Jury Trials in Complex Litigation

Maralynne Flehner
NOTES AND COMMENTS

JURY TRIALS IN COMPLEX LITIGATION

INTRODUCTION

The seventh amendment to the Constitution guarantees the right to jury trial in “Suits at common law.” In interpreting the effect of the Federal Rules of Civil Procedure (Federal Rules) on the jury trial guarantee, the Supreme Court has broadened considerably the scope of the seventh amendment, indicating that the right to jury trial should be preserved wherever possible. Unique problems are presented, however, by the use of juries in complex cases. The enormous difficulties generated for jurors, courts and litigants raises an inquiry whether the jury is fulfilling the role it was intended to

---

1 U.S. Const. amend. VII. The seventh amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.


Some eminent authorities have suggested that civil jury trials be abolished altogether by repealing the seventh amendment. See, e.g., Burger, New Constitution for United States?, Trial 5 (Aug.-Sept. 1970); Landis, Jury Trials and the Delay of Justice, in The Jury 20 (G. Winters ed. 1971); see Wolfram, supra note 1, at 650-51 & n.40. See generally Moore, supra note 1, ¶ 38.02[1], at 8.1. It is interesting to note that the right to trial by jury in civil cases has been eroded severely in England. See Shapiro & Coquillette, supra note 1, at 443 n.4; Zander, The Jury in England: Decline and Fall?, in The American Jury System 29, 31 (1977).
play in our system of justice. While "complex case" can have many meanings, as used in this Note it is typified by antitrust or securities litigation where there are many parties to the action and complexity is inherent in the sheer volume of evidence to be heard and digested by the jury, and often in the number of federal and state laws and standards which must be applied to the evidence admitted for and against each defendant. The issues in these cases may be so complicated that the jury may lack the ability to comprehend, remember or evaluate the evidence, although this has been a matter of some debate. Responding to these problems, and notwithstanding the Supreme Court's protective posture toward trial by jury, several federal district courts recently have denied requests for jury trials in complex cases.

It is suggested that any limitation on the use of juries should be critically examined, especially in view of the procedural devices available to assist the jurors. If, on balance, a jury trial appears to be untenable, however, an alternate factfinder should be selected in a manner which will preserve rather than erode the seventh amendment. To this end, this Note will review the functions of the jury in civil litigation and the problems of a trial-by-jury system in complex litigation. It then will consider whether the jury's role is fulfilled in a complex case. An evaluation of the procedural aids available to ameliorate some of these problems will follow. In commenting on various solutions, this Note will examine the scope of the right to

---

3 There is no prototype for complex litigation. It is not limited to cases with large amounts of evidence and many litigants. Some cases involving fewer parties have been described as being too complex for a jury because they dealt with intricate accounts, see Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887); Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801, 804 (D. Kan. 1928), aff'd, 46 F.2d 241 (10th Cir. 1931), or difficult and technical subject matter, see ILC Peripherals Leasing Corp. v. IBM Corp., 488 F. Supp. 423, 447 (N.D. Cal. 1978). Complicated lawsuits of this kind are typified by cases involving patent validity or infringement, see, e.g., General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197-98 (4th Cir. 1964), or cases where damages are exceedingly difficult to compute, see Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D. Ill. 1977).


7 See notes 50-58 and accompanying text infra.
jury trial as guaranteed by the seventh amendment and interpreted by the Supreme Court and analyze the methods used by the federal district courts to avoid jury trials in complex cases. With a view toward preserving the integrity of the seventh amendment, the Note will conclude by exploring the effectiveness of another alternative.

**The Functions of the Jury and the Problems Inherent in Complex Litigation**

While there is little conclusive evidence of the objective of the seventh amendment, it seems clear that the framers intended the civil jury trial guarantee to perform several basic protective functions in addition to serving as factfinder. The jury, being immune from rationalization, can serve to insure the integrity of the tribunal hearing the case by shielding the litigant from corrupt, arbitrary or biased judges. Similarly, the jury can protect parties from strong and powerful adversaries with political influence and expensive legal advice. The jury also serves a legislative function in that it crystallizes and applies the community's perception of justice, often before any standard has been embodied in a statute. In bringing common sense to bear on the issues, the jury insulates

---

8 Wolfram, supra note 1, at 652 n.42; see Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 513, 521 (1972). Professor Wolfram states that, because of the paucity and questionable accuracy of historical materials, only an imperfect understanding of the framers' original perceptions of the seventh amendment is possible today. Wolfram, supra note 1, at 652. While all the reasons for adopting the seventh amendment may not be discoverable, it is clear that the framers perceived the jury as serving a protective function, see id. at 671-72, which was jealously guarded since early colonial days. *See J. Houghteling, The Dynamics of Law* 51 (1968); Fisher, supra, at 511-12.


10 Moore, supra note 1, ¶ 38.02[1], at 17.

litigants from oppressive or rigid rules of law by reaching a result
that a judge perhaps was unable or unwilling to reach. Finally,
since a jury verdict does not set any precedent, equitable decisions
are possible without the danger of creating bad law.

The jury's protective function, however, is related only margin-
ally to its capacity to understand and integrate the evidence in a
complex case. It must determine whether there is liability, to
whom and for how much based on all the evidence. It is with this
focus that two complex cases are discussed to illustrate the enormity
of that task.

Bernstein v. Universal Pictures, Inc. was a complex antitrust
class action involving sixty-five named plaintiffs who were seeking
declaratory judgments, injunctions and damages against eleven de-
fendants. Since it was a treble damage suit under the antitrust laws,
the plaintiffs' right to jury trial was well settled. The court ob-
erved that, since each class member was required to prove his own
injuries and damages with respect to each contract entered into with
each defendant, resolution of the case as to the named plaintiffs
would require in excess of 1000 "mini-trials." Moreover, the com-
plaint alleged seven separate conspiracies in violation of the anti-
trust laws. The court projected a minimum of four months to try
the case notwithstanding its view that such an estimate probably

---

13 Wolfram, supra note 1, at 671; see J. Houghteling, THE DYNAMICS OF LAW 53 (1968); Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, in THE JURY 30, 34 (G. Winters ed. 1971). See also Wigmore, A Program for the Trial of Jury Trial, 12 J. AM. JUD. SOC'Y 168, 170 (1929); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1286 (1952). This function of the jury has been criticized on the ground that
the jury does not consider the potential effects its decision will have on the law, see J. FRANK, COURTS ON TRIAL 120 (3d ed. 1973), and often bases its verdict on "fiction and not fact," Moore, supra note 1, ¶ 38.02[1], at 14.


15 A jury, for example, may know that one litigant is powerful and well connected while
another is vulnerable and unknown, or it may sense that a tribunal is hostile to or prejudiced
against one of the parties quite apart from the evidence. Obviously, if a jury is predisposed
to protect a litigant because he is weak or the victim of a corrupt court, it will do so regardless
of the relative merits of the case. Similarly, with the legislative function, the jury need only
decide that someone has been injured and should be compensated. It will reach its desired
result notwithstanding the facts and the law.


