mold" a verdict where the correct verdict is correct.[130] Such power should probably be

125. *See infra* note 229 and accompanying text.

126. *See infra* notes 229-39 and accompanying text.

127. *See* cases cited *supra* note 117.

128. *See supra* note 14 for a description of conditional new trial orders.

129. *See, e.g.*, McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1984); Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983); Kline v. Wolf, 702 F.2d 400, 405 (2d Cir. 1983).

130. *See* Marder v. Conwed Corp., 75 F.R.D. 48, 50 (E.D. Pa. 1977) (motion to mold verdict). *See also* Eastern Assoc. Coal v. Aetna Casualty & Sur. Co., 475 F. Supp. 586, 593-94 (W.D. Pa. 1979) (if amount of error is definite, "the court is of the opinion that the matter can be handled by a reduction of judgment pursuant to Rule 50(b) . . . . instead of following the cumbersome route of the remittitur resulting possibly in a lengthy retrial of the whole case"), *rev'd on other grounds* 632 F.2d 1068 (3d. Cir.), *cert. denied*, 451 U.S. 986 (1980). *Cf.* Comment, *Remittitur Review*, *supra* note 15, at 390 (suggesting that remittitur is constiutional in "liquidated amount" cases but possibly not constitutional in cases involving unliquidated amounts or uncertain measures of damages).

Under Rule 49(b) of the Federal Rules of Civil Procedure, a federal court judge has the power to correct a jury verdict to make the verdict consistent with interrogatories. This

used in all cases in which an identifiable error (such as an incorrect jury instruction) has led to the inclusion in the verdict of an erroneous amount.[131] Remittitur is not necessary where a clear error can be corrected by "molding" the verdict; in those cases, the plaintiff should not be given the power to force a new trial.[132]

When the trial judge makes a conditional new trial order, he can order a total new trial[133] or can limit the new trial to certain issues, usually damages.[134] A partial new trial is often ordered when the trial judge feels that the jury decision in regard to liability is correct and the only problem with the verdict is in the valuation of damages.[135] Then, if the plaintiff refuses to remit, he is only subjected to a partial new trial. Thus, judgment in his favor would be assured, with only the amount of damages to be relitigated.[136]

Conditional partial new trial orders appear to be an economical response to circumstances in which a trial judge is convinced that the only defect in a trial was that the jury awarded excessive damages. Such orders, however, might actually lead to judicial waste; a plaintiff who is assured of a judgment in his favor might not view a new trial as a particularly risky proposition. Thus, he might reject a reasonable remittitur order and opt for a new trial, if he feels that the reduced verdict is a little too small.[137]

After the conditional new trial order is entered, the plaintiff is given a certain number of days in which to affirmatively agree to the

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power, coupled with locally recognized authority to "mold" jury verdicts, should provide a method for resolving "liquidated amount" cases without resorting to remittitur. *See supra* notes 117-18 and accompanying text, text accompanying note 127, *infra* notes 134-35 and accompanying text, and text accompanying notes 178-79. *See also* FED. R. CIV. P. 49(b).

131. *See supra* cases cited in note 117.

132. *See infra* text accompanying notes 181-82 and 258-61.

133. *See generally supra* note 14.

134. *See, e.g.*, Harper v. Zapata Off-Shore Co., 563 F. Supp. 576, 585 (E.D. La. 1983), *rev'd on other grounds*, 741 F.2d 87 (5th Cir. 1984); Morgan v. Consolidated Rail Corp., 509 F. Supp. 281, 288 (S.D.N.Y. 1980). *See generally supra* note 14 (citing cases in which the defendant's new trial motion is granted conditioned on the plaintiff's subsequent refusal to remit excess).

135. *See, e.g.*, *Harper*, 563 F. Supp. at 585; *Morgan*, 509 F. Supp. at 288. *See also* Proler v. Modern Equip. Co., 602 F. Supp. 1388, 1393-94 (E.D. Wis. 1985) (The judge stated that he *could* grant a limited new trial or grant a remittitur option; the judge denounced the option and ordered an absolute new trial only on the issue of damages).

136. A partial new trial procedure might lead to judicial waste by encouraging plaintiffs to seek unrealistically high damages or engage in improper trial tactics on the theory that an excessive verdict will probably only lead to a remittitur or a partial new trial on damages. The plaintiff's prize, a finding of liability against the defendant, will not be put at risk.

137. *See supra* note 136, *infra* notes 185-89 and accompanying text, and text accompanying notes 250-52.

remittitur.[138] If he rejects the remittitur or if he is silent, the new trial is automatically ordered. At that point, neither party can appeal because a new trial will be conducted.[139] After the new trial terminates in a final judgment, the plaintiff can appeal the original trial judge's new trial order as well as raise any other objections that he has.[140] The defendant also might appeal if dissatisfied with the outcome.

If the plaintiff agrees to the remittitur, the trial judge enters a final judgment in the remittitur-reduced amount.[141] After years of debate in lower federal courts,[142] the Supreme Court decided, in

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138. *See supra* note 14.

139. 28 U.S.C. § 1292 (1948 & Supp. 1987) (provides, in part, that "[t]he Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." If a trial judge orders a new trial, he does not enter a judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure and his order is not deemed "final." *See* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (an order granting a new trial is not immediately appealable because of its interlocutory nature; a party seeking a writ of mandamus must have no other means of relief; thus a trial court order for a new trial which is reviewable on a direct appeal after a final judgement has been entered rarely will justify issuance of the writ). *See generally* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932) (an appeal can be taken only from a final judgement; an underlying policy is that it is the only way in which the appellate courts can prevent themselves from being inundated with appeals).

140. *See, e.g.*, Conway v. Chem. Leaman Tank Lines, Inc., 610 F.2d 360 (5th Cir. 1980); cases cited in 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2818, 115 nn. 41-42 (2d ed. 1982 & Supp. 1987).

141. *See supra* note 14.

142. As of 1977, the Fifth Circuit had adopted a procedure, contrary to a traditionally observed prohibition of remitting plaintiff appeals, of permitting such a plaintiff to remit and still appeal the conditional new trial order so long as he remitted "under protest," thereby giving notice of the possibility of an appeal. *See, e.g.*, Gilbert v. St. Louis-San Francisco R.R., 514 F.2d 1277 (5th Cir. 1975); Bonura v. Sea Land Servs., Inc., 505 F.2d 665 (5th Cir. 1974), *reh. and reh. en banc denied*, 512 F.2d 671 (5th Cir. 1975); Simmons v. King, 478 F.2d 857 (5th Cir. 1973); United States v. 1160.96 Acres of Land, 432 F.2d 910 (5th Cir. 1970); Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971), *reh. denied*, 409 U.S. 899 (1972), *modified*, 456 F.2d 180 (5th Cir. 1972); Steinberg v. Indemnity Ins. Co. of N. Am., 364 F.2d 266 (5th Cir. 1966). The Sixth Circuit had also permitted remitting plaintiff appeals, but under a state law which the court had followed. *See, e.g.*, Howard v. J.W. Zellner & Sons Transfer Co., 539 F.2d 244 (6th Cir. 1976); Jones v. Wittenberg Univ., 534 F.2d 1203 (6th Cir. 1976); Burnett v. Coleman Co., 507 F.2d 726 (6th Cir. 1974) (per curiam); Brewer v. Uniroyal, Inc., 498 F.2d 973 (6th Cir. 1974); Manning v. Altec, Inc., 488 F.2d 127 (6th Cir. 1973); Mooney v. Henderson Portion Pack Co., 334 F.2d 7 (6th Cir. 1964). Other circuits had not adopted the procedure, although the First Circuit assumed, in dictum, that "an appeal lies from a consented-to remittitur," Bonn v. Puerto Rico Int'l. Airlines, Inc., 518 F.2d 89, 94 (1st Cir. 1975). The Second Circuit had reviewed the Fifth Circuit procedure but had reserved the decision on whether to employ the procedure until faced "squarely" with the issue, Reinertsen v. George W. Rogers Constr. Corp., 519 F.2d 531, 536 (2d Cir. 1975), and the Third Circuit had narrowly avoided the issue when a district court accepted a remittitur "under protest," the court of appeals reversing and remanding on other grounds. Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163, 1171

1977 in *Donovan v. Penn Shipping Co.*,[143] that plaintiffs who had agreed to remit could not appeal the trial court's conditional new trial order, even if the plaintiffs remitted "under protest."[144] According to the view adopted by the Supreme Court, the plaintiff, who has reaped the benefits of the remittitur procedure by avoiding a new trial cannot question the propriety of the conditional new trial order from which he has benefited.[145] The defendant, on the other hand, can appeal the trial court's grant of a remittitur, arguing that he should have had the new trial, his right to which had been tacitly recognized by the order of the conditional new trial. But for the availability of remittitur, the defendant might argue, the trial judge would have granted a new trial on the ground of excessiveness of the jury verdict.[146] Moreover, the defendant often contends that the defects in the trial which culminated in the excessive verdict were not curable by remittitur in that the errors might have affected the jury's decision on the issue of liability as well as amount.[147] Some defendants will argue, in the alternative, that the remittitur ordered by the trial court was too small.[148]

At the appellate level, the remitting plaintiff has nothing to gain; he does, however, have something to lose. While the plaintiff must

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(E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973). The Seventh Circuit had expressly disapproved the Fifth Circuit approach in a direct appeal case, Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970), and had felt compelled to dismiss a remitting plaintiff's cross-appeal on the basis of precedent. Shor-line Rambler, Inc. v. American Motors Sales Corp., 543 F.2d 601 (7th Cir. 1976), The Eighth Circuit also rejected the Fifth Circuit procedure, Slatton v. Martin K. Eby Constr. Co., 491 F.2d 707 (8th Cir.), *aff'd*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

143. 429 U.S. 648 (1977) (per curiam).

