Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation

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The recent surge of civil cases involving unusually complex factual and legal issues has given rise to great controversy over the necessity for jury competence in complex civil litigation.[1] The controversy stems, in part, from the clash between the constitutional right to a jury trial in actions at law[2] and the due process considerations of the fifth amendment.[3] The argument against having jury trials is that due process of law is denied a party if the jury is unable to understand the issues and reach a rational decision.[4] Although this debate has raged for some time,[5] only recently have the courts squarely addressed this issue.[6] Advanced technology and sophistication of modern society have spawned a great deal of antitrust, patent and other commercial litigation, the size and complexity of which is staggering.[7]

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1. *E.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); *In re* U.S. Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1980); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976).

2. U.S. CONST. amend. VII. The seventh amendment guarantees the right to a jury trial in all actions at law where the amount in controversy exceeds twenty dollars. *Id.*

3. U.S. CONST. amend. V. The fifth amendment guarantees, in part, that no person shall "be deprived of life, liberty or property, without due process of law." *Id.*

4. *See generally* Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1 (1981).

5. *E.g.*, Deforest, *Trial by Jury in Commercial Cases*, 35 HUNT'S MERCHANTS' MAG. 302, 304 (1856) (denouncing the frequent inability of jurors to agree in commercial cases). After the seventh amendment was passed in 1791, some 19th century courts took equity jurisdiction over actions for accounting due to the complexity of such suits. *E.g.*, President of the Farmers' & Merchanics' Bank v. Polk, 1 Del. Ch. 167, 175-76 (1821) in which the court said:

> These transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy. They will require time, assiduous attention and minute investigation, and are involved in so much confusion and difficulty that no other tribunal, by reason of the forms of proceeding of the courts of law, can afford the plaintiff a remedy.

Id.

6. *See supra* note 1.

7. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 895 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (over 20,000,000 documents were produced for inspection and over 100,000 pages of deposition

Four recent court decisions have held that the seventh amendment does not guarantee the right to a jury trial in complex civil actions.[8] In so holding, these cases all relied, in part, upon the last clause of a controversial footnote in *Ross v. Bernhard*[9] which enumerated three factors to be considered in determining whether the right to jury trial is preserved for a particular issue: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, *the practical abilities and limitations of juries*."[10] The Ninth Circuit, however, expressly rejected the *Ross* footnote argument, declaring that such reliance on the dictum in *Ross* is misplaced; a constitutional interpretation of such magnitude would not have been relegated to a mere footnote.[11] In fact, the Ninth Circuit held that no case could be so complex as to be beyond the capabilities of a jury.[12] The court pointed out that with proper presentation of the case by counsel, active control and management of the trial by the judge, and the use of various simplifying techniques, a jury is competent to make rational fact decisions in complex cases.[13]

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transcripts taken in an action alleging a worldwide conspiracy spanning a 30 year period and involving some 100 international importers, exporters and manufacturers of electronics products); SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 986 (D. Conn. 1978), *aff'd*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 102 S. Ct 1708 (1982) (the trial lasted 14 months and the 38 days of jury deliberation resulted in 54 verdicts in a private treble damages action alleging a violation of federal antitrust laws by defendant's refusal to license a patent); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423, 444 (N. D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1980) (approximately 2,300 exhibits were allowed into evidence and counsel called 87 witnesses in an action alleging monopolization or attempted monopolization involving determinations of the existence of relevant product market and predatory pricing).

8. ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1980) (plaintiff's jury demand was stricken in antitrust case where the magnitude and complexity of the suit rendered it beyond the capabilities of a jury to understand and decide rationality); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976) (plaintiffs' demand for jury trial was stricken in securities fraud action where the issues were so immense and complex that jury was incapable of being a rational factfinder); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (plaintiffs' demand for jury trial was stricken in copyright/antitrust action because the complex liability issues and complex relationships between the parties as well as the estimated four month trial rendered the case beyond the practical abilities and limitations of the jury).

In the recent case of *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980), the court held that due process considerations outweigh the seventh amendment right to a jury trial when a case is so complex that a jury is incapable of making a rational decision by means of a reasonable comprehension of the evidence and the law. *Id.* at 1086. The Third Circuit did not strike the jury demand but, rather, remanded the case to the district court to determine if the case was too complex to be tried by a jury. *Id.* at 1090.

9. 396 U.S. 531 (1970).

10. *Id.* at 538 n.10 (emphasis added). For arguments against considering the "practical abilities and limitations of juries" in interpreting the seventh amendment right to a jury trial in complex litigation, see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 92, at 454 (3d ed. 1976); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationability of Rational Decision-Making*, 70 N.W.L. REV. 486, 526 (1975); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 645 (1973).

11. *See In re* United States Fin. Sec. Litig., 609 F.2d 411, 425 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). *See also* Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D. Ill. 1977).

12. *In re* United States Fin. Sec. Litig., 609 F.2d 411, 432 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

13. *Id.* at 427-28.

Despite the controversy over the competence of the jury in complex cases, the United States Supreme Court historically has maintained that the jury trial "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."[14]

The competency issue undoubtedly will remain before the courts until a decision is ultimately rendered by the United States Supreme Court. Given the increasing number of complex cases and the ambiguity of determining when a case is so overwhelmingly complex that it requires the denial of a jury demand on due process grounds,[15] the immediate concern appears to be the competence of juries who are deciding such complex issues. Many courts, acknowledging the serious nature of the problem, have suggested several viable methods to improve the competence of the jury.

