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Constance S. Huttner

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NOTES

UNFIT FOR JURY DETERMINATION: COMPLEX CIVIL LITIGATION AND THE SEVENTH AMENDMENT RIGHT OF TRIAL BY JURY

Since its 1959 decision in *Beacon Theatres, Inc. v. Westover,*[1] the Supreme Court has steadily broadened the scope of the seventh amendment to encompass many situations excluded from the penumbra of the jury right at common law.[2] Ironically, this expansion occurs at a time when the federal courts are plagued by record numbers of complicated civil suits—suits which in consequence of *Beacon Theatres* and subsequent decisions of the Supreme Court are arguably entitled to jury trial. Although several courts have questioned the practical wisdom of permitting jury resolution of complicated claims,[3] most have felt constrained to allow jury demands where complex cases have presented legal claims.[4]

Recently, however, four federal district courts[5] have stricken jury requests where the complexity of the factual issues presented, and the massiveness of the case as a whole, have led them to doubt a jury's competence to render an intelligent verdict. Relying on a footnote from the Supreme Court's decision in *Ross v. Bernhard,*[6] which, interestingly, expanded the scope of the jury right, these courts have reasoned that a jury's probable inability to arrive

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[1] 359 U.S. 500 (1959).

[2] *E.g.*, Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

The Supreme Court has held there is no constitutional right to a non-jury trial. Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963). *See also* Hurwitz v. Hurwitz, 136 F.2d 796, 798-99 (1943). There is therefore no constitutional barrier to expanding the scope of the jury trial right beyond its common law boundaries. *See generally* 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[4], at 115-17 (2d ed. 1977) [hereinafter cited as MOORE'S].

[3] The functional desirability of jury trial has been the subject of intense debate for nearly six centuries, with no apparent consensus having been reached. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 160 (5th ed. 1956). A more recent criticism is contained in J. FRANK, COURTS ON TRIAL (1949).

[4] *See* cases cited in note 45 *infra.*

[5] The four cases striking jury trial demands in complex cases are: ILC Peripherals Leasing Corp. v. International Business Machines Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976).

[6] 396 U.S. 531, 538 n.10 (1970). The footnote and accompanying text stated:

> The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.[10]
>
> 10. As our cases indicate, the "legal" nature of an issue is determined by considering, first, the premerger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.

at a rational decision operated to except the cases involved from the normal operation of the seventh amendment. The precedent established by these courts presents a tempting model to trial court judges wishing to avoid the irksome task of supervising jury trials in protracted civil suits, and therefore threatens to carve out a "complexity exception" from the seventh amendment's jury trial guarantee.

This note will address the issues and problems raised by the spectre of a complexity exception to the seventh amendment's jury trial guarantee. After an introductory discussion of the historical and constitutional background against which the propriety of denying jury trials in complex cases must be considered, the reasoning of those courts which have stricken jury demands in complex cases will be set out in detail. An effort will then be made to assess the constitutionality of these decisions in light of the material set out in the introductory portion of the article. Finally, this note will suggest that effective judicial management of complex litigation, rather than a curtailment of the jury right, is the practical and constitutionally mandated solution to the problems created by protracted civil litigation.

I. BACKGROUND MATERIAL: RESOLVING THE SEVENTH AMENDMENT QUESTION

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 . . . ."[7] The phrase "common law," as employed by the framers of the amendment, was intended to embrace "not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable* rights alone were recognized, and equitable remedies were administered."[8] Traditionally, resolution of the seventh amendment question has involved recourse to historical inquiry—if the nearest common law equivalent form of action was triable to a jury in 1791,[9] then so too is its modern day analogue.[10] In the typical case, this sort of historical analysis

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[7] U.S. CONST. amend. VII.

[8] Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 446 (1830) (emphasis added). The distinction between legal and equitable claims is preserved by rule 38(a) of the Federal Rules of Civil Procedure, which provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a).

The characterization of a particular claim as legal or equitable is thus central to the determination of whether there is a constitutional right to jury trial in any civil action.

[9] The seventh amendment was adopted in 1791. *See* 5 MOORE'S, *supra* note 2 ¶ 38.08 [5], at 73.

[10] The Supreme Court has phrased the historical test as follows:

> In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.

Dimick v. Schiedt, 293 U.S. 474, 476 (1935). Applying this test, the Supreme Court has determined, for example, that suits for treble damages under the antitrust laws are

presents little difficulty.[11] However, the dramatic post-war expansion of federal statutory law[12] and the procedural changes worked by the merger of law and equity under the Federal Rules of Civil Procedure[13] have spawned a variety of legal actions possessing no clear common law counterpart. In these cases, application of the historical test has proved a tedious and occasionally arbitrary task involving relatively esoteric inquiry into the pre-merger practices of the chancery courts.[14]

In consequence of the difficulties inherent in applying the historical test to novel, modern-day forms of action, the Supreme Court has steadily modified the standard for determining the existence of a constitutional right to jury trial. In a series of cases commencing with *Beacon Theatres*,[15] the Court has indicated that the right of trial by jury is not solely dependent upon the historical characterization of an action as legal or equitable. These decisions recognize that there is a strong federal policy favoring trial by jury[16] which may in itself provide the answer to the seventh amendment question where historical analogy proves unenlightening.

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entitled to jury trial, even though antitrust claims were unheard of at common law. Fleitman v. Welsbach Co., 240 U.S. 27 *passim* (1916). For an interesting critique and defense of the historical test, see James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

[11] Professors Wright and Miller have opined that "the number of cases presenting a really doubtful question of jury right is very small. In many cases jury trial will not be demanded. If it is demanded, in most instances it will be obvious that there is or is not a right to trial by jury." C. WRIGHT & A. MILLER, 9 FEDERAL PRACTICE AND PROCEDURE § 2302, at 17 (1971) [hereinafter cited as WRIGHT & MILLER].

[12] The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), enacted in 1934, is an excellent example of a congressionally created remedy. Jury trial is available under the Act in cases where legal issues are involved. 28 U.S.C. § 2201; *see* 5 MOORE'S, *supra* note 2, ¶ 38.29, at 214.5.

Generally, in creating a new right of action, Congress may specify the mode of trial subject only to the limitations imposed on its power by the seventh amendment. Thus, Congress may extend the right to jury trial by statute to include suits formerly heard in equity. 5 MOORE'S, *supra* note 2, ¶ 38.08[5], at 82. The seventh amendment, however, prohibits Congress from enlarging the scope of equity or admiralty jurisdiction, if the enlargement is to be accomplished at the expense of actions entitled to jury trial at common law. *Id. See also* Chief Justice Taney's opinion in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 460 (1851); note 2 *supra*.

[13] The Federal Rules of Civil Procedure, enacted in 1938, effected a merger of the law and equity courts. Thus, since the advent of the Federal Rules, there are no longer actions at law and suits in equity, but only *civil* actions. *See* Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563, 565-66 (2d Cir. 1942). The sole remaining distinction between law and equity is the right to jury trial in non-equitable actions.

[14] In Damsky v. Zavatt, 289 F.2d 46, 48 (2d Cir. 1961), Judge Friendly apologized that historical analysis "may seem to reek unduly of the study." Judge Clark, dissenting, responded that "the result [reached by the majority] seems to be one of logistic bootstrap lifting; it justifies my brother's apology that their discussion 'may seem to reek unduly of the study,' or, I would add, 'if not of the museum.' " *Id.* at 59.

[15] 359 U.S. 500 (1959). Professor Redish has characterized *Beacon Theatres* and its progeny as representing "a rational decision-making approach" to interpretation of the seventh amendment. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. L. REV. 486, 487 (1975).

[16] *See* Simler v. Conner, 372 U.S. 221, 222 (1963), observing that "[t]he federal policy favoring jury trials is of historic and continuing strength."

In *Beacon Theatres*, the plaintiff, Fox West Coast Theatres, sought a declaratory judgment that certain of its business practices were not violative of the antitrust laws.[17] The complaint also requested that defendant Beacon Theatres be enjoined from threatening to file suit under the Sherman Act.[18] Beacon Theatres counterclaimed for treble damages, alleging that Fox's business practices were in fact violative of the antitrust laws; Beacon Theatres subsequently demanded a jury trial on its counterclaim. The district court, viewing the issues raised by the complaint as primarily equitable,[19] ordered that they be tried first to the court. Beacon Theatres' counterclaim was reserved for later trial to a jury.[20] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed, reasoning that courts sitting in equity had authority to dispose of legal claims arising in the context of an action for equitable relief.[21] The Supreme Court reversed, holding that the defendant had a constitutional right to jury trial on its counterclaim, and that the order of trial must be arranged so as to preserve that right.[22]

Justice Black, writing for the majority in *Beacon Theatres*, acknowledged that strict historical analysis would dictate a denial of the defendant's jury demand.[23] Nevertheless, the Court reasoned that the justification for this practice at common law was the lack of alternative procedures to insure the equity plaintiff of an orderly disposition of his claims. Thus, to the extent that procedural reforms since 1938 have provided alternative means of achieving this end, the Court held that the order of trial must be arranged to assure jury resolution of all legal claims. In reaching this conclusion, the Court noted that equitable relief was traditionally limited to situations where the legal rem-

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[17] 359 U.S. at 501-04.

[18] 15 U.S.C. § 1 *et seq.* (1976).

[19] 359 U.S. at 503.

[20] *Id.* The effect of arranging the order of trial in this manner was to preclude jury trial of Beacon Theatres' counterclaim if the court initially chose to grant Fox's request for a declaratory judgment. Since the factual issues underlying Beacon Theatres' treble damage claim and Fox's demand for a declaratory judgment were identical, Beacon Theatres argued that its claim must be tried first to a jury. *Id.*

[21] 252 F.2d 864, 874-75 (9th Cir. 1958).

[22] 359 U.S. at 508.

