RECENT DEVELOPMENTS IN ANTITRUST LAW

CONSTITUTIONAL LAW—SEVENTH AMENDMENT—DUE PROCESS OVERRIDES RIGHT TO JURY TRIAL IN COMPLEX CASES. *In re Japanese Electronic Products Antitrust Litigation*, [1980-2] Trade Cas. (CCH) ¶ 63,421 (3d Cir.). Two American electronic products producers[1] sued their Japanese competitors[2] under antitrust and anti-dumping acts,[3] alleging that the competitors attempted to drive the producers out of business by selling products in America at artificially reduced prices.[4] Fourteen of the defendants[5] moved to strike the plaintiff's demand for

1. One of the two plaintiffs, National Union Electric Corp., was no longer an electronic products producer at the time of filing suit in December 1970, but it had been a major domestic television receiver producer until February of that year. The other plaintiff, Zenith Radio Corp., was still a major producer of many kinds of electronic products when it filed suit in 1974. *In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,186-87 (3d Cir.) (also reported at 631 F.2d 1069 (3d Cir. 1980)).

The suits were later consolidated for trial. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63,421 (3d Cir.).

2. National Union Electronic Corp. named as defendants a Japanese trading company, Mitsubishi Corp., and seven Japanese television manufacturers: Matsushita Electric Industrial Co., Toshiba Corp., Hitachi Ltd., Sharp Corp., Mitsubishi Electric Corp., Sanyo Electric Co., and Sony Corp., as well as nine subsidiaries of those companies. Zenith named as defendants all of the above companies plus several additional subsidiaries and two American companies: Sears, Roebuck and Co. and Motorola, Inc. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76, 186-87 (3d Cir.).

3. National Union Electric alleged violations of the Anti-Dumping Act of 1916, 15 U.S.C. § 72 (1976), the Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976), and the Wilson Tariff Act § 73, 15 U.S.C. § 8 (1976). Zenith repeated those charges and also alleged violations of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) and the Clayton Act, 15 U.S.C. § 18 (1976). [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,186-87 (3d Cir.).

A group of the defendants filed counterclaims charging Zenith with price-fixing, territorial allocations, and price discrimination in violation of the Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976) and the Robinson-Patman Act, 15 U.S.C. §§ 1, 2, 13(a) (1976). They also charged Zenith and a group of about thirty co-conspirators with maintaining a program of sham litigation against competitors. *Id.* at 76,187. Sears filed a separate counterclaim against Zenith for misleading advertising. *Id.*

4. *Id.* The "artificially" low prices were allegedly made possible by aid from the Japanese government in maintaining high prices in Japan. *Id.* at 76,186.

5. Mitsubishi Corp., Matsushita Electronic Industrials Co., Toshiba Corp., Sharp Corp., Sony Corp., Motorola, Inc., and eight defendant subsidiaries of those corporations moved to strike the demand for a jury trial. Eight other defendants supported the motion, but did not join in it for reasons unrelated to its merits. The positions of the remaining two defendants, Mitsubishi Electric Corp. and its subsidiary Melco Sales, Inc., were unknown at the time of the trial. *Id.* at 76,187.

a jury trial, arguing that the case was too large and complex[6] for a jury to comprehend. A divided Third Circuit,[7] reversing the lower court,[8] *held*: In cases too complex for a jury to understand and decide rationally, the fifth amendment's due process clause[9] overrides the seventh amendment[10] and mandates a nonjury trial.[11]

Because the seventh amendment preserves the right to trial by jury only in suits at common law,[12] as opposed to suits at equity,[13] the existence of that jury right in a particular case depends on whether a suit is

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6. To show complexity, the court outlined the case's size and subject matter. The district court predicted that the trial would last a year. Discovery had lasted nine years and produced millions of documents and over 100,000 pages of depositions. The conspiracy allegedly occurred over thirty years and involved almost 100 firms. The defendants alleged that proof of the case would involve detailed comparisons of American and Japanese marketing techniques, analysis of complicated rebate schemes, and evaluation of sophisticated financial systems. The defendants also alleged that it would require review of the technical features of thousands of different products and understanding of the relationships between those features and cost of manufacture, product performance, and marketability. *Id.* at 76,188-89. Finally, the defendants argued that the complexity of the suit would be compounded by conceptually difficult issues, such as proof of predatory intent. *Id.* at 76,189.

The plaintiffs contended that massive, highly technical proof would not be required and that the alleged conspiracy was a "classic" one; therefore, they did not anticipate problems in jury comprehension. *Id.* at 76,188.

The district court did not have to resolve the dispute as to degree of complexity because it found that complexity was not relevant in ascertaining the right to a jury trial. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 942 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63,421 (3d Cir.).

7. Judge Gibbons dissented. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,203 (Gibbons, J., dissenting).

8. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63,421 (3d Cir.).

9. U.S. CONST. amend. V states: "nor shall any person . . . be deprived of life, liberty or property without due process of law . . . ."