This Note examines these court-sanctioned methods. The Note first will set forth and explore the federal court-sanctioned procedures for simplifying complex trials for the jury. Many of these procedures are commonly known and used under certain circumstances but they are not recognized or used adequately to simplify complex litigation. Second, the Note will discuss special juries and administrative tribunals and their potential use in complex litigation. The general effectiveness and practicability of these simplifying techniques will be discussed and compared. Finally, the Note will suggest that improving the competence of the jury through the court-sanctioned procedures will be the most effective and immediate means of preserving the right to a jury trial in complex civil litigation.

COURT-SANCTIONED PROCEDURES

Faced with the rapidly rising number of complex suits in out litigious society, the courts have begun to address the need for both increasing a jury's capabilities and reducing the complexity of a suit.[16] As a result, the

14. Colgrove v. Battin, 413 U.S. 149, 187-88 (1973); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1958); Dimick v. Schiedt, 293 U.S. 474. 485-86 (1934). *See* C. WRIGHT, *supra* note 10, § 92, at 448.

15. The court in *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) stated that "[a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner." *Id.* at 1079. The court enumerated three factors to be considered when determining complexity:

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

Id. at 1088-89. *See also In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 431-32 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980) ("[n]ot only do we refuse to read a complexity exception into the Seventh Amendment, but we also express grave reservations about whether a meaningful test could be developed were we to find such an exception"); Davis-Watkins Co. v. Service Merchandise Co., Inc., 500 F. Supp. 1244, 1251 (M.D. Tenn. 1980) ("unfortunately, no litmus-paper test exists to determine complexity").

16. *E.g.*, *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). The court

courts have suggested several approaches. These approaches can be grouped into three categories: pre-trial, trial, and post-trial.

Pre-Trial Procedures

One court-advocated, pre-trial method of improving jury trials in complex litigation is the effective use of the pre-trial conference.[17] Under this procedure the judge and the attorneys isolate and define the parties' positions on the various issues in the initial proceeding. The pre-trial conference can be advantageous to parties because it narrows the issues for trial. In *Cotton v. Witco Chemical Corp.*,[18] nine plaintiffs brought an antitrust action against the defendant corporation and four of its officers.[19] After four years of pre-trial discovery the defendants filed a motion to strike the plaintiffs' jury demand due to the complexity of the case.[20] The Fifth Circuit denied the motion, noting that the case had been unnecessarily complicated by defense counsel at the trial level and that the pre-trial conference should have been used to narrow the issues to those reasonably represented by the parties.[21] The use of the pre-trial conference in *Cotton* would have curtailed the discovery period and saved the parties time and money. Indeed, since much of the complexity in modern civil litigation is simply the result of counsels' failure adequately to prepare their cases,[22] the pre-trial conference could result in the streamlining of cases and encouraging counsel preparedness.

In addition to using the pre-trial conference to simplify the case during the pre-trial stage, courts have noted the severability of issues and claims.[23] Under Rule 42(b) of the Federal Rules of Civil Procedure, a court may grant separate trials to separate claims or issue,[24] and thereby

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stated that a demand for jury trial should not be denied if, by other methods, the court can enhance a jury's capabilities or reduce the level of complexity of a case to bring it within the ability of a jury to decide. *Id.* at 1088.

17. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (1978) (suggests detailed procedures to be followed in the pre-trial conferences) [hereinafter cited as MANUAL]. A few courts have expressly referred to the MANUAL as a source of suggestions for improving the jury's competence in complex litigation. *E.g.*, *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1088 (3d Cir. 1980); *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 427-28 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

18. 651 F.2d 274 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982).

19. *Id.* at 274.

20. *Id.* at 275.

21. *Id.*

22. *See* American Can Co. v. Dart Indus., Inc., 205 U.S.P.Q. (BNA) 1006, 1008 (N.D. Ill. 1979) (the court suggested improving trial preparation before entertaining the idea of abolishing the right to trial by jury); *The Civil Litigator*, 9 COLO. LAW. 2371, 2372 (1980) ("in the final analysis, retention of the jury system in complex cases will depend on how well trial lawyers communicate complex facts to juries").

23. *See* Ross v. Bernhard, 396 U.S. 531, 540 (1970); *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1088 (3d Cir. 1980); *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980); Davis-Watkins Co. v. Service Merchandise Co., Inc., 500 F. Supp. 1244, 1252 (M.D. Tenn. 1980).

24. FED. R. CIV. P. 42 (b) provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

avoid the element of complexity arising from multiplicity of parties and issues. Separate trials result in better organization and clarity in the cases presented as well as in avoidance of unnecessary litigation of other issues.[25]

Separating the issues of liability and damages into different trials, for example, may simplify a complex trial. If the issue of liability is tried first and no liability is found, then there is no need to determine damages. Thus, evidence relating solely to the damages issue will not be presented to the jury if no liability is found. This will make the trial less complicated and shorter in many cases. Moreover, if liability is found in the first stage, the possibility of settlement increases, and a long complicated trial on the issue of damages is avoided. One court has specifically advocated separation of these issues under certain circumstances. In *LoCicero v. Humble Oil & Refining Co.*,[26] the federal district court noted that, in antitrust cases, separate trials on the issues of liability and damages will be granted where it will result in "convenience, potential economy, clearer jury understanding of the issues, less embracive closing arguments, a shorter jury charge at each stage of the trial."[27]

The ability of a court to grant separate trials of claims or issues under Rule 42(b) may, however, conflict with other Federal Rules of Civil Procedure which provide for the liberal joinder of claims and parties and for consolidation of actions for trial.[28] These latter rules are aimed at increasing the efficiency of the courts by allowing the matters to be tried and determined "in one action, with all parties before one court."[29] Therefore, allowing separate trials for all the component parts of a case may cause much inefficiency in the judicial system. This may be a necessary cost to preserve the jury.