17 See note 74 and accompanying text infra.

18 79 F.R.D. at 62. The court noted, however, that the figure of 1000 "mini-trials" did not
include any of the contracts made by the 400-900 absent class members. Id.

19 Id. at 61-62, 66. The plaintiffs alleged that the defendants had conspired to deprive
them as a class of the copyrights to music and lyrics they had written. Id. at 61. While the
size of the class was disputed, the absent class members numbered anywhere from 400 to 900.
Id. at 62.
was unrealistically short.\textsuperscript{20}

While the burden confronting the factfinder in \textit{Bernstein} was enormous, it was overwhelming in \textit{In re U.S. Financial Securities Litigation (USF)},\textsuperscript{21} wherein eighteen cases were consolidated for trial.\textsuperscript{22} Approximately twenty individual and eighty corporate or partnership defendants, many of whom had filed cross claims, were alleged to have violated federal and state securities laws.\textsuperscript{23} Some complaints also alleged common law negligence, gross negligence, fraud and malpractice.\textsuperscript{24} The court speculated that 100,000 pages of documentary evidence along would be presented to the fact finder, a stack of paper as high as a three-story building.\textsuperscript{25} This material not only would have to be read and understood, but the jury also would have to hear and remember many months of tedious, technical testimony about complex accounting methods and theories.\textsuperscript{26} The jury then would have to apply the evidence under the correct law or standard to each cause asserted against each defendant.\textsuperscript{27} Finally, it would have to determine the extent of liability, if any, of each defendant to each plaintiff, as well as the liability of the defendants to each other, and the amount of damages.\textsuperscript{28} The estimated length of trial was two years.\textsuperscript{29}

In cases like \textit{Bernstein} and \textit{USF}, it is clear that compulsory jury duty would be a great hardship for most prospective jurors. Not only

\textsuperscript{20} \textit{Id.} at 63-64. The court noted, however, that such an assumption was impractical because civil trials often were interrupted to hear criminal matters. \textit{Id.}

\textsuperscript{21} 75 F.R.D. 702 (S.D. Cal. 1977).

\textsuperscript{22} \textit{Id.} at 705. Financial (USF) was a large corporation engaged in a nationwide real estate development business. Its projects ranged from financing and issuing title insurance to designing, manufacturing and construction. \textit{Id.} The venture was not successful, however, and trading in its securities was suspended. Thereafter, the corporation filed a petition in bankruptcy. \textit{Id.} In addition to the 17 lawsuits arising out of the failure of the business, the court also was faced with a complaint filed by the SEC. \textit{Id.} Five separate classes had been certified at the time of the opinion. \textit{Id.} at 705-06.

\textsuperscript{23} \textit{Id.} at 706. The complaints charged various inaccuracies in USF's financial statements, by grossly inflating income and using improper methods of accounting. \textit{Id.}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.} at 707. The court observed that this would be the equivalent of reading the first 90 volumes of the Federal Reporter, Second Series, including the headnotes. \textit{Id.} Depositions alone filled 150,000 pages. The court noted that the actual testimony of the witnesses would be more time-consuming than reading the depositions into the record. \textit{Id.} The plaintiffs asserted that they would offer approximately 12,000 documents into evidence, many of which were multi-paged. The court assumed that the defendants would submit a comparable amount of material. \textit{Id.}

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} at 713.
may many jurors be unwilling to serve because jury duty often
proves to be tiresome and unrewarding, but extremely long trials
may place unreasonable demands on a juror's time and interfere
with career or other commitments. Even in cases of shorter dura-
tion, a growing reluctance to serve has developed, especially among
businessmen. Moreover, most jurors would not receive an amount
equal to the income from their salaries.

Jury trials of complex cases also place burdens on the judicial
system. Many contend that, since jury trials are time consuming
and often difficult to manage, they contribute to the slow pace of
justice. The wisdom of the Supreme Court's adoption of an expan-
sive view of the seventh amendment has been questioned at a time
when backlogs, delay and congestion have led to a re-evaluation of
the civil jury as "an instrument of justice." Others have decried
the costs involved in jury trials, although there is convincing evi-

30 See Facets of the Jury System, supra note 10, at 1.
31 See In re U.S. Financial Sec. Litigation, 75 F.R.D. 702, 713-14 (S.D. Cal. 1977). See also Kirkham, Complex Civil Litigation - Have Good Intentions Gone Awry?, 70 F.R.D. 199, 208 (1976). Jury duty in most courts averages about 10 days. There is considerable variation, however, and some courts require jury duty of 30 days or more, whereas others have a one day or one trial method. Facets of the Jury System, supra note 10, at 32-33. There is general agreement that a shorter term is better because it relieves the burden on the juror. See id.; American Bar Association Commission on Standards of Judicial Administration, Management of the Jury System 25 (1975) (hereinafter cited as Management of the Jury System).
34 See ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978); J. Houghteling, The Dynamics of Law 54 (1968); Facets of the Jury System, supra note 10, at 1; Landis, supra note 2, at 21-22; Morris, Jury Trial Under the Federal Fusion Of Law And Equity, 20 Tex. L. Rev. 427, 429 (1942); Ross v. Bernhard: The Uncertain Future of the Seventh Amendment, 81 Yale L.J. 112, 124-26 (1971) [hereinafter cited as Uncertain Future]. See generally H. James, Crisis in the Courts (1967). But see Clark, supra note 9, at 5. Various studies have been undertaken to compare the duration of court and jury trials. One study found that jury trials take 67% more time. Uncertain Future, supra, at 124-25 & n.72 (citing H. Zeisel, H. Kalven, Jr. & B. Buchholz, Delay in the Courts 74, 79 (1959)). But cf. Clark, supra note 9, at 5 (slight time difference between jury and court trials, with jury trials often less time-consuming). See also Clark, supra, at 5-6 (2/3 of jury cases are settled before verdict compared with 40% of nonjury cases).
35 See Moore, supra note 1, ¶ 38.11[9], at 128.23. See generally notes 75-95 and accompanying text infra.
36 ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978);
JURY TRIAL

vidence that the economic arguments have little basis in fact.\textsuperscript{37} Complex litigation presents additional considerations for the courts. Besides finding jurors who are willing and able to serve, there is no guarantee that a full panel of jurors will remain until the end of the trial.\textsuperscript{38} The most significant problem is that a jury may not be able to reach a reasoned decision, or any decision at all, due to its frequent inability to understand the evidence in a complex case.\textsuperscript{39} Under some circumstances a mistrial will have to be declared or a new trial ordered, thereby increasing both the time and money spent in the litigation and further congesting the court calendar.\textsuperscript{40}

Jury trial of complex cases also raises questions to fairness to the litigants.\textsuperscript{41} The first is whether a representative jury, which pre-

\textsuperscript{37} See Padawer-Singer, \textit{Justice or Judgments?}, in \textit{The American Jury System} 45, 46-50 (1977). Of the nearly 330 million dollars expended to meet the costs of operating the federal judicial system, only 4.7\% or approximately 15.6 million dollars was spent for fees, subsistence and mileage to petit jurors. \textit{Id.} at 46-47.