10. U.S. CONST. amend. VII states:

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

11. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,198. The court remanded the case to the lower court for a ruling on whether the case was actually too complex for a jury to understand. *See* note 6 *supra*.

12. U.S. CONST. amend. VII, *supra* note 10.

13. For discussions of the distinction between "law" and "equity," see Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 48-65 (1980). *See generally* H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 97-124 (2d ed. 1948).

characterized as "legal" or "equitable."[14] Traditionally, a court has made that characterization by determining whether an English court, in the year of the seventh amendment's adoption,[15] would characterize the suit as "legal" or "equitable."[16] Although the Supreme Court has modified that strict historical test, not only to account for the creation of new "legal" remedies,[17] but also to allow jury trials of legal issues in

14. *See* Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 788 (1978). *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 371-81 (1974); Colgrove v. Battlin, 413 U.S. 149, 152 (1973); Ross v. Bernhard, 396 U.S. 531, 533 (1970); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

15. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right to trial by jury thus preserved is the right which existed under English common law when the [seventh] amendment was adopted." (1791)) Justice Story apparently made the first reference to English law in United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750):

> Beyond all question, the common law alluded to [in the seventh amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

See generally Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). In some cases the Court has apparently also referred to the common law of the American states as well as to that of England. Continental Ill. Nat'l Bank & Trust Co. v. Chicago R.I. & P. Ry., 294 U.S. 648, 669 (1935). "That guaranty [the seventh amendment] has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted." *See also* Patton v. United States, 281 U.S. 276, 288 (1930); Callan v. Wilson, 127 U.S. 540, 549 (1888).

16. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470 (1962); *Ex parte* Quirin, 317 U.S. 1, 39 (1942); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). Newly created causes of action are characterized generally as "legal" or "equitable" by comparing the rights and remedies involved in them to traditional "legal" and "equitable" remedies. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 374-76 (1974) (action to recover possession of real property); Curtis v. Loether, 415 U.S. 189, 193-97 (1974) (action for violation of fair housing provision of the Civil Rights Act of 1968).

The Court has found that some specific practices of 1791 (the year of the seventh amendment's adoption) remain part of the right to a jury trial. *See* Dimick v. Schiedt, 293 U.S. 474 (1935) (courts may not increase amount of a jury verdict). The Court also has ruled, however, that certain changes in aspects of jury trials since 1791 are consistent with the amendment. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149, 156-57 (1973) (twelve member jury not required by the seventh amendment); Galloway v. United States, 319 U.S. 372, 390 (1943) (directed verdict permitted); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 498-99 (1931) (new trial on less than all the issues may be ordered); Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 596-98 (1897) (judgment on the basis of answers to special interrogatories allowed when such answers conflict with the general verdict).

17. Some causes of action involving traditionally equitable remedies may now be tried to juries because of the creation of new legal remedies. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), the Court allowed a jury trial in a traditionally equitable suit, a stockholder's derivative suit, because the new Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), cre-

predominately equitable cases,[18] the historical doctrine has not been seriously questioned until recent years.[19]

In the 1970 decision, *Ross v. Bernhard*,[20] however, the United States Supreme Court included a footnote that has raised doubts about the viability of the traditional method of distinguishing "legal" and "equitable" issues. The footnote stated that the "legal" nature of an issue is determined by considering premerger custom, the remedy sought, and "the practical abilities and limitations of juries."[21] Although premerger custom and the nature of the remedy are arguably components of the traditional historical test,[22] the origin and meaning of the third factor is unclear.[23] The Supreme Court neither explained nor applied the test in *Ross*[24] or any subsequent opinion discussing the seventh amendment.[25]

ated an "adequate" remedy at law. The court explained that "[s]ince in the federal courts equity has always acted only when the legal remedies were inadequate, the expansion of adequate legal remedies . . . necessarily affects the scope of equity." *Id.* at 509. *See also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 n.19 (1962).

18. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531, 538-39 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470 (1962).

19. *See, e.g.,* Pernell v. Southall Realty, 416 U.S. 363, 374-81 (1974); Curtis v. Loether, 415 U.S. 189, 193 (1974).

20. 396 U.S. 531 (1970).

21. *Id.* at 538 n.10.

22. *See* Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 HARV. L. REV. 898, 903 (1979); Note, *Preserving the Right to Jury Trial in Complex Civil Cases,* 32 STAN. L. REV. 99, 102 (1979).

23. *See* notes 30-41 *infra* and accompanying text. In addition to those theories, courts have proposed other explanations for the meaning and origin of that third factor. The court in Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977), argued that the footnote permitted inquiry into jury competence:

> [T]he Court may have intended federal courts to make such an inquiry only at the threshold stage where the issue is whether a right to a jury trial exists for the entire class of claims asserted by the parties. . . . Once the Court had applied its three-pronged analysis to characterize this class of claims as creating a right to a jury, . . . individual deviations in the complexity of the case would be irrelevant.

Id. at 226.

In United States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974), Judge Friendly stressed that the *Ross* footnote was part of an argument expanding the scope of the seventh amendment, not contracting it, and argued that in any case it was only one of three factors to be weighed. *Id.* at 428-29.