[23] *Id.* at 506. Historically, the relief sought by Fox was essentialy equitable. At common law, although the declaratory judgment procedure did not exist, a party anticipating suit and unable to force the prospective plaintiff to initiate the action could seek an injunction in equity against the potential suit at law. The equity court, once having obtained jurisdiction in this manner, was free to resolve all issues raised in the case, whether or not legal issues were involved. Thus, the historical approach would have granted the trial judge in *Beacon Theatres* discretion to order Beacon Theatres' counterclaim tried by jury, or to order all issues tried to the court for convenience. *See* Redish, *supra* note 15, at 492-93.

In the wake of *Beacon Theatres*, the trial court's discretion is severely limited. Now, the order of trial must be arranged so as to preserve the right to jury trial on the legal issues; the power to order all issues tried in equity is altogether eliminated. *Beacon Theatres* therefore represents a "striking departure" from historical practice. *See* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 5 (1967).

edy was "inadequate."[24] Because procedure is not static, however, the Court asserted that the adequacy of the legal remedy must be assessed "in light of the remedies now made available by the Declaratory Judgement Act and the Federal Rules,"[25] rather than on the basis of "precedent, decided under discarded procedures."[26] The Court's holding in *Beacon Theatres* thus established that courts sitting in equity may properly assert jurisdiction only where the legal remedy is inadequate in light of contemporary procedure, notwithstanding the existence of equity jurisdiction prior to merger. The case therefore stands for the proposition that the availability of jury trial is not only a product of historical practice, but is also a function of the procedural realities of the post-merger federal courts.[27]

The Court continued to move away from strict reliance on historical analogy and towards an expanded view of the seventh amendment in *Dairy Queen, Inc. v. Wood*,[28] decided three years after *Beacon Theatres*. *Dairy Queen* dealt primarily with the continuing vitality of the "clean-up doctrine," a jurisdictional doctrine which permitted courts sitting as courts of equity to resolve any legal issues arising incidentally to the main, equitable action.[29] The Court in *Dairy Queen* repudiated this practice, relying on its decision in *Beacon Theatres* for the proposition that the right to jury trial must be determined with regard

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[24] The "adequacy" of the legal remedy at common law was dependent not only on whether a particular claim was cognizable in the law courts, but also on whether the remedy obtainable at law was as "practical and efficient" to the ends of justice and its prompt administration as the remedy available in equity. Thus, although his claim was recognized by the law courts, a plaintiff might proceed in equity if the equitable remedy was faster or less cumbersome than the legal remedy. On the other hand, if the legal remedy was "plain, adequate and complete," the plaintiff was required to proceed at law. Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874) (quoting Boyce v. Grundy, 28 U.S. (3 Pet.) 215 (1830)).

[25] 359 U.S. at 507 (footnote omitted).

[26] *Id.* With reference to the facts of *Beacon Theatres*, if the action had been brought prior to merger, the inadequacy of the legal remedy would have stemmed both from Fox's inability to force Beacon Theatres to file suit at law, and the law court's inability to grant injunctive relief.

[27] Professor McCoid has commented that "[t]he Beacon Court's principle is directed exactly to those cases where equity jurisdiction was founded on procedural inadequacies at law: where the remedy at law is adequate in light of contemporary procedure, equity lacks jurisdiction, though such jurisdiction might have existed under earlier and different procedure." McCoid, *supra* note 23, at 12-13.

[28] 369 U.S. 469 (1962). *Dairy Queen* involved a claim for breach of contract and trademark infringement. Defendants had been licensed by contract to employ the Dairy Queen trademark and refused to discontinue its use after plaintiff, alleging breach of contract, ordered them to desist. Plaintiff sought both an injunction against defendant's continued use of the Dairy Queen trademark, and money damages for the unauthorized use of its name. In its complaint, plaintiff styled its demand for a money judgment as a claim for an "accounting" for sums due it for the past unauthorized use of the Dairy Queen trademark. Since "accounting" actions were traditionally regarded as equitable actions, the district court held that the claim for money damages was "incidental" to the equitable relief sought, and ordered all claims tried without a jury. McCullough v. Dairy Queen, Inc., 194 F. Supp. 686, 687-88 (E.D. Pa. 1961).

[29] An excellent discussion of the clean-up doctrine, its purpose, and its continuing vitality, appears in Levin, *Equitable Clean-Up and the Jury: A Suggested Orienta-*

to the procedural exigencies of modern federal practice.[30] Applying the *Beacon Theatres* principle to the facts of *Dairy Queen*, the Court observed that the liberal joinder provisions of the Federal Rules and the merged federal judiciary had eliminated the need for clean-up jurisdiction as an equitable doctrine.[31] Since the justification underlying the doctrine had vanished, the Court reasoned that there was no logical justification for adhering to the practices of the common law chancery courts.[32]

The *Dairy Queen* Court similarly rejected the argument that the characterization of the complaint as one for an accounting—an action traditionally regarded as a suit in equity—operated to deprive the defendant of its right to jury trial.[33] The Court noted that equity's jurisdicton over accounting actions was traditionally dependent on a finding that the accounts were so complicated that only a court of equity could unravel them. In light of the provisions of rule 53(b) of the Federal Rules of Civil Procedure, authorizing the appointment of a special master to assist the jury, the Court concluded that the burden of establishing the requisite degree of complexity was "considerably increased"[34] under modern federal procedure, and that it would "indeed be a rare case"[35] in which this burden could be met.

Any remaining doubts about the exclusivity of the historical test as a means of resolving the jury trial question were eliminated by the Supreme Court's decision in *Ross v. Bernhard*.[36] In *Ross*, the Court departed from clear historical precedent and held that trial by jury is available in shareholder derivative suits whenever the underlying cause of action is such that the corporation would have been entitled to a jury trial had it sued on its own behalf.[37] The Court reasoned that although shareholder derivative actions were

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tion, 100 U. PA. L. REV. 320 (1951). Professor Levin ascribes the origins of the clean-up doctrine to the procedural hardships created by the separate systems of law and equity. Prior to the enactment of the Federal Rules, if a party initiated an action in equity, the equity court's refusal to pass upon incidental legal issues would have forced the equity plaintiff to initiate a second separate action at law. Such a bifurcated procedure entailed considerable time and effort and frequently resulted in incomplete relief for the equity plaintiff due to the running of the applicable statute of limitations. *Id.* *See also* Redish, *supra* note 15, at 498.

[30] See text at note 27 *supra*.

[31] FED. R. CIV. P. 18(a), (b). *See also* FED. R. CIV. P. 13(a), (b).

[32] The essence of the *Dairy Queen* and *Beacon Theatres* decisions is that the seventh amendment protects substance rather than form. In this regard, the two decisions evidence a flexible approach to constitutional interpretation. *See* McCoid, *supra* note 23, at 11, observing that the *Beacon Theatres* decision "fits well with the conception of the Constitution as a durable document providing continuingly useful standards for an evolving society." However, to the extent that this flexible approach might be employed to reduce the scope of the common law right to jury trial, it would seem clearly at odds with the dictates of the seventh amendment.

[33] 369 U.S. at 477-78.

[34] *Id.* at 478. *See also* Broderick v. American Gen. Corp., 71 F.2d 864, 867 (decided prior to *Dairy Queen*, but reaching the same conclusion).

[35] 369 U.S. at 478.

[36] 396 U.S. 531 (1970). See note 6 *supra*.

[37] *Id.* at 537-39. The Court observed that the right to jury trial is a function of "the nature of the issue to be tried, rather than the character of the overall action." *Id.* at 538. Thus, the derivative form of the shareholders' suit was held not to be control-

traditionally cognizable only in equity, the availability of jury trial was not foreclosed under modern federal practice.[38] The *Ross* case, in conjunction with its predecessors, therefore embodies the principle that equity may properly act only where the legal remedy is inadequate in light of contemporary procedure. Thus, to the extent that procedural reforms since 1938 have made it possible for a party to obtain adequate relief at law, equity is deprived of jurisdiction, even though such jurisdiction may have existed at common law.[39] In such cases, there is a right to trial by jury, notwithstanding the absence of this right prior to the enactment of the Federal Rules.

II. Defining the Inquiry: The Problem and Its Analysis

In the aftermath of *Beacon Theatres, Dairy Queen* and *Ross,* the relevant inquiry with respect to the seventh amendment is not whether, prior to merger, the claims presented would have been decided by a court of equity, but whether the issues comprising the action could have been tried at law.[40] This inquiry, in turn, necessitates a determination of which issues are legal issues, itself a task of considerable difficulty.[41] Recognizing the difficulty inherent in identifying "legal" issues, the *Ross* Court, in a footnote to the majority decision, delineated three factors to be considered in determining the "legal" nature of a claim.[42] *Ross* directed that a court should first examine the practices of the premerger courts to determine whether the issue or its com-

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ling on the question whether there was a right to jury trial.

[38] *Id.* Prior to the merger of law and equity, courts of law refused to grant shareholders standing to assert corporate claims. Thus, where the corporation declined to institute an action on its own behalf, the shareholders had no remedy at law. In consequence of the harshness of this rule, courts of equity developed the derivative action, in which shareholders faced with the possibility of irreparable harm could seek appropriate equitable remedies. Since rule 23.1 of the Federal Rules of Civil Procedure specifically recognized the shareholders' standing to assert the corporation's legal claims, the Court in *Ross* concluded that the traditional rule relegating derivative actions to equity had been rendered "obsolete." *Id.* at 540. Accordingly, in the aftermath of *Ross,* the seventh amendment question is contingent on whether the claims being asserted by the shareholders are "legal" in nature. *See generally* Note, *The Right to a Jury Trial in a Stockholder's Derivative Action,* 74 Yale L.J. 725 (1965).

[39] See text at note 26 *supra.* The *Beacon Theatres, Dairy Queen,* and *Ross* decisions have been interpreted by several courts as favoring the granting of jury trials in cases where there is doubt as to whether the issues presented are "legal." *See, e.g.,* Dixon v. Northwestern Nat'l Bank of Minneapolis, 297 F. Supp. 485, 489 (D. Minn. 1969); Gefen v. United States, 400 F.2d 476, 479 n.5 (5th Cir. 1968), *cited in* 9 Wright & Miller, *supra* note 11, § 2302, at 21 n.51.