\textsuperscript{38} In re U.S. Financial Sec. Litigation, 75 F.R.D. 702, 714 (S.D. Cal. 1977). The court pointed out that during a two year trial, elderly jurors might die and housewives may have to move with their husbands out of the jurisdiction. \textit{Id.} The USF court noted that in proceedings that were going on at the same time in the state courts, \textit{see id.} at 708, four alternate jurors had been selected and after three months of trial, two of the jurors already had been excused. \textit{Id.} Bifurcated proceedings create additional problems. If the alternates are excused at the conclusion of the liability trial, there are no alternates remaining for the damages trial. \textit{See Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 443 \& n.15 (S.D.N.Y. 1978), aff'd in part, rev'd in part, and remanded, Nos. 78-7445, 78-7448 (2d Cir. June 25, 1979).}

\textsuperscript{39} See Chief Justice Burger, supra note 33; notes 16-29 and accompanying text supra.


\textsuperscript{41} While the length of a complex trial is an exacerbating factor, at least one court has held that a lengthy proceeding is not a per se denial of a fair trial. United States v. Dardi,
supposes impartial persons of diverse backgrounds, can be empaneled. The large number of exemptions and excuses that would have to be granted in a complicated lawsuit make it highly unlikely that the resulting pool would constitute a cross section of the community. As one court suggested, the litigants would be left with housewives whose children had grown, welfare recipients, retired persons or wealthy individuals who do not have to work. Thus, the class of persons most likely to understand the issues in a complex case, businessmen or attorneys, are the very persons who would be excused or exempt. In addition, litigants may be deprived of an adequate remedy at law if the jury cannot fulfill its factfinding function.

330 F.2d 316, 329-30 (2d Cir.), cert. denied, 379 U.S. 845 (1964) (citing People v. Clemente, 8 N.Y.2d 1, 7, 167 N.E.2d 327, 328, 200 N.Y.S.2d 625, 626, cert. denied sub nom. Brinkman v. New York, 364 U.S. 923 (1960)). But see Uncertain Future, supra note 34, at 125-26. See also SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13 (D. Conn. 1977). This decision appears sound and is supported by collateral evidence that juries may act arbitrarily even in trials that are not lengthy and complex. See J. Frank, Courts on Trial 114-15 (3d ed. 1973). Judge Frank states that juries consistently have reached their verdicts by one of three methods: (1) each juror writes down an amount he or she wants to award and the amounts are averaged; (2) the jurors agree to decide for one party or another by the flip of a coin; (3) in cases of deadlock, 24 ballots are prepared, twelve of which represent each view. The vote of each juror is then determined by picking a ballot out of a hat. See J. Houghteling, The Dynamics of Law 58 (1968). See generally Stradbeck, Social Process, the Law, and Jury Functioning, in Law and Sociology: Exploratory Essays 144-64 (W. Evan ed. 1962).


See Chief Justice Burger, supra note 33; note 43 supra. Businessmen are often excused because extremely long trials may place unreasonable demands on their time. See Kirkham, supra note 31, at 208; Rowe, supra note 32, at 108.

Despite the numerous problems presented by the use of juries in complex cases, their protective intervention may be just as necessary. For this reason, several alternatives and procedural devices will be explored with a view toward preserving jury trial in complex cases where possible.

In an effort to reach a compromise between the seventh amendment and the problems inherent in complex litigation, one court has proposed that the right to a jury be limited to one trial for each complex case. Accordingly, a jury demand would have to be granted regardless of the complexity of a case, although the court could direct a verdict or order a new trial should the jury be unable to reach a verdict. While this alternative is an effort to preserve jury trial, it does not alleviate the time and cost burdens on jurors, the problem of empaneling and keeping a representative jury or the inability of the jury properly to fulfill its factfinding function. Moreover, such an alternative seems inefficient, time consuming and expensive.

A second alternative would be to increase the use of the special verdict. Pursuant to the Federal Rules, the court may require the jury to make written findings on questions of fact that have been framed by the court. The court then would apply the law to these findings. The implementation of the special verdict would insulate litigants from general verdicts based on clearly erroneous findings of fact and misapplication of the law and make jury trial more efficient. Its use, however, is limited where the evidence is so complicated that the jury is unable to answer the questions posed by the court. Special verdicts also would not substantially reduce the cost burdens associated with complex litigation.

---

47 See Tamm, supra note 13, at 35 & n.30; Wolfram, supra note 1, at 731; Zeisel, supra note 5, at 68; notes 8-14 and accompanying text supra. One of the purposes behind the seventh amendment is the capacity to achieve a result that a judge would not have achieved. See Wolfram, supra note 1, at 671, 746. For a discussion of the "functional desirability" of a civil jury, see Ochoa v. American Oil Co., 338 F. Supp. 914, 922 n.5 (S.D. Tex. 1972); J. Frank, Courts on Trial 108-45 (1949); J. Frank, Law and the Modern Mind 170-85, 302-09 (1935); Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964).


49 Id. The ILC case was an antitrust action, involving many complicated and technical concepts. Id. After the jury found for the plaintiff, the court declared a mistrial, concluding that the evidence could not justify a verdict for the plaintiff, and directed a verdict for the defendant. Id. at 444.

50 See Fed. R. Civ. P. 49.

A final method of avoiding the abolition of jury trials in complex suits is through the use of Rule 53(b) of the Federal Rules, which permits the court to refer complicated issues to a master in order to assist the jury in its role as factfinder. Since the master often will be able to organize and present the evidence in a manner that is capable of being understood by individual jurors, Rule 53(b) could provide an adequate answer to jury incompetence in some complex cases. The use of masters would not threaten the seventh amendment jury trial guarantee since the jury is not superseded as factfinder. Rather, the master's findings are admissible as expert testimony which the jury is free to accept, reject or give whatever weight it wishes. Moreover, since Rule 53(b) allows reference only in exceptional cases, and because jury demands cannot be struck unless a master is rejected, it is unlikely that the seventh amendment right to a jury trial will be diluted under this alternative.

Sometimes, however, cases may be so complicated that the jury would not even be capable of comprehending the master's testimony. Thus, Rule 53(b), like the special verdict, has limited usefulness when factfinding is extremely complicated. While the use of the master ameliorates one of the major problems inherent in complex litigation, therefore, it does not significantly affect any of the

---

52 Fed. R. Civ. P. 53(b) provides in pertinent part: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . . ."


54 In re Peterson, 253 U.S. 300 (1920).

55 5A Moore's Federal Practice ¶ 53.14[2], at 3036.