The Sixth Circuit has addressed this dichotomy, noting that where the complications and confusions resulting from the joinder of numerous issues are such that it would be impossible to try the case before a jury in an orderly manner, then the judge should authorize separate trials on any claim or issue, pursuant to Rule 42(b).[30] In a dissenting opinion, Judge Gibbons of the Third Circuit noted that if a case appears too complex for a jury, the economic and procedural advantages of the joinder and consolidation rules should be foregone by the party demanding a jury trial, in an effort to simplify the case.[31]

There are several other well-known pre-trial procedures which remove issues from the realm of jury determination and thereby simplify the case. Courts have suggested the use of Rule 12 of the Federal Rules of

25. *See* MANUAL, *supra* note 17, § 4.12.

26. 52 F.R.D. 28 (E.D. La. 1971).

27. *Id.* at 30-31.

28. For rules concerning joinder, see FED. R. CIV. P. 13, 14, 18, 19, 20 & 22(1). For rules concerning consolidation, see FED. R. CIV. P. 42(a).

29. Lasa Per L'Industria del Marmo Societa Per Azioni of Lasa, Italy v. Alexander, 414 F.2d 143, 147 (6th Cir. 1969).

30. *Id.* at 147.

31. *See In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1091 (3d Cir. 1980) (Gibbons, J., dissenting).

Civil Procedure[32] to test the adequacy of the pleadings of the opposing party.[33] In fact, many cases appear overwhelmingly complex in the initial stages. Efforts by counsel to utilize the pre-trial procedures above can transform the initially overwhelmingly complex case into a coherent, manageable array of facts and issues by the time the case gets to the jury.

Trial Procedures

The clarification of issues and parties' views which began in the pretrial conference can be furthered during the trial through the use of discovery conferences between the attorneys and the court. Rule 26(f) of the Federal Rules of Civil Procedure[34] allows the court, on a party's motion or at the court's discretion, to interrupt the trial to resolve any latent conflicts or confusion that may arise during the course of the trial. The use of discovery conferences to simplify complex cases during trial has not been addressed specifically by the federal courts but it can be effectively used in such cases.

Another means of improving jury competence during the trial is the use of preliminary jury instructions. Psychological studies confirm that jurors are more apt to remember and correctly classify the evidence produced during the trial if they are given the legal framework of jury instructions before hearing the case.[35] Indeed, the practice of giving preliminary jury instructions at the outset of the trial was advocated by Judge Prettyman as early as 1960.[36] He pointed out that the present order of procedure makes much of the trial mere "mumbo jumbo" because jurors are not properly prepared by the court to listen intelligently for matters that may help them determine the questions they are expected to decide.[37] Preliminary instructions will put the jury in the best possible position to perform their decisionmaking task.[38] This suggestion has been supported recently by the National Commission for the Review of Antitrust Laws

32. *See* FED. R. CIV. P. 12(b), (c), (f) & (g). Rule 12(b) allows a party to test the adequacy of the pleadings through motions alleging (1) lack of jurisdiction; (2) improper venue; (3) insufficiency of process or service of process; (4) failure to state a claim upon which relief can be granted; and (5) failure to join a party under Rule 19. Rule 12(c) allows a party to move for a judgment on the pleadings. Rule 12(f) allows a party to move to strike from pleadings insufficient defenses or improper matters. Rule 12(g) allows a party to join and assert any number of these motions provided for and available under Rule 12.

33. *E.g.*, Tights, Inc. v. Stanley, 441 F.2d 336, 340 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971) (complex patent infringement suit wherein court advocated the use of involuntary dismissal and summary judgment to relieve jury of the decision); *In re* United States Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980) (complex securities litigation where court suggested use of Rule 12 motions and summary judgment in order to simplify the trial).

34. Rule 26(f) provides that at any time after the commencement of an action, the court may, of its own volition or upon the motion of the attorney of any party, direct the attorneys for the parties to confer with the court regarding the discovery in the case. The purposes of the conference may be to identify issues, establish a plan and schedule of discovery, set limitations on discovery, and/or determine other matters necessary to ensure proper management of discovery in the case. *See* FED. R. CIV. P. 26(f).

35. *See* Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or In Light of It?*, 1 L. & HUM. BEHAV. 163 (1977).

36. *See* Prettyman, *Jury Instructions—First or Last*, 46 A.B.A.J. 1066 (1960).

37. *Id.*

38. *Id.*

and Procedures.[39]

Several courts have acknowledged this suggestion and begun slowly to give jury instructions prior to the case being heard.[40] A strong argument can be made, however, that the practice of giving preliminary jury instructions is highly prejudicial in cases where the applicable legal theories are in dispute or where the facts brought out at trial do not legally support the jury instruction given before the trial began. This issue was addressed by the Ninth Circuit in 1965. In *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*,[41] the trial court read a statement to the jury at the outset of the trial advising them as to the antitrust nature of the case and the issues likely to be presented.[42] This was challenged by counsel as prejudicial.[43] The Ninth Circuit found it was neither prejudicial nor a violation of Rule 51 of the Federal Rules of Civil Procedure, which provides that the jury shall be instructed after the final arguments have been completed.[44]

Potential problems of prejudice may be avoided if before the trial the parties agree upon the specific language a court should use in a preliminary statement of the law and the burdens of proof. Giving preliminary jury instructions or a general statement to the jury before trial is a practical means of improving jury competence in complex trials. Consequently, both attorneys and judges should attempt to eliminate any prejudicial effect and encourage such a practice.