144. *Id.* at 649. The Court stated, "[i]n order to clarify whatever uncertainty might exist, we now reaffirm the longstanding rule that a plaintiff in federal court . . . may not appeal from a remittitur order he has accepted." *Id.* at 650. The Court also rejected Sixth Circuit reliance on state law, stating that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." *Id.* at 649.

145. *Id.*

146. *See, e.g.*, Carlin, *supra* note 15, at 12-13; Note, *Constitutional Law*, *supra* note 15, at 672.

147. In Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984), the defendants had appealed from a remittitur reduced verdict, 574 F. Supp. 1407 (S.D.N.Y. 1983), arguing that the verdict was still excessive and that they should be granted a new trial or an increased remittitur. The court concluded that "use of remittitur deprived the defendants of their right to a jury trial on the issue of pecuniary loss" and remanded for a new trial on that issue. 742 F.2d at 47. *See also* Knight v. Texaco, Inc., 786 F.2d 1296, 1299 (5th Cir. 1986); Gardino v. Caribbean Lumber Co., 587 F.2d 204, 206 (5th Cir. 1979); Durant v. Surety Homes Corp., 582 F.2d 1081, 1088-89 (7th Cir. 1978); Westerman v. Sears, Roebuck & Co., 577 F.2d 873, 882 (5th Cir. 1978).

148. *See, e.g.*, *Knight*, 786 F.2d at 1298; *Shu-Tao Lin*, 742 F.2d at 47; *Gardino*, 587 F.2d at 206; *Durant*, 582 F.2d at 1087.

remain mute, the defendant can attack the remittitur-reduced award.[149] The result might be the new trial that the plaintiff sought to avoid by agreeing to the remittitur at the trial level[150] or a conditional new trial order by the appellate court, with grant of a new trial being conditioned on the plaintiff's refusal to remit an additional amount set by the court of appeals.[151] In other words, at the appellate level the plaintiff can again be asked to relinquish part of his verdict or submit to a new trial on some or all issues.

The question of the power of an appellate court to order a remittitur has plagued the federal judicial system since the remittitur procedure was first employed by federal courts.[152] In fact, in *Blunt v. Little*,[153] Mr. Justice Story was sitting as a circuit court judge when he announced his approval of remittitur and ordered the plaintiff to remit $500 or submit to a new trial.[154] Federal courts have been slow to adopt the procedure,[155] and commentators have expressed disapproval of appellate remittitur on a variety of grounds, including, difficulty, on the basis of a trial record, of identifying an appropriate case for remittitur,[156] and calculating the amount to be remitted,[157] the inequity of giving the defendant another opportunity to reduce the plaintiff's verdict,[158] and the potential seventh amendment objection that appellate court judges would be making a remote reexamination of an issue decided by a jury.[159] This has

149. *See, e.g.*, cases cited *supra* notes 147-48.

150. *See, e.g.*, Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984) (court of appeals orders new trial on damage issue excepting pre-impact pain and suffering award rather than accepting remittitur because of prejudicial errors at trial).

151. *See, e.g.*, Harper v. Zapata Off-Shore Co., 741 F.2d 87 (5th Cir. 1984) (district court had requried remittitur for part of punitive damage award, court of appeals requires remittitur of part of compensatory damage award); Durant v. Surety Homes Corp., 582 F.2d 1081 (7th Cir. 1978) (district court had required remittitur of certain elements of compensatory damages, court of appeals remands for additional remittitur or new trial).

152. *See* Busch, *supra* note 15, at 550; Hullverson, *Remittitur and Other Things*, 28 J. Mo. B. 81, 98 (Feb. 1972); Note, *Remittitur Practice*, *supra* note 15, at 310-11; Comment, *Appellate Remittitur*, *supra* note 15, at 644.

153. 3 F. Cas. 760 (No. 1578) (C.C.A. Mass. 1822).

154. *See supra* notes 51-54 and accompanying text.

155. *See, e.g.*, Whiteman v. Pitrie, 220 F.2d 914, 919 (5th Cir. 1955). *Accord* Ballard v. Forbes, 208 F.2d 883, 888 (1st Cir. 1954); Bucher v. Krause, 200 F.2d 576, 586-87 (7th Cir. 1952); Smith v. Welch, 189 F.2d 832, 837-38 (10th Cir. 1951).

156. Note, *Remittitur Practice*, *supra* note 15, at 310; Comment, *Appellate Remittitur*, *supra* note 15, at 643-44.

157. *See* Hullverson, *supra* note 152, at 98 (noting the problems juries and judges face when trying to determine the present value of awards designed to compensate for future losses).

158. Note, *Remittitur Practice*, *supra* note 15, at 310.

159. *Id.*; Comment, *Appellate Remittitur*, *supra* note 15, at 643-44. *See also* Busch, *supra* note 15, at 550 (suggesting appellate remittitur is neither justified nor necessary for affirming

not stopped federal appellate courts from adopting and employing the practice in a wide variety of situations.[160] Recognizing the objections raised above, some appellate judges apply a more rigorous standard to the grant of appellate remittitur than the standard they recognize as appropriate for a trial judge.[161] Other judges, however, do not evidence any sensitivity to their limited role on appeal, hacking away at jury verdicts (or trial court remittitur-reduced verdicts) that they consider excessive.[162]

If the court of appeals decides that a remittitur should be ordered, the plaintiff is again put to the choice of remittitur or new trial on some or all issues.[163] If he agrees to appellate remittitur, what is left of his verdict is probably safe because of the unlikelihood that the Supreme Court will entertain the defendant's petition for a writ of certiorari.[164]

Finally, if the trial judge denies the defendant's new trial and/or remittitur motions, judgment will be entered on the jury verdict. Then both parties would be free to appeal and the defendant could seek, and receive, a remittitur at the appellate level.[165]

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a verdict. If a verdict is clearly improper, reversal and remand for a new trial on all the issues or damages only is appropriate).

160. *See, e.g.*, Enterprise Ref. Co. v. Secter Ref., Inc., 781 F.2d 1116 (5th Cir. 1986); Joan W. v. City of Chicago, 771 F.2d 1020, 1023 (7th Cir. 1985); K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1162 (10th Cir. 1985); Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985); Everett v. S.H. Parks & Assocs., 697 F.2d 250, 253 (8th Cir. 1983). *See also supra* notes 158-59.

161. In Hollins v. Powell, 773 F.2d 191 (1985), the United States Court of Appeals for the Eighth Circuit stated:

> This court has noted repeatedly that the excessiveness of a verdict is basically an issue for the trial court, and that we consider review only in those rare situations where we are pressed to conclude that there is a plain injustice, or a monstrous or shocking result.

Id. at 197. *See, e.g.*, Hansen v. Johns-Mansville Prods. Corp., 734 F.2d 1036, 1046 (5th Cir. 1984); Kolb v. Goldring, 694 F.2d 869, 871 (1st Cir. 1982); Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982); Stineman v. Fontbonne College, 664 F.2d 1082, 1088 (8th Cir. 1981).

162. *See, e.g.*, American Andoco, Inc. v. Reynolds Metals Co., 743 F.2d 417, 425 (6th Cir. 1984); Harper v. Zapata Off-Shore Co., 741 F.2d 87, 93 (5th Cir. 1984); United States v. 47.14 Acres of Land, 674 F.2d 722, 728 (8th Cir. 1982); Kropp v. Ziebarth, 601 F.2d 1348, 1351 (8th Cir. 1979).

163. *See, e.g.*, Harper v. Zapata Off-Shore Co., 741 F.2d at 425; Kropp v. Ziebarth, 601 F.2d at 1355.

164. Except for its three page, per curiam treatment of the "remittitur under protest" issue in *Donovan*, *see supra* notes 142-45 and accompanying text, the court has not considered remittitur since its dictum in *Dimick*, *see supra* notes 54-68 and accompanying text.

165. *E.g.*, Note, *Remittitur Practice*, *supra* note 15, at 302.

III. EVALUATION OF REMITTITUR PRACTICE

Hundreds of recent federal court cases involving remittiturs and scores of articles and other secondary sources were consulted in the preparation of this Article.[166] About ten years ago, a flurry of interest in remittitur arose from the then-current federal court conflict concerning whether a plaintiff should be allowed to remit "under protest" and then appeal the remittitur order.[167] The Supreme Court's per curiam opinion in *Donovan* put an end to the conflict when it "reaffirm[ed] the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted."[168] The "long standing rule" reaffirmed in *Donovan* was based on four Supreme Court decisions, rendered between 1889 and 1917,[169] which courts and commentators felt did not constitute compelling precedent for rejection of the "remittitur under protest" procedure.[170]

Since this brief flare-up of interest in remittitur, which ended shortly after the *Donovan* case, the Supreme Court has not dealt with remittitur practice and commentators have also been silent on the subject. The federal courts, however, have been most enthusiastic in their employment of the device (sans the "remittitur under protest" protection for plaintiffs), engaging in wholesale, unfettered use of remittitur both at the trial and appellate levels.[171] While the frequency of remittitur's use varies from circuit to circuit, there has been an observable proliferation of remittitur cases in recent years. This is partly ascribable to remittitur's use in an ever-widening variety of cases in which money damages might be awarded and partly ascribable to an increase in the number of actions in which remittitur traditionally has been employed—personal injury suits involving pain and suffering and other "incalculable" sorts of damages such as loss of services, of consortium, of counsel, of companionship, and the like. As constantly improving technology has created new and different ways in which ever-increasing numbers of people can suffer personal injury and death, medical science has improved apace, in-

166. *See, e.g.*, authorities cited *supra* note 15 and cases cited *supra* in notes 31, 111, 117, and 160.

167. *See supra* notes 142-45 and accompanying text.

168. Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (per curiam).

169. Woodworth v. Chesbrough, 244 U.S. 79 (1917); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895); Lewis v. Wilson, 151 U.S. 551 (1894); Kennon v. Gilmer, 131 U.S. 22 (1889).