58 See Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 71 (S.D.N.Y. 1978); In re United States Financial Sec. Litigation, 75 F.R.D. 702, 713 (S.D. Cal. 1977); notes 16-29 and accompanying text supra. In Bernstein, the court noted that the liability issues, which required testimony concerning each contract between the parties and the negotiations leading up to each, were not appropriate for submission to a master. 79 F.R.D. at 71. Similarly, the USF court reasoned that the mere presentation of figures by a master would not enable the jury to understand and integrate the master's findings. 75 F.R.D. at 713.
other problems experienced by jurors, courts and litigants.

It is submitted that, notwithstanding the various alternatives which have been proposed, and despite the loss of the jury's protective functions, the jury should not serve as factfinder in a complex antitrust or securities case. There are simply too many significant issues which militate against its use. Although economic considerations alone do not justify abandonment of jury trial in such cases, other factors point to that end. Empaneling and keeping a representative jury may be virtually impossible where jurors must serve for two years. Moreover, even if they do serve for two years, they may not understand or remember the issues or the evidence even with the aid of a master. Not only does the volume of evidence which the jury must remember stagger the imagination, but the jury is untrained in the controlling concepts and laws and technical terminology, and it cannot immediately appreciate either the significance of the evidence presented or the weight it should be accorded. It may be unable to sift out important pieces of evidence before that evidence fades into the recesses of memory. Moreover, these limitations are exacerbated by inconveniences which jurors face. Although jury trial is inappropriate in a complex case, it is an institution of great value and the seventh amendment should be protected from erosion as much as possible. Consequently, the rationales for reaching the desired end, an alternate factfinder, should be examined with a view toward their impact on the seventh amendment generally.

THE CONSTITUTIONAL RIGHT TO JURY TRIAL: THE SEVENTH AMENDMENT

The Historical Approach

The mandate of the seventh amendment that jury trials be preserved in "Suits at common law" was defined early in American jurisprudence with reference to the common law of England in 1791, the year the seventh amendment was adopted. It then was the

---

50 See, e.g., Green v. United States, 356 U.S. 165, 216 (1958) (Black, J., dissenting). In Green, Justice Black stated that "trifling economies . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value." Id.

51 United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812). The seventh amendment was intended to preserve the substance, and not the form, of jury trial as it existed in 1791. Galloway v. United States, 319 U.S. 372, 390-92 (1943); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497-98 (1931); In re Peterson, 253 U.S. 300, 309-10 (1920); American Publishing Co. v. Fisher, 166 U.S. 464, 467 (1897); Walker v. New Mexico & S.
English practice to administer law and equity by separate courts, each having distinct jurisdictions. Actions at law were tried to juries, and cases brought in equity were heard by the chancellor. When legal remedies did not exist or were inadequate, equity jurisdiction attached although the suit also may have presented claims cognizable at common law. Once the cause was within equity’s concurrent jurisdiction, the chancellor had an option: he could require that the legal claims be adjudicated first, necessitating a jury trial, or he could resolve the entire case in equity, thereby precluding the action at law due to the principles of res judicata and collateral estoppel. By opting for the latter, the chancellor effectively could thwart the right to jury trial for the common law claims.

Where causes of action were created after 1791, and Congress had not specified the mode of trial, American courts initially used an historical approach, fitting the cause sued upon into its closest historical analogue. If the corresponding historical action was recognized at common law, the new cause of action came within the protection of the seventh amendment’s jury trial guarantee. The

---

Pac. R.R., 165 U.S. 593, 596 (1897); Wolfram, supra note 1, at 735. The static reference to the English common law of 1791 generally has been accepted. See Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935); F. James, Civil Procedure 337 (1965); Moore, supra note 1, ¶ 38.08[5], at 79-80 n.53; Shapiro & Coquillette, supra note 1, at 448.


2 See F. James, Civil Procedure 337 (1965).

3 Uncertain Future, supra note 34, at 120 & n.47 (1971).

4 The power of the chancellor to hear the entire case in equity was based on “clean-up” jurisdiction. Under this doctrine, the chancellor could determine legal questions and provide legal relief which normally would not have been within his jurisdiction. See Fitzpatrick v. Sun Life Assurance Co., 1 F.R.D. 713, 716-17 (D.N.J. 1941). In recent years, the Supreme Court has considered equity’s “clean-up” jurisdiction in light of the seventh amendment and the Federal Rules of Civil Procedure, and presently, it is doubtful whether anything remains of it. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506 (1959); notes 75-95 and accompanying text infra. But see Katchen v. Landy, 382 U.S. 323, 335-36 (1966) (quoting Alexander v. Hillman, 296 U.S. 222, 241-42 (1935)); Gefen v. United States, 400 F.2d 476 (6th Cir. 1968), cert. denied, 393 U.S. 1119 (1969). See generally Chesin & Hazard, Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791, 83 Yale L.J. 999 (1974).

5 Since the chancellor’s findings of fact in equity were binding in the suit at law on common issues of fact, Brady v. Daly, 175 U.S. 148, 159 (1899); Dobson v. Pearce, 12 N.Y. 156, 156-160 (1854), the parties were collaterally estopped from relitigating those issues before a jury. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 894, at 82 (1961).

6 See Luria v. United States, 231 U.S. 9, 27-28 (1913); James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963); Uncertain Future, supra note 34, at 113.

historical test was not always easy to apply, however, since difficulties often arose in determining the legal or equitable nature of the historical analogue.  

The Effect of the Federal Rules of Civil Procedure  

When the Federal Rules merged courts of law and equity and created a consolidated civil jurisdiction, the substantive right to jury trial at common law was not intended to be abridged, enlarged or modified, but rather preserved as mandated by the seventh amendment and federal statutes. Consequently, cases triable by jury prior to the passage of the Federal Rules remained jury actions, and causes previously heard in equity continued to be adjudicated by the courts. In actions involving legal and equitable issues having questions of fact common to both, the order of the trial of these issues became significant since adjudication of the equitable issues first would collaterally estop the parties from litigating these issues before a jury. Until 1959, the order of trial was determined by the

¶ 38.11[6], at 121; Uncertain Future, supra note 34, at 113. For a criticism of the historical test, see Wolfram, supra note 1, at 731.


69 Fed. R. Civ. P. 2; see 2 Moore, supra note 1, ¶ 2.02[1], at 303-04 (2d ed. 1979).


71 Moore, supra note 1, ¶ 38.11[6], at 121-22. An affirmative demand for a trial by jury is required by Rule 38. Fed. R. Civ. P. 38. If the demand is not timely, the right to a jury is waived. Fed. R. Civ. P. 38(d). The action would then be tried before the court, see Moore, supra note 1, ¶ 38.08[6], at 92, unless, in its discretion, a jury trial was ordered. Fed. R. Civ. P. 39(b). See also General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.), cert. denied, 377 U.S. 952 (1964). The plaintiff in Watkins argued that the district court had abused its discretion under Rule 39(b) by refusing to order a jury trial after a waiver under 38(d). The court reasoned, however, that the complexity of the case and difficulty of the subject matter warranted a trial by the court rather than an inexperienced jury. In addition, a nonjury trial would result in a substantial saving of time. 331 F.2d at 197.

