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# The Jury Trial in Antitrust Cases: An Anachronism?

*Edward D. Cavanagh*<sup>†</sup>

## Introduction

The Seventh Amendment of the United States Constitution provides in relevant part that “[i]n suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.”<sup>1</sup> The jury trial has long been the foundation of the American civil justice system and is deeply embedded in American culture.<sup>2</sup> As the Supreme Court has observed, “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>3</sup> Consistent with

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<sup>1</sup> U.S. CONST. amend. VII.

<sup>2</sup> See *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 65 n.4 (S.D.N.Y. 1978) (citing 5 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE §38.02 (2d ed. 1977)) (“The jury is like rock music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon the law.”); see also *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 419-20 (9th Cir. 1979) (“The right to jury trial arrived on the shores of this country with the first English colonists. The original Jamestown charter guaranteed all the rights of Englishmen to the colonizers, including trial by jury. During the next two hundred years of development in colonial America, the right to jury trial continued to expand. The principles embodied in jury trials found a receptive atmosphere in the egalitarian principles of the colonists. By 1776, the right to jury trial existed, in one form or another, in each one of the thirteen colonies. In fact, one of the primary grievances against England at the time of the Declaration of Independence was the restriction on the right to jury trial. Colonial administrators had been circumventing the right by trying various cases, both criminal and civil, in the vice-admiralty courts.”).

<sup>3</sup> *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); see also *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”).

that approach, the Court has construed the Seventh Amendment broadly to protect the right to jury trial.<sup>4</sup>

Nevertheless, “[t]he surface simplicity of [the Seventh Amendment] is beguiling for the exact scope of its application was unclear even when it was first adopted.”<sup>5</sup> Applying the so-called historical test,<sup>6</sup> courts have upheld the right to jury trial when the issue in question is essentially legal in nature, irrespective of whether the right in question existed at the time the Seventh Amendment was adopted.<sup>7</sup> Notwithstanding the popular reverence for the jury system and the Supreme Court’s expansive view of the Seventh Amendment, the use of lay jurors to decide complicated fact issues in antitrust cases, as well as in other types of cases, has come under criticism, notably from the judiciary.<sup>8</sup>

The attack on the use of juries in antitrust cases has proceeded in two distinct phases. Phase one took place in the 1970s, a time that roughly coincides with the federal judiciary’s embrace of the Chicago School

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<sup>4</sup> See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (finding that where the issue involves money damages and is clearly legal in nature, the court is not bound by a party’s characterization of its claim as equitable); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (finding the fact that the plaintiff’s claim is equitable in nature cannot preempt defendant’s right to a jury trial on its antitrust counterclaim).

<sup>5</sup> *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 421 (9th Cir. 1979).

<sup>6</sup> *Id.*; see *infra* notes 36-38 and accompanying text.

<sup>7</sup> *In re U.S. Fin. Sec. Litig.*, 609 F.2d at 421 (citing *Parsons v. Bedford*, 28 U.S. 433, 446-447 (1830)).

<sup>8</sup> See *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 447-48 (N.D. Cal. 1978) (“Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses, most of whom had doctorate degrees in their specialties. This perception was confirmed when the court questioned the jurors during the course of their deliberations and after they were discharged. When asked by the court whether a case of this type should be tried to a jury, the foreman of the jury said, ‘If you can find a jury that’s both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don’t know anything about that.’ Several of the other jurors indicated that they thought that the major stumbling block was the requirement that the verdict be unanimous. When they were questioned after the trial, most of the jurors indicated that they thought a complex antitrust case like this one should be tried to the court.”) (citation omitted); see generally Peter W. Sperlich, *The Case for Preserving Trial by Jury in Complex Civil Litigation*, 65 JUDICATURE 394, 397 n.2 (1982) (citing speeches and articles by then Chief Justice Warren Burger that detail his “rather modest enthusiasm for trial by jury” because “the jury system does not work and, in any case, we cannot afford it”).

revolution in antitrust thinking.<sup>9</sup> Phase one featured a full-frontal assault on the right to a jury trial. In antitrust cases where a jury trial had been demanded, defendants seeking a bench trial moved to strike the jury demand on the grounds that the matter was too complicated for a lay jury to decide, thus invoking the so-called complexity exception to the Seventh Amendment.<sup>10</sup> Although some trial-level courts have embraced this approach,<sup>11</sup> the Ninth Circuit categorically rejected the complexity exception.<sup>12</sup> Only the Third Circuit has accepted it.<sup>13</sup> The Supreme Court has not weighed in on the issue, but the overall trend in federal courts has been to expand—not limit—the right to a jury trial.<sup>14</sup> By 1988, the complexity exception seemed dead in the water.

Phase two is a more recent phenomenon in which the use of lay juries in private treble damage actions has come under increasingly sharp attacks from antitrust scholars. The focus of the academic criticism is practical rather than theoretical or legalistic.<sup>15</sup> Academic critics of the traditional jury system contend that the lay jury is ill-suited to resolve factual disputes arising in ever-more technical and complicated twenty-first century market settings. Among other things, critics contend that antitrust issues are beyond the ken of the average juror and that “juries misunderstand essential economic concepts, fail to comprehend their instructions, and make decisions based on fairness intuitions that are irrelevant in antitrust analysis.”<sup>16</sup> Some see jurors as inherently biased in favor of the little guy in what they view as a David versus Goliath

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<sup>9</sup> See, e.g., *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 481 n.4 (1977).

<sup>10</sup> *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1088 (3d Cir. 1980).

<sup>11</sup> See, e.g., *ILC Peripherals Leasing Corp. v. IBM Corp.* 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980); *Bernstein v. Universal Pictures*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978).

<sup>12</sup> *In re U.S. Fin. Sec. Litig.*, 609 F.2d at 423.

<sup>13</sup> See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1088.

<sup>14</sup> See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

<sup>15</sup> See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 63 (2005); Daniel Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 38 (2008); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797 (1987).

<sup>16</sup> Crane, *supra* note 15, at 35.

lawsuit.<sup>17</sup> Former Harvard Law School Professor and Antitrust Division head Donald Turner has stated, “There would be significant gains from eliminating jury trials from private antitrust actions.”<sup>18</sup> Similarly, University of Iowa Law Professor Herbert Hovenkamp has stated that “[j]ury trials are a truly unfortunate way to decide most of the contested issues in complex antitrust cases” and has described antitrust juries as “the weak link in a system where most of the relevant evidence is economic and technical.”<sup>19</sup>

Critics of the jury system point out that among other nations with antitrust regimes, the United States stands virtually alone in utilizing lay jurors as fact finders in antitrust cases involving complex economic evidence, suggesting that the United States is out of step with the rest of the world.<sup>20</sup> Critics further observe that curtailing the right to a jury would not likely adversely affect antitrust litigation because as a practical matter, jury participation in resolving antitrust disputes is severely limited.<sup>21</sup> Most public antitrust enforcement actions in the United States do not involve juries. For example, many actions brought by the Antitrust Division under section 2 of the Sherman Act and Section 7 of the Clayton Act seek equitable remedies to which the right to a jury does not attach. Likewise, many, if not most, antitrust criminal cases are resolved prior to trial.<sup>22</sup> The same is true for public civil enforcement actions. Furthermore, there is no right to a jury trial in Federal Trade Commission enforcement actions, which are typically handled administratively.

Critics argue that lay juries are simply not up to the task of resolving highly complex disputes regarding ever-evolving technology settings.<sup>23</sup>

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<sup>17</sup> See Barbara S. Swain & Dan R. Gallepeau, *What They Bring to Court: Juror Attitudes in Antitrust Cases*, 8 ANTITRUST 14 (1994) (“Many jurors walk into antitrust cases with a jaundiced eye toward a large corporate defendant.”).

<sup>18</sup> Turner, *supra* note 15, at 812 (stating the “elimination of juries would increase the probability of accurate results”).

<sup>19</sup> HOVENKAMP, *supra* note 15, at 63.

<sup>20</sup> *Id.*

<sup>21</sup> Crane, *supra* note 15, at 35 (observing that “only a small fraction of [private] cases ever find their way to a jury”).

<sup>22</sup> *Id.*

<sup>23</sup> See William Watkins, *We Need a Specialized Patent Trial Court*, LAW 360, Oct. 20, 2014, <http://www.law360.com/articles/583409/we-need-a-specialized-patent-trial->

For them, getting the “right” answers is more important than the fact-finding process; technocracy trumps democracy. However, this distrust of juries is not universal. Not everyone disparages the abilities of lay jurors. Just as antitrust defendants seek to avoid juries, antitrust plaintiffs generally welcome juries as fact finders.

Although the Supreme Court has stayed out of the debate over the existence of a complexity exception to the Seventh Amendment, it has not been unsympathetic to concerns about the competence of lay juries. The Court has frozen juries out of the decision-making process in private antitrust cases in other ways, including (1) granting motions to dismiss, (2) granting summary judgment motions, (3) excluding or limiting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>24</sup> and (4) denying class certification motions. Indeed, the Supreme Court has observed that antitrust cases may be too complicated for judges, and *a fortiori* juries, thus leading to erroneous outcomes that may serve to hinder, rather than to promote, competition.<sup>25</sup> In *Bell Atlantic Corp. v. Twombly*,<sup>26</sup> the Court endorsed the motion to dismiss as a cost containment tool to police insubstantial private treble damages actions, exhorting trial judges to carefully screen antitrust complaints at the motion to dismiss stage in order to avoid waste of court and private resources.<sup>27</sup>

This judicial response—finding procedural vehicles to dispose of private suits pretrial, coupled with the fact that defendants, not plaintiffs, want to avoid juries in private antitrust actions—is very telling and strongly suggests that criticisms of the jury system are, in reality, attacks on the private right of action in antitrust cases itself. However, the question of whether there should be a private right of action is not up to the courts; Congress has already made that decision.<sup>28</sup>

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court (“For jurors serving in patent trials, courts could require the jurors to possess a formal education in the sciences or technology—and in some cases specialized knowledge in the particular field related to the patent.”).