[40] *See* 5 Moore's, *supra* note 2, ¶ 38.16[1]-[4], at 153-162.9. The reason for directing the inquiry to the jurisdiction of the law courts rather than the practices of the chancery courts is that there is a constitutional right to trial by jury, whereas no similar right attaches to proceedings in equity. *See* Fitzgerald v. United States Lines, 374 U.S. 16 (1963). Thus, equity's practices prior to merger are not determinative of whether there is a right to trial by jury.

[41] Professor James has observed that there are, for the most part, no such things as inherently "legal issues" or inherently "equitable issues." There are only factual issues, and "like chameleons, [they] take their color from surrounding circumstances." James, *supra* note 10, at 692. This passage was quoted approvingly in Justice Stewart's dissenting opinion in *Ross.* 396 U.S. at 550.

[42] 396 U.S. at 538 n.10.

mon law analogue was historically committed to jury determination. Secondly, the court should consider whether the remedy sought is of the sort that was traditionally available in the law courts. Finally, the *Ross* Court stated that the court should determine whether the issues presented by the case are beyond the "practical abilities and limitations of juries."[43]

The first two elements of the *Ross* test are presumably references to established methods of seventh amendment analysis. The meaning of the third element of the test is less certain. No authority was cited by the *Ross* Court for the proposition that jury competence is relevant to the existence of a right to jury trial. Nor did the Court indicate the relative weight to be accorded the third element of the test in assessing the "legal" nature of a claim. Perhaps in consequence of this lack of authority, the majority of courts that have applied the *Ross* test have either ignored the third element[44] or determined that the claims presented were not beyond the analytical ability of a jury.[45] In four cases, however, the third element of the *Ross* test has been employed to deny jury trial where the jury requests were otherwise warranted.[46] In essence,

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[43] *Id.*

[44] *See, e.g.*, Tights, Inc. v. Stanley, 441 F.2d 336, 340-41 (4th Cir. 1971). The *Stanley* court stated that the complexity of the issues, and the jury's ability to understand them, was relevant with respect to damage issues, but not with respect to liability issues. There was no reference to the *Ross* test.

[45] *See, e.g.*, Cleverly v. Western Elec. Co., 69 F.R.D. 348, 351 (W.D. Mo. 1975) (the right to jury trial under the Age Discrimination in Employment Act); Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D. Ill. 1977) (patent infringement action); Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977) (securities fraud action); Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1125 (E.D. Mich. 1974) (action for breach of duty of fair representation and collective bargaining agreement).

[46] See note 5 *supra*. *Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974), has been cited as an additional authority for the proposition that there is no right to trial by jury in complex civil cases. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 69 (S.D.N.Y. 1978) (discussed in text at notes 65-73 *infra*). Such reference to *Hyde*, however, would seem incorrect. The *Hyde* court, while observing that the complicated issues presented by the case were not especially suited for jury determination, nonetheless based its decision to deny jury trial on a finding that equitable relief was necessary to adequately redress the claims between the parties.

Hyde was an interpleader action brought by Hyde Properties, the maker of certain promissory notes. The notes were originally issued by Hyde Properties to International House of Pancakes of Tennessee, Inc., (IHPT), as payment for a building owned by IHPT. IHPT subsequently transferred the notes to McCoy, a shareholder of IHPT, to redeem all of McCoy's interest in IHPT. Some time later, the I.R.S. filed notices of tax liens against IHPT, and moved to levy upon Hyde Properties. Because of McCoy's conflicting interest in the notes, Hyde Properties filed an interpleader action against the United States and McCoy, and deposited sufficient funds with the court to satisfy its obligation on the notes. *Id.* at 303-04.

The United States Government claimed that IHPT's redemption of McCoy's stock with the notes received from Hyde Properties was a fraudulent conveyance as to it as a tax lien creditor. *Id.* at 304. McCoy argued that the transfer was not fraudulent as to the Government, since, at the time of the redemption, IHPT was a solvent corporation. McCoy subsequently demanded a jury trial on the question of whether the transfer was fraudulent. *Id.* The Government moved to strike McCoy's jury demand on the

these courts have reasoned that judicially ordered recourse to equity is permissible in extraordinarily complex cases, regardless of the nature of the underlying issues, because the jury's inability to reach an intelligent decision implies that the legal remedy is inadequate. These cases thus squarely present the question whether *Ross* can justifiably be read to sanction a "complexity exception" to the seventh amendment.

The question thus posed is significant in several respects. First, as the law becomes increasingly complicated in response to commercial, social, and technological developments, the legal and factual complexity of the typical law suit will increase. It can therefore be reasonably assumed that future courts will encounter a greater number of cases presenting issues beyond the comprehension of the average juror. A seventh amendment analysis which premises the right to jury trial on a case-by-case examination of jury competence thus threatens to severely curtail the availability of jury trial in civil actions in the federal courts. In a like fashion, if jury competence is ultimately adopted as the constitutional weathervane of the right to trial by jury, both judges and prospective litigants will be faced with the task of determining when a complex case is *too* complex for jury determination. This, in turn, will necessitate

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ground that the interpleader proceeding was equitable in nature. The motion was denied by the district court, and the case was conducted as a jury trial. *Id.*

On appeal, the Court of Appeals of the Sixth Circuit determined that the district court had erred in denying the Government's motion to strike McCoy's jury demand. Judge Miller, writing for the court, characterized the underlying issue in the case as "whether or not the conveyance of the two promissory notes to McCoy was fraudulent as to the Government." *Id.* at 305. Judge Miller then proceeded to apply the *Ross* test in order to determine whether the identified issue was legal, and hence entitled to jury resolution. *Id.* With reference to the first element of the *Ross* test, Judge Miller observed that "questions involving fraud cannot be classified from custom as solely legal or solely equitable," and concluded that "the nature of the remedy sought [is] considerably more important in resolving the right to jury trial." *Id.* In looking to the nature of the remedy sought in the case at bar, Judge Miller noted that, under Tennessee law, a creditor has both a legal and an equitable remedy for a fraudulent conveyance. *Id.* Because of the seventh amendment right of jury trial, however, Judge Miller concluded that a creditor may not proceed in equity unless the legal remedy is inadequate. *Id.* at 306. Judge Miller thereupon concluded that the legal remedy available under Tennessee law—attachment or execution—"would be generally inadequate because of the ease with which [promissory notes] can be concealed or otherwise placed beyond the reach of levy." *Id.* He therefore determined that "equitable relief was necessary for enforcement of the Government's claims," and held that the issue presented by the case was equitable with respect to the second factor specified in *Ross*, the nature of the remedy sought. Applying the third element of the *Ross* test to the case at bar, Judge Miller observed that "the jury [was] not especially well qualified" to deal with the conflicting and complicated financial issues involved in the action. *Id.* He therefore concluded that "a non-jury trial of the issues is both more efficient and more likely to produce a just result." *Id.*

Thus, although Judge Miller did conclude that the action was beyond the practical abilities and limitations of juries, his decision to deny jury trial can be justified solely in terms of his characterization of the remedy sought as equitable. *Hyde* is therefore distinguishable from *ILC Peripherals*, *Bernstein*, *United States Financial* and *Boise Cascade* (see note 5 *supra*), since in each of the latter four cases the issues presented were legal with respect to both of the first two elements of the *Ross* test.

the formulation of new and potentially unmanageable standards for deciding when jury demands may be properly stricken from complicated civil actions. Under such a standard, it is conceivable that even where quintessential jury issues such as tort liability or contract damages are involved, the right to jury trial would exist or not as a function of the overall complexity of the action. In short, a vast new area of confusion would be interjected into an already perplexing area of law.

A. *The Cases: A Move Towards a Complexity Exception to the Seventh Amendment's Jury Trial Guarantee*

In re Boise Cascade Securities Litigation[47] was the first case in which an otherwise valid jury demand was stricken on the grounds that the litigation exceeded "the ability of a jury to decide the facts in an informed and capable manner."[48] The action arose when the assets of the Boise Cascade Corporation were devalued following the corporation's acquisition of a newsprint company in exchange for shares of Boise Cascade stock.[49] Relying on the *Ross* test, Judge Sharp, of the United States District Court for the Western District of Washington, concluded that both the complexity of the factual issues involved in the action and the five to six months estimated trial time indicated "that a jury would not be a rational and capable fact finder."[50] In reaching this conclusion, Judge Sharp acknowledged that juries are ordinarily presumed competent.[51] He felt that at some point, however, "it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner."[52] When that point is reached, Judge Sharp reasoned, trial by jury is no longer constitutionally mandated, since "the right and necessity of fairness is defeated by relegating fact finding to a body not qualified to determine the facts."[53]

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[47] 420 F. Supp. 99 (W.D. Wash. 1976).

[48] *Id.* at 104.

[49] *Id.* at 101.

[50] *Id.* at 103. The *Boise Cascade* court emphasized the intricate financial questions presented in the case, and the great volume of the evidence, stating:

> [I]n order to determine whether liability exists, the fact finder will have to analyze . . . the accounts, as they existed at the time of the merger, . . . [and] as plaintiffs claim they should have existed. . . .
>
> . . . .
>
> Competing theories of accounting will be presented for all of these matters. . . .
>
> . . . .
>
> In sum, it appears to this Court that the scope of the problems presented by this case is immense. The factual issues, the complexity of the evidence that will be required to explore those issues and the time required to do so leads to the conclusion that a jury would not be a rational and capable fact finder.

Id.

[51] *Id.* at 104.

[52] *Id.*

[53] *Id.* Judge Sharp concluded: "[t]he third part of the analysis in footnote 10 to the majority opinion in *Ross v. Bernhard* directly recognizes this." *Id.* (citations omitted)..