72 See note 65 and accompanying text supra. There is no waiver of the right to jury trial by the joinder of legal and equitable claims or remedies under Fed. R. Civ. P. 18. See Ring v. Spina, 166 F.2d 546, 550 (2d Cir.), cert. denied, 335 U.S. 813 (1948). This is true even when the claims are separate and distinct. See McComb v. Frank Scerbo & Sons, Inc., 177 F.2d 137, 139 (2d Cir. 1949); Bruckman v. Hollzer, 152 F.2d 730, 732 (9th Cir. 1946); Hartford-Empire Co. v. Glenshaw Glass Co., 3 F.R.D. 50, 51 (W.D. Pa. 1943). Likewise, the right is not waived by imposition of a legal counterclaim under Rule 13, whether compulsory or permissive, in an equitable action. See Fed. R. Civ. P. 13; Moore, supra note 1, ¶ 38.13, at 144.
basic nature of the dispute. For example, where an action seeking treble damages for violations of the antitrust laws was accompanied by a prayer for injunctive relief, the legal issues were tried first because the general character of the lawsuit was deemed legal.74 Beginning in 1959, the Supreme Court decided several cases which dealt with the effect of the Federal Rules on the scope of equity jurisdiction.

In *Beacon Theatres, Inc. v. Westover,*75 the Supreme Court rejected the notion that trial courts had free discretion to determine the sequence of trial in an antitrust action in which legal and equitable issues were involved.76 Rather, it was found that the seventh...

---

77 See Ring v. Spina, 166 F.2d 546, 550 (2d Cir.), cert. denied, 335 U.S. 813 (1948); Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir.), cert. denied, 320 U.S. 777 (1945); Hargrove v. American Cent. Ins. Co., 125 F.2d 225, 228 (10th Cir. 1942); Moore, supra note 1, ¶ 38.16[1], at 153-162.2.

78 Ring v. Spina, 166 F.2d 546, 550 (2d Cir.), cert. denied, 335 U.S. 813 (1948); Forstmann Woolen Co. v. Alexander's Dep't Stores, Inc., 11 F.R.D. 405 (S.D.N.Y. 1951). In large part, this conclusion was based upon dicta in a 1916 case emphasizing the right to jury trial in a treble damage suit. See Fleitmann v. Weisbach St. Lighting Co., 240 U.S. 27 (1916). In *Fleitmann,* a shareholder brought a derivative action, traditionally deemed equitable in nature, for treble damages under the Sherman Act, 15 U.S.C. § 15 (1976). 240 U.S. at 28. In addressing the question whether a jury trial was appropriate, the Court reasoned that, “when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.” Id. at 29. The Court was apparently influenced by the punitive nature of the imposition of treble damages. Since only a court of law could award punitive damages, see Moore, supra note 1, ¶ 38.37[2], at 308.2, the Court concluded that an antitrust action seeking treble damages could not be tried by a court of equity. 240 U.S. at 29. See United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917) (stockholder may not sue at law to recover treble damages on behalf of corporation for violations of Sherman Act since derivative actions may be brought only in a court of equity); Panchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 781 (2d Cir. 1953). *But see* Davis v. Marathon Oil Co., 57 F.R.D. 23, 24 (N.D. Ohio 1972), aff'd on other grounds, 528 F.2d 395 (6th Cir. 1975). See generally Comment, *Federal Antitrust Law—Stockholders' Remedies For Corporate Injury Resulting From Antitrust Violations: Derivative Antitrust Suit and Fiduciary Duty Action,* 59 Mich. L. Rev. 904 (1961). The conclusion that there is a right to jury trial in treble damage suits has been criticized. See Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66 (S.D.N.Y. 1978); Davis v. Marathon Oil Co., 57 F.R.D. 23, 24 (N.D. Ohio 1972), aff'd on other grounds, 528 F.2d 395 (6th Cir. 1975). *See also* Finlay & Assoc. v. Borg-Warner Corp., 146 N.J. Super. 210, 214 n.1, 369 A.2d 541, 543 n.1 (1976), aff'd, 155 N.J. Super. 331, 382 A.2d 933 (1978). One court has suggested that it is “probably not required by history, logic or statute.” Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 66. Many lower courts, however, have accepted the principle. See, e.g., Davis v. Marathon Oil Co., 57 F.R.D. 23, 24 (N.D. Ohio 1972), aff'd on other grounds, 528 F.2d 395 (6th Cir. 1975); Lah v. Shell Oil Co., 50 F.R.D. 198, 199 (S.D. Ohio 1970).


80 *Id.* at 508-11. In *Beacon Theatres,* a potential defendant in an antitrust action sought a declaratory judgment that it was not violating the antitrust laws and requested that the bringing of an antitrust claim against it be enjoined pending the declaratory judgment suit. *Id.* at 502-03. The defendant filed a counterclaim under the antitrust laws for treble damages...
amendment mandates that a trial judge must use his discretion to preserve jury trials wherever possible by ordering the adjudication of the legal claims first. Noting that equity jurisdiction always had attached when the remedies at law were inadequate, the Court reasoned that the adequacy of a remedy now must be determined with reference to the Federal Rules and the Declaratory Judgment Act. Additionally, since the Federal Rules allow courts to grant legal and equitable remedies, the historical restraint requiring the trial of legal issues in equity was removed, thus permitting the legal issues to be tried by a jury. Only in exceptional circumstances, therefore, could the right to a jury trial be lost through prior adjudication of equitable claims. The right to jury trial was further expanded in Dairy Queen, Inc. v. Wood, wherein the Supreme Court demanded a jury trial on the common issues of fact. The district court characterized the issues in the declaratory judgement action as basically equitable in nature and ordered that those issues be tried first pursuant to its discretion under Rules 42(b) and 57. Consequently, a key factual issue in the counterclaim for treble damages would be determined by the court, foreclosing relitigation through the operation of res judicata or collateral estoppel. Beacon Theatres, Inc. v. Westover, 252 F.2d 864, 874 (9th Cir. 1958), rev'd, 359 U.S. 500 (1959); see Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971), discussed in Shapiro & Coquillette, supra note 1, at 448; notes 63-65 and accompanying text supra. 359 U.S. at 510; accord, Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 490-91 (5th Cir. 1961); see Moore, supra note 1, ¶ 38.11[8.-2], at 128.9. This is true even where the action is primarily equitable in nature. Ochoa v. American Oil Co., 338 F. Supp. 914, 921 (S.D. Tex. 1972). See also Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971); Shapiro & Coquillette, supra note 1, at 457.