170. *See, e.g.*, Note, *Remittitur Practice*, *supra* note 15, at 313-15; Note, *Appealability of Judgements*, *supra* note 15, at 1155-61.

171. *See* cases cited *supra* notes 31 and 160.

creasing the probability that seriously injured people, people who would have died under more primitive conditions, will survive to face a life of pain, suffering and diminished capabilities. The problem of determining an appropriate measure of damages in such cases continues to plague courts and juries, with the frequent result that a jury verdict for such intangible losses is considered excessive by the trial or appellate court—a candidate for remittitur.

The remittitur procedure, as employed in federal courts, is unfair and does not achieve the desired ends—economies of time and money—which have repeatedly been cited to justify the procedure.[172] In fact, remittitur practice appears to encourage a certain type of waste[173] and to create circumstances in which the result will necessarily be an excessive verdict.[174] To determine what corrective measures should be employed, one must first evaluate current procedure[175] and then propose alternative procedures to better achieve the underlying purposes of remittitur without the detrimental side effects of the current practice.[176]

A. *Current Remittitur Practice*

As noted above,[177] serious doubts have been expressed as to the constitutionality of remittitur practice in light of the seventh amendment's proscription of reexamination of facts found by a jury other than as such reexamination was available at the common law. Moreover, the procedure was overruled in England in 1905,[178] thus requiring that the procedure employed in the United States be examined closely on grounds other than constitutionality. Even if a comparable procedure for reexamining jury verdicts existed at the common law, which would make the use of the procedure by federal courts not unconstitutional, the rejection of the procedure in England makes one wonder whether the use of the procedure in the United States is objectionable for other reasons. Clearly, the English courts found it to be so. Moreover, without persuasive comparable procedures in the country from which the federal system sprang, compelling reasons should support continuation of the procedure, reasons which this writer cannot identify.[179]

172. *See infra* notes 177-247 and accompanying text.
173. *See infra* text accompanying notes 182-88.
174. *See infra* text accompanying notes 184-88.
175. *See infra* notes 177-247 and accompanying text.
176. *See infra* notes 248-63 and accompanying text.
177. *See supra* notes 56-88 and accompanying text.
178. Watt v. Watt, App. Cas. 115 (1905).
179. *See infra* notes 180-240 and accompanying text.

Traditionally, defendants have viewed remittitur as an unfair procedure. By ordering a conditional new trial, the trial judge (or the appellate judge) recognizes that something went wrong at trial, resulting in an excessive verdict. Rather than giving the defendant the new trial to which he admittedly would be entitled if remittitur practice did not exist, the defendant is told that the judge is going to try to "fix" the defective verdict by asking the plaintiff to give up that part of the jury verdict which the judge deems to be excessive.[180] If the plaintiff agrees to remit, the defendant is deprived of the new trial even if the defendant thinks that the reduced verdict is still too high or that the problem with the verdict indicates a serious defect in the course of the trial itself.[181]

Remittitur may also be viewed as unfair to the defendant if used in a "liquidated amount case."[182] If the trial judge can pinpoint the error at trial and can calculate the amount of damages included in the verdict as a result of the error,[183] then it is unfair to the defendant to give the plaintiff the option of forcing a new trial. The defendant will argue that the plaintiff should not be permitted to force an expensive new trial if the only problem with the jury verdict is the inclusion of an inappropriate element of damages which can be removed by the judge.

Finally, the defendant might object to a trial court's grant of a partial rather than total conditional (or unconditional) new trial. If the new trial order is limited to damages, a plaintiff might be encouraged to seek a new trial and refuse to remit; the plaintiff has the assurance that he risks nothing more than the amount of his verdict if he opts for a new trial. Moreover, the partial new trial procedure might encourage plaintiffs to ask for unrealistically high damages in the hope that the jury will give the plaintiff all that he seeks. The advantage of this for the plaintiff is the possibility that the trial and appellate judges might be unwilling to disturb the jury verdict. If the trial judge or appellate judge does find excessiveness, the judge will often order a conditional new trial on only the issue of damages. If the plaintiff is satisfied with the remittitur-reduced verdict, he can agree to remit. If he is dissatisfied, he is not required to risk

180. *See supra* notes 101-29 and accompanying text.

181. *See supra* notes 107-10 and accompanying text. The defendant can, of course, appeal the denial of his new trial motion, *see supra* notes 146-51 and accompanying text. However, the standard employed on that appeal should be stricter than that provided at the trial court level, thus, in theory, making it harder to get relief in a court of appeals. *See supra* notes 152-62 and accompanying text.

182. *See supra* notes 117-19 and accompanying text.

183. *See* cases cited *supra* note 117.

his verdict but only the measure of damages to be awarded.[184] If no remittitur practice were available and no partial new trial were possible, the plaintiff would be constrained to seek realistic damages because the only option available to the trial judge upon a finding of excessiveness would be to grant a total new trial on all issues.

A related problem, from the point of view of the defendant (as well as the judicial system), is that remittitur and partial new trials encourage plaintiffs to engage in improper trial tactics. The plaintiff who knows that a remittitur-partial new trial order is a strong possibility,[185] will not be averse to "pulling out all of the stops" to get a jury verdict because the court is likely to merely slap the plaintiff's wrist by asking for remittitur of some of the verdict obtained in a trial marred by misconduct such as improper arguments to the jury[186] or requiring that the plaintiff undergo a new trial only on the issue of damages.[187] Again, if the plaintiff knew at the outset of the trial that the judge's only option, upon finding prejudicial error in the form of plaintiff misconduct, would be to order a new trial on all issues, the plaintiff and his attorney would be encouraged to conduct their case in a more appropriate manner.[188] Misconduct would be too great a risk to take if the possibility of remittitur and partial new trial were removed. Thus, from the defendant's point of view, remittitur can be used to deprive him of a new trial which he deserves, can lead to expensive new trials at the whim of the plaintiff where the defect in the jury verdict could easily be corrected by the trial judge, and can actually encourage plaintiffs to seek unrealistically high damages and engage in improper trial tactics.

The plaintiff also has many reasons for objecting to remittitur practice. The plaintiff who has gone through the litigation process and emerged victorious with a verdict in hand would like to retain his entire verdict. He is told, however, that he must choose between a new trial or remitting some of his verdict. For many plaintiffs, this essentially amounts to blackmail, with the verdict being held hostage.[189]

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184. *See supra* note 136 and accompanying text.

185. *See supra* note 136 and accompanying text.

186. *See* cases cited *supra* notes 104-05.

187. *See supra* notes 133-36 and accompanying text.

188. *See supra* notes 103-07 and accompanying text, and *infra* text accompanying note 249.

189. Judge Feinberg argued, in his dissent in Donovan v. Penn Shipping Co., 536 F.2d 536, 539 (2d Cir. 1976), *aff'd*, 429 U.S. 648 (1977):

> When a remittitur is used . . ., the coercive effect upon a plaintiff is very great. He is offered a reduced verdict right away. Should he refuse, in order to regain the full amount of the verdict he must first undergo the delay and trouble of a second

For a plaintiff who is old or ill, there is no real choice but to opt for remittitur if he hopes to receive the fruits of the verdict during his lifetime. Other plaintiffs who are in difficult financial straits—for example, those who have suffered disabling injuries and cannot support themselves or pay medical expenses—can ill afford to wait until the end of another trial to receive financial benefits. Moreover, such plaintiffs are not in a position to bear the expense or risk of a new trial, even if they feel that the remittitur reduced verdict is unjustly small. Finally, attorneys will pressure these plaintiffs to agree to remit, partly from a desire to have their fees paid. Very few plaintiffs are in the enviable position of not feeling pressured into agreeing to the remittitur. If not deterred by added expense and time, plaintiffs might still be reluctant to risk another trial, especially because second trials often result in smaller verdicts[190] or in

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> trial, perhaps obtain a lower verdict, and then try to persuade an appellate court that the trial judge erred in reducing the first verdict. It should be no surprise that, as the majority puts it, "most plaintiffs now accept the remittitur thus necessitating a second trial in only a small minority of cases." If this is so, it proves appellant's point, which is that the present system deprives him of any real opportunity to challenge the judge's use of a remittitur.

See also Note, *Remittitur Practice*, *supra* note 15, at 311-13.

The tortuous process which ensues when a plaintiff refuses to remit, what one commentator refers to as "a potentially permanent treadmill, [with plaintiff] forever winning jury awards only to have them nullified by the court," Comment, *Remittitur Review*, *supra* note 15, at 377-78, is illustrated by some of the cases cited *infra* notes 190-91. The court in Collins v. Retail Credit Co., 410 F. Supp. 924 (E.D. Mich. 1976), noted:

> Technically, a remittitur gives the plaintiff a choice which gives plaintiff the option of a new trial. Such an option is really without much significance. An order of remittitur is a judicial determination that the verdict is excessive as a matter of law . . . . The reality is that if there is a verdict for the plaintiff upon retrial, it cannot from a pratical standpoint, be expected to be sustained in an amount previously deemed excessive . . . .

Id. at 934 (citations omitted).