One year after the *Boise Cascade* decision, Judge Turrentine, writing for the United States District Court for the Southern District of California, ordered all jury demands stricken from *In re United States Financial Securities Litigation*.[54] *United States Financial* was a consolidated securities fraud action arising out of the collapse of a massive real estate development corporation.[55] Liability was asserted against the various defendants under a variety of state law theories and the antifraud provisions of the federal securities laws.[56] In justifying his decision to order a non-jury trial, Judge Turrentine relied on both premerger custom and the Supreme Court's decision in *Dairy Queen* and *Ross*. He determined initially that intricate accounting problems were central to the resolution of the various claims in the case.[57] In this regard he noted that complicated accounting actions were historically committed to the jurisdiction of the equity courts,[58] and concluded that neither *Beacon Theatres* nor *Dairy Queen* had altogether eliminated that jurisdiction. Rather, Judge Turrentine interpreted *Dairy Queen* as specifically authorizing recourse to equity in cases where a special master appointed pursuant to rule 53(b) of the Federal Rules of Civil Procedure would not meaningfully assist the jury in deciphering the accounts between the parties.[59] Concluding that the case at bar was within the rule of *Dairy Queen*,[60] Judge Turrentine subsequently held that the parties were not entitled to jury trial.[61]

In addition to relying on equity's traditional jurisdiction over complicated accounting actions, Judge Turrentine based his decison to deny jury trial on the third element of the *Ross* test.[62] He observed initially that a lay jury was "singularly unqualified" to analyze and reconcile the many complicated accounts between the parties.[63] This inability, in Judge Turrentine's view, operated to render the legal remedy inadequate, since a finding of ultimate liability in the case was dependent on an intelligent analysis of the accounts between the parties. He therefore concluded that the third element of the

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[54] 75 F.R.D. 702, 705 (S.D. Cal. 1977).

[55] *Id.* Liability was asserted by various purchasers and sellers of United States Financials' common stock and debt instruments. *Id.* at 705-06.

[56] *Id.* at 705-06.

[57] *Id.* at 707, 712-13.

[58] *Id.* at 709.

[59] *Id.* at 711.

[60] *Id.* at 713. The court also concluded that severance of one or more of the actions was impractical. *Id.* at 714.

[61] *Id.*

[62] See text at notes 42 and 43 *supra*.

[63] 75 F.R.D. at 713. In connection with his assertion that the instant case was beyond the practical abilities of jurors, Judge Turrentine argued that the estimated length of trial—two years—would make the impaneling of any jury difficult. The *Boise Cascade* court, echoing this sentiment, argued additionally that since few persons possessing a sophisticated educational or financial background would be willing to serve as a juror in a lengthy trial, the persons ultimately selected for jury service were likely to be the *least* qualified persons to decide a complicated case. 420 F. Supp. at 104-05.

Ross test was satisfied, and held that the parties were not entitled to jury trial on any of the issues presented.[64]

Relying on the precedent established by *Boise Cascade* and *United States Financial*, Judge Brieant, of the United States District Court for the Southern District of New York, refused to permit a jury trial in *Bernstein v. Universal Pictures, Inc.*[65] *Bernstein* was a complicated antitrust action brought against several members of the motion picture and television industry.[66] Plaintiffs, a class of musical composers and lyricists, alleged seven separate violations of the antitrust laws and demanded a jury trial.[67] In the ensuing six years, none of the various defendants evidenced any objection to proceeding at law. Nevertheless, Judge Brieant, of his own initiative, questioned the propriety of submitting such a complicated case to a jury, and subsequently ordered that the action be tried in equity.[68]

In his opinion, Judge Brieant acknowledged that all of the claims presented in the action would normally be entitled to jury trial under the rule of *Beacon Theatres* and *Dairy Queen*.[69] Similarly, he admitted that all of the issues in the case were "legal" with respect to both premerger federal practice and the nature of the remedies sought.[70] Notwithstanding this admission, how-

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[64] 75 F.R.D. at 710-13. Judge Turrentine enumerated three criteria for determining when a case is so complicated that equity jurisdiction will attach and permit the case to be tried without a jury:

> First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution. . . .
>
> Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.
>
> And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the jurors to function effectively throughout the trial.

Id. at 711. The court purportedly derived these guidelines from a series of cases dealing with equity's power to decide complex accounting actions, and several modern cases including the *Dairy Queen* decision.

The first factor is an accurate description of when the equity courts would take jurisdiction over accounting matters. See text at notes 95-123 *infra*. Since *Dairy Queen*, this description is no longer accurate; modern accounting plaintiffs must demonstrate that appointment of a special master pursuant to rule 53(b) of the Federal Rules of Civil Procedure would not materially assist the jury in deciphering the accounts between the parties. 75 F.R.D. at 711.

The second criterion is presumably a reference to the third prong of the *Ross* test. However, its relevance to the seventh amendment question is not at all clear. See text at notes 128-34 *infra*.

The final element was adopted from the *Boise Cascade* opinion. *See* 420 F. Supp. at 104-05. It would appear relevant to the jury trial question only insofar as it bears on the practical abilities and limitations of juries. Obviously, if the second factor of the test is of no consequence to whether there is a right to jury trial, the third factor is similarly insignificant.

[65] 79 F.R.D. 59 (S.D.N.Y. 1978).

[66] *Id.* at 61.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 65.

[70] *Id.* at 66-67.

ever, Judge Brieant concluded that the practical abilities and limitations of juries was a consideration of constitutional significance, operating to impose an upper limit on the availability of jury trials under the seventh amendment.[71] He asserted that "the rule of *Beacon Theatres* and *Dairy Queen* is itself an 'equitable doctrine,'"[72] and refused to interpret those cases to require trial by jury in actions where the jury was incapable of reaching an informed decision. Reasoning that "the traditional equity powers of the Court . . . include the power to strike a jury demand when to allow it to stand would work an injustice,"[73] Judge Brieant ordered the parties to proceed in equity with respect to all issues raised by the suit.

The decision to order a non-jury trial was arrived at by a slightly different path in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*[74] In *ILC Peripherals*, a complex antitrust action, defendant moved to strike plaintiff's jury demand on the grounds that the case was too complex for jury determination.[75] Judge Conti, writing for the United States District Court for the Northern District of California, denied the motion, and the parties proceeded to trial before a twelve man jury.[76] At the conclusion of a five month trial, involving eighty-seven witnesses and more than 2,300 written exhibits, the case was submitted to the jury. After nineteen days of deliberation, the jury reported itself deadlocked and a mistrial was declared.[77] Defendant I.B.M. subsequently moved for a directed verdict.[78]

In the course of granting I.B.M.'s motion, Judge Conti chose to reconsider his earlier denial of defendant's motion to strike plaintiff's jury demand.[79] He thereupon ordered the action tried in equity in the event of a subsequent retrial.[80] Referring to *Bernstein, Boise Cascade* and *United States Financial*, Judge Conti stated that "the teaching of these three cases is that where the issues in a case are beyond 'the practical abilities and limitations of a jury,' the legal remedy is inadequate and equity jurisdiction will attach."[81] Drawing on his own five month ordeal, Judge Conti cited several factors which, in his opinion, rendered the legal remedy in the instant case inadequate. First, he noted the difficulty the jury had in comprehending the financial and technical concepts introduced at trial.[82] According to Judge

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[71] *Id.* at 66. Judge Brieant acknowledged that the third element of the Ross test was "devoid of cited authority" and "regarded by some as a departure . . . from former law." *Id.* (citing Redish, *supra* note 15, at 526). However, he nonetheless concluded that "the adequacy of the legal remedy necessarily involves the adequacy of the jury and its competency to find the facts." 79 F.R.D. at 66.

[72] *Id.* (citing Katchen v. Landy, 382 U.S. 323, 339 (1966)).

[73] *Id.*

[74] 458 F. Supp. 423 (N.D. Cal. 1978).

[75] *Id.* at 444.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 426.

[79] *Id.*

[80] *Id.* at 448.

[81] *Id.* at 447.

[82] *Id.*

Conti, his suspicions of jury inadequacy were confirmed by the responses and comments elicited from the jurors themselves.[83] Observing that only one of the jurors possessed even a modest technical background,[84] Judge Conti remarked:

> [I]t is understandable that people with such backgrounds would have trouble applying concepts like cross-elasticity of supply and demand, market share and market power, reverse engineering, product interface manipulation, discriminatory pricing, barriers to entry, exclusionary leasing, entreprenurial subsidiaries, subordinated debentures, stock options, modeling, and etc.[85]

As a second justification for his decision, Judge Conti noted that the trial of the I.B.M. action had monopolized his time and staff for a period of five months, thereby increasing the burden on the other judges in the district.[86] In consequence of this experience, Judge Conti expressed the rather novel view that:

> While there may be a right to a jury trial in every case . . . where the cost to both the litigants and the government of such a trial is as great as it was in this case, and where the case is as technically and financially complex as this one is, this right should be limited to one jury trial.[87]

Although Judge Conti's decision to disallow a jury trial in *ILC Peripherals* may ultimately prove irrelevant if no retrial of the action is ordered, the case still stands as authority for the proposition that complex cases are excepted from the normal operation of the seventh amendment.

In summary, two basic contentions are central to the reasoning of *Boise Cascade* and its progeny. First, these courts have argued that equity has the inherent authority to order non-jury trials in complex civil cases, which power is unaffected by the seventh amendment; the *Ross* test, in their view, is but a

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[83] *Id.* at 447-48. Judge Conti emphasized that while the *Bernstein, Boise Cascade* and *United States Financial* courts could only speculate as to the jury's ability to understand the case, he was able to base his decision on actual experience. *Id.* at 447. He related that the jurors themselves reported that they were unable to understand the technical and financial issues in the case. *Id.* at 448.

[84] *Id.* at 448.