<sup>24</sup> 509 U.S. 579 (1993).

<sup>25</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

<sup>26</sup> 550 U.S. 544 (2007).

<sup>27</sup> *Twombly*, 550 U.S. at 559.

<sup>28</sup> See 15 U.S.C. § 15 (1964) (creating a private right of action for those aggrieved by antitrust violations).

This Article argues the complexity exception is inherently flawed and that the jury system, although by no means perfect, remains the best vehicle for resolving disputes in antitrust cases brought in the federal courts, however complex. First, antitrust issues may well be complicated and difficult to resolve, but they are not beyond the ken of jurors. In our adversarial system, attorneys and their clients have the responsibility of making their cases understandable to lay jurors.<sup>29</sup> As more fully discussed below,<sup>30</sup> courts have a variety of tools and mechanisms to ease the task of jurors. Critics of the lay jury denounce the system, but they never come forward with a viable alternative to the jury trial. After all, criticisms leveled at lay jurors would seem to apply with equal force to generalist judges—the only real alternative to the jury.<sup>31</sup>

Second, in encouraging trial courts to dispose of private antitrust suits earlier and earlier on the litigation timeline, the Supreme Court may be thwarting a fundamental goal of the Federal Rules of Civil Procedure that meritorious litigants should have their day in court.<sup>32</sup> Worse, the litigation model being shaped by the Supreme Court is strikingly similar to the common law model, which was designed to avoid trial altogether and which the drafters of the Federal Rules pointedly rejected.<sup>33</sup>

Third, and often overlooked in the debate over the merits of juries in antitrust cases, is that having antitrust disputes resolved by juries consisting of ordinary citizens promotes democratic values and lends legitimacy to the judiciary's function of resolving legal disputes among citizens.<sup>34</sup>

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<sup>29</sup> See John F. Grady, *Trial Management and Jury Control in Antitrust Cases*, 51 ANTITRUST 249, 251 (1982) (providing tips for guiding a jury in understanding crucial facts).

<sup>30</sup> See *infra* notes 208-30 and accompanying text.

<sup>31</sup> See Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 ANTITRUST 99, 109 (1992) (asserting a generalist judge can better grasp antitrust issues than jurors, but is still relatively ignorant in complex matters such as antitrust questions).

<sup>32</sup> See FED. R. CIV. P. 1.

<sup>33</sup> See Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 636 (2015) (“[C]ommon law procedures were complicated and difficult to navigate, and . . . one misstep could lead to dismissal with prejudice. . . . The Federal Rules eliminated the land mines from the litigation landscape so as to facilitate trial.”).

<sup>34</sup> Among other things, the jury verdict “provides a needed check on judicial power.” *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 942 (E.D. Pa. 1979), *rev'd on other grounds*, 631 F. 2d 1069 (3d Cir. 1980). In addition,

## I. The Right to a Jury Trial in Antitrust Actions

### A. Evolution of the Law

The Supreme Court has never directly addressed the question of whether the source of the right to a jury trial in antitrust cases is constitutional or statutory. Despite some “tantalizing language” in earlier Supreme Court decisions suggesting that the right to a jury in antitrust matters is statutory in nature, the lower courts have uniformly held that “no right to jury trial flows directly from the antitrust laws.”<sup>35</sup> Accordingly, the right to a jury trial in antitrust cases is rooted in the Constitution.

Interestingly, the Seventh Amendment does not *confer* the right to a jury. Rather, it provides that “[i]n [s]uits at common law . . . the right of trial by jury shall be *preserved*.”<sup>36</sup> A narrow reading of this language would suggest that, unless there was a right to jury trial in 1791—the year the Seventh Amendment took effect—no such right would exist today. Courts have rejected this view as unduly narrow and instead adopted the historical test.<sup>37</sup> This entails a two-step inquiry: (1) whether the issues to be tried are legal in nature or analogous to legal issues; and (2) whether the action was of the type that juries tried at common law.<sup>38</sup> Antitrust damage claims, which are sometimes described as statutory torts,<sup>39</sup> are

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the jury ruling offers the judiciary a “contemporaneous expression of community values that bear on the issues in each case.” Ernest Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977).

<sup>35</sup> *Standard Oil Co. of Cal. v. Arizona*, 738 F.2d 1021, 1025 (9th Cir. 1984).

<sup>36</sup> U.S. CONST. amend. VII (emphasis added).

<sup>37</sup> *See In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 421-23 (9th Cir. 1979) (noting that “courts are not rigidly bound to the procedural rules and forms of action as they existed in 1791” and that “the historical test is not static”); *see also Standard Oil Co. of Cal.*, 738 F.2d at 1028-31 (upholding the right to jury trial in an action by a state *parens patriae*).

<sup>38</sup> *Standard Oil Co. of Cal.*, 738 F.2d at 1027; *see also Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (“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.”).

<sup>39</sup> *See Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556, 565-69 (1982); *Grip-Pak, Inc. v. Ill. Tool Workers, Inc.*, 694 F.2d 466, 473 (7th Cir. 1982).



clearly legal actions and qualify for trial by jury under the historical test. The result has been a broad expansion of the constitutional right to a jury trial in antitrust actions as well as other federally based claims. In *Beacon Theatres v. Westover*,<sup>40</sup> an outdoor theatre operator challenged the exclusive licenses granted by film distributors to theatres operated by Fox, a rival exhibitor.<sup>41</sup> Fox initiated a declaratory judgment action against Beacon Theatres seeking a declaration that its exclusive licenses were lawful.<sup>42</sup> Beacon then counterclaimed, alleging a violation of section one of the Sherman Act, and demanded a jury trial.<sup>43</sup> The trial court denied the request for a jury, ruling that the issues were basically equitable in nature.<sup>44</sup> The Ninth Circuit affirmed, holding that, when read as a whole, Fox's complaint stated a claim for equitable relief.<sup>45</sup> The Supreme Court reversed, holding that neither the Declaratory Judgment Act nor the Federal Rules of Civil Procedure can justify denial of a jury trial on antitrust issues.<sup>46</sup> The Court recognized that where the facts give rise to both equitable and legal claims, the trial court will necessarily have some discretion in deciding which issue to try first; however, in accordance with the Seventh Amendment, "discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial."<sup>47</sup> Accordingly, the existence of equitable issues cannot preempt the right to a jury trial on legal issues.

Notwithstanding the sweeping language of *Beacon Theatres* favoring jury trials, critics of jury trials in treble damages actions continue to argue that the right to a jury trial in antitrust cases is not absolute and should be curtailed where complex factual issues are beyond the ability of lay jurors to comprehend.<sup>48</sup>

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<sup>40</sup> 359 U.S. 500 (1959).

<sup>41</sup> *Beacon Theatres*, 359 U.S. at 502.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 503.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 504-05.

<sup>46</sup> *Id.* at 508-09.

<sup>47</sup> *Id.* at 510.

<sup>48</sup> Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1, 5 (1981).

## B. Critics Have Not Made the Case for a Complexity Exception

Given the constitutional underpinnings of the right to a jury trial in civil cases, the Supreme Court's historical support of that right, the trans-substantive nature of federal procedural rules and the popular reverence for juries, proponents of the complexity exception face a heavy burden of proof. They have not made their case. The theoretical basis for any complexity exception is weak. There are three arguments that have been put forward to support this so-called complexity exception. First, at common law, complex cases were typically referred to the equity courts where no right to a jury trial existed.<sup>49</sup> Second, the Supreme Court in *Ross v. Bernhard*<sup>50</sup> limited the right to a jury trial, stating in a footnote that one factor in determining the legal nature of a claim (and hence the right to a jury trial) is "the practical abilities and limitations of juries."<sup>51</sup> Third, where the facts are so complicated that the jury cannot render a rational verdict, utilizing the jury as fact-finder would violate the due process clause of the Fifth Amendment.<sup>52</sup> Courts have uniformly rejected the first argument.<sup>53</sup> The second argument based on the *Ross* footnote has gotten some traction in the lower courts.<sup>54</sup> Ultimately, however, that argument has not won over the courts. If the Supreme Court had intended to articulate a major limitation on the right to a jury trial—after years of expanding that right—it is most unlikely that this limitation would have been buried in a footnote *with no explanation whatsoever* and no citation to prior authority.<sup>55</sup> Moreover, in the years since *Ross*, the Supreme Court has not relied on that decision to any significant extent to limit the right

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<sup>49</sup> *Id.*

<sup>50</sup> 396 U.S. 531 (1970).

<sup>51</sup> *Ross*, 396 U.S. at 538 n.10.

<sup>52</sup> *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1088 (3d Cir. 1980).

<sup>53</sup> *Id.* at 1083.

<sup>54</sup> *See, e.g., In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 104 (W.D. Wash. 1976); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 66-67 (S.D.N.Y. 1978); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 926 (E.D. Pa. 1979), *rev'd on other grounds*, 631 F.2d 1069 (3d Cir. 1980) (citing cases that have supported use of *Ross* factors when determining Seventh Amendment questions).