190. *See*, Kazan v. Wolinski, 721 F.2d 911, 912-14 (3d Cir. 1983) (after Trial 1, plaintiff refused to remit $90,000 of his $150,000 jury award to bring verdict to $60,000; Trial 2 resulted in jury award of $50,000; court of appeals found no abuse of discretion in Trial 1 court's conditional new trial order); Smith v. John Swafford Furniture Co., 614 F.2d 552, 553 (6th Cir. 1980) (after Trial 1, plaintiffs refused to remit amounts necessary to reduce their jury awards of $44,797 and $9,000 to $27,500 and $5,000 respectively; Trial 2 resulted in jury awards of $16,000 and $0, respectively; court of appeals found no abuse of discretion); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280, 283-85 (7th Cir. 1975) (after Trial 1 plaintiff refused to remit amount sufficient to reduce his jury award of $546,000 to $408,119.25; Trial 2 resulted in jury award of $120,000; court of appeals found no abuse of discretion); Reinertsen v. George W. Rogers Constr. Corp., 519 F.2d 531, 532-33 (2d Cir. 1975) (after Trial 1 plaintiff refused to remit amount sufficient to reduce jury award of $75,000 to $45,000; Trial 2 resulted in jury award of $16,000; court of appeals found no abuse of discretion); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 506-09 (8th Cir. 1974) (after Trial 1 plaintiff refused to remit amount sufficient to reduce jury award of $85,000 to $50,000; in Trial 2 the trial court assessed damages of $19,000 less an offset for workmen's compensation benefits; court of appeals found no abuse of discretion), *cert. denied*, 421 U.S. 931 (1975); Holmes v.

the new trial judge again ordering a remittitur or new trial on the ground of excessiveness.[191] The unfairness of ordering a remittitur after a second trial is particularly apparent—arguably, the second judge should defer to the jury since two different juries awarded damages greater than trial judges deemed appropriate, leading to the obvious conclusion that the jury verdict should not be disturbed.

The plaintiff may also raise the argument that remittitur actually encourages trial judges to interfere with the functioning of the jury by making relatively minor adjustments to the jury verdict.[192] The judge may feel that the damages are not so excessive that he would, in good conscience, order a new trial on that basis. He will

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Wack, 464 F.2d 86, 87-89 (10th Cir. 1972) (after Trial 1, plaintiff refused to remit amount sufficient to reduce jury award of $15,000 to $5,000; Trial 2 resulted in jury award of $0; court of appeals found no abuse of discretion); Cosentino v. Royal Neth. S.S. Co., 389 F.2d 726, 727 (2d Cir.) (after Trial 1 plaintiff refused to remit amount sufficient to reduce jury award of $25,000 to $13,000; Trial 2 resulted in jury award of $1,800; court of appeals found no abuse of discretion), *cert. denied*, 393 U.S. 977 (1968). *See also* Bruner v. Dunaway, 684 F.2d 422, 424-27 (6th Cir.) (Trial 1 resulted in $300,000 jury award for plaintiff, trial court ordered new trial; Trial 2 resulted in $100,000 award for plaintiff; court of appeals affirmed), *cert. denied*, 459 U.S. 1171 (1982). *But see* Dabney v. Montgomery Ward & Co., 761 F.2d 494, 497-501 (8th Cir.) (Trial 1 resulted in $1,000,000 jury award for plaintiff; court of appeals ordered new trial for prejudicial errors at trial; Trial 2 resulted in $2,000,000 award for plaintiff; court of appeals affirmed), *cert. denied*, 106 S.Ct. 233 (1985); Vanskike v. Union Pac. R.R., 725 F.2d 1146, 1148-50 (8th Cir. 1984) (Trial 1 resulted in jury award of $903,000, trial court ordered new trial on damages; Trial 2 resulted in jury verdict of $1,811,177; court of appeals affirmed); Shows v. Jamison Bedding, Inc., 671 F.2d 927, 929-35 (5th Cir. 1982) (Trial 1 resulted in verdict for defendant and trial court ordered new trial because verdict was against weight of the evidence; Trial 2 resulted in award of $600,000 for plaintiff; court of appeals affirmed).

191. *See*, Central Microfilm Serv. Corp. v. Basic/Four Corp., 688 F.2d 1206, 1210-22 (8th Cir. 1982) (Trial 1 resulted in total jury award of $1,094,000 and court ordered new trial; Trial 2 resulted in total jury award of $650,000, trial court ordered remittitur down to $406,978 and plaintiff refused to remit; on petition for mandamus, court of appeals ordered trial court 2 to reinstate second jury verdict), *cert. denied*, 459 U.S. 1204 (1982); Ouachita Nat'l Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982), *reh'g en banc*, 716 F.2d 485, 487-90 (8th Cir. 1983) (after Trial 1, plaintiffs refused to remit amounts necessary to reduce their jury awards of $3,300,000 and $500,000 to $1,312,762.17 and $250,000, respectively; Trial 2 resulted in a verdict for defendant; court of appeals found that remittitur in Trial 1 might be too large and vacated and remanded for reconsideration; court of appeals reconsidered the appeal en banc and concluded that the damage award should not have been less than $1,808,547.67 and then remanded to the district court); Richardson v. Communication Workers of Am., 530 F.2d 126, 128-30 (8th Cir. 1976) (Trial 1 resulted in finding of wrongful discharge and damages of $20,000 which was reduced to $1,500 by trial judge, court of appeals ordered new trial limited to damages; Trial 2 resulted in damages of $92,000 for loss of employment and $250,000 for "mental anguish"; district court granted new trial on "mental anguish" claim because it found the verdict punitive; Trial 3 resulted in finding for defendant on "mental anguish" claim; court of appeals affirmed).

192. *See* cases cited *supra* note 116.

feel less constrained about ordering a new trial conditioned on the plaintiff's refusal to remit a small amount of his award. The judge knows that the plaintiff will probably remit and bring the award exactly in line with the amount that the trial judge feels is the "correct" verdict.

The *Donovan* decision[193] has exacerbated the unfair position in which the plaintiff perceives himself. According to the Supreme Court, the plaintiff, who has benefited from the remittitur by having the new trial cancelled, cannot be so ungracious as to appeal the trial court's conditional new trial order.[194] Thus, the remitting plaintiff, who probably views himself as a victim of the judicial system because his election to remit rather than suffer a new trial is not really voluntary, is forced to remain mute at the appellate level while the defendant is free to challenge the denial of his new trial motion or to argue that the amount of the remittitur was too small.[195] If the court of appeals grants the defendant's motion for a new trial, the plaintiff's hard fought battle is lost, and he must submit to a new trial.[196] Moreover, he faces the substantial risk that the court of appeals will ask him to remit more of his verdict or submit to a new trial.[197]

Plaintiffs could also raise legitimate objections to the procedures federal courts use in determining when remittitur is appropriate and calculating the amount to be remitted. Moreover, the entire federal judicial system may be compromised by the remittitur procedure as currently employed in many courts. Even if a form of remittitur were available at the common law, so that the seventh amendment arguments would not prevail to invalidate the entire procedure, the "wholesale" remittitur practiced in federal courts seems to exceed permissible bounds. Arguably, at the common law, a judge had the power to "correct" an excessive jury verdict or to order new trials on the ground of excessiveness.[198] His power did not extend, however, to substituting his own evaluation of the facts adduced at trial for that of the jury. A federal trial judge is not given such power in other contexts. He cannot, for example, grant a judgment notwithstanding the verdict on the basis of insufficiency of evidence; he

193. *See supra* notes 142-45 and accompanying text.

194. *See supra* note 145 and accompanying text.

195. *See supra* notes 146-51 and accompanying text.

196. *See supra* note 150 and accompanying text.

197. *See supra* notes 151-62 and accompanying text.

198. *See supra* note 88 and accompanying text.

must grant a new trial.[199] When a trial judge orders remittitur on a factual rather than legal basis, he is substituting his own evaluation of the facts for that of the jury. The plaintiff does, of course, have the option to refuse to remit and thus elect a new trial; thus the judgment notwithstanding the verdict analogy is not complete. When one considers, however, the unrealistic nature of any expectation plaintiff will opt for a new trial—most plaintiffs have no real choice but to remit—the analogy becomes more apt.

To assess circumstances in which trial judges (and appellate judges) grant remittitur and the procedures they use to determine the amounts to be remitted, the cases should be examined by category. Clearly, some of the most astonishing results occur in personal injury and wrongful death cases in which the jury is required to evaluate past and future pain and suffering, as well as future financial and personal loss because of the continuing effect of the injury. The judge often maintains that, due to his exposure to similar personal injury cases, he is well-equipped to determine what should be the maximum allowable jury verdict.[200] He and his colleagues within a particular circuit have sat on many "lost limb" cases, for example, and he will assert that a jury verdict which exceeds the largest prior verdict for such a loss is "too large" and should be reduced, if not to equal the average of such past verdicts,[201] or the highest of such past verdicts[202] then to some "reasonable" increment above the highest prior verdict (thus allowing for some usually undefined "fudge" factor).[203] Such a mathematical and mechanical approach to evaluation of damages completely undercuts the function of the jury which is to decide how much this

199. *See supra* note 10.

200. *See generally* Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985); *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985); Martell v. Boardwalk Enter., 748 F.2d 740 (2d Cir. 1984); Lux v. McDonnell Douglas Corp., 608 F. Supp. 98 (N.D. Ill. 1984); Villar v. Wilco Truck Rentals, 627 F. Supp. 389 (M.D. La. 1986); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16 (E.D. Tenn. 1980); Williams v. Ryder Truck Lines, 489 F. Supp. 430 (E.D. Tenn. 1979); Smith v. City of Seven Points, 608 F. Supp. 458 (N.D. Ill. 1984).

201. *See, e.g.*, *Martell*, 748 F.2d at 740; *Williams*, 489 F. Supp. at 430; *Smith*, 608 F. Supp. at 458.

202. *See, e.g.*, In re *Air Crash*, 767 F.2d at 1151; *Gaston*, 487 F. Supp. at 16.

203. *See*, Joan W. v. City of Chicago, 771 F.2d 1020, 1025 (7th Cir. 1985) ("[w]e believe the jury could rationally award damages to Joan above the record $60,000 figure . . . [; a]ccordingly, we hold the damages excessive only to the extent they exceed $75,000); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 319 (5th Cir. 1984) ("[because] $150,000 appears to be a relatively large, if not the largest, damage award for loss of an adult child in Louisiana, the maximum that we think a reasonable jury could have awarded . . . was $200,000 ($150,000 plus an additional one third)").

particular plaintiff has suffered and will suffer in the future because of the injury.[204] The judge uses his prior experience to round off the corners and adjust the verdict so that it is in line with a judicial preconception of what a particular type of injury is worth. The effect of this approach is almost the same as if trial judges provided juries with "schedules" of allowable ranges of recovery for particular types of injuries, much like the schedule provided with most liability insurance policies.