[85] *Id.*

[86] *Id.*

[87] *Id.* Judge Conti added: "Even if one does not want to eliminate jury trials completely in complex antitrust cases, then surely if the first trial results in a mistrial, the system, and probably the parties themselves, are better served if the decision is ultimately made by the court, with the right of the parties to supplement the record." *Id.*

Professor James has noted that "[a]t no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice between issues that were better suited to court or to jury trial." James, *supra* note 10, at 661. *But see* Note, *The Right to A Nonjury Trial*, 74 HARV. L. REV. 1176, 1181 (1961) (suggesting that some actions were tried in equity because they were "unsuitable for resolution by the typically illiterate jury").

recognition of this traditional authority.[88] Secondly, these courts have reasoned that even if the seventh amendment does not sanction an exception for complex cases, considerations of fairness and due process militate against permitting trial by jury in situations where common sense impels the recognition that a jury is incapable of rendering an intelligent verdict.[89] The constitutionality of these four decisions thus rests partly on the accuracy of their characterization of the seventh amendment, and partly on whether the due process clause can be read to override the seventh amendment's jury requirement in cases where trial by jury bodes the possibility of an irrational jury verdict.

The following section of this article will demonstrate that no exception for complex cases inheres in the seventh amendment. It will be submitted that jury competence is irrelevant to the resolution of the seventh amendment question, regardless of whether the question is viewed in the context of pre-merger practice or modern interpretations of the jury right. Finally, the discussion will address the contention that the due process clause provides constitutional justification for removing difficult cases from the jury, regardless of the legal character of the issues involved.

B. *Analysis: Complexity, Jury Competence and the Right to Jury Trial at Common Law*

There is little to suggest that considerations of factual complexity and amenability to jury resolution were historically germane to the jurisdictional allocation between law and equity.[90] Rather, whether an action would be tried at law or in equity depended largely on factors other than the relative ability of the jury as a trier of fact.[91] Foremost among these factors were the procedural differences between the two tribunals.[92] For example, at common law, parties to a suit at law were prohibited from testifying on their own behalf. Thus, where the testimony of the parties was required to shed light on the underlying dispute, they would be forced to proceed in equity, since they were incompetent to testify at law.[93] Similarly, if equitable remedies such as injunction or specific performance were necessary to redress the grievances between the parties, equity would assume jurisdiction because the law courts were incompetent to award equitable forms of relief.[94]

This is not to say that the practical abilities and limitations of juries were never relevant to the decison to grant or deny jury trial. The existence of

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[88] *See* 79 F.R.D. at 67; 458 F. Supp. at 445-46; 75 F.R.D. at 710; 420 F. Supp. at 105.

[89] *See* 79 F.R.D. at 71; 458 F. Supp. at 447-48; 75 F.R.D. at 712-13; 420 F. Supp. at 104.

[90] *See* James, *supra* note 10, at 661 & n.39.

[91] *See id.* at 661-63 & nn.39-47. As Professor James phrased it, "jury trial (or court trial) was often merely the tail of the dog under a system where you had to take the whole dog." *Id.* at 662.

[92] *Id.* at 661-62.

[93] *Id.* at 662.

[94] *Id.*

complex accounts between the parties provided a traditional basis for equity jurisdiction.[95] Although this jurisdiction may have resulted partially from the procedural deficiencies of the law courts,[96] concern over the jury's ability to unravel complicated financial transactions was undeniably a major consideration prompting equity to act.[97] Outside the ambit of accounting actions, however, a review of the cases provides little support for the contention that practical abilities and limitations of juries were primary considerations in determining whether an action should be tried at law or in equity.[98]

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[95] *See, e.g.*, Kirby v. Lake Shore & Michigan Southern R.R., 120 U.S. 130, 134 (1887), where the Court stated that "[t]he complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity."

Equity's jurisdiction over accounting actions that were also cognizable at law was limited to situations where the accounts were so complicated that only a court of equity could unravel them. *See* J. McClintock, Equity §§ 200, 202, at 537-38, 540-41 (2d ed. 1948). Thus equity had no jurisdiction over cases where the accounts were simple or merely numerous and not difficult. Equity's jurisdiction over complicated accounting actions was reaffirmed in *Dairy Queen* although its availability was limited to situations where the accounts between the parties are so complex that a jury could not unravel them, even with the assistance of a special master. 369 U.S. at 478.

[96] Equity's jurisdiction over complicated accounting actions may have stemmed at least partially from the unavailability of party testimony and pre-trial discovery at law, since the parties themselves frequently were the only persons possessing sufficient knowledge of the underlying transactions to shed light on their dispute. James, *supra* note 10, at 662-63.

[97] The Eighth Circuit expressed this concern in McMullen Lumber Co. v. Strother, 136 F. 295 (8th Cir. 1905):

> How would it be possible for a jury, through a protracted, tedious hearing, to carry such infinite details in their minds, and work out such problems in the wranglings of the jury room? That any result, under such conditions, reached by a jury, no matter how intelligent or honest, would necessarily be something of guesswork, does not admit of debate. . . . Indeed, the conscientious judge who should sit in the trial of such a case to a jury would feel impelled, in assisting the jury to a just result, to quite nigh perform the part of a chancellor in reviewing and analyzing the many details of the evidence . . . . Under the conditions that would inevitably attend such a trial the judge's own review and analysis could be but superficial, and probably incorrect.

136 F. at 304.

[98] Indeed, the opposite appears to have been true. *See, e.g.*, Curriden v. Middleton, 232 U.S. 633, 636 (1914) ("It is said that the facts are complicated, but they are not so on the allegations of the bill, which merely discloses a series of acts alleged to have been parts of the plan to deceive, and further, *mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction.*") (emphasis added); *But see* Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801, 804 (D. Kan. 1928) ("while mere difficulty of proof is not sufficient to confer jurisdiction upon equity, *yet if the action is one for an accounting*, and the account presented is so difficult, complicated and confusing that a jury cannot handle it, an action may properly be brought in equity for the purpose of taking an accounting. *But the field is a narrow one.*") (emphasis added). *See also* United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906). The *Bernstein* court, after reviewing these cases, found that, to the extent they required an accounting in addition to factual complexity before the aid of equity could be invoked, the requirement was satisfied in *Bernstein*. 79 F.R.D. at 70. While Judge Brieant's interpretation of the rule of these cases is correct, *Bernstein* can not be properly termed an "accounting action." See text and notes 108-21 *infra*.

Admittedly, some of the early English cases suggest that concern over the analytical abilities of the jury prompted equity to act in other types of cases where the claims involved would normally have been tried at law.[99] In *Clench v. Tomley*,[100] for example, an equity court enjoined an ejectment proceeding at law because proof of liability depended on an analysis of documents considered to be beyond the capacity of "a jury of ploughmen."[101] Similarly, in *Wedderburn v. Pickering*,[102] the court quoted with approval the "old rule"[103] expressed by *Clark v. Cookson*[104] that some cases are "from great complexity or otherwise, not capable of being conveniently tried before a jury."[105] The institution of jury trial evolved quite differently in America than in England, however, and the rule of these cases seems not to have been generally followed in the United States.[106] Thus, only to the extent that a case may be properly termed an "action for an accounting" does there appear to be authority for a complexity exception to the seventh amendment.[107]

The accounting action was born in the common law action of "account render."[108] Account render was narrow in scope and would lie only against persons having a legal duty to account to the plaintiff.[109] The procedure at

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[99] The four courts denying jury trial in complex cases attempted to draw support from these cases. *See, e.g., Bernstein*, 79 F.R.D. at 67 ("[f]ar from being an innovation, consideration of 'the practical abilities and limitations of juries,' . . . is actually the restatement of the Court's traditional equity powers. The early common law, in an age when many jurors could not read, reserved for itself matters involving complex writings." (citations omitted)).

[100] 21 Eng. Rep. 13 (Ch. 1603).

[101] *Id.*

[102] 13 Ch. D. 769 (1879).

[103] *Id.* at 771. However the "rule" appears to have developed long after the enactment of the seventh amendment. It is thus of questionable precedential value in ascertaining the existence of a complexity exception to the seventh amendment. See text and note 106 *infra*.

[104] 2 Ch. D. 746 (1875).

[105] *Id.* at 747-48.

[106] The jury as an institution did not enjoy the same esteem in English practice. *See generally* L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY (1973). The civil jury has essentially disappeared from modern English practice by virtue of Parliamentary decree. *Id.* at 125-30.

[107] The *Bernstein* court cited Fowle v. Lawrason, 30 U.S. (5 Pet.) 495, 503 (1831), for the proposition that equity's power to dispense with a jury in complex cases was not limited to actions for an accounting. 79 F.R.D. at 67-68. That case stated: "In all cases in which an action of account would be the proper remedy at law, . . . the jurisdiction of a Court of equity is undoubted. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some great difficulty at law should interpose, . . . in order to induce a Court of chancery to exercise jurisdiction." It is doubtful that this passage can be accorded the broad meaning favored by the *Bernstein* court. Rather the passage refers to the limitations on equity's traditional jurisdiction over accounting matters, and should not be interpreted as sanctioning a broad complexity exception to the seventh amendment. See text and notes 114-23 *infra*. *See generally* 9 WRIGHT & MILLER, *supra* note 11, § 2310, at 48 & nn.67-69.

[108] Williams v. Collier, 32 F. Supp. 321, 324 (E.D. Pa. 1940).