<sup>55</sup> *Zenith*, 478 F. Supp. at 926.

to a jury trial in civil cases.<sup>56</sup> In any event, having upheld the jury demand, the Court was clearly not concerned that the *Ross* case itself was beyond the ken of jurors; therefore the footnote is, at best, mere dicta.<sup>57</sup> More likely, the language in the *Ross* footnote simply “refers to the established exception to the Seventh Amendment in administrative proceedings and specialized courts of equity.”<sup>58</sup>

The third argument based on due process is the most challenging. The contention that a verdict based on complex facts that the jury did not understand is irrational and cannot stand as a matter of law has visceral appeal. In the end, however, the due process argument is fundamentally flawed and unpersuasive. As a threshold matter, it is questionable that Fifth Amendment rights would so easily displace Seventh Amendment rights. The Fifth Amendment prohibits the federal government from interfering with a citizen’s life, liberty, or property without due process of law.<sup>59</sup> A litigant would suffer loss of property only *after* a supposedly incompetent jury has rendered a verdict that is arbitrary.<sup>60</sup> At the time a jury is demanded or empaneled, any injury to the litigant is merely speculative.<sup>61</sup> Depending on how the jury decides, the litigant may have no claim; it is impossible to predict when a jury will be unable to understand the issues and act arbitrarily. In any event, the aggrieved litigant has ample weapons with which to attack an arbitrary verdict.

Moreover, the Due Process clause does not entitle a litigant to a jury of a particular composition or one that is to its liking. Rather, it entitles them only to a jury that is representative of the community and that does not systematically exclude identifiable groups from that community.<sup>62</sup>

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<sup>56</sup> On the contrary, the Court has emphasized that the Seventh Amendment “requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.” *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

<sup>57</sup> See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979) (declining to “read the *Ross* footnote as establishing a new interpretation of the Seventh Amendment”).

<sup>58</sup> *Zenith*, 478 F. Supp. at 930.

<sup>59</sup> U.S. CONST. amend. V.

<sup>60</sup> *Sperlich*, *supra* note 8, at 411.

<sup>61</sup> *Id.*

<sup>62</sup> See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (noting intentional racial discrimination in jury selection improperly deprives the defendant of a trial by his or her peers).

In our adversary system, counsel's job is to present a case that puts its client's best foot forward. Critical to the success of that task is presentation of the evidence in a way that the fact finder can understand.<sup>63</sup> If counsel cannot do that, it has failed in its basic mission. It is no answer for counsel to say that the proof was there, but the jury was simply too incompetent to comprehend it. This is not to say that antitrust issues are not complicated; many such issues are, indeed, complicated. Nevertheless, counsel must find a way to present the facts to the jury in digestible doses. As more fully discussed below,<sup>64</sup> there are a variety of practices and procedures that the court and counsel can invoke to make the facts comprehensible to a lay jury. In the end, the complexity argument is more an excuse for failure to win a case than a reason to disqualify the lay jury. Furthermore, proponents of the complexity argument have left many questions unanswered. Assuming, *arguendo*, that some antitrust cases are too complex for a jury to decide, who should serve as the fact finder? The default answer, of course, is the judge. But, is the judge really a *better*—it is clearly the *only*—alternative to the jury? The same logic that leads to the conclusion that antitrust issues are too complex for lay jurors would seem to apply equally to generalist judges.<sup>65</sup> In other words, if antitrust issues are too complicated for a lay jury, then these same issues are probably too complicated for generalist judges. Indeed Judge Easterbrook argues forcefully that judges are no better equipped to decide complex antitrust issues than lay jurors:

[W]e commit the resolution of tough [antitrust] questions to amateurs. Jurors are amateurs, and so are judges. Judges are generalists. At a ratio of fifty cocaine cases to ten securities cases to five pension cases to two tax cases to one antitrust case, how is a judge to stay on top of this field? This is roughly the ratio for the last term at my court. And don't forget the civil rights, torts, and contracts cases. Acquiring and assessing information is easier for a judge who visits the subject occasionally than for a juror who visits it once in a lifetime, but a judge is still a dunce compared with the most junior professor of business at a third-rate college.<sup>66</sup>

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<sup>63</sup> See generally Grady, *supra* note 29, at 253-58 (detailing ways in which counsel can make a complicated case understandable to a lay juror).

<sup>64</sup> See *infra* notes 208-32 and accompanying text.

<sup>65</sup> Easterbrook, *supra* note 31, at 109.

<sup>66</sup> *Id.*

Similarly, Judge Higginbotham has argued that judges are not necessarily superior fact finders to juries in complex antitrust cases: "Apart from the occasional situation in which a judge possesses unique training . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion."<sup>67</sup>

Professor Hovenkamp, on the other hand, has argued that the judge is a better choice than the jury in complex cases.<sup>68</sup> Oversimplifying the role of the jury, he reduces the jury's fact-finding function to two areas: (1) determining subjective intent and (2) choosing among dueling expert witnesses.<sup>69</sup> First, Hovenkamp argues that jurors have difficulty distinguishing between lawful aggressive competitive intent and unlawful anticompetitive intent.<sup>70</sup> He observes that jurors often misinterpret the "rhetoric of competition"—we must destroy or kill the competition—and penalize industrious companies who are simply seeking to outsell their rivals.<sup>71</sup> Hovenkamp suggests that judges, unlike juries, can distinguish between lawful aggressive competitive intent and unlawful exclusionary intent and are able to ignore such intent distinctions when irrelevant.<sup>72</sup> At the same time, he acknowledges that judges do allow juries to hear proof of subjective intent as evidence of unlawful exclusionary behavior.<sup>73</sup>

Hovenkamp's observations may well be correct, but his solution—eliminate the jury—seems extreme. A principal function of the trial judge is to exclude from the jury evidence that is inadmissible. If the court permits the jury to entertain inadmissible evidence, its judgment is subject to review and reversal in an appellate forum. The jury can hardly be blamed if it considers evidence that the court permits to slip through the

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<sup>67</sup> Higginbotham, *supra* note 34, at 53; *see also* DOROTHY K. KAGEHIRO & WILLIAM S. LAUFER, HANDBOOK OF THE PSYCHOLOGY AND LAW 89 (1992) ("Because of this lack of confidence in juries, judges are often favored as the fact finder. However, judges may be in no better position than juries to adequately understand much of the technical information that arises in complex cases. Although better educated than the average juror, judges are not likely to be trained in specific technical areas.").

<sup>68</sup> HOVENKAMP, *supra* note 15, at 61-62.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 61.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

evidentiary screen. Often, evidence of subjective intent may be admitted into evidence for purposes other than establishing unlawful exclusionary conduct. In those cases, it is incumbent on the court to instruct the jury that it may not use evidence of aggressive competitive intent to establish unlawful exclusionary conduct.

With respect to dueling experts, Hovenkamp is concerned that the lay jury will be adrift in a sea of confusion and will “base[] its decision on such things as rhetorical skills, personalities or the expert’s rate of pay.”<sup>74</sup> He points out that, although in theory a lay person could learn over time how to effectively evaluate expert testimony, for most people jury service is a once in a lifetime endeavor; realistically, there will not be subsequent opportunities for jurors to hone their fact finding skills.<sup>75</sup> The judge, on the other hand, does have the opportunity to evaluate expert evidence in case after case, thereby giving the court a comparative advantage in this endeavor.<sup>76</sup>

This comparative advantage for the judge, however, does not appear to be significant. Hovenkamp acknowledges that even judges may have difficulty choosing among contending experts and “often the question is given to the jury because the judge did not know how to answer it and therefore declined to rule at an earlier stage of the litigation.”<sup>77</sup> At the end of the day, Hovenkamp’s observations on jury performance in antitrust cases are interesting, but at most show that antitrust issues may pose a challenge for any fact finder—whether judge or jury—and not compelling evidence of the need to jettison juries in complex antitrust cases. This is not to suggest that the judge has no fact-finding role, even where a jury is empaneled. Traditionally, the roles of judge and jury have been sharply defined: the judge decides the legal issues; and the jury decides the facts. In practice, however, the line demarcating law from facts is not as bright as might appear at first blush. The Supreme Court observed in *Pullman-Standard v. Swint*:<sup>78</sup> “The Court has previously noted the vexing nature of the distinction between questions of fact and

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<sup>74</sup> *Id.* at 61-62.

<sup>75</sup> *Id.* at 62.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 456 U.S. 273 (1982).

questions of law. . . . Nor do we yet know of any . . . rule or principle that will unerringly distinguish a factual finding from a legal conclusion."<sup>79</sup>

The quintessential fact question involves events or occurrences, so-called historical facts. Notice, intent, and state of mind are common illustrations of historical facts established by inference. Law, on the other hand, "means a body of principles and rules which are capable of being predicated in advance and which are so predicated, awaiting proof of the facts necessary for their application."<sup>80</sup> Between the two poles of "pure question of fact" and "pure questions of law" lies a significant middle ground of mixed questions of law and fact, sometimes referred to as questions of ultimate fact. Ultimate facts differ from pure questions of fact in that they are typically outcome determinative facts, derived from historical facts that imply application of a legal standard.<sup>81</sup> Ultimate facts are also distinct "from pure legal conclusions, which follow necessarily from proof of historical facts."<sup>82</sup> Whether a case is barred by *res judicata* or a statute of limitations or whether there is sufficient standing or jurisdiction are examples of legal conclusions that follow from proof of certain historical facts.<sup>83</sup>

Mixed questions have varying degrees of factual content. Where the factual content is relatively high and the law content relatively low, the mixed question is decided by the jury.<sup>84</sup> Thus, issues of proximate cause, due care, timeliness, and notice are typically referred to juries.<sup>85</sup> The unifying feature of these issues is that they involve facts that operate on examination or assessment of human behavior, and therefore, precisely the kinds of questions that are tailor-made for juries.<sup>86</sup> Decisions turn

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<sup>79</sup> *Pullman Standard*, 456 U.S. at 288 (citation omitted).

<sup>80</sup> Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924).

<sup>81</sup> William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 470 (1983).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 471.