Such an approach clearly usurps the function of the jury. The fact that the trial judge has seen, in his years on the bench, human misery of different types, might make him a particularly poor candidate for the task of assessing damages in a particular case. Arguably, after a while, he may become unable to see the cases as involving unique individuals but rather as fact situations to be fit into a scheme of prior cases. Jury members, on the other hand, do not come to a case prejudiced by earlier courtroom experiences but rather view the case as a unique event in which they evaluate loss based on their own experiences of the real world and their own assessments of the peculiar circumstances of the plaintiff at bar. On the ground that this is the role traditionally ascribed to the jury,[205] a trial judge's reassessment based on other cases should not be countenanced.

The arrogance displayed by courts in these types of cases is particularly galling. One need review only a couple of cases to be able to identify with these feelings.[206] In a recent decision in the Fifth

204. *See supra* notes 73-75 and accompanying text.

205. *See supra* notes 73-75 and accompanying text, and *infra* notes 218-20 and accompanying text.

206. *See Joan W.*, 771 F.2d at 1023-25 (civil rights action for recovery for emotional damage caused by strip search; court compared verdicts in other cases arising from same police procedure and required remittitur down to $75,000, which was $15,000 more than largest prior verdict); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 318-19 (5th Cir. 1984) (wrongful death action for death of 25 year old son of plaintiffs; court agreed with defendant's contention that verdict of $350,000 for each parent was "by far the largest quantum of damages awarded the parents of an adult offspring in Louisiana jurisprudence" and, on the basis of prior decisions, required remittitur down to $200,000 each, one-third higher than highest amount previously awarded); Lux v. McDonnell Douglas Corp., 608 F. Supp. 98, 105 (N.D. Ill. 1984) (wrongful death action for death of husband of plaintiff; "[c]onsidering the evidence at trial and other awards in similar cases, the Court is of the opinion that a remittitur of $1,000,000 is appropriate"); Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16, 18-19 (E.D. Tenn. 1980) (products liability action involving permanent paralysis of plaintiff; court reviewed awards in other similar cases and concluded that the verdict of $1,250,000 was "out of line with the verdict in other cases . . .[; a] reasonable verdict and one in line with other cases . . . would be $1,000,000"); Williams v. Ryder Truck Lines, Inc., 489 F. Supp. 430, 432 (E.D. Tenn. 1979) (personal injury action involving disabilitating back injury; the court found it "obvious . . . that the $250,000.00 verdict for Mr. Williams

Circuit, for example, *In re Air Crash Disaster Near New Orleans, Louisiana*,[207] a case in which an aircraft had crashed into the plaintiff's home, killing his wife and three children, and destroying his house and its contents, the jury had awarded the plaintiff, *inter alia*, $400,000 for the loss of each child and $1,500,000 for the loss of his wife. The District Court had obtained the plaintiff's agreement to a remittitur of $500,000 for the loss of his wife. In reviewing the remaining damage award which it found to be excessive, the Court of Appeals "examine[d] past awards for similar injuries," "[f]or what rough guidance they provide."[208] The Court of Appeals did allow that "simply because certain awards have been *affirmed* does not indicate that these are the highest, or even near the highest, awards which might be allowed."[209] With no analysis other than notation of the results of several recent cases, however, the court concluded:[210]

> We find that $500,000 for the loss of love and affection of the wife and $250,000 for the loss of love and affection of each child are the maximum amounts which may be awarded in this case. We reach this conclusion first and foremost on the evidence in this record, and secondarily on the rough guidance provided by awards approved for similar injuries by the Louisiana appellate courts and the decisions of this court applying Louisiana law.

The court did not explain how the "evidence in the record" prompted its conclusion that "on the facts of *this* case, these are the

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[was] out of line with the verdicts and awards in similar cases in this Court"). *See also infra* notes 207-21 and accompanying text. *Cf.* Coburn v. Browning Arms Co., 565 F. Supp. 742, 750-52 (W.D. La. 1983) (products liaility case; court downplays "comparison" test in favor of determining whether the jury verdict, which was higher than a number of awards in similar cases, "[did] not exceed the maximum amount allowable under the evidence adduced at trial"). In one recent wrongful death action, the Fifth Circuit refused to disturb a jury verdict which was the "largest published award for the surviving parents of an adult child," concluding that they were "very reluctant to substitute [their] views on damages for those of the jury . . . ." Guiterrez v. Exxon Corp., 764 F.2d 399, 403 (5th Cir. 1985). This case demonstrates surprising restraint by the court which seemed so free to interfere with large verdicts against airlines, *see* In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985) (described *infra* notes 207-10 and accompanying text); *Haley*, 746 F.2d 311, 318-19 (5th Cir. 1984), making one wonder about the source of the inconsistency in approach.

At least one circuit has gone so far as to express regret that no awards in similar cases were available for comparison purposes. In Huff v. White Motor Corp., 609 F.2d 286, 296 (7th Cir. 1979), the judges noted that they "would be more comfortable in deciding the amorphous question before us . . .[in favor of affirming the jury verdict] if other courts had approved comparable awards."

207. 767 F.2d 1151 (5th Cir. 1985).

208. *Id.* at 1156.

209. *Id.* (emphasis in original).

210. *Id.* at 1157.

maximum awards which may be sustained."[211] The reader is left to guess at the court's analysis. Did the Court of Appeals reduce the amounts because the record revealed that the defendant did not love his family very much and thus would not suffer too much from their loss? Or, on the other hand, did the court believe that, with no children to raise by himself, the plaintiff would not suffer the loss of his wife too keenly? Did the court reduce the per child damages because there were three children, so the plaintiff might have valued each less than if he had only one child? Of course, such speculations seem ghoulish and unfair, but with nothing more to go on than conclusory statements that the record will support no more than these amounts, any precedential value of the case is reduced to merely a recital of maximum allowable amounts to be quoted as "rough guidance" by a trial or appellate judge in the next similar case. The jury, not having to answer uncomfortable questions like those posed above, is better equipped to calculate damages in this case. Jurors do not compare the plaintiff here to other people whose spouses have died in accidents; jurors decide what damages this plaintiff suffered in this tragic event which wiped out his entire personal life. Comparisons are inappropriate unless the cases are quite comparable, and such identity does not occur.[212]

The Second Circuit also engaged in a comparison process as part of its analysis in concluding that a $2,000,000 jury verdict for a teenage boy who lost an arm in a boating accident was excessive and should be reduced to $1,200,000.[213] The court noted:

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211. *Id.* (emphasis in orginal).

212. Judge Tate, in his dissenting opinion, argued:

> In short-hand terms, the fundamental error of the majority is its failure to recognize that, as a threshold matter, the award of damages is essentially a factual determination by the trier of fact under the particularized facts of each case—*not* a matter that on appellate review is to be scaled as allowable by a trier of fact only by the use of numbers derived from prior appellate approval of awards for losses of wives and children that were made under varying factual conditions; *not* as if the loss of a wife or the loss of a child represents some kind of a fungible loss to be measured interchangeably, so that the loss of any wife is the same as the loss of any other wife under all circumstances.
>
> Essentially, it is only *after* an appellate court determines that an award is excessive under federal standards of appellate review, that utilization of past awards may become relevant in determining the amount to which a jury award should be reduced, for remittitur purposes, as the greatest amount awardable under the circumstances. Here, in effect, the majority determines that the present awards for the plaintiff's loss of his entire family, his wife and three little boys, is excessive—without reviewing the particular circumstances of the *present* loss—essentially because it is greater than any award found reported in federal or state appellate decisions that had approved a particular trial jury's award of lower damages for loss of a wife or a child (under circumstances, however, that differ markedly from the present).

Id. at 1160.

213. Martell v. Boardwalk Enter., 748 F.2d 740, 754 (2d Cir. 1984).

> [T]he guidance we receive from the recent New York cases is that the awards condoned for the loss of a single limb have ranged from $325,000 to $810,000. The award to Brent of $2,000,000, if designed principally to compensate him for the loss of his arm and his other physical injuries must be considered to be at least twice as high as what is permissible.[214]

In this case the court *did* compare the facts to other cases, concluding that this plaintiff had not suffered such extreme loss as the other plaintiffs. Again, however, this rather clinical approach, taken by an appellate court which was remote from the trial process in which the jury participated and on which it based its decision, seems inappropriate. Either the jury should be able to decide each case on its own merits, or trial judges should require the jury to review prior cases. In many recent personal injury cases, judges seem to use the jury merely to decide questions of liability with the judges deciding the questions of unliquidated damages by themselves.[215]

Not all judges are willing to use remittitur to reduce jury verdicts so that the amount awarded is more consistent with the results of other similar cases in the jurisdiction. At least one District Court granted a new trial on the ground that the excessiveness of the jury verdict when compared with other verdicts reflected "undue sympathy of the jury toward the plaintiff."[216] The court, finding that the jury had been improperly biased in favor of the plaintiff, required a new trial, concluding that "[i]f a jury verdict results from passion or prejudice, the proper remedy is a new trial and not remittitur."[217]

While noting this disagreeable practice by many federal court judges, it is only fair to observe that other judges have respected the jury as the body with which responsibility for these difficult damage decisions should rest. After denying a remittitur in *Milos v. Sea-Land Service, Inc.*, Judge Irving Ben Cooper of the United States District Court for the Southern District of New York presented strong arguments for respecting the unique function of the jury:

> [W]e must take great care to avoid an "unjustified usurpation of the function of the jury," especially where clear issues of fact appear in the trial record and ample evidence exists to support the verdict.
>
> In the last analysis, we see overwhelming support for the observation (in essence) of Mr. Justice Holmes: that the life of the law has not been logic; it has been experience. It is exactly that "experience" which brought the jury system into its very exist-

214. *Id.* at 753.
215. *Id.*
216. Villar v. Wilco Truck Rentals, 627 F. Supp. 389, 392 (M.D. La. 1986).
217. *Id.* at 392. *See also supra* notes 101-10 and accompanying text.