A third court-advocated trial method of simplifying a case is to allow counsel to use summaries, charts, or calculations to simplify the presentation of evidence to the jury.[45] As early as 1943, the United States Supreme

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39. *See* NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 107 (1979), *summarized in* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 5 TRADE REG. REP. (CCH) ¶ 62,753, at 78,342 n.78 (E.D. Pa. June 6, 1979).

40. *See* Stonehocker v. General Motors Corp., 587 F.2d 151, 157 (4th Cir. 1978) (on reviewing the propriety of the pretrial jury instructions by the trial court, the Fourth Circuit noted that "introductory instructions may serve a useful purpose and are often helpful and proper in acquainting the jury with the nature of the case. . . ."); Cavendish v. Sunoco Service of Greenfield, Inc., 451 F.2d 1360, 1364-66 (7th Cir. 1971) (products liability case in which the trial judge gave jury instructions before evidence, before final argument and after final argument); Record at 296, SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 12 (D. Conn. 1977).

> Judge Newman gave preliminary jury instructions, explaining to the jury:
> [It] may be helpful if right now at the start I give you at least a general outline of some of the principles that apply to this case, so that as you listen to the testimony, you will at least have a general idea of the rules of law that you will be asked to apply when you come to consider your verdicts at the end of the trial.

Id. at 296.

41. 341 F.2d 653 (9th Cir. 1965), *cert. denied*, 382 U.S. 817 (1965).

42. *Id.* at 665.

43. *Id.*

44. *Id.*

45. FED. R. EVID. 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

See In re U.S. Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980) (Rule 1006 should be liberally employed in complex civil litiga-

Court advocated the use of summaries, noting that their use did not impede the function of the jury since all the issues were still presented to the jury.[46] This practice is invaluable today where the discovery in a single case may yield twenty million relevant documents and over hundred thousand pages of deposition transcripts.[47] The use of summaries and charts in such cases will enable the jurors to comprehend better the presented issues and conflicts and will thereby increase their overall understanding of the case.

Jury competence also can be facilitated by allowing jurors to take notes during the trial and to use their notes during deliberations. Note-taking may not only aid the jurors' memories and recall of the facts, but may also serve to involve the jurors in the trial, by bolstering their attentiveness. This means of managing the tremendous amount of information generated in lengthy, complex trials appears to be gaining acceptance in the federal courts.[48] In a 1971 criminal case, the Second Circuit upheld the trial court's decision to allow jurors to take notes during the trial and to use them later during deliberations without special instructions regarding their use and without inspection by counsel.[49] Another court has allowed jurors to take their notes into the deliberating room.[50] Counsel and courts should encourage jurors to take notes during trial for their later use. In addition to improving the accuracy of the jurors' memories, note-taking may increase their concentration and comprehension.

A fifth trial procedure involves the use of a special master[51] whose use in complex civil litigation has increased recently.[52] The master may make findings of fact and conclusions of law based upon the evidence presented to the master.[53] In actions to be tried by a jury, the court may appoint special masters only when the legal issues appear too complicated for the jury to handle adequately alone.[54] The practice of using special masters has several attendant considerations. In *Bernstein v. Universal Pictures, Inc.*,[55] the New York District Court found that before a jury demand in an

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tion because it promotes fairness and eliminates unjustifiable expense and delay). *See also* FED. R. EVID. 102.

46. United States v. Johnson, 319 U.S. 503, 519 (1943).

47. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 895 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).

48. *E.g.*, United States v. Braverman, 522 F.2d 218, 224 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975) (jurors allowed to take notes while the jury instructions were played back to them on a tape recorder); SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 15 (D. Conn. 1977) (jurors allowed to take notes during complicated, lengthy civil trial).

49. United State v. Marquez, 449 F.2d 89, 93 (2d Cir. 1971), *cert. denied*, 405 U.S. 963 (1972).

50. SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 15 (D. Conn. 1977) (pretrial ruling).

51. Under Rule 53(a) of the Federal Rules of Civil Procedure, a master includes "a referee, an auditor, an examiner, a commissioner, and an assessor." FED. R. CIV. P. 53(a).

52. *See In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980) (a special master may be appointed, pursuant to Rule 53(b), to assist the jury); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (the court should explore the possibility of using a special master pursuant to Rule 53); S.P.C.S., Inc. v. Lockheed Shipbuilding & Constr. Co., 29 Wash. App. 930, 935-36, 631 P.2d 999, 1002 (1981) (the power of the court to appoint a special master to aid in complex computations provides a procedure for reaching a just resolution of the issues).

53. FED. R. CIV. P. 53(e).

54. *Id.* 53(b).