<sup>85</sup> *Id.* at 471-72.

<sup>86</sup> *See id.* at 472 (noting twelve people have greater knowledge of the "common affairs of life" than does a single person).

on the facts of the particular case and there is no need for uniform or expected outcomes.<sup>87</sup>

The situation is different where the law content of the mixed question is relatively high. Examples include issues involving whether a publication is copyrightable, whether securities law considers a control person to have acted in good faith, and whether the victim of an alleged defamatory statement is a public figure.<sup>88</sup> Judges typically decide these types of issues because consistency and predictability are essential.<sup>89</sup>

Professor Jorde has persuasively argued that the well-recognized right to a jury trial in antitrust cases does not preclude the court from a fact-finding role.<sup>90</sup> Put another way, the Seventh Amendment right to a jury trial does not guarantee that all issues in the case will be decided by the jury. Jorde points out that certain recurring issues in antitrust cases involving conduct and damages have deep roots in common law jurisprudence and therefore are appropriate for the jury.<sup>91</sup> Other antitrust issues, notably those involving market structure and economic analysis, have no analogue at common law; therefore, no constitutional right to a jury trial attaches on those issues.<sup>92</sup> Accordingly, the court may itself decide facts relating to market structure issue but refer issues relating to conduct and damages to the jury.

The Supreme Court's later decision in *Markman v. Westview Instruments, Inc.*<sup>93</sup> is consistent with the Jorde approach. *Markman* was a patent infringement matter in which the Supreme Court ruled that, notwithstanding the right to a jury trial in patent cases, issues concerning the scope or construction of the patent are for the court because judges are "better suited to find the acquired meaning of patent terms."<sup>94</sup> In so

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 472-73.

<sup>89</sup> *Id.* at 473.

<sup>90</sup> Jorde, *supra* note 48, at 36.

<sup>91</sup> *Id.* at 53.

<sup>92</sup> *Id.* at 66 ("[W]hile the Seventh Amendment preserves jury trial of conduct and damage issues it does not preserve jury trial for market structure issues because none were tried by juries in England in 1791.").

<sup>93</sup> 517 U.S. 370 (1996).

<sup>94</sup> *Markman*, 517 U.S. at 388.



holding, the Court was careful to point out that it reached its conclusion only after a review of history yielded no definitive guidance on whether questions regarding the scope or construction of patents are for the judge or jury.<sup>95</sup> Accordingly, *Markman* cannot be read as supporting the complexity exception or as a retreat from earlier opinions favoring jury trials.<sup>96</sup>

As noted above, in antitrust practice, motions to strike jury demands are almost exclusively made by defendants, not plaintiffs. If juries were truly an obstacle to achieving valid outcomes in antitrust cases, one would expect more of a consensus on this issue and would expect to see plaintiffs, as well as defendants, challenging the utilization of the jury as the fact finder. Furthermore, it is anomalous that those who would eliminate juries in private antitrust actions also contend that antitrust enforcement is principally designed to protect consumers. Yet, they would exclude consumers—the very people that the antitrust laws are meant to benefit—from the decision-making process.

### C. The Courts and the Complexity Issue

Although the federal courts have largely balked at both the notion that antitrust cases are so inherently complex that the factual issues raised therein are beyond the comprehension of jurors and at the argument that certain antitrust cases are so complex that juries cannot reach reasoned verdicts, the federal judiciary has not been insensitive to, or unconcerned about, the practical problems surrounding resolution of complex factual issues in antitrust cases. To the contrary, the courts have addressed complexity concerns, using a variety of techniques to keep antitrust issues out of the jury room, including: (1) granting motions to dismiss, (2) granting summary judgment, (3) limiting or excluding expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>97</sup> and (4) denying class certification.

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<sup>95</sup> *Id.*

<sup>96</sup> See CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL COURTS § 92 (7th ed. 2011).

<sup>97</sup> 509 U.S. 579 (1993).

## 1. Motions to Dismiss

Courts have kept antitrust cases away from juries by entertaining and granting motions to dismiss. Although courts have refrained from direct criticism of jurors, they have done so indirectly by questioning the ability of judges to reach good outcomes in antitrust cases.<sup>98</sup> In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*,<sup>99</sup> the Supreme Court, reversing the Second Circuit, ruled that Verizon's motion to dismiss the complaint should have been granted, noting that even in the best of circumstances, courts may face difficulty applying the requirements of section 2 of the Sherman Act because it is "a daunting task for a generalist antitrust court" to assess antitrust duties in the highly technical, complex and fluid telecommunications market.<sup>100</sup> The Court's concern about the complexity of the decision making process is tied to its fear that judges will make mistakes and wrongly condemn conduct that is pro-competitive, giving rise to false positives and ultimately hindering, rather than promoting, competition.<sup>101</sup> If judges are likely to get it wrong, then so, too, are juries.

In *Bell Atlantic Corp. v. Twombly*, the sister case of *Trinko* brought under Section 1 of the Sherman Act, the Court again found that the plaintiffs' complaint was deficient as a matter of law and should have been dismissed.<sup>102</sup> In so ruling, the Court reiterated the themes stated in *Trinko*, most prominently the high cost of discovery in complex cases and the likelihood of false positives if questionable cases are permitted to proceed to trial.<sup>103</sup> The Court in *Twombly* held that under Rule 8, an antitrust conspiracy claim must plausibly suggest agreement among defendants, that is, the complaint must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal

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<sup>98</sup> See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (asserting that facts involved in anticompetitive conduct are often "beyond the practical ability of a judicial tribunal to control.").

<sup>99</sup> 540 U.S. 398 (2004).

<sup>100</sup> *Trinko*, 540 U.S. at 414.

<sup>101</sup> *Id.*

<sup>102</sup> 550 U.S. 544, 548-49, 553 (2007).

<sup>103</sup> *Twombly*, 550 U.S. at 555, 558.

agreement.”<sup>104</sup> Mere possibility of wrongdoing is not enough to pass muster under Rule 8, “lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’”<sup>105</sup> Accordingly, when the complaint fails to allege facts that state a plausible claim for relief, “this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court,” and the complaint then tossed on a motion to dismiss.<sup>106</sup>

The Court in *Twombly* assigned district judges in the role as gatekeepers, tasked with the job of scrutinizing complaints at the motion to dismiss stage to assure that infirm antitrust claims do not proceed to discovery.<sup>107</sup> In assessing complaints, the trial court must (1) accept all well-pleaded facts as true, and (2) apply experience and common sense to determine whether the complaint is plausible.<sup>108</sup> This broad charge would seem to license the court to make factual decisions at the motion to dismiss stage that had traditionally been left to the jury after trial.<sup>109</sup>

## 2. Summary Judgment

Similarly, the courts have used summary judgment as a vehicle to avoid jury trials in antitrust cases. Under Rule 56 of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment where it “shows that there is no genuine issue as to material fact and the movant is entitled to judgment as a matter of law.”<sup>110</sup> Although Rule 56 is party neutral, summary judgment is quintessentially a defendant’s tool.<sup>111</sup> Antitrust cases are heavily fact-bound. Rarely, if ever, will a

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<sup>104</sup> *Id.* at 556.

<sup>105</sup> *Id.* at 557-58 (quoting *Dura Pharms. Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

<sup>106</sup> *Id.* at 558.

<sup>107</sup> *Id.* at 552, 573.

<sup>108</sup> *Ashcroft v. Iqbal* 556 U.S. 662, 678-79 (2009) (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d. Cir. 2007)).

<sup>109</sup> *See id.* at 682-83 (rejecting the plaintiff’s claim in favor of the “obvious alternative explanation” offered by the Government).

<sup>110</sup> FED. R. CIV. P. 56(a).

<sup>111</sup> *See Samuel Issacharoff & George Lowenstein, Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 83 (1990) (“By streamlining the production required of

plaintiff be able to successfully assert that the facts are not in dispute and that it is entitled to judgment as a matter of law. The plaintiff simply wants to present its case to a jury; the defendant wants to avoid the jury altogether. Like motions to dismiss in the wake of *Twombly*, summary judgment motions are now routine in antitrust cases.

Although summary judgment has always been part of the Federal Rules of Civil Procedure and reads substantially the same today as when it was initially promulgated in 1938, courts were initially reluctant to invoke this procedure,<sup>112</sup> fearing that to do so may deny plaintiffs their day in court.<sup>113</sup> This was particularly true in antitrust cases in the wake of the Supreme Court's decision in *Poller v. CBS, Inc.*<sup>114</sup> In *Poller*, the Court denied defendant's motion for summary judgment, ruling that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."<sup>115</sup> Not surprisingly, some courts read *Poller* as precluding summary judgment in antitrust cases, even though the Supreme Court explicitly rejected such a broad reading of *Poller* six years later in *First National Bank of Arizona v. Cities Service Co.*<sup>116</sup>

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a movant without the ultimate burden of proof, *Celotex* facilitates recourse to summary judgment by defendants," which "completes the shift from summary judgment as a plaintiff's motion prior to the promulgation of the Federal Rules to a defendant's motion under *Celotex*."); Morton Denlow, *Summary Judgment: Boon or Burden?*, 37 JUDGES' J. 26, 27 (1998) ("Although a plaintiff has equal recourse to summary judgment under Rule 56, the motion has largely become a defendant's weapon.").

<sup>112</sup> See 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.07 (7th ed. 1999) (noting a general sense that summary judgment was "limited by judicial reluctance"); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77 (1990) ("From its inception, federal judges treated summary judgment warily, perceiving it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the right to have one's cause advocated by counsel before a jury.").

<sup>113</sup> See *Hamilton v. Sec'y of Health & Human Servs.*, 961 F. 2d 1495, 1504 (10th Cir. 1992) (expressing concern that summary judgment may hinder plaintiff's ability to fully present its case).