[109] Persons having a legal duty to account included guardians, bailiffs, receivers, and the like. 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198. *See also* Lile, *Bills for Account*, 8 VA. L. REV. 181 (1921).

law was considerably involved, requiring the plaintiff to establish initially that the defendant had a legal duty to render an accounting.[110] If the plaintiff prevailed on this issue, the court would enter an interlocutory decree to that effect, and the matter would be referred to auditors for the actual rendition of the account.[111] Disputed entries were submitted to the jury for resolution, and if the plaintiff ultimately prevailed a final judgment was entered in his favor.[112]

Because of the relatively cumbersome nature of this proceeding, the common law action of account render gradually gave way to the more flexible proceeding in equity.[113] Equity's jurisdiction over accounting actions, however, was not plenary. Rather, it was limited to three basic situations:[114] (1) equity could require an accounting where the duty to account was itself of equitable origin, as where the accounting was sought from a trustee by a *cestui que trust*;[115] (2) equity could give an accounting where the claim was otherwise legal, if the request for an accounting was incidental to a demand for equitable relief;[116] and (3) equity could require an accounting where the accounts between the parties were so complicated that a jury would have difficulty understanding them.[117]

In a strict sense, the accounting action was limited, both in law and in equity, to cases where there was a history of financial transactions or business dealings between the parties, and it was alleged that a balance was owing.[118] Thus, the term "accounting" traditionally referred to either the balance due on a statement of dealings or the right of action for that balance.[119] An

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[110] 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198; Belsheim, *The Old Action of Account*, 45 HARV. L. REV. 466, 493-94 (1932).

[111] 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198-99; Belsheim, *supra* note 110, at 496-97. The court would issue a writ of capias to bring the defendant before the auditors. 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198; Belsheim, *supra* note 110, at 496.

[112] 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198; Belsheim, *supra* note 110, at 497-98. If the defendant was found to owe a balance on his account, he was ordered to pay the plaintiff. On the other hand, if an examination of the accounts revealed that the plaintiff had been overpaid, the defendant could use the auditor's report as a basis of an action in debt against the plaintiff. 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198-99; Belsheim, *supra* note 110, at 498-99.

[113] 5 MOORE'S, *supra* note 2, ¶ 38.25, at 198; Belsheim, *supra* note 110, at 499-500.

[114] *See generally* 9 WRIGHT & MILLER, *supra* note 11, § 2310, at 48.

[115] Williams v. Collier, 32 F. Supp. 321, 324 (E.D. Pa. 1940). *See generally* MCCLINTOCK, *supra* note 95, § 201, at 538.

[116] *See, e.g.*, Root v. Lake Shore & Michigan Southern R.R., 105 U.S. (15 Otto.) 189, 205 (1882); Hirsch v. Glidden Co., 79 F. Supp. 729, 730 (S.D.N.Y. 1948).

Where the primary cause of action was not of an equitable nature, equity had no jurisdiction over the incidental accounting claim, unless jurisdiction could be justified on one of the two other grounds. 5 MOORE'S, *supra* note 2, ¶ 38.25, at 200 n.12 (citing Universal Pictures Corp. v. Marsh, 36 F. Supp. 241 (N.D. W. Va. 1940)).

[117] *See* MCCLINTOCK, *supra* note 95, § 202-03, at 540. Equity jurisdiction in complicated accounting actions is founded on the inadequacy of the legal remedy. *See also* Kirby v. Lake Shore & Michigan Southern R.R., 120 U.S. 130, 134 (1887).

[118] Harnischfeger Sales Corp. v. Pickering Lumber Co., 97 F. 2d 692, 694-95 (8th Cir. 1938).

[119] *Id.*

accounting action would therefore not lie for unliquidated damages, such as those arising from a breach of contract, or for damages arising from tortious conduct generally.[120] Nor did it extend to every situation where an examination of financial records was required to assess liability or calculate damages;[121] indeed, the assessment of damages was regarded as the "peculiar office of a jury."[122] In short, the common law action for an accounting, whether brought at law or in equity, was relatively narrow in scope.[123]

If reference is had to this limited definition of accounting actions at common law, none of the four cases striking jury demands on complexity grounds appears to come within the ambit of equity's jurisdiction over compli-

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[120] *Id.* United States v. Bitter Root Dev. Co., 200 U.S. 451, 478 (1906) ("There are no accounts between the parties. The cause of action is one arising in tort and cannot be converted into one for an account.").

[121] *See, e.g.*, City of Sedalia v. Standard Oil Co. of Indiana, 66 F.2d 757, 761 (8th Cir. 1933), *cert. denied*, 290 U.S. 706 (1934) ("This suit was brought as a suit in equity for an accounting. There is no allegation of mutual accounts or any other subject of equitable cognizance, but it was the theory of the bill that an accounting is authorized because it will be necessary to consider many transactions between the defendant and its customers, and to examine the books and records . . . . [T]hese facts present no grounds for maintenance of a suit in equity for an accounting.").

[122] Root v. Lake Shore & Michigan R.R., 105 U.S. 189, 207 (1882). For a view that a jury's inability to calculate the amount of damages does not preclude jury trial on the liability issues, see Tights, Inc. v. Stanley, 441 F.2d 336, 340-41 (4th Cir. 1971), *cert. denied*, 404 U.S. 852 (1971).

[123] Despite the relatively narrow definition of "accounts" and accounting at common law, the terms, in common parlance, have come to be employed as a generic reference to financial transactions of every kind, especially where those transactions are recorded in "accounts" for bookkeeping purposes. Thus, modern actions are frequently styled as demands for an "accounting," even though the claim is in reality for money damages. *See, e.g.*, Dairy Queen v. Wood, 369 U.S. 500 (1959). In *Dairy Queen*, the Court held that the label employed in the pleadings was not controlling for purposes of a right to jury trial. Thus, even though the action was characterized as one for an "accounting," the Court held that it was a legal claim for money damages on which there was a right to jury trial. 369 U.S. at 478-79. *Cf.* Sid & Marty Kroft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1174-75 (9th Cir. 1977) (an action is not converted into an accounting action simply because matters involving the professional expertise of accountants are in issue).

As a result of the *Dairy Queen* decision, equity's traditional jurisdiction over accountings incidental to otherwise legal claims no longer exists. 369 U.S. at 473. Equity's power to dispense with jury trial in complicated accounting actions has been limited to situations where a special master is unable to meaningfully assist the jury in deciphering the accounts between the parties. *Id.* at 478. Most lower courts have accepted the *Dairy Queen* Court's statement that "it will indeed be a rare case" where the remedy of law is inadequate because of the complexity of the accounts between the parties. *See, e.g.*, Stockton v. Altman, 432 F.2d 946 (5th Cir. 1970) (complicated partnership accounting triable to jury since matter could be referred to a master); Kennedy v. Lasko Co., 414 F.2d 1249 (1969) (suit for patent infringement seeking an accounting for profits and damages entitled to jury trial). *See also* Broderick v. American Gen. Corp., 71 F.2d 864, 867 (4th Cir. 1934) (decided before *Dairy Queen* but expressing same principle).

Dairy Queen does not affect equity jurisdiction over accounting actions where the duty to account is itself of equitable origin. *See* 9 WRIGHT & MILLER, *supra* note 11, § 2310, at 50.

cated accounting matters. In all of these cases, the underlying cause of action was for money damages, and an "accounting" was required only in the sense that the determination of liability and damages necessitated an examination and analysis of financial records. In *United States Financial* and *Boise Cascade*, for example, the claims were brought for damages under the antifraud provisions of the federal securities laws, and thus sounded in tort rather than accounting.[124] Similarly, in *Bernstein* and *ILC Peripherals*, the complaint sought money damages for various violations of the antitrust laws.[125] Thus, despite the existence of complex corporate accounts and accounting questions in these cases, none can be honestly characterized as a traditional action for an accounting.

Jury competence and factual complexity thus appear to have been generally irrelevant to the adequacy of the remedy at common law.[126] Indeed, with the limited exception of an action for an accounting, the jury's inability to rationally decide the issue in a case did not bear on the existence of a right to jury trial. In this light, it would seem that the power to order non-jury trials in complex cases, other than those for an accounting, was not among the traditional powers of the equity courts. History therefore fails to support the contention of the *Boise Cascade* line of cases—that claims normally triable at law may be transferred into equity whenever the complexity of the case casts doubt on the jury's competence as a factfinder.

Admittedly, as a logical proposition, there is little basis for distinguishing between complex accounting actions and other types of complicated commercial suits; if the adequacy of the legal remedy with respect to the former action is affected by the quality and intelligence of the finder of fact, then the latter should be similarly affected. However, the seventh amendment commands that the right to jury trial shall be preserved. The inquiry must therefore focus *not* on whether trial by jury is the most efficacious means of decid-

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[124] Section 10(b) of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j, proscribes fraudulent conduct in all forms of securities dealings. An action under § 10(b) (or § 11 of the 1933 Act, 15 U.S.C. § 77k), thus appears analogous to the common law action of deceit, an action sounding in tort. L. Loss, 3 SECURITIES REGULATION 1430-44 (2d ed. 1961). The Supreme Court has specifically held that damages for deceit are unavailable in equity "when the like amount could be recovered in an action sounding in tort or for money had and received." Buzard v. Houston, 119 U.S. 347, 352 (1886). *See also* Equitable Life Ins. Soc'y v. Brown, 213 U.S. 25, 50-51 (1909). There is little doubt that actions for money damages under § 10(b) and related sections of the federal securities laws are entitled to jury trial. *See, e.g.*, Aid Auto Stores, Inc. v. Cannon, 525 F.2d 468, 469 n.1 (2d Cir. 1975) (§§ 10(b) and 12 of the 1933 Act); Hopkins University v. Hutton, 488 F.2d 912, 916 (4th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974) (§ 10(b) and §§ 12(2) and 17(a) of the 1933 Act).

[125] Antitrust actions are essentially actions for money damages which are legal claims carrying a right to jury trial on demand. *See* Fleitman v. Welsbach, 240 U.S. 27 (1916), where the Court stated: "[W]e agree with the courts below that when the penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Id.* at 29.

[126] The inadequacy of the legal remedy is the prerequisite to proceeding in equity. *Dairy Queen*, 369 U.S. at 478, 479.

ing the action, but rather on whether there is a right to jury trial, notwithstanding the relative merit of trial to the court alone. Thus, unless the directive of *Ross v. Bernhard* to consider the "practical abilities and limitations of juries"[127] represents a latter day reversal of the preceding 200 years of judicial thought on the scope of the jury right, *Boise Cascade* and its progeny have erred in concluding that trial by jury is not constitutionally mandated in complex civil cases.