The well-settled principle that a district court could control its own docket and order the equitable cause tried first even where there was a common issue of fact, see American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937), apparently was eradicaded by Beacon Theatres, 359 U.S. at 517-18 (Stewart, J., dissenting). Accord, Moore, supra note 1, ¶ 38.11[9], at 128.23 & n.19.

See note 63 and accompanying text supra. 359 U.S. at 509; see 28 U.S.C. §§ 2201-02 (1976); Fed. R. Civ. P. 2; Moore, supra note 1, ¶ 38.07[1], at 44.5, 38.04[2], at 34; notes 69-70 and accompanying text supra. But see 359 U.S. at 517-19 (Stewart, J., dissenting) (citing American Life Ins. Co. v. Reese, 300 U.S. 203, 215 (1937)), pointing out that equity jurisdiction traditionally was not vitiated because a legal remedy became available. Justice Stewart opined that the Federal Rules did not expand the right to jury trial and was not intended to undermine the structure of equity. Accord, Moore, supra note 1, ¶ 38.11[9], at 128.23 & n.19.

Fed. R. Civ. P. 2; see notes 69-70 and accompanying text supra.

359 U.S. at 510; see Uncertain Future, supra note 34 at 120.

359 U.S. at 510-11; see Moore, supra note 1, ¶ 38.11[8.-2], at 128.7. Prior to striking a jury demand, the court must seek any available means, including the Rules, to permit trial by jury. See Wolfram, supra note 1, at 644. Furthermore, regardless of the form in which the cause of action is presented, there is a right to trial by jury for any claim that traditionally would have been triable by law. See Kennedy v. Lakso Co., 414 F.2d 1249, 1252 (3d Cir. 1969). Under limited circumstances, however, the court might order the equitable claim tried first despite the effect of res judicata. See Katchen v. Landy, 382 U.S. 323, 339 (1966).

concluded that any legal issue must be tried by a jury on a proper and timely demand whether it is joined with a claim for equitable relief or is characterized as "incidental" to the equitable issues in the case.\footnote{44} Relying on \textit{Beacon}, the Court determined that a suit for an "equitable accounting" was nothing more than a common law damage action for which a court of law could provide an adequate remedy by utilizing the procedural devices and remedies furnished by the Federal Rules and the Declaratory Judgment Act.\footnote{45}

The Court continued to demonstrate its partiality for civil jury trials in \textit{Ross v. Bernhard},\footnote{46} where it held that the seventh amendment right to trial by jury extends to the legal issues involved in a stockholder derivative suit,\footnote{47} an action historically heard only in a court of equity.\footnote{48} Basing its rationale on the merger of law and equity,\footnote{49} the Court found that the seventh amendment jury trial guarantee was not vitiated simply because equity first had to adjudicate the issue of standing to sue derivatively.\footnote{50} In effect, the Court

\footnotesize\begin{itemize}
\item \footnote{44} Id. at 471-72 (relying on Scott v. Neely, 140 U.S. 106, 109-110, 117 (1891)); see Cates v. Allen, 149 U.S. 451 (1893). The plaintiff in \textit{Dairy Queen} sued for an injunction and an accounting, and the defendant made a timely demand for a jury. The district court denied the demand since the action was "purely equitable" or, if not, that the legal issues were merely incidental to the equitable claims. 369 U.S. at 473-76.
\item \footnote{45} 369 U.S. at 477-79. The Court held that the right to jury trial could not depend upon the plaintiff's choice of words in the pleadings. The Court reasoned that, to maintain a suit for an "equitable accounting" triable by the court, the litigant would have to show that the accounts were so involved that only a court of equity could untangle them. Since the Rules permit the courts to appoint masters to help juries sort out such complicated evidence, however, see FED. R. Civ. P. 53 (b), claims for an accounting will rarely be classified as equitable in nature. 369 U.S. at 477-79; see FED. R. Civ. P. 53(b); notes 52-58 and accompanying text supra.
\item \footnote{46} 396 U.S. 531 (1970).
\item \footnote{47} Id. at 537-38. Had the corporation sued on its own behalf, it clearly would have been entitled to a jury trial. Id. at 542.
\item \footnote{48} Id. at 544 & n.4, 546 (Stewart, J., dissenting). While there was no shareholder derivative action in England in 1791, see \textit{Uncertain Future}, supra, note 34 at 115 & n.26, the derivative action was heard in equity because the shareholder was threatened with irreparable harm and had no remedy at law when the corporation itself refused to sue. 396 U.S. at 539.
\item \footnote{49} 396 U.S. at 539-40; FED. R. Civ. P. 2; see notes 69-70 and accompanying text supra.
\item \footnote{50} 396 U.S. at 539-40. The Court concluded that the shareholder's claims were essentially those of the corporation and that the only reason for requiring the derivative suit to be brought in equity was because courts of law historically had refused to recognize a shareholder's standing to sue on behalf of his corporation. \textit{Id.} With the advent of the Rules, the procedural barrier of standing, which impeded the shareholder's right to sue derivatively in a court of law, was abolished. \textit{Id.; see Moore, supra} note 1, ¶ 38.11[8-8], at 123.18. \textit{But see Uncertain Future, supra note} 34, at 121. The Court held, therefore, that the seventh amendment guarantees the right to a jury trial of the issues in a derivative suit that would have been triable by a jury had the corporation brought the action. 396 U.S. at 532-33.
\end{itemize}
extracted the legal issues from a traditionally equitable action and held that the legal claims set forth in the complaint were protected by the seventh amendment even though the legal issues could not have been tried at law prior to the passage of the joinder provisions in the Federal Rules.\footnote{91}

In deciding the case, the \textit{Ross} Court set forth a test to aid in determining whether the issues in a case are legal: a court must consider "first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."\footnote{92} The first criterion appears to be nothing more than a reaffirmation of the historical analogue method, while the second factor could be regarded as combining the historical approach with the effect of the Federal Rules on the remedies at

\begin{footnotes}
\item[91]In deciding the case, the \textit{Ross} Court set forth a test to aid in determining whether the issues in a case are legal: a court must consider "first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."\footnote{92} The first criterion appears to be nothing more than a reaffirmation of the historical analogue method, while the second factor could be regarded as combining the historical approach with the effect of the Federal Rules on the remedies at

\item[92]In deciding the case, the \textit{Ross} Court set forth a test to aid in determining whether the issues in a case are legal: a court must consider "first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."\footnote{92} The first criterion appears to be nothing more than a reaffirmation of the historical analogue method, while the second factor could be regarded as combining the historical approach with the effect of the Federal Rules on the remedies at

\end{footnotes}
In deciding whether there is a right to jury trial, the relief requested will take on added importance where no clear analogue is available, although the label used to characterize the remedy cannot be determinative. The third Ross factor has received the most varied interpretation and has been criticized as an unwarranted departure from the traditional aspects of the seventh amendment. Despite the fact that the Ross Court neither relied on the third criterion as a basis for its holding nor indicated how each element of its three-pronged test should be weighed, "the practical abilities and limitations of juries" has been interpreted by some federal courts to serve as a basis for striking jury demands in actions that were clearly legal in nature.