55. 79 F.R.D. 59 (S.D.N.Y. 1978).

antitrust case could be struck on complexity grounds, the court must have rejected the possibility of using a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure.[56] In *Bernstein* the court found that any role a special master might play was so peripheral that the underlying complexities of the antitrust action would still remain.[57] The *Bernstein* court found the case to be completely unsuitable for submission to a master.[58]

Another district court[59] recently rejected the use of a court-appointed special master in an action for breach of a patent license agreement when it found the issues involved in the case to be within the intellectual grasp of laymen.[60] The court expressed the fear that using a impartial court-sponsored special master in a case where the issues are within the jury's comprehension potentially could transform a trial by jury into a trial by master.[61] Indeed, the United States Supreme Court has pointed out that the use of special masters is a limited inroad on the right to trial by jury and " 'should seldom be made, and if at all only when unusual circumstances exist.' "[62] If a special master is to be used only in "unusual circumstances" or when the issues are too complex for the layman to understand, the problem is determining when the requisite circumstances or complexities exist. The courts have not enumerated specific guidelines for making such a determination, nor should they. The mere fact that a case involves a certain number of parties, issues, or discovery documents does not mean necessarily that the case will exceed the jury's comprehension. Such decisions must be left to judicial discretion and decided on a case-by-case method. Arguably, this method may result in disparate decisions as to when a special master should be appointed and when such an appointment should be foregone.

One federal district court took an interesting approach to appointing a special master. In *Kaehni v. Diffraction Co.*,[63] the court recognized early in the case the complex, technical, and scientific nature of the patent infringement suit. Consequently, the parties agreed in a hearing on pre-trial motions that a neutral, court-appointed expert witness would be used in making the critical findings in the case.[64] The expert studied the patents, heard all the testimony, examined the exhibits, questioned witnesses, conducted experiments at night during the trial, and testified himself.[65]

56. *Id.* at 70.
57. *Id.*
58. *Id.* at 71.
59. Kian v. Mirro Aluminum Co., 88 F.R.D. 351 (E.D. Mich. 1980).
60. *Id.* at 356.
61. *Id.*
62. La Buy v. Howes Leather Co., 352 U.S. 249, 258 (1957), *quoting Re* Irving-Austin Bldg. Corp., 100 F.2d 574, 577 (7th Cir. 1938). *See also In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom.* Gant. v. Union Bank, 446 U.S. 929 (1980) (appointing a special master to assist the jury is the exception, not the rule, because it constitutes a "limited inroad on the right to trial by jury").
63. 342 F. Supp. 523 (D. Md. 1972), *aff'd*, 473 F.2d 908 (4th Cir.), *cert. denied*, 414 U.S. 854 (1973).
64. *Id.* at 527.
65. *Id.*

Such a pre-trial agreement between parties which allows the court to appoint an expert acceptable to both parties not only will simplify the litigation for the jury but may avoid the procedural problems of invoking the use of a special master under Rule 53.

Given the increasing complexity of many civil suits, it is likely that special masters or court-appointed experts will become increasingly valuable in cases tried to a jury. The use of such experts is a practical compromise between the extremes of abolishing the jury trial and having to submit the case to a confused, incompetent jury. Thus, the practice of using special masters or experts should be employed, for whatever benefits it may bring, when the right to a jury trial appears threatened by the exceptional complexity of the case.

Another court-recognized means by which the competence of a jury can be improved in complex litigation is to allow some of the issues to be tried to the jury and other issues to be tried to the court.[66] This proposal is premised on the theory that, according to historical precedent, legal issues must be afforded a jury trial while a judge may have jurisdiction over issues in equity.[67] Until 1970, the question of the right to a jury trial was resolved on the basis of the nature of the case as a whole.[68] Therefore, if a majority of the issues were equitable, a judge would decide the case. If the issues were predominantly legal, a jury trial was required. In 1970, however, the United States Supreme Court in *Ross v. Bernhard*[69] held that the question of the right to a jury trial should be resolved on an issue-by-issue basis, not on a whole-case basis.[70] The Court further held that if both legal and equitable issues are present and the issues turn on common facts, then the legal issues must be tried to a jury first.[71]

Recently, Washington state courts have suggested using the *Ross* issue-by-issue approach as a means of resolving the seventh amendment right to jury question in complex civil cases,[72] but the practical application of such an approach is fraught with ambiguity. Which issues should be given to the jury? Which issues should go directly to the judge? How will inconsistencies in the fact-findings be resolved? How can interrelated issues be separated adequately and submitted to different fact finders without the risk of prejudice?

In *Beacon Theatres v. Westover*,[73] the United States Supreme Court

66. *See* Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1, 66-67 (1981) (historical analysis of issues of law and equity reveals that in modern antitrust litigation, judges may decide market structure issues without a jury, but questions of conduct and damages must continue to be jury tried).

67. *See generally* Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Edquist, *The Use of Juries in Complex Cases*, 3 CORP. L. REV. 277 (1980).

68. *See infra* notes 69-71 and accompanying text.

69. 396 U.S. 531 (1970).

70. *Id.* at 538.

71. *Id.* at 542.

72. Brown v. Safeway Stores, Inc., 94 Wash. 2d 359, 366-67, 617 P.2d 704, 708 (1980); S.P.C.S. Inc. v. Lockheed Shipbuilding & Constr. Co., 29 Wash. App. 930, 934, 631 P.2d 999, 1001 (1981).

73. 359 U.S. 500 (1959).

addressed the idea of submitting some issues to one fact finder and some to another. In *Beacon*, the Court noted that the issue of whether the antitrust laws have been violated *vel non* often turns a determination of the reasonableness of a restraint on trade in light of all the facts.[74] Under such circumstances, the Court stated, "it is particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another."[75]

The suggestion to remove some issues from the jury and give them to a judge to decide belies the underlying assumption that the judge is inherently more qualified than the jury to decide those issues. Yet, "[w]hile we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case."[76] Indeed, jurors bring "collective wisdom, intelligence, and dedication to their task rarely equaled in other areas of public service."[77] Moreover, submission of issues to a judge for decision renders post-trial safeguards such as directed verdicts, retrials and judgments notwithstanding the verdict useless.[78]

The relegation of some issues to a jury and some to a judge is impractical, potentially prejudicial to parties, and unnecessary. Rather than taking some issues away from the jury, the better approach in jury-tried cases is to employ other court-suggested techniques of improving the jury's ability to decide all the issues.