C. *The* Ross *Test and Its Relationship to the Right of Trial by Jury Under the Seventh Amendment*

Given the rather limited historical relevance of complexity and jury competence to the right to a jury trial, it is difficult to imagine what the *Ross* Court contemplated when it directed consideration of the practical abilities and limitations of juries. Most of the lower courts which have employed the *Ross* test to ascertain the existence of a right to jury trial have done so without discussion. Indeed, with the exception of the four cases discussed, courts which have applied the *Ross* test have uniformly concluded that the cases involved were amenable to jury resolution.[128]

Of the courts and commentators that *have* considered the issue, most have rejected the contention that the third element of the *Ross* test represents a limitation on the right to jury trial under the seventh amendment.[129] Judge Friendly, for example, has commented that[130]

> the footnote in *Ross v. Bernhard* was part of an argument for applying the Seventh Amendment right to jury trial where it had not been recognized before the merger of law and equity—not a suggestion that the type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it.

On closer examination, it would appear that Judge Friendly's argument against a sweeping interpretation of the *Ross* test is correct. The Court itself failed to consider the practical abilities and limitations of juries in connection with the jury trial question presented in *Ross*. The jury's relative ability as a factfinder was similarly ignored by the Court in subsequent decisions on the scope of the right to jury trial.[131]

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[127] *Id.* at 538 n.10.

[128] *See, e.g.*, Pons v. Lorrilard, 549 F.2d 950, 954 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978); Minnis v. International Union, U.A.W., 531 F.2d 850, 852-53 (8th Cir. 1975); Fellows v. Medford Corp., 431 F. Supp. 199, 201 (D. Or. 1977); Cleverly v. Western Elec. Co., 69 F.R.D. 348, 351 (W.D. Mo. 1975); Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1125 (E.D. Mich. 1974); Dawson v. Contractors Transp. Corp., 467 F.2d 727, 734-41 (D.C. Cir. 1972) (dissenting opinion).

[129] *See* Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 226-28 (N.D. Ill. 1977). *See also* United States v. J. B. Williams Co., 498 F.2d 414, 428-29 (2d Cir. 1974). *Cf.* Crane v. American Standard Co., 490 F.2d 332, 344 (2d Cir. 1973).

[130] United States v. J. B. Williams Co., 498 F.2d 414, 428 (1974).

[131] *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty, 416 U.S. 363 (1974).

Even if it is accepted that the Court intended to engender a case-by-case analysis of jury competence, it does not follow that an entire action may be removed from the jury's province upon a finding that the case, as a whole, is beyond the jury's practical abilities and limitations. As the *Ross* Court observed, the seventh amendment inquiry is a generic one, focusing on whether the claims comprising the law suit are of the sort customarily entitled to jury resolution.[132] Thus, even if it is accepted that jury competence is relevant to the resolution of the seventh amendment question, the analysis should properly center on the jury's capacity to intelligently assess each of the individual types of issues underlying the action; if it were to be concluded that a particular issue was beyond the intellectual abilities of the jury—and hence equitable in nature—it would not preclude jury resolution of the remaining issues. The classification of this issue as equitable, however, *would* preclude jury determination of issues of the same type, and this preclusion would apply not only in the context of the particular law suit under consideration, but to the issue generally, regardless of the circumstances in which it was raised.[133] Using antitrust litigation as an illustration, the existence of a right to jury trial would depend on whether the jury was competent to decide antitrust *claims* generally and *not* on whether the jury was able to decide the particular antitrust *case* at bar. Thus, if the court were to determine that antitrust claims were beyond the analytical expertise of a lay jury, there would be no right to jury trial in antitrust actions generally, no matter how uncomplicated the facts of the individual case. The confusion that such a practice would engender, and the potentially drastic curtailment of the jury right that would result, are additional arguments against attributing constitutional weight to the third element of the *Ross* text.

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[132] 396 U.S. at 538. The Court stated: "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." Thus, although a case might be described as basically equitable, if any legal claim is present, there is a right to jury trial on that issue. *See* Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir. 1964). In *Swofford,* the court emphasized that the nature of the issues comprising the action, rather than the overall posture of the case, is the controlling factor in determining whether there is a constitutional right to jury trial. *Id.*

[133] *See* Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D. Ill. 1974), where the court stated:

> The three *Ross* criteria are guides for determining whether a claim typically has a sufficient quantum of legal elements so that it must be tried to a jury. . . . The inquiry is a generic one, directed toward classifying a group of claims. . . . Once the court finds that the nature of an issue is basically legal, the right to jury trial exists for that entire class of claims. The portion of the *Ross* test which weighs the practical abilities and limitations of juries contemplates a general analysis of the problems typically presented by those claims, not a specific case-by-case analysis for the complexity of the litigation. . . . The test is used to characterize a single issue as legal or equitable. It does not analyze the entire framework of the lawsuit. The focus is a narrow one. Complex lawsuits with multiple claims and parties must be broken down into their constituent parts. If any legal cause is apparent, the right to a jury trial exists.

Id. at 227. *See also In re* Clinton Oil Co. Sec. Litigation, [1977–1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96.015 (D. Kan. 1977).

In summary, a survey of the relevant case law reveals little evidence to support the contention that the *Ross* test was intended to create a general complexity exception to the seventh amendment's jury trial guarantee. Rather, the more reasonable interpretation of the third prong of the *Ross* test is that it was merely a reference to equity's traditional jurisdiction over complex accounting actions.[134] Thus, to the extent that *Bernstein, ILC Peripherals, Boise Cascade,* and *United States Financial* relied on *Ross* to support their decisions to deny jury trial, they would appear to be in error.

D. *The Due Process Clause As a Limitation on the Availability of Jury Trial Under the Seventh Amendment*

It has been demonstrated in the preceding sections of this article that neither premerger practice nor modern interpretations of the seventh amendment right to jury trial lend justification to a test for jury trial based on considerations of jury competence. From a practical perspective, however, it seems absurd to delegate the task of factfinding in complex cases to a decision making body of dubious competence. Such a result, while perhaps mandated by the preservative nature of the seventh amendment, appears repugnant to both the principles of fairness that underlie the jury right, and traditional notions of substantive and procedural due process.

In an attempt to resolve this apparent conflict between the right of trial by jury and the right to a fair trial, at least one author has advocated the adoption of a "due process standard" for the right to jury trial.[135] Under this standard, the due process clause would operate to impose an "upper limit" on the availability of trial by jury under the seventh amendment; in cases where the level of complexity casts doubt on the jury's ability to reach a fair and rational decision, application of the proposed due process standard would permit the trial judge to order a non-jury trial, regardless of whether the case involved legal claims. Thus, adoption of a due process standard in connection with the right to jury trial would permit courts to freely dispense with jury trials in complex cases without forcing them to employ reasoning offensive to traditional seventh amendment analysis.

Despite the relative attractiveness of a due process standard for jury trial, it is nevertheless doubtful that the fourteenth amendment can be legitimately employed to require a non-jury trial in cases where the jury is incapable of reaching an intelligent decision. An obvious constitutional barrier to the adoption of a due process standard is presented by the prospective nature of its proposed application. No due process injury can occur until such time as a jury actually renders an arbitrary verdict. A denial of jury trial on due process

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[134] *See* Van Ermen v. Schmidt, 374 F. Supp. 1070, 1075 (W.D. Wis. 1974). The *Ross* footnote immediately followed a discussion of the *Dairy Queen* case. 396 U.S. at 538.

[135] Note, *Jury Trials in Protracted Commercial Litigation,* 10 U. CONN. L. REV. 775 (1978). *See also* Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 HARV. L. REV. 898 (1979). *See generally,* Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm,* 28 HASTINGS L.J. 1 (1976).

grounds would thus function in the nature of anticipatory relief, since at the time the mode of trial is determined, the injury is merely threatened.[136] Against this *prospect* of harm to the due process rights of the party opposing jury trial must be balanced the *vested* seventh amendment rights of his adversary. Accordingly, courts would seem to be constitutionally required to employ the method of protecting the due process rights of the litigants that least impinges on the right to trial by jury.

Interestingly, federal civil procedure already encompasses a method for protecting the due process rights of litigants. By permitting complex cases to be tried to a jury where a right to jury trial is otherwise indicated, the seventh amendment rights of the litigants are preserved. If the verdict reached is a rational one, no injury is done to the due process rights of either party. Conversely, if the jury's verdict is clearly arbitrary, the court may enter judgment *non obstante verdicto,* thereby preventing the due process injury which would otherwise occur.[137] Admittedly, this method provides no solution to the many administrative difficulties created by the jury trial of complex civil actions. However, it has the virtue of preserving and protecting the constitutional rights of all parties involved. Thus, the Constitution would seem to require that it be employed in preference to a method that more severely restricts the right to jury trial.

Even aside from constitutional considerations, the adoption of a due process standard in the jury trial area portends a host of practical difficulties. An obvious difficulty would lie in formulating precise, objective standards for determining when the complexity of a case is such that due process requires the denial of jury trial. Factors such as the projected length of trial, the number of parties and claims involved, the presence or absence of sophisticated financial or technological concepts, and the quantity of evidence to be adduced at trial are all theoretically relevant to the typical jury's ability to understand and rationally analyze the issue before it. Yet, it is difficult, if not altogether impossible, to specify with precision what combination of these factors must be present to transform the ordinary case into one beyond the practical abilities and limitations of juries.[138] Regardless of where the line were to be drawn, a due process standard that attempted to delineate specific guidelines for denying the right to jury trial would necessarily be somewhat arbitrary.[139]

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[136] A possible exception to this statement is *ILC Peripherals*. There the court had an opportunity to actually assess the practical abilities and limitations of juries before ordering a non-jury trial. *See* text at notes 74-85 *supra*. However, the decision would still seem erroneous in terms of the court's authority to order j.n.o.v. Moreover, there is no way of predicting with certainty whether a second jury would suffer from the same analytical deficiencies as the first.

[137] *See* Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977).