Implementation of the Third Criteria of the Ross Test: The Practical Abilities and Limitations of Juries

In In re Boise Cascade Securities Litigation, a complex securities fraud case, the court observed that, while jury trials clearly were favored, "the Supreme Court [had] recognized that the use

---

92 See generally Wolfram, supra note 1, at 643-44. One observer has noted that the Court failed to specify which "questions" would be examined for their pre-merger customs. Uncertain Future, supra note 34, at 127. It would appear that the Court was referring to the underlying claim to be tried and not to the vehicle used by the claimant to bring the action.
93 See, e.g., Hyde Properties v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974); Ochoa v. American Oil Co., 338 F. Supp. 914, 920 (S.D. Tex. 1972). Where both legal and equitable remedies are available, Beacon and Dairy Queen require the plaintiff to proceed at law. Hyde Properties v. McCoy, 507 F.2d at 306; see notes 75-85 and accompanying text supra. See also Uncertain Future, supra note 34, at 127-28.
94 See note 85 and accompanying text supra. Where legal and equitable causes are joined, Beacon and Dairy Queen require that the right to jury trial be preserved on the legal issues, even if they are incidental to the equitable issues. See, e.g., Kennedy v. Lakso Co., 414 F.2d 1249 (3d Cir. 1969). See notes 88-94 and accompanying text supra.
95 Uncertain Future, supra note 34, at 129-30; see In re Japanese Elec. Prods. Antitrust Litigation, 930 ANTTRUST & TRADE REG. REP. (BNA) A-11 (E.D. Pa. Aug. 21, 1979). The practical abilities and limitations of juries have never been considered part of the historical test, as the division between law and equity was never determined by whether judge or jury would be a more capable factfinder. See Moore, supra note 1, ¶ 38.11[9], at 128.21; Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 NW. U.L. Rev. 486, 523-25 (1975); Uncertain Future, supra note 34, at 130.
96 See Uncertain Future, supra note 34, at 129.
97 See notes 99-112 and accompanying text infra.
98 See note 99 and accompanying text supra.
99 In Boise, the former stockholders of a company which had been acquired sued the acquiring company for securities fraud. Four cases were consolidated for trial. Id. at 101. The case involved difficult accounting concepts and required an examination of assets and liabilities of over one billion dollars covering a period of five years. Id. at 103.
100 Id.
of juries [was] not without limits.'

Reasoning that the third factor of the Ross test acknowledges that an "impartial and capable factfinder" is central to the concept of fairness in the fifth and fourteenth amendments, the Boise Cascade court struck a demand for a jury trial. It was found that the practical abilities and limitations of jurors "must be seen as a limitation to or interpretation of the Seventh Amendment." In according constitutional status to the capacity of jurors to understand and find the facts, it is submitted that the Boise Cascade Court misinterpreted the intended function of the tripartite test in Ross. These three factors apparently were designed only to be used to make a threshold determination of whether a class of claims was "legal" and therefore triable by a jury. It is suggested that the Ross court did not intend jury competence to be an open and overriding question in every case, but simply one factor in determining the nature of the claim. In view of the Court's strong policy favoring jury trials, it would seem unlikely that the Ross Court pronounced a constitutional exception to the seventh amendment in a footnote, without the benefit of discussion, direction or explanation. Moreover, the Boise Cascade court's rationale threatens to erode the seventh amendment by making jury trials depend upon vague notions of what is beyond the practical abilities and limitations of jurors.

Other district courts interpreting the third criterion of Ross have reached similar results, reasoning, however, that complex actions are within equity jurisdiction and therefore not subject to

---

102 Id. at 104.
103 While conceding that it was not possible to define precisely when a case exceeds the ability of a jury, the court in Boise suggested that "a number of factors must combine to convince the Court that a jury would be incapable of fairly deciding the case." Id. The inability of the jury to act as a capable fact finder in certain situations has been consistently recognized. See, e.g., Davis v. Marathon Oil Co., 57 F.R.D. 23, 24 (N.D. Ohio 1972), aff'd on other grounds, 528 F.2d 395 (6th Cir. 1975); The Federalist, No. 83 (A. Hamilton), at 527-28 (Lodge ed. 1888); Kirkham, supra note 31, at 208; 1977 Judicial Conference of the Second Circuit of the United States, Transcript of Proceedings 29 (September 9, 1977) (remarks of Chief Judge Kaufman). See generally J. Frank, Courts on Trial 108-45 (1949). See also 1 W. Holdsworth, A History of English Law 347 (6th ed. 1938).


seventh amendment protection. For example, in Bernstein v. Universal Pictures, Inc., although the application of the first two criteria of the Ross test suggested that a jury trial was appropriate, the court observed that the third Ross standard was a restatement of the traditional equity power of the courts to exercise concurrent jurisdiction over matters involving intricate damage calculations or complex accounts when the remedy at law was inadequate or inefficient.

Insofar as Bernstein and other courts relied on the inability of the jury to understand intricate accounting problems and damage calculations to justify the invocation of equity jurisdiction, they were firmly supported by precedent. These courts, however, did not restrict their basis for equity jurisdiction to the complex accounting problems involved in those cases. Each court found the complexity of the case as a whole beyond the competence of the jury and that, since the remedy at law was inadequate, the entire case must be heard in equity. Although an early case suggested that the power of equity to take jurisdiction might not be limited to accounts, but may attach if “some difficulty at law should interpose,” later cases indicate that the complicated nature of the facts
in an action where no accounts or accountings are involved, would not be a sufficient basis for equity jurisdiction.\textsuperscript{114}

While extending the concept of an inadequate remedy at law to instances where the jury cannot understand the evidence is appealing because it allows the court to invoke equity jurisdiction, it is submitted that such an extension is subject to the same criticism as the \textit{Boise Cascade} rationale. Great discretion would lie in the hands of a trial judge to deny a jury based on the judge’s conception of the practical abilities and limitations of the jurors and the complexity of the case, a result most likely not intended by the framers of the seventh amendment.\textsuperscript{115} Moreover, this rationale appears to be inconsistent with \textit{Beacon}, wherein the Supreme Court restricted the discretion of the trial courts to control their own dockets, so that the right to jury trial could be most effectively preserved.\textsuperscript{116}

\textbf{BEYOND ROSS}

Consistent with preserving the right to jury trial where complex cases are not involved, it is suggested that jury trial should be eliminated in areas where complex suits most frequently arise. The Supreme Court has stated that in matters involving public rights,\textsuperscript{117}

\begin{itemize}
  \item this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, \ldots in order to induce a court of chancery to exercise jurisdiction.
  \end{itemize}

\textit{Id.} (emphasis added) (citations omitted).