One final court-sanctioned procedure of promoting jury competence during the trial is to require the jury to return special verdicts[79] or general verdicts accompanied by interrogatories.[80] Such verdicts are supplemented by written answers to formal questions asked by the court concerning the pleadings, the evidence and the applicable law.

The use of general verdicts coupled with written interrogatories will probably minimize the risk of judgments notwithstanding the verdict, retrial, or remittitur in lieu of a new trial. Under Rule 49(b) of the Federal

74. *Id.* at 508 n.10.

75. *Id.*

76. *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980). *See also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 935 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) ("a jury, applying its collective wisdom, judgment and common sense to the facts of a case . . . is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so"); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53 (1977) ("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"). *But see In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086-87 (3d Cir. 1980) (the presumption that a judge, as opposed to a jury, is more capable of deciding an extraordinarily complex case is reasonable).

77. Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 355 (1980).

78. *See infra* notes 92-107 and accompanying text.

79. *See* FED. R. CIV. P. 49(a). The court may require the jury to make special written findings upon each issue of fact. The court may also submit interrogatories to the jury in the form of written questions concerning the pleadings and the evidence. *Id.*

80. *See* FED. R. CIV. P. 49(b). The court may require the jury to render a general verdict and to complete written interrogatories on one or more essential issues of fact. *Id.*

Rules of Civil Procedure,[81] when the jury's general verdict and answers to the interrogatories are in harmony, the verdict will be entered. If, however, the interrogatory answers are harmonious within themselves but inconsistent with the general verdict, the court may (1) order judgment in accordance with the answers; (2) order a new trial; or (3) require the jury to consider further its answers and verdict.[82] If the interrogatory answers are inconsistent within themselves and inconsistent with the general verdict, the court must either order a new trial or require the jury to reconsider its answers and verdict.[83] The choice between ordering a new trial and reconsideration is left to the court's discretion. It seems reasonable that the grim prospect of retrial, indeed a costly, time-consuming choice, will encourage judges to require juries to reconsider the inconsistencies in order to resolve the case.

In the past, interrogatories have been used when distinctive or doubtful theories are at issue, or when the law is ambiguous or unsettled.[84] Recently, special verdicts and interrogatories have been recognized as useful means of handling jury trials where the evidence and issues are highly complicated and difficult to comprehend. In *SCM Corp. v. Xerox Corp.*,[85] a photocopy machine manufacturer brought suit against his competitor alleging a violation of antitrust laws.[86] The trial lasted fourteen months and the jury deliberated for thirty-eight days, returning fifty-four verdicts.[87] The trial court submitted lengthy interrogatories to the jury at the conclusion of each stage of evidence presented at trial.[88] This resolved two problems. First, the enormous amount and complexity of the evidence required the use of written interrogatories to ensure that orderly decision-making would occur.[89] Second, the use of interrogatories would possibly decrease the risk of retrial.[90] The use of such verdicts and interrogatories may enable the jury's final decision to be the result of careful, organized, logical reasoning. Moreover, the use of interrogatories will provide the opportunity for subsequent particularized appellate review.[91]

Post-Trial Safeguards

The federal court system has a strong interest in ensuring the fair and accurate outcome of a trial. Thus, once the trial has taken place and a verdict has been rendered by the jury, the post-trial procedural safeguards

81. FED. R. CIV. P. 49(h) provides: "When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58."

82. *Id.*

83. *Id.*

84. *See* Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930, 931 n.2 (5th Cir. 1965). *See generally* Brown, FEDERAL SPECIAL VERDICTS: THE DOUBT ELIMINATOR, 44 F.R.D. 338 (1968).

85. 463 F. Supp. 983 (D. Conn. 1978), *aff'd*, 645 F.2d 1195, (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1708 (1982).

86. *Id.* at 985.

87. *Id.* at 986.

88. *Id.* at 988-89.

89. *Id.* at 988.

90. *Id.*

91. *Id.*

come into play. These safeguards include directed verdicts,[92] judgments notwithstanding the verdict,[93] and the ordering of a new trial.[94] The United States Supreme Court in *Curtis v. Loether*[95] noted that these three safeguards provide substantial protection against the risk of an unfair, undeserved verdict being returned by a prejudiced jury.[96] This same reasoning has been applied recently to jury trials in complex litigation.[97] The underlying premise is that jurors often lack familiarity with many of the complex issues that face them during the trial.[98] Consequently, the difficulty that juries face in complex cases may lead to confusion concerning the evidence and issues and may result ultimately in an erroneous decision.[99] The argument, then, is that the same procedural safeguards which protect the victim from a prejudicial jury verdict will protect litigants in complex cases from erroneous, unjustified jury decisions. In short, the argument that the jury in a complex case will render an irrational or irresponsible verdict loses much of its force since, in the event of such a verdict, the court serves as a check on this risk. In *In re U.S. Financial Securities Litigation*,[100] the Ninth Circuit concluded that the potential granting of a new trial or a judgment notwithstanding the verdict serves to protect parties from the risk of an "irrational" jury verdict.[101]

The persuasive countervailing arguments, however, cannot be ignored. In *In re Japanese Electronics Products Antitrust Litigation*,[102] the

92. FED. R. CIV. P. 50(a). A party may move for a directed verdict at the close of evidence offered by the opposing party. *Id.*

93. *See* FED. R. CIV. P. 50(b). A party whose previous motion for a directed verdict was not granted may move to have the verdict rendered set aside. If no verdict was rendered, the party may move for judgment in accordance with his motion for a directed verdict. *Id.*

94. *See* FED. R. CIV. P. 59. Any or all parties may, under certain circumstances, be granted a new trial on all or part of the issues in an action in which there has been a trial by jury or in an action tried without a jury. *Id.*

95. 415 U.S. 189 (1974).