[138] In a sense, the problems inherent in creating due process guidelines for removing complex cases from the jury are the same problems that would arise from the adoption of the *Ross* test as the constitutional standard for jury trial. In each case, the standard would necessarily be arbitrary.

[139] One author has suggested the following guidelines for a due process exception to the seventh amendment's jury trial guarantee:

> (1) For administrative convenience a presumption could be established whereby only specific actions, such as antitrust or securities, could qualify

The problems inherent in the application of a due process standard to the right to jury trial would not be diminished if a strict due process standard were eschewed in favor of a flexible approach—one that granted courts the discretion to grant or deny jury trial depending on the facts of each case. Such a discretionary standard would make jury trial an open issue in *every* law suit, no matter what its relative degree of factual complexity.[140] Litigants would find it virtually impossible to determine in advance whether they were entitled to jury trial. Under such circumstances, trial preparation would become doubly difficult, since the parties would be forced to prepare both possible modes of trial. The administrative nightmare that such a situation would engender could easily surpass the burden presently imposed on the federal courts by jury trials in complex civil actions. In short, however practically desirable it might be to limit the availability of jury trial to those cases presenting issues of relative simplicity, the due process clause would seem neither a practical nor constitutional means of achieving that goal.

III. Alternative Approaches to the Jury Trial Problem in Complex Civil Litigation

In a broader sense, *Boise Cascade* and its progeny are not so much an indictment of the jury's effectiveness as an institution as they are a reaction to the heavy burden imposed on the overtaxed federal judiciary by complex civil litigation. No matter what the ultimate outcome on the jury trial question with regard to either the due process clause or the seventh amendment, the basic task of devising a rational means of dealing with massive law suits remains. In the long run, the answer may lie in redrafting the laws with a view towards eliminating the more esoteric bases for lawsuits; the "jury trial problem" may be more a function of the laws which juries are asked to enforce than a product of any inherent deficiency in the institution of jury trial.[141]

> for evaluation under the test to determine whether the required complexity was present; and (2) the anticipated trial length should be estimated to determine whether it is likely that highly skilled and experienced persons will be represented adequately in the jury. Uniformity may be achieved by setting a fixed time period to serve as the standard.

Note, *Jury Trials in Protracted Commercial Litigation*, 10 U. Conn. L. Rev. 775, 798-99 & n.118 (1978) (the author suggested four weeks). This proposal suffers from considerable analytical and practical difficulties. For one thing, if it is accepted that the due process clause commands non-jury trial in cases beyond the comprehension of the jury, there would seem to be no basis for limiting the test to securities or antitrust actions. Similarly, the requirement that the length of trial be in excess of four weeks does not account for those cases which take under four weeks for trial, but which are nonetheless beyond the analytical skill of the jury.

[140] See *Radial Lip*, 76 F.R.D. at 227 ("Jury competence would be an open question in every law suit.").

[141] *See* Shaffer, *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16, col. 4, stating: "All this may say less about the jury system than about the laws juries are being asked to consider. If antitrust and securities cases are so difficult to comprehend it may be a sign that in those areas the law itself needs to be reconsidered. Might it also mean that juries are being forced to render judgments on the bases of legal theories that are losing touch with reality?"

Meanwhile, courts are not powerless to lift themselves out of the administrative quagmire engendered by mammoth civil suits. Numerous procedural devices can and *should* be employed by courts and litigants alike to pare the complex case down to a manageable size. The liberal and effective use of pre-trial conferences,[142] for example, can organize and streamline the action for trial.[143] In a similar manner, issues which are uncontested or not fairly controvertible can be eliminated from the action by agreement of the parties or through the vehicle of partial summary judgment.[144] In an appropriate case, magistrates or special masters can be appointed by the court to oversee pre-trial discovery, prepare factual memoranda, or assist generally in preparing the action for trial.[145] Severance of parties or claims, wherever it is possible to do so without prejudice to the rights of the litigants, can also aid in simplifying the complicated case, as can other procedural duties too numerous to mention here.[146]

Just as pre-trial devices can be utilized to reduce the complexity of the litigation, methods are available for assisting the jury both before and after the actual trial. Some courts have permitted jurors to take notes during trial.[147] Similarly, in some instances juries have been allowed to take transcripts of testimony and trial exhibits with them into the jury room.[148] De-

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[142] The Southern District of New York has long employed an extensive system of pretrial conferences to simplify cases for trial. *See generally* Solomon, *Techniques for Shortening Trials,* 65 F.R.D. 485 (1974); Pollack, *Pretrial Procedures More Effectively Handled,* 65 F.R.D. 475 (1974).

[143] Pollack, *Pretrial Conferences,* 50 F.R.D. 451, 463 (1970) ("Cases where counsel have anticipated trials lasting weeks or even months have been collapsed into satisfactory trials of less than six to twelve court days.").

[144] *Id.* at 463-65 ("The purpose of the pretrial procedure is to endeavor to avoid wasting time at trial in hearing proof on substantive matter which *ought not reasonably be controverted* or matter which opposing counsel, while not admitting, concedes he will not controvert at trial.") (emphasis in original).

[145] This procedure was apparently employed in *In re* United States Financial Sec. Litigation. *See* Brief for Appellant Union Bank at 17, *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (1977).

[146] The suggestions appearing in this article are not intended as a comprehensive analysis of procedural tactics for dealing with complex cases. An excellent and exhaustive discussion of the topic appears in the MANUAL FOR COMPLEX LITIGATION (West Publishing Co., 1977), and its forerunner, *The Handbook of Recommended Procedures for the Trial of Protracted Cases, published in* 25 F.R.D. 351 (1960). The Manual takes the position that "there are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management." MANUAL FOR COMPLEX LITIGATION, p. ii.

[147] *See* Note, *Jury Trials in Protracted Commercial Litigation,* 10 U. CONN. L. REV. 775, 785 & nn.37-38 (1978), discussing the methods employed by Judge Newman in S.C.M. Corp. v. Xerox Corp., Civil No. 15,807 (D. Conn. filed July 31, 1973). The author takes the view that "[w]hile these measures may aid jurors to some degree, the jury is still at a disadvantage compared to a judge." *But see* Kalven, *The Dignity of the Civil Jury,* 50 U. VA. L. REV. 1055 (1964). Professor Kalven argues that on the basis of statistical evidence, there is little difference between the abilities of judges and juries to decide difficult cases. *Id.* at 1064-66.

[148] This procedure was employed in S.C.M. Corp. v. Xerox Corp., 77 F.R.D. 10, 15 (D. Conn. 1977) (pre-trial ruling). For a complete description of the methods employed to assist the jurors in *S.C.M.* see Note, *Jury Trials in Protracted Commercial Litigation,* 10 U. CONN. L. REV. 775, 785 (1978).

tailed instructions on the applicable law, especially when given *before*, as well as after the presentation of the evidence, may also prove helpful in simplifying the jury's task. A well drafted, detailed outline of the logical steps to be followed in deciding the case should do much to direct the jury's analysis along the appropriate path. This benefit could be enhanced, moreover, by permitting the jury to have access to the court's written instructions during its tenure in the jury room.[149] Finally, special interrogatories pertaining to the facts relevant to the issue of ultimate liability could be propounded to the jury pursuant to rule 49(a) or (b) of the Federal Rules of Civil Procedure as a final check on the rationality of the jury's verdict.[150] In this manner, the trial judge could conveniently scrutinize the jury's verdict for any indications of arbitrariness.

Admittedly, employment of the procedural methods suggested in the preceding paragraphs will entail the expenditure of considerable judicial energy, but if means are available to the courts to reduce complex cases to an intelligible level, then the seventh amendment commands that they be employed in preference to denying or curtailing the jury right. Effective utilization of pre-trial procedure will avoid not only the constitutional difficulties inherent in the denial of jury trial in complex civil cases, but will afford significant practical benefits as well. The early clarification of claims, for example, is likely to encourage the responsible settlement of law suits,[151] thereby eliminating the need for a trial of any kind. In sum, it seems practical and sensible to pursue existing alternatives, especially where those alternatives may afford a substantially shortened, and more easily managed trial.

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[149] Access to judges' instructions is not yet a widely permitted practice. *But see* Straun & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUD. 478, 483 (1976). The authors found that many jurors do not understand judges' oral instructions. There would thus seem to be a special need to propound written instructions to the jurors in complex civil cases.

[150] Rule 49(a) provides in relevant part:

> [T]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact . . . or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

Rule 49(b) provides in pertinent part:

> The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. . . . When the answers are consistent with each other, but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

[151] Pollack, *Pretrial Conferences*, 50 F.R.D. at 462.

CONCLUSION

Neither the seventh amendment nor the due process clause provides constitutional justification for striking demands for jury trial in complex civil cases presenting legal claims. Both historical practice and modern interpretations of the seventh amendment defy the contention that jury competence is generally relevant to the adequacy of the legal remedy, insofar as its inadequacy is a prerequisite to obtaining equitable relief.[152] Moreover, the availability of judgment *non obstante verdicto* affords adequate protection against the due process violations that would otherwise result from clearly arbitrary jury verdicts. Even aside from these constitutional difficulties, the creation of a complexity exception to the seventh amendment would engender a host of practical problems for courts and litigants alike. The simpler, more reasonable approach to the problem of complex civil litigation is to develop and utilize effective procedural methods for reducing the "monster case" to a manageable size.

CONSTANCE S. HUTTNER

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[152] *But see*, Parklane Hosiery Co. v. Shore, ___ U.S. ___, 99 S. Ct. 645 (1979), suggesting that the Court may be moving toward a functional approach to determine the right to jury trial. If the Court were to ultimately embrace a test that conditioned the right to jury trial upon its relative functional desirability, jury competence would presumably become relevant to the resolution of the seventh amendment question. *See generally* Kane, *Civil Jury Trial: The Case For Reasoned Iconoclasm*, 28 HASTINGS L.J. 1 (1978). *But see Parklane Hosiery, supra* (Rehnquist, J., dissenting).