<sup>114</sup> 368 U.S. 464 (1962).

<sup>115</sup> *Poller*, 368 U.S. at 473.

<sup>116</sup> See 391 U.S. 253, 289-90 (1968) (declining to accept the view that summary judgment is precluded by Rule 56(e)).

Nevertheless, the *Poller* ruling created some uncertainty as to the role of summary judgment in antitrust cases. That uncertainty was exacerbated by the language of Rule 56 itself, which provides that summary judgment is proper where there is “no genuine dispute as to any material fact.”<sup>117</sup> What is a “genuine dispute”? How does one draw the line delineating questions of fact from questions of law? It is also unclear whether the moving party had the burden of proof on the summary judgment motion and whether the quantum of proof needed at the summary judgment stage mirrored the burden of proof at trial.<sup>118</sup> Rather than address these questions directly, the courts simply resolved any doubts by denying summary judgment.<sup>119</sup> Courts, in other words, were reluctant to exercise the screening function embodied in Rule 56, which was designed to eliminate cases lacking sufficient merit for a full-scale trial. Once summary judgment has been denied, defendants facing the uncertainties of trial had little choice but to bargain for settlement in the shadow of the impending jury trial.

The Advisory Committee on Federal Civil Rules considered changes to Rule 56. However, in the 1980s, “docket pressures . . . prompted dramatic revisions in federal procedure.”<sup>120</sup> In 1986, the Supreme Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>121</sup> which clarified summary judgment standards and expanded the role of summary judgment in antitrust cases.<sup>122</sup> In *Matsushita*, Zenith was an American electronics manufacturer that claimed rival Japanese electronics producers had conspired to drive it from the field by engaging in predatory pricing.<sup>123</sup> In a predatory pricing scenario, dominant defendants with deep pockets sell below their costs—that is, at a loss—in the short-

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<sup>117</sup> FED. R. CIV. P. 56(a).

<sup>118</sup> For example, the Second Circuit ruled that summary must be denied if there is the “slightest doubt” regarding whether the plaintiff could obtain a jury verdict. *Dolgow v. Anderson*, 438 F.2d 825, 830 (2d Cir. 1970); *cf.* *Frederick Hart & Co. v. Recordgraph Co.*, 169 F.2d 580, 581 (3d Cir. 1948) (finding summary judgment must be denied where the motion is at odds with allegations of a well-pleaded complaint).

<sup>119</sup> *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (denying summary judgment to a defendant where the only “fact” issue was the defendant’s credibility).

<sup>120</sup> *Issacharoff & Lowenstein, supra* note 112, at 73.

<sup>121</sup> 475 U.S. 574 (1986).

<sup>122</sup> *Matsushita*, 475 U.S. at 585-87.

<sup>123</sup> *Id.* at 584-85.

run to drive shallow pocket rivals from the market and thereby eliminate competition and both earn monopoly rents and recoup short-term losses in the long run.<sup>124</sup>

Although as a matter of logic, Zenith's claim might make sense, the Court pointed out that a predatory pricing strategy is inherently risky and that rational sellers would be hesitant to embrace it as a plausible business strategy, especially since for-profit companies loathe even short-term losses.<sup>125</sup> Accordingly, Zenith's claim came before the Court with at least one strike against it.<sup>126</sup> Not only was the predatory pricing claim shaky as a matter of substantive antitrust law, the supporting evidence was weak as well.<sup>127</sup> Zenith's principal proof of the alleged predation scheme was that the defendants sold their products at low prices.<sup>128</sup> The defendants' low prices may very well be evidence of conspiracy, but an equally plausible explanation is that the low prices were merely the product of aggressive competition for sales.<sup>129</sup> Low prices clearly benefitted consumers.<sup>130</sup> Far from being anti-competitive, defendants' pricing practices arguably evidenced the kind of robust price competition that the antitrust laws seek to promote.<sup>131</sup>

To defeat the motion for summary judgment, Zenith had the burden of adducing sufficient evidence creating "a genuine issue of material fact."<sup>132</sup> Put another way, Zenith had to come forward with enough proof to establish an issue about which reasonable persons could disagree.<sup>133</sup> The Supreme Court ruled that Zenith had failed to establish a genuine issue of material fact.<sup>134</sup> It held that the evidence of defendants' low prices was at best ambiguous on the issue of conspiracy because low

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<sup>124</sup> *Id.* at 589.

<sup>125</sup> *Id.* at 589-90.

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 578.

<sup>129</sup> *Id.* at 596-97.

<sup>130</sup> *Id.* at 594.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 585-86 (quoting FED R. CIV. P. 56(e)).

<sup>133</sup> *Matsushita*, 475 U.S. 574, 587 (1986).

<sup>134</sup> *Id.* at 587.

prices may also evidence competition.<sup>135</sup> The Court further held that antitrust law limits the range of permissible inferences that can be drawn from ambiguous evidence on a motion for summary judgment.<sup>136</sup> Conduct that is as consistent with competition as it is with conspiracy does not, as a matter of law, create a question of fact for the jury.<sup>137</sup> To defeat the motion for summary judgment, it was incumbent upon Zenith to come forward with additional evidence of conspiracy.<sup>138</sup> The Court found that Zenith would have to present proof “that tends to exclude the possibility that the alleged conspirators acted independently.”<sup>139</sup> Accordingly, Zenith must show that “the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiff].”<sup>140</sup>

Without specific reference to *Poller*, the Court made clear that summary judgment procedures are as appropriate in antitrust cases as in any other area of substantive law. In companion summary judgment rulings issued within weeks of *Matsushita*, the Court detailed how summary judgment procedures, far from being at odds with the Federal Rules, are consistent with the overall thrust of the Federal Rules that *meritorious* litigants have their day in court.<sup>141</sup>

In the wake of *Matsushita*, trial courts have not been shy about granting summary judgment for defendants in antitrust cases. One court has gone so far as to say that summary judgment is “particularly favored in antitrust cases because of the concern that protracted litigation will chill procompetitive market forces.”<sup>142</sup> That is surely an overstatement. Nevertheless, in the aftermath of *Matsushita*, the line dividing what a

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<sup>135</sup> *Id.* at 588.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

<sup>138</sup> *Id.* (citing *Monsanto*, 465 U.S. at 764).

<sup>139</sup> *Id.* (internal quotation marks omitted) (citing *Monsanto*, 465 U.S. at 764).

<sup>140</sup> *Id.* (citing *First Nat’l Bank of Ariz. v. Cities Serv. Co.* 391 U.S. 253, 280 (1968)).

<sup>141</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (stating summary judgment is consistent with the Federal Rules, which were created to ensure actions are handled fairly, quickly, and inexpensively).

<sup>142</sup> *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002) (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998)).

court may or may not do at the summary judgment stage has become blurred. Traditionally, the court's role in summary judgment cases has been issue spotting, not issue determination. Once the court determines that a genuine issue of material facts exists, that issue can only be resolved at trial.<sup>143</sup> *Matsushita* did not alter this basic rule.<sup>144</sup>

Nevertheless, in the wake of *Matsushita*, antitrust courts routinely decide factual issues, including market definition,<sup>145</sup> causation,<sup>146</sup> antitrust injury,<sup>147</sup> market power<sup>148</sup> and conspiracy,<sup>149</sup> at the summary judgment stage. Indeed, summary judgment has proven to be an effective vehicle in keeping complex antitrust issues from the jury, while at the same time paying lip service to the right to jury trial.

### 3. *Daubert* and the Exclusion of Expert Evidence

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>150</sup> the Supreme Court revamped the standards for admissibility of scientific and technical evidence in federal court. The Court replaced the old "generally accepted in the scientific community" standard with a more flexible multifactor test designed to ensure that such evidence is both reliable and relevant to the issues in the case.<sup>151</sup> The Court in *Daubert* also assigned district

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<sup>143</sup> See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 478-79 (1992) (finding conduct to be anticompetitive on its face, which raised a genuine issue of material fact).

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., *Belfiore v. New York Times Co.*, 826 F.2d 177, 180 (2d Cir. 1987) (opining on contrasting market definitions).

<sup>146</sup> See, e.g., *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1126 (E.D. Cal. 2002) (finding that the appellant had not met their burden in proving damages).

<sup>147</sup> *Pool Water Prods v. Olin Corp.*, 258 F.3d 1024, 1033 (9th Cir. 2001).

<sup>148</sup> *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986).

<sup>149</sup> *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1043-44 (8th Cir. 2000).

<sup>150</sup> 509 U.S. 579 (1993).

<sup>151</sup> *Daubert*, 509 U.S. at 589. Factors to be taken into account include: (1) whether the theory or technique has been, or can be, tested; (2) whether the theory or technique has been subject to peer review; (3) the known or potential rate of error; and (4) whether the theory or technique has general acceptance in the scientific community. *Id.* at 593-94.



courts the role as gatekeepers, tasked with keeping junk science away from the jury.<sup>152</sup> *Daubert* was thus a two-edged sword. On the one hand, *Daubert* made it easier for courts to entertain scientific evidence based on cutting edge research that was reliable but without a significant track record, such as DNA evidence.<sup>153</sup> On the other hand, *Daubert* urged trial judges to scrutinize carefully all such evidence before it got to the jury and to exclude expert evidence that was not both relevant and reliable.<sup>154</sup> The *Daubert* holding was subsequently extended to all expert testimony.<sup>155</sup>

Expert evidence, notably economic evidence, is an integral part of most antitrust claims and defenses.<sup>156</sup> Pretrial rulings on the admissibility of expert testimony can have outcome-determinative effects.<sup>157</sup> Rejection of proof proffered by plaintiff's expert may stop a lawsuit dead in its tracks.<sup>158</sup> Allowing rather than rejecting that very same expert proof may lead a defendant to seek settlement. In either case, jury trial is avoided. *Daubert* thus provides another avenue for keeping complex issues away from the jury in antitrust cases.