> ence; and it was the jury's "experience" which resulted in the verdict herein recorded and now under attack.[218]

In a recent case, *McDonald v. Federal Laboratories, Inc.*, the United States Court of Appeals for the First Circuit noted that "[p]lacing a value on human suffering is always a subjective enterprise, turning on the jury's sensibilities to the facts and circumstances presented in a particular case."[219] Finally, in defense of the district court's decision to refuse remittitur from a verdict of $19,000,000, the court gave homage to the jury system:[220]

> It is not for me to say that a jury's assessment of unliquidated damages is wrong because I would have arrived at a different figure. Indeed, the constant exposure to death, injury and outrage which confronts judges necessarily jades our vision and immures our emotions. The genius of the jury system is the deliverance of judgment by collective response from members of the community who have ordinary experience.

Unless the Supreme Court steps in to set guidelines for remittitur cases such as those discussed above,[221] the dichotomy in approaches will persist, to the detriment of the parties involved in litigation and the judicial system as a whole. If the federal courts are not permitted to dispense with juries in these cases, the First Circuit's sentiments will, indeed, be pertinent—assessment of incalculable, intangible damages is a function best left for the jury.[222] If the jury errs and awards damages which would be excessive as a matter of law, then a new trial with a properly functioning jury should be granted.

In addition to the objectionable practice of trial and appellate judges using the remittitur device to second guess juries in areas in which no definite amount or even ballpark figure can be identified with any degree of certainty, many judges who base their remittitur orders on the "facts of the case" employ a clinical approach which is offensive and unjust. Often, complete dissection of a portion of the damage award (on the basis of the facts of the case) is coupled with a completely conclusory analysis of another aspect of damages. The offensiveness of the "clinical approach" lies in the tendency of trial and appellate court judges to make inappropriate inferences from the facts at trial. The court, for example, might conclude that

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218. 478 F. Supp. 1019, 1028 (S.D.N.Y. 1979). *See* In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1160 (5th Cir. 1985) (Tate, J., dissenting); *supra* note 208.

219. 724 F.2d 243, 247 (1st Cir. 1984).

220. Rawson v. Sears, Roebuck & Co., 615 F. Supp. 1546, 1553 (D. Colo. 1985).

221. *See supra* notes 199-219 and accompanying text.

222. *See supra* notes 218-19 and accompanying text.

a small amount of damages or no damages at all should be awarded to a spouse for loss of consortium, affection, companionship, and guidance, based not on the fact that the evidence at trial established that the spouse did not have an affectionate or physical relationship prior to the tragic event in question, rather on the fact that the couple was in their later years at the time of the injury.[223] While it is a reasonable inference that some older couples are less frequently physically intimate than some younger couples, it is equally possible that dependence on one another for the satisfaction of physical and emotional needs can grow during a marriage with the later years being the ones in which the spouses are most needful of one another's companionship as well as physical love. Again, this is not the sort of inference that a judge ought to be making; if the facts at trial could lead to more than one conclusion as to the value of an element of damages, the jury should make the choice. Judges are too often influenced by stereotypes of prior decisions to be effective in the microscopic examination of a single case where a fair damage assessment is essential.[224]

Another less than subtle form of age discrimination evidenced by judges examining jury verdicts appears in the area of damages for pain and suffering, past and future.[225] While everyone recognizes that the life span of an older person is statistically less than that of a younger person, leading to the conclusion that the future

223. In Holman v. Mark Indus., 610 F. Supp. 1195, 1205 (D. Md. 1985), *aff'd*, 796 F.2d 473 (4th Cir. 1986), a personal injury case involving a 60 year old plaintiff, the court stated:

> Moreover, $180,000 for loss of consortium is likewise grossly excessive. Plaintiffs did not even seek damages for loss or impairment of the sexual relationship between plaintiff Holman and his wife, and the jury was expressly instructed not to consider this element in deciding upon the amount to be awarded for loss of consortium. In view of the ages of both plaintiff Holman and his wife, this Court concludes that on the record here an award in the amount of $180,000 was likewise grossly excessive.

224. *See, e.g., supra* note 206.

225. In *Holman*, 610 F. Supp. at 1205, the court concluded that the damage award of $1,300,000 for pain and suffering of a 60 year old man was "grossly excessive." The court noted:

> In opposing the motion of defendant Patuxent for a partial new trial, plaintiffs have cited numerous cases in which substantial awards in excess of $1,000,000 have been upheld on appeal. However, almost all of the cases cited by the plaintiffs involve a plaintiff who was much younger at the time of the injury than plaintiff Holman. Indeed, in most of these cases, the plaintiff was a child, a teenager, or a person in his 20's or 30's with a much greater life expectancy than J.C. Holman.

Id. In Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 1-2 (E.D. Tenn. 1978), a products liability case in which the plainitff contracted mercury poisoning from the defendant's skin cream, the court seemed, in part, to base its decision to grant a new trial on the issue of damages on the fact that the plaintiff was 84 years old and already suffered from other physical ailments.

pain and suffering of an older person will probably be of shorter duration than that of a younger person, an older person still suffers pain. Moreover, older people have reduced physical capabilities in terms of recovery and will be condemned to live out their lives with little hope of relief from pain and disability. A younger person will heal more completely, will possibly benefit from future medical breakthroughs, and is usually surrounded by a supportive family structure. Often, the older person is alone. Again, the jury seems better equipped to evaluate all of these factors in a particular case to reach a just result. The court, in ordering a remittitur, usually focuses only on the age of the plaintiff, finding that an older plaintiff is entitled to a much smaller recovery than a similarly situated younger plaintiff.[226] These "clinical approach" problems not only arise in circumstances involving apparent age discrimination by trial judges, but also problems will arise in any circumstance in which a judge will have a stereotypical reaction based on a particular fact of the case, such as age, sex, social status, educational background, or the like.

A different but no less frustrating approach taken by some courts in calculating remittiturs is the "conclusory statement" technique. The court will usually outline the facts of the case rather carefully and will describe, in detail, the requirements for grant of a remittitur and the other circumstances in which the court had made such orders. Then, without further discussion, the court will announce its conclusion that the verdict is too high and that a certain remittitur will reduce the verdict to a permissible level.[227] *Hodges v. Keystone Shipping Co.* provides a representative sample:

> The Court concludes that the jury verdict was not the result of passion or prejudice but is beyond the maximum award supported by the evidence. The Court finds that the evidence presented could support a maximum award of no more than $12,500. The Court therefore grants defendant's motion for new trial on the issue of the amount of compensatory damages unless plaintiff accepts remittitur of the compensatory damages to $12,500.[228]

In such cases, the parties and the appellate court have no clue

226. *See supra* notes 222 and 224.

227. *See, e.g.*, Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982) ("[c]onsidering all relevant evidence, we conclude that the punitive damages award exceeds the [standard and] . . . find $20,000 to be the maximum allowable recovery for punitive damages in this case . . . and order a conditional remittitur to that amount"); Hodges v. Keystone Shipping Co., 578 F. Supp. 620, 624 (S.D. Tex. 1983) (quoted in text *supra* note 225).

228. 578 F. Supp. 620, 624 (S.D. Tex. 1983).

how the court reached its decision. In effect, the trial judge becomes a jury of one, rendering a general verdict, with no responsibility to explain the basis for this verdict.[229] This sets the trial judge up as an alternative to the jury, an alternative who might, at any time, substitute his own conclusion for that of the jury.

Another objection that plaintiffs might raise to current use of remittitur is the frequency with which the device is used in cases involving relatively new causes of action, such as proceedings for sexual harrassment, employment discrimination, violation of civil rights, and the like.[230] It is obvious that, where a right to relief has only recently been recognized or adopted, there will be few cases in which the right has been vindicated. Thus, damage assessment must be created along with the other parameters of the cause of action. The courts, however, seem reluctant to allow juries the freedom to formulate damage awards. Instead, the courts freely employ remittitur to adjust jury awards downwards, even though where there are no prior awards in similar cases the trial judge has very little on which to base a remittitur. Again, these awards should be left to the jury to determine on the basis of the facts of the case and the jury's collective assessment of the damages suffered by plaintiff in this new kind of civil wrong.

Finally, the party who sought the jury trial at the outset of litigation, as required by Rule 38 of the Federal Rules of Civil Procedure,[231] can legitimately object to the use of remittitur by the trial or appellate courts. In the federal courts in cases in which a trial by jury is available, one of the parties must demand a jury trial or the case will be tried by a judge without a jury.[232] The party demand-

229. If a federal judge sits without a jury, the court is required to "find the facts specially and state separately its conclusions of law thereon . . . ." FED. R. CIV. P. 52(a). Thus, a trial judge who grants a remittitur without sufficiently explaining the steps by which he reached the result is "having it both ways"—because of the presence of a jury he is not required to comply with Rule 52(a) and explain himself, but because of the power to grant a remittitur he can substitue his own evalaution of damages for that of the jury, essentially cutting the jury out of the process.

230. *See, e.g.*, Smith v. City of Seven Points, 608 F. Supp. 458 (E.D. Tex. 1985) (remittitur in suit for violation of civil rights by wrongful arrest); Huebschen v. Department of Health & Social Servs., 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983) (remittitur in suit for wrongful conception).

231. Rule 38(b) provides:

> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue . . . .

FED. R. CIV. P. 38 (b).