\textsuperscript{115} See Wolfram, supra note 1, at 644; Uncertain Future, supra note 34, at 129-30.


\textsuperscript{117} A public right exists in “cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact . . . .” Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n, 430 U.S. 442, 450 (1977). An order of a governmental agency is said to enforce a public right even though the benefit accrues to an individual. See L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965). Thus, the amended statutes properly could provide for damages for injured parties. Inasmuch as the proceeding is both initiated and controlled by the agency, the statutory right to enforcement belongs to the public rather than to an individual. Id., see Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 269 (1940). In determining the limits to the concept of a public right, Professor Jaffe notes that “[t]he classification must no doubt rest on a specifically defined statutory policy, the enforcement of which is committed to public authorities.” Jaffe, supra, at 90. Where solely private rights are at stake, the use of
Congress may commit the trial of all issues to an administrative agency. In the antitrust and securities fields, where government regulation already is extensive, it is submitted that Congress properly could assign the adjudication of all claims arising under those statutes to an administrative agency, as it has done in the field of labor relations. In doing so, neither amorphous limitations to the seventh amendment nor discretionary enlargements of equity jurisdiction would be created.

The concept of administrative enforcement of the antitrust and securities laws is appealing. Through its expertise, the agency would function in a manner similar to a "blue ribbon" jury, and since the agency would be required to document its findings of fact and

an administrative agency as factfinder has been sanctioned in limited instances as an "adjunct to an Art. III court." Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 n.7 (1977); see Crowell v. Benson, 285 U.S. 22, 51 (1932).

III See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977); Moore, supra note 1, ¶ 38.119(1), at 128.20. In Atlas, the petitioners challenged the constitutionality of the enforcement of the Occupational Safety and Health Act without a jury trial and a finding by the Occupational Safety and Health Review Commission that they had violated the Act. The petitioners argued that since the Commission's suit to collect the civil penalties was tantamount to an action at law for a money judgment, a jury trial was required. 430 U.S. at 449. The Court held, however, that, since public rights were involved, Congress could assign the adjudication of the claims to an administrative agency without violating the seventh amendment. Id. at 455; see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); Crowell v. Benson, 285 U.S. 22, 50-51 (1932). See also Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335 (1932); Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). Moreover, this principle pertains even where a jury trial would have been required by the seventh amendment had Congress chosen courts of law to adjudicate the causes of action. 430 U.S. at 455. See also Pernell v. Southall Realty, 416 U.S. 383, 383 (1974); Curtis v. Loether, 415 U.S. 189, 194-95 (1974).

IV See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In Jones & Laughlin, the Court concluded that the adjudication of unfair labor practices under the National Labor Relations Act by the National Labor Relations Board was not violative of the seventh amendment, notwithstanding that reinstatement and backpay could be ordered. Such a proceeding could not be classified as a "suit at common law." Id. at 48. Rather, the action was a "statutory proceeding," not requiring a jury trial. Id. In cases subsequent to Jones & Laughlin, the Supreme Court has determined that the seventh amendment does not restrict the power of Congress to create administrative agencies with the ability to enforce statutory rights. Curtis v. Loether, 415 U.S. 189, 194-95 (1974); see Pernell v. Southall Realty, 416 U.S. 383, 383 (1974); Katchen v. Landy, 382 U.S. 323 (1966).

conclusions of law, it is likely to be less arbitrary than a jury.\footnote{121} Moreover, an agency's findings of fact could be more readily challenged than a jury's, thus adding an element of protection.\footnote{122}

Of course, this proposal is not without drawbacks. It is overinclusive because the protection of the jury will be sacrificed in antitrust and securities cases which are not complex. This result, however, is preferable to conditioning seventh amendment rights on a discretionary assessment of the "practical abilities and limitations" of jurors. With no guidelines as to what that means, one can only assume that a standard of "You'll know it when you see it," will be applied. The seventh amendment should not be subject to such unfettered discretion. Although this proposal will reach most large, complex cases, it is also underinclusive in that it fails to provide for complex cases which may occur in other areas of law.\footnote{123} Perhaps masters and special verdicts can assist the courts in those cases, especially if the cases are not as unwieldy, and concepts and terminology are familiar to the jurors. Finally, it undoubtedly will be costly to create a new agency, and such considerations cannot be dismissed lightly, but a capable and efficient factfinder would be assured, the seventh amendment would not be open to erosion, and congestion and costs in the courts would be reduced.

\footnote{121}{The Federal Administrative Procedure Act, 5 U.S.C. § 557(c) (1976) provides that each decision reached in an administrative agency proceeding must include a documentation of "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record." It has been noted that in most federal cases involving jury trials, a general verdict is used, requiring only that the jury find for one of the parties. C. Wright, Law of Federal Courts § 94, at 417 (2d ed. 1970).}

\footnote{122}{The standard generally adopted by administrative agencies to allow judicial review on determinations of questions of fact is one of substantial evidence. Many statutory schemes expressly provide for such. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (1976), where it is stated that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." The courts have provided this interpretation in cases where a statute was silent as to the standard for judicial review. See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Ellers v. Railroad Retirement Bd., 132 F.2d 636, 639 (2d Cir. 1943). Chief Justice Hughes, in Consolidated Edison, gave, perhaps, the most widely accepted definition of substantial evidence. He concluded that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 305 U.S. at 229 (citations omitted). The seventh amendment, of course, prohibits the re-examination of a jury's findings of fact. U.S. CONST. amend. VII. While a jury verdict may be challenged, a fact tried by a jury may not. Id. The substantial evidence rule, therefore, affords the litigant in an administrative proceeding this additional benefit.}

\footnote{123}{See note 3 supra.}
CONCLUSION

Although the jury has improved the quality of justice in this country and has protected litigants from arbitrariness and bias, its use in complex litigation has given rise to serious problems for jurors, courts and litigants. In some cases, masters may assist the jury in its role as factfinder, and the use of special verdicts may insulate litigants from clearly erroneous general verdicts, but these devices are piecemeal measures which do not adequately address the myriad of problems associated with complex antitrust and securities litigation.

It has been suggested that jury trials should be sacrificed in complex antitrust or securities cases. This end, however, should not be achieved by opening the seventh amendment to erosion in other areas. Consequently, rationales which engraft discretionary limitations onto the seventh amendment or enlarge equity jurisdiction should be discouraged as both are subject to potential abuse by judges who overestimate the complexity of a case or underestimate the capabilities of the jury. Instead, Congress should provide for an alternate factfinder by amending the antitrust and securities laws to require trial by an administrative agency. While this proposal would not solve all the problems associated with complex litigation, it is preferable to an ineffective factfinder or having seventh amendment rights dependent on a court’s notion of what is beyond a jury’s competence.

Maralynne Flehner