#### 4. Class Actions

The class action mechanism is a potent weapon in the arsenal of private antitrust plaintiffs. Antitrust violations, particularly those involving price-fixing, may cause only nominal damages to individual consumers but enormous damages to consumers in the aggregate. Neither consumers nor their attorneys would find such cases cost-effective to litigate on an individual basis. The class action mechanism not only makes these cases cost-efficient to pursue but also makes sure that

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<sup>152</sup> *Id.* at 589.

<sup>153</sup> *Id.* at 593-94.

<sup>154</sup> *Id.* at 589.

<sup>155</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999) (Rule 702 of the Federal Rules of Evidence applies equally to "scientific," "technical," or "other specialized" knowledge.).

<sup>156</sup> Christine P. Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 *CARDOZO L. REV.* 2147, 2149-50 (2014).

<sup>157</sup> *Id.* at 2150.

<sup>158</sup> *Id.*

antitrust violators will not keep their ill-gotten gains simply because they were savvy enough to take only a little bit at a time.<sup>159</sup>

Before a case can proceed as a class action, the court must certify that the case meets the requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>160</sup> Certification is a threshold question which the court must address “[a]t an early practicable time” in the lawsuit.<sup>161</sup> In some respects, a class certification motion operates much like a summary judgment motion. Denial of class certification in the kind of price fixing case described above may well end a lawsuit before it even begins.<sup>162</sup> Granting certification also has consequences. It may lead the defendants to seek a settlement; at the very least, it assures that the defendants will be spending large sums of money defending the case.<sup>163</sup>

The Supreme Court has long held that class certification may be granted only where “the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) are satisfied.”<sup>164</sup> Yet the lower courts historically have disagreed about the meaning of rigorous analysis. Some courts, reading the Supreme Court’s decision in *Eisen v. Carlisle*<sup>165</sup> as a bar to any fact-finding at the class certification stage, have avoided ruling on “the battle of the experts” and allowed the class claims to go forward upon making a threshold showing that Rule 23 requirements have been met or upon demonstration that plaintiff intends to try the case in a manner that satisfies the requirements of Rule 23.<sup>166</sup>

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<sup>159</sup> See LAWRENCE SULLIVAN & WARREN GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* §14.6 (3d ed. 2016) (“Class actions became a significant force because they allowed aggregation of individual claims, too small to warrant individual plaintiffs bringing an action.”).

<sup>160</sup> FED. R. CIV. P. 23(c).

<sup>161</sup> *Id.*

<sup>162</sup> See *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“For some cases the denial of class status sounds the death knell of the litigation.”).

<sup>163</sup> *Id.* (“[J]ust as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight.”).

<sup>164</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

<sup>165</sup> 417 U.S. 156 (1974).

<sup>166</sup> See, e.g., *Selzer v. Bd. of Educ.*, 112 F.R.D. 176, 178 (S.D.N.Y. 1986) (“A motion for class ratification is not the occasion for a mini-hearing on the merits.”);

This posture of deference to plaintiff's class claims is now a distinctly minority approach.<sup>167</sup> The majority of courts now require factual findings supporting the decision to grant or deny class certification.<sup>168</sup> That process may lead district courts to confront merits issues at the class certification stage.<sup>169</sup> As the Supreme Court observed in *Wal-Mart Stores, Inc. v. Dukes*: "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."<sup>170</sup> Failure to make such factual findings at the certification stage "flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim."<sup>171</sup> Indeed, "[w]eighing conflicting expert testimony at the certification stage is not only permissible, it may be integral to the rigorous analysis that Rule 23 demands."<sup>172</sup>

At the same time, the Supreme Court has cautioned that even though the mandate for rigorous analysis may involve some overlap with the merits of plaintiff's claim, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."<sup>173</sup> Merits issues "may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."<sup>174</sup>

Nevertheless, the more searching inquiries now undertaken by district courts at the certification stage have led to frequent denials of class certification, which, in turn, have stopped consumer antitrust actions dead in their tracks.

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*Caridad v. Metro N. Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (stating the trial court may not weigh conflicting proof offered by experts or engage in statistical dueling of experts when determining class certification).

<sup>167</sup> See *Dukes*, 564 U.S. 338, 350 ("Rule 23 does not set forth a mere pleading standard.").

<sup>168</sup> *Id.* ("A party seeking class certification must affirmatively demonstrate his compliance with the rules—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact . . .").

<sup>169</sup> See *id.*

<sup>170</sup> 564 U.S. 338, 351 (2011).

<sup>171</sup> *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (citation omitted).

<sup>172</sup> *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008).

<sup>173</sup> *Amgen Inc., v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

<sup>174</sup> *Id.* at 1195.

## D. Alternative Tribunals

Some critics of the civil jury in antitrust cases have suggested that it would be preferable for private suits to be heard by specialized tribunals rather than by generalist judges or randomly selected juries.<sup>175</sup> In addition to eliminating concerns about incompetent juries, this plan has the additional virtue of bringing the United States more in line with vast bulk of industrialized countries that have implemented antitrust enforcement regimes. However, any transition to this type of model in private actions would require an act of Congress. The likelihood that Congress would undertake such a drastic revision of the private antitrust remedy after more than a century under the Sherman Act seems remote. Even if Congress were to act, there would be significant uncertainty whether a specialized tribunal would be an improvement over the present system. Such a regime would likely be more efficient and perhaps more predictable, but may sacrifice “societal values deeply rooted in our notions of democracy—values which require that factual decisions affecting the life, liberty, and property of litigants should, at least at their option, be made by a cross section of the community, [i]e., a jury of their peers.”<sup>176</sup>

Among these values is the individual treatment of individual cases. Administrative agencies, like courts in bench trials, must engage in extensive fact-finding to support their decisions. Justice, on an individual basis, may take a back seat to broader goals of predictability and consistency. Juries, on the other hand, are not required to disclose findings of fact. Rather, they operate in what Judge Becker termed the “black box,” reaching a verdict without explanation as to how they got there.<sup>177</sup> Juries are thus better positioned than public authorities to do justice on a case-by-case basis.<sup>178</sup>

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<sup>175</sup> See Crane, *supra* note 15, at 34 (“Antitrust experts frequently bemoan the substitution of juries for regulators and criticize juries as unsuited to determining complex antitrust matters.”).

<sup>176</sup> *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 938 (E.D. Pa. 1979), *rev'd on other grounds*, *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

<sup>177</sup> *Id.* (“The ‘black box’ jury allows our courts to deliver individualized justice to do ‘equity’ without sacrificing our expressed devotion to the uniform rule of law.”); see Sperlich, *supra* note 8, at 414 (“A viable system of justice . . . requires individualization of justice as well as uniformity.”).

<sup>178</sup> *Matsushita Elec. Indus. Co.*, 631 F. Supp. at 938.

A less radical, but still controversial alternative, would be empaneling specialized juries, qualified by educational background, job experience, and professional skills to hear complex antitrust cases. The concept is not new and is similar to the "Blue Ribbon" jury approach that some jurisdictions experimented with a generation ago.<sup>179</sup> On its face, this proposal has some visceral appeal. A specially qualified blue ribbon jury would probably be better able to comprehend complex antitrust issues than a jury drawn from the general population. However, the special jury concept would seem to run afoul of the Federal Jury Selection and Services Act of 1968,<sup>180</sup> which requires that jurors be selected randomly from a cross-section of those in the juror pools.<sup>181</sup> The special jury approach also has practical problems. It is an elitist concept that is at odds with a jury system built on egalitarian principles. Also, those deemed qualified to sit on blue ribbon juries may not be interested in serving on a jury in a complex antitrust case where the opportunity costs are high and the rewards low. Yet, these factors may not prove fatal to the special jury. Where the parties consent, a court may empanel a special jury and go forward on a "don't ask, don't tell" basis.<sup>182</sup>

From the foregoing discussion, two conclusions emerge. First, the jury is here to stay in private antitrust actions. Second, the proposed alternatives to the current jury system, even if desirable to some extent, face legal and practical hurdles so severe that they cannot be reasonably viewed as viable alternatives to the current system. In short, the best action is to find ways to improve the operation of the jury in complex litigation.

## II. Handling Complexity Under the Federal Rules of Civil Procedure

Without a doubt, the Federal Rules of Civil Procedure have introduced procedures that have served to make federal actions more complicated,

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<sup>179</sup> See Sperlich, *supra* note 8, at 416.

<sup>180</sup> 28 U.S.C.A § 1867 (West 1968).

<sup>181</sup> 28 U.S.C.A § 1863(b)(2) (West 1968); see Sperlich, *supra* note 8, at 416.

<sup>182</sup> See Grady, *supra* note 29, at 250.

including compulsory counterclaims,<sup>183</sup> joinder of claims,<sup>184</sup> joinder of parties,<sup>185</sup> intervention,<sup>186</sup> class actions,<sup>187</sup> and liberal pretrial discovery.<sup>188</sup> However, the Federal Rules have also provided the courts and litigants with the management tools to distill and ultimately simplify issues for trial. Judicious use of these tools is critical to improved jury performance.