96. *Id.* at 198. *See also* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940) (a new trial may be granted when the verdict is against the weight of the evidence or the trial is, for some reason, unfair); Fountila v. Carter, 571 F.2d 487, 489-90 (9th Cir. 1978) (a court should grant a judgment notwithstanding the verdict only if there was not enough evidence to make an issue for the jury).

97. *See In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); *In re* U.S. Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

98. *See In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980) ("a jury is likely to be unfamiliar with both the technical subject mater of a complex case and the process of civil litigation"); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423, 447-48 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1980) (the court learned, after questioning the jurors, that they were having difficulty grasping the concepts presented in the case). *See generally* Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 783-86 (1978).

99. *In re* Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980). *See also* ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423, 447-48 (N.D. Cal. 1978), *aff'd sub nom.* Memorex Corp. v. International Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1980) (jurors were not prepared to decide this case involving extremely complicated technical and financial issues; consequently, after seven months of litigation, the jury was unable to reach a decision and the court declared a mistrial).

100. 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* Gant v. Union Bank, 446 U.S. 929 (1980).

101. *Id.* at 432.

102. 631 F.2d 1069 (3d Cir. 1980).

Third Circuit pointed out that directed verdicts and judgments notwithstanding the verdict do not necessarily ensure that the requirements of due process will be met.[103] In fact, the court is prohibited from using these procedural devices if the evidence presented might reasonably support a verdict for either party.[104] Thus, the jury may return any one of a range of possible verdicts even though it is only minimally supported by the evidence.[105] Such a consequence is inconsistent with the courts' interest in ensuring that the verdict fairly rests on the applicable law and the evidence presented at trial. The procedural safeguards which a judge may exercise after a jury has returned a verdict are designed to protect that interest. The debate still rages, however, over whether a judge is, in reality, better equipped and more competent to decide those issues than a jury.[106] The jury system, however, remains a cornerstone of the American system of justice. Although not perfect, the jury trial system, with its built-in procedural safeguards[107] serves, at the very least, to guard against gross miscarriages of justice.

Special Juries and Administrative Tribunals

Finally, there are two specific trial devices which, arguably, are applicable to jury-tried complex litigation. The first device involves the use of so-called "blue ribbon" juries. Such a jury is created from a special pool of potential jurors who have specific qualifications well-suited to trying a particular case. This practice of using special jury selection methods to improve the competence of the jury has historically received much support.[108] James Thayer, in tracing the development of the jury,[109] noted that "as among eligible persons, there seems always to have existed the power of selecting those especially qualified for a given service."[110] He cited the use of special juries in English cases where juries composed of cooks and fishmongers were used to try men accused of selling bad food, and a jury of merchants was used to try a case in which both the parties were merchants and the dispute concerned merchants' affairs.[111] In 1942, however, the United States Supreme Court indicated that special jury selection methods may no longer be allowed if they conflict with certain fundamental concerns.[112] Five years later, the Court considered the constitutionality of special juries in *Fay v. New York*.[113] Under a New

103. *Id.* at 1087.
104. *Id. See also* Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978).
105. 631 F.2d at 1087-88.
106. *See supra* notes 73-78 and accompanying text.
107. *See supra* notes 92-94 and accompanying text.
108. *See generally* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 80-82 (1980); Thatcher, *Why Not Use the Special Jury?*, 31 MINN. L. REV. 232, 234-42 (1947); Thayer, *The Jury and Its Development*, pt. 2, 5 HARV. L. REV. 295 (1892).
109. Thayer, *supra* note 108.
110. *Id.* at 300.
111. *Id.*
112. Glasser v. United States, 315 U.S. 60, 85 (1942) (a "proper jury" embodies basic concepts of a democratic society and a representative government. The jury, as an instrument of public justice, is traditionally a true representation of the community).
113. 332 U.S. 261 (1947).

York statute, the trial court had discretionary power to impanel a special jury in important, intricate, or widely publicized cases, or for any other reason by which "the due, efficient and impartial administration of justice . . . would be advanced."[114] In *Fay*,[115] two union officials had been convicted of extortion and conspiracy by a New York special jury.[116] On appeal, the court rejected the officials' argument that the use of the special jury was unconstitutional.[117] The Court held the state's rights to use a special jury was constitutional.[118] The Court relied upon several factors, including 1) the absence of race, color, creed, or occupation as a basis for excluding any person or class; 2) the reasonableness of the connection between the basis for exclusion and the person's suitability as a special juror; and 3) the necessity of deferring to local government in the area of judicial administration.[119] Although the use of state statute created special juries has fallen into disuse, it appears that under this analysis, special juries could be utilized in state courts without contravening the Constitution. The utilization of special juries in complex cases in state courts is conceivable but could meet strong opposition. Such a solution to the problem of complex litigation would be long in coming and perhaps will never materialize.