232. Rule 38(d) provides:

ing the jury trial can argue that his demand implied a desire to have questions of fact be decided by a jury and not by the trial judge. When the trial judge orders a remittitur or new trial, the judge must substitute his own evaluation of the evidence—at least he must substitute what *he* thought a properly functioning jury would have awarded—for that of the jury.[233] This is not what the party seeking a jury trial had in mind; he bore the additional expense and delay of the jury trial to reap the benefits of having factual issues decided by the jury and not according to what the judge thought the jury ought to have found. If the party is the plaintiff, he will argue that the amount of the jury verdict should not be disturbed—he asked for a jury and this is what the jury awarded him. If the party is the defendant, he will maintain that he is entitled to a new trial before a new jury—he asked that questions of fact be decided by a jury, and if this jury made some serious error, then he should be entitled absolutely to have the question presented to a new jury. As noted above,[234] in a system in which some trial and appellate judges use the remittitur device to run "rough shod" over the jury findings, such objections can be supported. The party who opted to have his questions presented to a jury should not have those questions decided by a judge—something he specifically wanted to avoid.

Aside from the interests of either party, remittitur can be viewed as a procedure which, contrary to the justifications usually given for it, encourages waste of judicial time and energy. As noted above,[235] if remittitur is used in a case in which the trial court is convinced, as a matter of law, as to the source of error which lead to an improperly high verdict and as to the amount of the verdict traceable to that error, remittitur is a wasteful method for dealing with the error. The plaintiff has the option to force a whole new trial even though the trial judge would not have questioned the amount of the verdict except for the existence of this particular error. If the error is plain to all and the amount is identifiable, the plaintiff should not be able to force a new trial in order to try to retain an erroneously awarded sum.

Remittitur is also wasteful because a defendant, who has little to

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(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury . . . . FED. R. CIV. P. 38(d).

Rule 39(b) provides that "[i]ssues not demanded for trial by jury as provided in Rule 38 shall be trial by the court . . .", FED. R. CIV. P. 39(b).

233. *See supra* notes 122-27 and accompanying text.

234. *See supra* notes 197-214 and accompanying text.

235. *See supra* note 117 and accompanying text and text accompanying notes 181-82.

lose by the process, will ask for a remittitur routinely. This wastes judicial time by requiring the trial judge to rule on these motions. Although the defendant might not want to undergo the expense of a new trial himself, especially where the verdict is not outrageously large or is even quite reasonable, he bears little risk by asking for a remittitur. The trial judge might deny the motion and the defendant is left where he started. If the trial judge grants a remittitur, it is almost a foregone conclusion that the plaintiff will opt for the remittitur rather than the new trial.[236] In either case, the trial judge will be required to rule on the motion and, if he decides to grant a remittitur, he will be required to determine the appropriate amount of damages. Thus, the system encourages judicial waste by providing almost no detriment for a defendant seeking a remittitur. If the defendant were required to accept the verdict or submit to a new trial, he would be less inclined to challenge the verdict on the ground of excessiveness. Thus, challenges would be reduced to those cases in which the defendant was convinced of the merits of his motion.

A related source of judicial waste in the remittitur procedure is the requirement that the plaintiff consent to remittitur.[237] The trial judge must spend time in calculating the appropriate verdict, but this time will be wasted if the plaintiff opts for a new trial.

An additional source of judicial waste is the effect, noted above, of the current system in encouraging plaintiffs to seek unrealistically high damages[238] and to engage in improper trial tactics.[239] Such actions by the plaintiff lead to more post-trial activity in the form of remittitur and new trial motions. If the plaintiff were forced to submit to a new trial when the jury awarded unrealistically high damages, or if the trial process involved plaintiff misconduct, the plaintiff would be encouraged to seek only realistic damages and conduct the trial in a more appropriate manner. Again, much judicial time would be saved.

As noted above, remittitur also encourages trial courts to alter jury verdicts[240] when, if the only choice available to the courts would be to grant a new trial on the ground of excessiveness, the court would feel constrained from doing so. The case would have

236. *Cf. supra* notes 188-90 and accompanying text.

237. *Cf. supra* notes 128-29 and accompanying text.

238. *See supra* note 183 and accompanying text.

239. *See supra* notes 184-87 and accompanying text.

240. *See supra* note 116 and text accompanying note 188.

to be rather compelling before a new trial would be ordered. Again, judicial waste would be avoided.

Overall, it is difficult to conclude that remittitur, as currently used, is a valuable procedure in the federal courts. Any time and effort saved by avoiding new trials is arguably overshadowed by the wasteful effects noted above. Moreover, the procedure is perceived by each party as unfair and results, in many cases, in a wholesale substitution of a trial judge's evaluation of the facts for that of the jury. Even if the procedure is constitutional, alternative procedures should be adopted in the federal courts.

Before proposing alternatives, this Article will identify an area in which remittitur seems to serve a useful function so that proposed schemes will provide for that circumstance. In many recent cases, federal courts have used remittitur to reduce punitive damages to an acceptable level, while attempting to avoid the necessity of a new trial.[241] Punitive damages are not intended to compensate the injured plaintiff for the damages he has suffered; they are intended to punish the defendant and deter him and others from future wrongful conduct.[242] Thus, the measure of damages, unless set

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241. *See, e.g.*, Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1635 (1986); Dempsey v. Auto Owners Ins. Co., 717 F.2d 556 (11th Cir. 1983); Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir.), *vacated*, 453 U.S. 247 (1980) (on grounds that municipality is immune from award of punitive damages); Douglas v. Hustler Magazine, 607 F. Supp. 816 (N.D. Ill. 1984), *rev'd*, 769 F.2d 1128 (7th Cir. 1985) (appellate court noting in dicta that the remittance was improper because the financial position of defendant justified jury's award), *cert. denied*, 106 S. Ct. 1489 (1986); Marcone v. Penthouse Int'l, 577 F. Supp. 318 (E.D. Pa. 1983), *rev'd on other grounds*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 106 S. Ct. 182 (1985); Alley v. Gubser Dev. Co., 569 F. Supp. 36 (D. Colo. 1983), *rev'd*, 785 F.2d 849 (10th Cir.) (evidence insufficient to support award of punitive damages), *cert. denied*, 107 S. Ct. 457 (1986); Walden v. United States Steel Corp., 567 F. Supp. 1443 (N.D. Ala. 1983), *modified*, 759 F.2d 834 (11th Cir. 1985); Brinks' Inc. v. City of New York, 546 F. Supp. 403 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700 (2d Cir. 1983); Anglo-American Gen. Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41 (N.D. Cal. 1979); Collins v. Retail Credit Co., 410 F. Supp. 924 (E.D. Mich. 1976).

242. In a recent case, the United States District Court for the Northern District of Illinois stated the function to be served by punitive damages as follows:

> Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence . . . . If a jury award exceeds the amount required to serve the two objectives of punishment and deterrence, the Court must reject it . . . . Damages should not go beyond deterrence and become a windfall . . . . Therefore, it is important that courts exercise control over excessive awards.

Douglas v. Hustler Magazine, 607 F. Supp. 816, 821 (N.D. Ill. 1984) (citations omitted), *rev'd on other grounds*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986). A district court sitting in Colorado articulated the Tenth Circuit's "formula" for assessing punitive damages:

> The purpose of punitive damages is to punish the wrongdoer and to deter similar conduct in the future and by others . . . . Several factors must be taken into

by statute, relates to the deterrent effect of such awards. If punitive damages are too small, the defendant might find it economically reasonable to continue committing the offensive behavior.[243] If punitive damages are too high, the defendant will be put out of business.[244] The correct measure of such damages depends on the defendant's assets. In many cases courts have required that the plaintiff remit part of punitive damage awards to bring such awards in line with the defendant's ability to pay. While ability to pay and deterrent effects arguably are questions of fact, a judge who finds that the punitive damages awarded by a jury far exceed the defend-

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> consideration in determining whether an award of punitive damages is excessive: (1) whether it bears some reasonable relation to the actual damages awarded; (2) the degree of malice involved; (3) the gravity of the plaintiff's injury; (4) the desire for meaningful punishment . . . . [T]here is no precise mathetmatical ratio for determining the reasonableness of the punitive damage award. However, it has been held in the Tenth Circuit that an award of punitives can be "[s]o extremely disproportional that we must assume that the jury acted either with passion or prejudice . . . ." *Dearmore v. Gold*, 400 F.2d 887, 888 (10th Cir. 1968). In the *Dearmore* case, a ratio of punitive to compensatory damages of 11:1 was struck down as being excessive.

Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983) (citations omitted), *rev'd on other grounds*, 785 F.2d 849 (10th Cir.), *cert. denied*, 107 S. Ct. 457 (1986).

243. In finding a $500,000 award for punitive damages not excessive, the United States District Court for the Western District of Michigan noted this possibility:

> Once it decided that punitive damages should be assessed to punish defendant and deter others, the jury could properly consider, as plaintiff argued, the multi-billion-dollar financial resources of defendant . . . . The size of an award which is necessary to make General Motors Corporation take steps to discharge its legal responsibilities, rather than be regarded as an inconvenient cost of doing business, is clearly a judgment call.

Rodgers v. Fisher Body Div., Gen'l Motors Corp., 575 F. Supp. 12, 17 (W.D. Mich. 1982) (citations omitted), *modified*, 739 F.2d 1102 (6th Cir. 1984) (statements concerning the consideration of defendant's financial resources in fixing the amount of punitive damages, however, were proper), *cert. denied*, 470 U.S. 1054 (1985). In a sex harrassment suit, the United States District Court for the District of Columbia also raised similar considerations in its assessment of punitive damages awarded by the jury:

> Punitive damages are allowable to punish defendant for the nature of his conduct and as a deterrent to others . . . . The jury could reasonably have believed that, in view of the considerable wealth of the defendant corporation, it, and others similarly situated, would not be motivated to prevent a recurrence of incidents such as those shown by the evidence to have occurred in this instance unless a substantial verdict was returned.

Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305, 310, 24 Empl. Prac. Dec. (CCH) ¶ 31,385, at 18,292 (D.D.C. Oct. 24, 1980).

244. In *Hollins v. Powell*, the court sought a remittitur of punitive damages against a person who had lost his job and was "under severe financial constraint" from $500,000 to $2,000 on the following theory:

> We can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied. The purpose of punitive damages is to punish Powell for outrageous conduct, not to drain him of his life's blood. . . . We believe an award of $2,000 would serve the purpose of punishing Powell for his callous indifference to the plaintiffs' constitutional rights, and also satisfy the deterrent purpose of punitive damges, over and above that provided by the compensatory damage award.

773 F.2d 191, 198 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1635 (1986).

ant's ability to pay, and orders a remittitur, is acting not as a factfinder (assets and ability to pay are facts usually not in dispute) but rather as a protector of the legal function to be served by punitive damages. In other words, while compensatory damages are clearly a matter for the jury where the relevant facts are the plaintiff's injuries, punitive damages remain more within the province of the judge, with the relevant facts being the defendant's financial condition. The law should recognize that the defendant legitimately can be "wiped out" by compensatory damages[245] but should not recognize or sanction such effect from punitive dam. ges.[246] A new trial on the basis of excessive punitive damages wi. not result in different factfinding—the defendant's wealth, a. objective amount, will remain the same. Excessive punitive damages is one area in which the trial judge can use the device of remittitur to avoid an essentially useless new trial. The jury's factfinding is not being overridden; the court is merely correcting damages, which as a matter of law are too high.[247] However, even this useful and relatively inoffensive remittitur procedure contains the seeds for judicial waste. The plaintiff can combat the use of this device by rejecting the remittitur and insisting upon a new trial. Clearly, a better approach is required.

B. *Remittitur Reform*

First, as noted above,[248] additur is probably no less constitutional than remittitur, and an additur-type procedure should be available to plaintiffs to the same extent that a remittitur-type procedure is available to defendants. Any alternative scheme to present conditional new trial practice should include both types of procedures.

This writer has concluded that remittitur, in its present form, should be eliminated as a procedural device. Without the availability of remittitur, plaintiffs would be constrained to be more responsible in their original requests for damages and in the conduct of their trials.[249] A plaintiff would know that if he sought excessive damages and the jury awarded the damages sought, the trial court would have to grant a new trial upon finding the damage award

245. Compensatory damages depend on the amount necessary to compensate the plaintiff for his injuries. The defendant's ability to pay should not be relevant to this inquiry.

246. *See supra* notes 242-43 and accompanying text.

247. *See* cases cited *supra* note 241.

248. *See supra* notes 91-93 and accompanying text.

249. *See supra* text accompanying notes 237-39.

excessive. The plaintiff would be forced to consider carefully the appropriate measure of damages to which he is entitled. If the unavailability of remittitur were coupled with a refusal to grant partial new trials on damage issues alone, plaintiffs would soon learn that excessive greed will result only in a waste of money, time and effort on a new trial. The plaintiff also runs the risk that a second jury will find for the defendant rather than him. With the result, being more reasonable demands for relief, the federal judicial system would be greatly relieved of the unreasonable, escalating damage demands now being requested in a large percentage of our jury trials. Moreover, fewer trials would result in excessive damage awards, thus necessitating fewer new trials and new trial motions, and relieving the federal system of the burden of these additional trials and motions.

Without remittitur, and without partial new trial, the plaintiff would learn that inflammatory trial tactics designed to maximize the amount awarded by the jury and performed in flagrant disregard for the appropriate conduct of a civil case would result in a new trial rather than an inflated jury verdict which could then be reduced by the trial judge using remittitur when necessary.[250] Again, the plaintiff who engaged in such tactics would be putting his entire verdict at risk. Not only would the trial process become more orderly and proper, but the occasion for prejudicial error at trial would be reduced.

Elimination of current remittitur practice would also serve the salutary function of checking trial and appellate courts in their unfettered tampering with jury verdicts.[251] With the grant of a new trial (the only option if the trial court found the jury verdict excessive) judges would not second guess the jury unless the verdict were truly excessive. Whereas some trial judges have no compunction about seeking a remittitur of ten or fifteen percent[252] (a circumstance in which the plaintiff will almost certainly remit rather than submit to a new trial), they probably would not grant an unconditional new trial in the same circumstances. Thus, new trials would be limited to cases in which damages were clearly excessive and a lot of "tinkering" with jury verdicts by trial and appellate courts would be eliminated. Judicial time would be saved because the courts would not have to calculate remittiturs and enter remittitur orders and new trials would occur only in the more extreme cases.

250. *See supra* notes 184-87 and accompanying text.
251. *See supra* notes 197-233 and accompanying text.
252. *See supra* note 116 and accompanying text.

Moreover, the judge would not be substituting his own opinion for that of the jury.

Trial and appellate judges also would not be engaging in wholesale reexamination of jury verdicts. Where the verdict is clearly excessive, a new trial with a new jury would be allowed. The judge would not be required to spend time calculating the exact amount of the excessiveness. Much of the chaotic state of the law, occasioned by the varying standards applied by courts, would be minimized. Moreover, any problem of the judge substituting his own factual evaluation for that of the jury would be eliminated.[253] Clearly, the judge would be unable to save a jury verdict by "lopping off the excrescence." In cases in which the verdict is clearly excessive and the source of error is unidentifiable, however, strong arguments have always been made that the defendant should be entitled to a new trial.[254]

Elimination of remittitur would also provide a more balanced appeals process. If the trial judge denied the defendant's motion for a new trial on the ground of excessiveness, the defendant could immediately appeal that denial and the plaintiff could defend his award. If the trial judge granted a new trial because of an excessive verdict, neither party could appeal until the end of the new trial. Thus, the inequitable situation created by the *Donovan* case in which the remitting plaintiff was not being permitted to appeal would be eliminated.[255]

Finally, both parties would probably feel more fairly treated. If the defendant were told that the judge could not support the verdict because it was too high, he would be granted a new trial. The plaintiff, on the other hand, would not be faced with the difficult choice of a reduced verdict or new trial—no real choice for many plaintiffs. The plaintiff who prefered to avoid a new trial would know that new trial orders would not be granted unless it was clearly warranted.

Elimination of current remittitur practice would not necessarily mean that every case in which the jury verdict was found excessive would lead to a new trial. A suggested alternative would be that subsequent to the finding of excessiveness, the parties be given the option to agree on a smaller verdict—a form of post-trial settlement. The parties could determine what amount would be fair

253. *See supra* notes 197-233 and accompanying text.

254. *See supra* notes 101-29 and accompanying text.

255. *See supra* notes 142-51 and accompanying text.

without relying on suggestions from the trial judge (thus avoiding the time required to make that evaluation). The trial judge would have the option to review the new verdict, but he would not be required to do so, because, if both parties have agreed to the amount, neither would be in a position to enter a motion for a new trial. This procedure would be useful if both parties wished to avoid the expense and delay of a new trial. Moreover, the new verdict could not be viewed as a substitution of the judge's fact-finding for that of the jury.

Such a procedure could also be made available in an additur-type situation in which the trial judge grants a new trial on the grounds of inadequacy of the jury verdict.[256] Instead of being forced to submit to a new trial, as is now the case because additur is not permitted in federal courts,[257] the parties could agree to an increased verdict and avoid a new trial.

Elimination of current remittitur practice would not mean that a "liquidated amount case" would have to be submitted to a new jury.[258] Under Rule 49(b) of the Federal Rules of Civil Procedure, the trial court has the power, when it has sought from the jury a general verdict accompanied by answers to interrogatories, to enter judgment in accordance with the answers to the interrogatories "[w]hen the answers are consistent with each other but one or more is inconsistent with the general verdict . . . ."[259] Moreover, the trial judge has always had the power to "mold" the jury's verdict in conformity with the jury's findings and to correct obvious errors in the verdict itself.[260] Thus, if the trial judge is certain that there is an error in the jury verdict and can readily determine the amount of money which is traceable to that error, he should have the power to correct the verdict without remittitur or additur. Conversely, the plaintiff should not have the power to force a new trial if the error in the jury verdict can be identified and rectified.[261] Trial judges should be encouraged to seek special verdicts or general verdicts with interrogatories in order to identify and correct calculable jury errors and avoid unnecessary new trials.

Punitive damages could be handled in several ways; they could

256. *See supra* notes 24-27 and accompanying text.

257. *See supra* notes 56-90 and accompanying text.

258. *See supra* notes 117-18 and accompanying text; text accompanying note 127; notes 130 and 132 and accompanying text; and text accompanying notes 181-82.

259. FED. R. CIV. P. 49(b).

260. *See supra* notes 130-32 and accompanying text.

261. *See supra* text accompanying notes 181-82.

be treated as "liquidated amount cases" with the trial judge setting the amount of damages.[262] Or perhaps it would be more satisfactory to view the measure of punitive damages as a question of law to be resolved by the trial judge based on the jury's findings on the amount of the defendant's assets, his ability to pay and his prior record as an offender.[263] Punitive damages calculations also could be handled by a formula determined by the courts or by Congress.

An alternative to the total elimination of remittitur practice would be to allow trial judges, at the time of submitting a case to the jury, to suggest upper and lower limits of permissible verdicts. This procedure, however, would require a tremendous effort on the part of the trial judge as he would have to assess each case before submitting it to the jury. Moreover, it might seriously compromise the function of the jury by giving them "ball park" figures.

CONCLUSION

Any attempt to standardize the remittitur procedure would be so difficult and would so seriously undermine the function of the jury that one would have to conclude that the work of the jury should be left to the jury, and that when the process misfires, a new trial should be granted. After all, because of the unavailability of additur in federal courts, the federal courts have been following the new trial procedures outlined above, and the system has not collapsed.

262. *See supra* notes 240-46 and accompanying text.
263. *Id.*