### A. Pretrial Management

The Federal Rules of Civil Procedure confer on trial judges significant managerial powers designed to narrow issues, control the amount and cost of discovery, limit delays, and push the case toward trial. Rule 16 confers broad powers on the district courts to manage every aspect of the litigation.<sup>189</sup>

In antitrust cases especially, the trial court must have a firm grasp on the issues before it. Notice pleading, even in the era since *Bell Atlantic Corp. v. Twombly*, allows claims to be stated in broad, general terms.<sup>190</sup> It is therefore critical for the court to intervene early in order to separate the wheat from the chaff and to ascertain precisely the claims and defenses that the parties are asserting.<sup>191</sup> Without judicial management, the issues will grow, and discovery with respect to those issues will quickly spin out of control.<sup>192</sup> In this regard, the court may find it useful to request the parties to submit preliminary jury instructions that identify

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<sup>183</sup> FED. R. CIV. P. 13(a).

<sup>184</sup> FED. R. CIV. P. 18.

<sup>185</sup> FED. R. CIV. P. 19-20.

<sup>186</sup> FED. R. CIV. P. 24.

<sup>187</sup> FED. R. CIV. P. 23.

<sup>188</sup> FED. R. CIV. P. 26, 30-36.

<sup>189</sup> FED. R. CIV. P. 16.

<sup>190</sup> 550 U.S. 544, 556 (2007).

<sup>191</sup> See William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 577 (1991) (“Judges serve a critical function in complex litigation by identifying and defining the issues that need to be tried.”).

<sup>192</sup> See *id.* (noting the importance of pretrial issue management in controlling the costs and burdens of a trial).

the issues actually in play.<sup>193</sup> Only when the court knows the real issues can the scope of discovery be ascertained.<sup>194</sup>

Rule 16(b) requires that the parties submit a discovery plan and that the court approve the plan before discovery can go forward.<sup>195</sup> Before approving the plan, the court must decide the appropriate limitations to be imposed on discovery.<sup>196</sup> Parties are not entitled to unlimited discovery; rather, discovery must be proportional to the needs of the case.<sup>197</sup> To this end, courts may impose specific limitations on the number of interrogatories,<sup>198</sup> and the number<sup>199</sup> and length of depositions.<sup>200</sup> The Federal Rules also encourage the courts to determine the scope of electronic discovery and whether any cost-shifting is appropriate in that e-discovery process at an early stage.<sup>201</sup>

The Federal Rules authorize management of the pretrial phase of the case; they do not require it.<sup>202</sup> Federal judges vary in their comfort levels with active case management. Some judges prefer to leave the discovery process to the attorneys.<sup>203</sup> However, active management is imperative in complex antitrust cases. Without active judicial supervision in the discovery phase, issues for trial will accumulate and necessarily complicate proceedings.<sup>204</sup> Active management is essential to ensure that the fact finder is not overwhelmed at trial and that discovery costs do not spiral out of control.<sup>205</sup>

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<sup>193</sup> *Id.* at 578.

<sup>194</sup> *Id.*

<sup>195</sup> FED. R. CIV. P. 16(b).

<sup>196</sup> *Id.*

<sup>197</sup> FED. R. CIV. P. 26(b)(1).

<sup>198</sup> FED. R. CIV. P. 33(a)(1).

<sup>199</sup> FED. R. CIV. P. 30(a)(2)(A)(i).

<sup>200</sup> FED. R. CIV. P. 30(d)(1).

<sup>201</sup> FED. R. CIV. P. 34(b).

<sup>202</sup> FED. R. CIV. P. 26(b)(1).

<sup>203</sup> *See* Schwarzer, *supra* note 191, at 577.

<sup>204</sup> *See id.*

<sup>205</sup> *See id.* at 575 (“Much of [a case’s] complexity is the product of lawyers’ work-excessive discovery and the proliferation of evidence and issues—and judges passivity and permissiveness.”).

Equally important is the need for the court to set time limits for the conduct and completion of discovery and the beginning of trial.<sup>206</sup> Arthur Miller once described discovery as a dance marathon where the litigants sought to hold on to each other until they collapsed.<sup>207</sup> Clearly, the longer discovery goes on, the more expensive the litigation. The court must also set firm dates from entertaining motions to dismiss and motions for summary judgment. In the wake of *Twombly*, motions to dismiss are routine in antitrust cases. Similarly, after *Matsushita*, summary judgment motions have been a fixture on the pretrial agenda. In some cases, of course, these motions will be dispositive and the cases dismissed. But, even where the motions are denied, they can be important vehicles for narrowing and focusing the issues for trial.

## B. Trial Management

Planning the trial phase of the case is as important, if not more important, as planning the pretrial phase. Key elements in the trial plan include establishing the number of trial days<sup>208</sup> and limiting the number of witnesses for trial.<sup>209</sup> In addition, the court must identify the issues to be tried and establish the order of trial.<sup>210</sup> In this regard, the court should consider the merits of bifurcating issues for trial, typically whether to try liability issues first and leave damages for the second phase of trial.

The court can also employ a number of devices to assist the jury in understanding the case. The *Manual for Complex Litigation* identifies a variety of techniques that courts can use to help the jury. Courts should also take advantage of technology to assist juries in hearing the case and understanding the evidence. Among other things, the court should consider the following devices or procedures.

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<sup>206</sup> FED. R. CIV. P. 16(b); see MANUAL FOR COMPLEX LITIGATION § 11.422 (4th ed. 2004) (explaining the pros and cons of establishing time limits on the discovery process, such as a “discovery cutoff date”).

<sup>207</sup> MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 56 (1st ed. 1996).

<sup>208</sup> Schwarzer, *supra* note 191, at 578-79; MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.11.

<sup>209</sup> Schwarzer, *supra* note 191, at 578-79.

<sup>210</sup> *Id.* at 577-78.



## 1. Preliminary Instructions to the Jury

Lay jurors might benefit from a preliminary set of instructions on antitrust laws, providing context for the proof they will hear at trial.<sup>211</sup> Obviously, these preliminary instructions need not be as detailed as the final instructions given after the close of proof, and the jury should be advised that the court will provide detailed instructions on the law at an appropriate point in the trial.

## 2. Glossaries

Providing the jury with a glossary of technical or unfamiliar terms can be useful to the jury in understanding the proof as the case unfolds.<sup>212</sup>

## 3. Exhibit Books

Each juror should be provided a copy of all exhibits to be used at trial.<sup>213</sup> That way, the jurors can focus their full attention on a particular document when it is being discussed and not be distracted as they would if a single exhibit were passed from juror to juror.

## 4. Note Taking

Jurors should be permitted to take notes.<sup>214</sup> Note taking has been traditionally banned out of fear that jurors will make mistakes in preparing notes and that such mistakes will infect deliberations and ultimately the verdict itself.<sup>215</sup> This argument is not compelling. Imagine if law

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<sup>211</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.432.

<sup>212</sup> *Id.* § 12.31.

<sup>213</sup> See Schwarzer, *supra* note 191, at 589.

<sup>214</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.421 (“Many jurors will not take notes, but denial of permission to do so may be inconsistent with the large measure of responsibility the system places on jurors, and it may hamper their performance.”); see Schwarzer, *supra* note 191, at 590-91 (“Although long discouraged, note-taking has now become widely accepted.”).

<sup>215</sup> See Schwarzer, *supra* note 191, at 592 (noting the stance against juror note taking, but arguing “[i]t seems more likely, however, that a juror who takes notes will

students were prohibited from taking notes in class and then expected to pass an examination based on class discussion throughout the term. That would be intolerable, and banning jurors from taking notes is equally intolerable. It may well be that some jurors may get it wrong in their notes, but the likelihood of error is far greater if jurors are barred from taking notes altogether.

## 5. Questions from the Jurors

Jurors should be permitted to ask questions of a witness. These questions can be screened by the judge, who then can put the question to the witness if appropriate.<sup>216</sup>

## 6. Visual Aids

The court should encourage the parties to use visual aids, such as Power Point slides, whenever possible.<sup>217</sup> Charts and data summaries may also assist the jury in digesting the evidence.<sup>218</sup> Where the parties seek to introduce deposition testimony at trial, videotape from the deposition (if available) should be used.<sup>219</sup> Listening to deposition excerpts being read into the record is a deathly boring exercise for the jury. Use of videotape allows the jury to see the witnesses as they testified on deposition and enables the jury more accurately to assess demeanor and credibility.<sup>220</sup> Moreover, jurors, more accustomed to television screens,

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be forced to concentrate and try to understand what he hears, and that his notes will help him remember the evidence”).

<sup>216</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.423 (Judges vary widely on whether to allow jurors to ask questions of the witness, and the jury should be advised that the issue may be covered in subsequent testimony or maybe inadmissible under the Federal Rules of Evidence.).

<sup>217</sup> See Schwarzer, *supra* note 191, at 588-89 (Visual aids serve the dual purpose of providing added meaning to evidence and saving time.).

<sup>218</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.31; Schwarzer, *supra* note 191, at 588.

<sup>219</sup> Schwarzer, *supra* note 191, at 588.

<sup>220</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.333 (“Videotape is generally more effective for the presentation of deposition testimony, for impeachment and rebuttal, and for reference during argument.”); Schwarzer, *supra* note 191, at 588.

are more apt to pay attention to the television than the “witness” reading the deposition excerpts.<sup>221</sup>

## 7. Witness Introduction

Jurors may benefit from a short introduction of the witnesses prior to their testimony. Counsel can explain to the jury who the witness is and what the witness’s testimony is designed to accomplish.<sup>222</sup> The jury can then decide after hearing the testimony whether counsel has achieved its stated purpose. Of course, counsel’s statement of purpose is not testimony and should not be treated as such by the jury.

## 8. Periodic Summations

Jurors may also benefit from intermediate summation by counsel.<sup>223</sup> Instead of waiting for one final summation at the end of trial, the court could permit counsel to summarize from time to time as the trial proceeds what it believes has been proven. Again, the jury is the ultimate judge as to whether counsel has in fact sustained its arguments with factual proof.