Moreover, it appears that the use of special juries is prohibited in federal courts by virtue of the Federal Jury Selection and Service Act of 1968[120] which requires that the jurors be "selected at random from a fair cross section of the community. . . ."[121] Some commentators have urged Congress to reconsider the advantages of the special jury and to pass new legislation authorizing the use of special juries of one kind or another in complex litigation.[122] As the cases become more and more technical and complex, the need for specially trained or specially educated jurors will become increasingly significant in the effort to preserve the right to a jury trial in complex civil litigation.

The use of special juries, however, is a tenuous alternative at the present time, making the previously discussed alternatives much more viable. But if the seventh amendment right to a jury trial is still at stake, a last attempt should be made to employ special juries to preserve the historical right.

The second device possibly applicable to complex cases involves the use of administrative tribunals rather than jury trials to enforce statutory laws. The possibility of applying this precedent to complex cases stems from the United States Supreme Court's decision in *Atlas Roofing Co. v.*

114. *See* Law of Apr. 17, 1938, ch. 552, art. 18-B, 1938 N.Y. LAWS 1400, 1448 (repealed 1965).
115. 332 U.S. 261 (1947).
116. *Id.* at 264.
117. *Id.* at 265.
118. *Id.* at 296.
119. *Id.* at 270-71.
120. 28 U.S.C. §§ 1861-1874 (1976).
121. *Id.* § 1861.
122. *See generally* Luneburg & Norenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 922-50 (1981); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155, 1172-76 (1980).

Occupational Safety & Health Review Commission.[123] In *Atlas*, the Court held that Congress has the power to assign the adjudication of newly-created statutory "public rights" to an administrative agency, thereby circumventing the seventh amendment right to jury trial.[124] The holding, however, limits such circumvention to those public rights which are adjudicated in a tribunal other than a federal court.[125] The scope of "public rights" was never clearly defined in *Atlas*.[126] The Court did, however, point out that crowded federal dockets and the special competence of administrative agencies are two factors to consider in determining whether Congress has the power to assign a case to an agency tribunal[127] "with which the jury would be incompatible."[128] *Atlas* also requires that the cause of action sought to be adjudicated in an administrative tribunal be based on a federal statute[129] and that the rights at issue be "new."[130] "New" rights are apparently those rights that are different from those existing at common law in 1791.[131]

The application of this court-recognized circumvention of the seventh amendment to cases involving complex litigation has been suggested by a few commentators.[132] The basic premise behind this application is that the securities and antitrust laws[133] created by Congress are statutory and designed to protect "public rights," which, under *Atlas*, can be enforced by an administrative tribunal rather than by the civil courts.

Such a proposition, although conceivable, is hardly an immediate resolution to the complexity problem. The sparse case law addressing such a possibility and the ambiguity of the definition and scope of the terms "public rights," "new statutory rights," and "tribunal" indicate the necessity for a lengthy analysis of the advantages and disadvantages of the practical application of such a proposal. Thus, the impracticality of this proposal makes it an alternative of last resort. Judges and attorneys should rely, instead, upon the previously advocated, immediate, court-approved methods of improving and preserving the jury trial in complex civil litigation.

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123. 430 U.S. 442 (1977).

124. *Id.* at 450, 455, 460-61.

125. *Id.* at 450, 455, 460.

126. The Court seemed to suggest that a public right is one in which the government is a party to the action. *Id.* at 450. In its analysis, however, the Court relied on Block v. Hirsch, 256 U.S. 135 (1921), involving a landlord-tenant dispute, and on Curtis v. Loether, 415 U.S. 189 (1974), involving a suit by a private litigant to recover damages under the housing discrimination provisions of the 1968 Civil Rights Act. *Id.* at 451-52, 457.

127. *Id.* at 455.

128. *Id.* at 450.

129. *Id.* at 444, 450, 455, 460, 461. *See also* Skidmore v. Consolidated Rail Corp., 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980).

130. 430 U.S. at 444, 450, 455, 460-61.

131. *Id.* at 461. *See also* Curtis v. Loether, 415 U.S. 189, 193 (1974).

132. *See* Edquist, *The Use of Juries in Complex Cases*, 3 CORP. L. REV. 277, 298 (1980); Luneburg & Norenberg, *supra* note 122, at 950-1007 (1981).

133. *E.g.*, The Sherman Act, 15 U.S.C. §§ 1-7 (1976 & Supp. 1980); The Clayton Act, 15 U.S.C. §§ 12-27 (1976 & Supp. 1980).

CONCLUSION

The problem of incompetence in jury trials of complex litigation is current and unsettled. The total abolition of the jury trial in all complex cases appears to be a decision that is not likely in the near future. A decision to deny the jury demand in any given case today is fraught with uncertainty. What areas of law are to be considered "complex"—securities law, antitrust law, patent law, tax law, products liability law, or contract law? When is a case "too" complex for a jury trial? What factors should and will guide judges in their determinations of complexity? How much weight should each factor be given? In light of the abounding ambiguities, judges and attorneys should turn to the methods advocated here as means of improving the jury rather than trying to abolish the jury.

In the interest of judicial expediency and effectiveness, parties involved in jury-tried complex litigation should use as many of these court-sanctioned procedures as possible to enhance the jurors' comprehension of the elusive issues, facts and law. Most of these procedures are immediately available, effective and, most importantly, advocated by many of the federal courts themselves. Improving the competence of the jury through these methods can lessen the controversy in this debate and will, ultimately preserve the seventh amendment right to a jury trial in all complex civil litigation.