## 9. Minimization of Distractions

The court should take steps to minimize distractions for the jury.<sup>224</sup> Evidentiary objections can be bewildering for lay jurors. Evidentiary issues are best handled through motions *in limine* prior to trial, and rulings on these motions should not be revisited during trial. Similarly, side bar conferences are distracting to jurors and may cause them to lose focus. Side bars should be kept to a minimum during trial. Additionally,

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<sup>221</sup> Schwarzer, *supra* note 191, at 588 (“Videotapes are particularly effective because jurors are accustomed to acquiring information from the television screen and thus react favorably to video presentation.”).

<sup>222</sup> *Id.* at 595-96.

<sup>223</sup> *Id.*

<sup>224</sup> See Grady, *supra* note 29, at 258 (expressing the importance of certain pretrial practices, such as premarking exhibits, in order to streamline a trial and keep the jury focused); MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.15 (finding that scheduling a conference between the judge and counsel at the end of each trial day may “avoid bench conferences and other trial interruptions”).

the court should plan the trial so as to minimize down time for the jury. The court should always have a Plan B for a given trial day so that the jury does not have to be dismissed for the day because a scheduled witness is suddenly unavailable.

## 10. Jury Instructions

Instructions to the jury should be presented in a clear and concise manner.<sup>225</sup> Instructions should be accompanied by interrogatories to the jury pursuant to Rule 49 of the Federal Rules of Civil Procedure.<sup>226</sup> Interrogatories provide not only a check on the jury but also a roadmap that facilitates deliberations by providing the jurors with a starting point.<sup>227</sup>

## 11. Facilitation of Jury Deliberations

In addition to using interrogatories, the court can facilitate jury deliberations by permitting the jury full access to the trial transcript, exhibits and the jury instructions throughout the deliberation process.<sup>228</sup> It makes no sense to keep the trial transcript out of the jury's hands and force them to request re-reading of specified portions of trial testimony. Much time goes to waste when jurors are trooped back into the court room to hear testimony re-read. Why not permit them to play with a full deck throughout the deliberations process?

Additionally, the ban on conversations among jurors about the case prior to final submission by the court to the jury should be eased.<sup>229</sup> Periodic discussion among jurors in the privacy of the jury room prior

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<sup>225</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.431 (“A complex and protracted trial makes understandable jury instructions particularly important.”); Schwarzer, *supra* note 191, at 582.

<sup>226</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 206, § 12.451 (Interrogatories “simplify instructions, help jurors organize their deliberations, facilitate partial verdicts, isolate issues for possible appellate review, and reduce the costs and burdens of retrial.”).

<sup>227</sup> *Id.*

<sup>228</sup> Grady, *supra* note 29, at 257.

<sup>229</sup> Schwarzer, *supra* note 191, at 593-94.

to final submission may facilitate rather than infect the fact-finding process.<sup>230</sup>

## 12. Rule 50

Rule 50 of the Federal Rules of Civil Procedure empowers the court to direct a verdict where a plaintiff has failed to make out a prima facie case and to set aside a jury verdict where that verdict is not supported by record evidence.<sup>231</sup> Rule 50 provides a necessary check on the runaway jury, and courts should not hesitate to invoke this provision where appropriate.

## 13. Rule 59

Closely related to Rule 50, Rule 59 invests the court with broad power to grant a new trial.<sup>232</sup> For example, a new trial may be granted where the verdict is against the weight of the evidence. In this instance, courts may invoke remittitur, a procedure through which the plaintiff agrees to accept an amount less than the verdict award in lieu of a new trial on damages, to police excess damage awards by the jury. Some courts are reluctant to set aside jury findings under Rule 59 out of fear that any such action might be viewed as interfering with the right to trial by jury. That is clearly not the case. Rule 59 is intended to police verdicts that should not stand, and courts should not hesitate to utilize it properly.

### C. Benefits of the Jury Trial

The foregoing discussion has focused on what the courts and litigants can do to improve jury performance. Not to be overlooked is the fact that having a jury at the end of the process can improve performance by litigants and their counsel.

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<sup>230</sup> *Id.*

<sup>231</sup> FED. R. CIV. P. 50(b).

<sup>232</sup> FED. R. CIV. P. 59(a).

## 1. Improving Performance of Counsel

Where the jury sits as fact finder, the lawyers at the outset must think through their respective cases from beginning to end.<sup>233</sup> Attorneys must focus the jury's attention on the key facts and eliminate the noise. However complex the underlying facts, counsel must reduce their presentations to the lowest common denominator so that the jurors are fed with bite-sized morsels of proof.<sup>234</sup> The jury thus imposes a discipline on counsel that benefits them, as well as the court, and ultimately the parties in the case.<sup>235</sup>

## 2. The Importance of Process

Juries in antitrust cases provide the litigants with fair process.<sup>236</sup> A hallmark of our federal civil justice system is that disputes will be resolved through trials held in open court based on the evidence.<sup>237</sup> Judgments entered by trial courts are then subject to appellate review. This is as true in antitrust cases as in any other field of law, whether torts, contracts, securities or civil rights. Adherence to this process is what guarantees the legitimacy of court decisions and ultimately their acceptance by the public. Diminishing the role of the jury in antitrust cases would unfortunately contribute to what Professors First and Waller have aptly described as antitrust's "democracy deficit."<sup>238</sup> As First and

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<sup>233</sup> Higginbotham, *supra* note 34, at 54 ("The process of distilling complex material into a comprehensible form operates less effectively in bench trials than in jury trials. Although the rules of evidence purport to discipline an advocate's presentation, they are generally only loosely followed in bench trials, on the assumption that the trial judge will consider only admissible evidence . . . . Trial to a jury imposes a fierce discipline on the advocates. The virtue of forcing counsel to organize a complex mass of information into a form understandable by the uninitiated is that counsel ultimately must understand the issues and evidence in the case well enough to teach. If counsel cannot comprehensibly present their case to lay persons, is it likely that counsel do, in fact, understand the case?").

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Zenith Radio Corp. v. Ma tsushita Elec. Indus. Co.*, 478 F. Supp. 889, 938 (E.D. Pa. 1979), *rev'd on other grounds*, 631 F.2d 1069 (3d Cir. 1980)

<sup>237</sup> *Id.*

<sup>238</sup> Harry First & Spencer Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2552 (2013) ("Juries help democratize antitrust.").

Waller observe, “[p]ublic and private antitrust enforcement were set up to enforce the law in a way that would advance democratic goals—to deal with concentrations of economic power and to police business behavior that exploited consumers and excluded competitors.”<sup>239</sup> Lay jurors, serving as fact finders, promote the democratic goals established by Congress.<sup>240</sup> Juries are accountable to the trial courts who are in turn accountable to appellate bodies. Taking fact finding away from juries and leaving that task to “unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control,” as some have advocated, would clearly serve to undermine the democratic goals of antitrust.<sup>241</sup>

### 3. Constraining the Courts

As Judge Becker observed, “[t]he jury also provides a needed check on judicial power” at both the trial and appellate level.<sup>242</sup> At the trial level, the jury functioning in its assigned role of fact finder directly limits the trial judge to matters of law.<sup>243</sup> The jury also limits the powers of the appellate courts.<sup>244</sup> Under the Seventh Amendment, a jury’s factual findings are not subject to appellate review.<sup>245</sup> Judicial findings of fact following a bench trial are subject to appellate scrutiny under a “clearly erroneous” standard.<sup>246</sup> Thus, judgments are more carefully examined than verdicts.<sup>247</sup> Abolition of the jury in complex cases would thus enhance the powers of judges at both the trial and appellate levels.<sup>248</sup>

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<sup>239</sup> *Id.* at 2573.

<sup>240</sup> *Id.* at 2552, 2573.

<sup>241</sup> *Id.* at 2545.

<sup>242</sup> *Zenith*, 478 F. Supp. at 942.

<sup>243</sup> *See id.*

<sup>244</sup> *Id.*

<sup>245</sup> The second clause of the Seventh Amendment provides in relevant part that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

<sup>246</sup> FED. R. CIV. P. 52(a)(6).

<sup>247</sup> *Zenith*, 478 F. Supp. at 942.

<sup>248</sup> *Id.* (citing Higginbotham, *supra* note 34, at 58).

Nor can it be said that a jury's role in complex antitrust cases is any less important than its role in run-of-the-mill fender-bender cases.<sup>249</sup> Jury verdicts offer the courts "a contemporaneous expression of the community values that bear on the issues in each case."<sup>250</sup> To deny litigants access to a jury merely because the issues involved are complex would deny the courts a window into community values and thus undermine the quality of justice.<sup>251</sup> Moreover, precisely because the jury offers this community insight, jury participation in the legal process serves to legitimize the judicial decision making process,<sup>252</sup> which, in turn, both reinforces the rule of law and promotes the acceptance of court rulings.<sup>253</sup>

## Conclusion

The constitutional right to a jury trial is sacred and has been carefully guarded by the courts throughout the history of our democratic republic. Critics of the jury trial in complex antitrust cases may well be correct that cases of this kind pose challenges to the judicial system. Their knee-jerk default solution—eliminate the jury as fact finder in favor of the judge—offers few, if any, tangible benefits at the risk of imperiling public acceptance of judicial outcomes specifically and the role of law generally. The solution lies in improving the jury trial, not in abolishing it.

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<sup>249</sup> *Id.*

<sup>250</sup> Higginbotham, *supra* note 34, at 58.

<sup>251</sup> *See id.*

<sup>252</sup> Sperlich, *supra* note 8, at 415 (quoting *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting)).

<sup>253</sup> *Id.* (quoting Higginbotham, *supra* note 34, at 59).