Some commentators consider the footnote an aberration. *See, e.g.,* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making,* 70 NW. U.L. REV. 486, 526 (1975); Wolfram, *supra* note 15, at 644-45. Others accept it as a constitutional test. *See* Note, *Preserving the Right to Jury Trial in Complex Civil Cases,* 32 STAN. L. REV. 99, 105-06 (1979).

24. Once it decided that the corporation's claim for waste and breach of fiduciary duty was a "legal" one, the Court summarily granted a jury trial. 396 U.S. at 542-43.

25. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Atlas Roofing Co. v. Occupa-

Some lower federal courts, however, have adopted the *Ross* footnote as a new constitutional test for the right to a jury trial.[26] Four lower courts have used the footnote's third factor to deny the right to a jury trial in an otherwise "legal" case.[27] Each of those lower courts found that the case before them was so complex[28] that it was beyond the "practical abilities and limitations of juries" and thus "equitable" under *Ross*.[29] Two of the courts concluded that juror inability to comprehend intricate matters makes jury trials an inadequate remedy at law in

tional Safety & Health Rev. Comm'n, 430 U.S. 442 (1977); Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Colgrove v. Battin, 413 U.S. 149 (1973). In *Loether* the Seventh Circuit expressly considered the "practical abilities and limitations of juries" before upholding the right to a jury trial. Rogers v. Loether, 467 F.2d 1110, 1118 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1975). The Supreme Court, however, did not mention jury ability as a factor.

26. *See, e.g.*, Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977), *aff'd on other grounds*, 434 U.S. 575 (1978); Minnis v. UAW, 531 F.2d 850, 852-53 (8th Cir. 1975); Fellows v. Medford Corp., 431 F. Supp. 199, 201-02 (D. Or. 1977); Polstroff v. Fletcher, 430 F. Supp. 592, 593-94 (N.D. Ala. 1977); General Tire & Rubber Co. v. Watson-Bowman Assocs., 74 F.R.D. 139, 140-42 (D. Del. 1977); Marshall v. Electric Hose & Rubber Co., 413 F. Supp. 663, 667 (D. Del. 1976); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794, 796-97 (W.D. Wis. 1975); Cleverly v. Western Elec. Co., 69 F.R.D. 348, 350-52 (W.D. Mo. 1975); Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1124-25 (E.D. Mich. 1974); Van Ermen v. Schmidt, 374 F. Supp. 1070, 1074-76 (W.D. Wis. 1974); Chilton v. National Cash Register Co., 370 F. Supp. 660, 662-66 (S.D. Ohio 1974); Richard v Smoltich, 359 F. Supp. 9, 11-12 (N.D. Ill. 1973).

27. I.L.C. Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978), *appeal docketed*, Nos. 78-3050, 78-3236 (9th Cir. Sept. 12 & Oct. 6, 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976). *Cf.* Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974) (discussed jury incompetence but did not base decision on it); SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 725-26 (E.D. Mich. 1977) (discussed jury incompetence but did not base decision on it).

28 *I.L.C. Peripherals*, *Bernstein*, *United States Financial*, and *Boise* all involved sophisticated accounting procedures and financial systems. I.L.C. Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 446 (N.D. Cal. 1978), *appeal docketed*, Nos. 78-3050, 78-3236 (9th Cir. Sept. 12 & Oct. 6, 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 63, 70 (S.D.N.Y. 1978); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702, 706-07 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 102-03 (W.D. Wash. 1976). In *I.L.C. Peripherals* the trial lasted five months and involved 2,300 exhibits and 87 witnesses. 458 F. Supp. at 444. In *Bernstein* the parties planned to introduce 1,200 exhibits and scores of witnesses. 79 F.R.D. at 63. The court in *United States Financial* estimated that over 100,000 pages of documentary evidence would be introduced and at least 240 witnesses would be called. Approximately 150,000 pages of depositions had already been taken. 75 F.R.D. at 707. In *Boise* the jury would have had to evaluate management practices involving over a billion dollars spent during a five year period. 420 F. Supp. at 103.

29. 458 F. Supp. at 445; 79 F.R.D. at 70; 75 F.R.D. at 710, 713-14; 420 F. Supp. at 104-05.

complex cases.[30] These courts found that complex cases are actually equitable[31] because inadequacy of legal remedies has been a traditional justification for trying cases in equity.[32] Other courts ruled that complex cases historically were classified as "equitable" and now must be considered "equitable."[33] One court asserted that cases "beyond jury ability" were made equitable because of the fifth and fourteenth amendments' command for fairness.[34]

None of these arguments, however, dissuaded two courts of appeals in recent decisions from upholding the right to jury trials in complex litigation.[35] The courts in these cases concluded that complexity was not a factor in determining the right to a jury trial.[36] The courts ruled that the *Ross* footnote did not establish a "complexity exception" to the

30. 458 F. Supp. 423 (N.D. Cal. 1978); 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980). In *United States Financial* the court stated that, "[t]he basis for granting equity jurisdiction over cases of extraordinary complexity is, of course, the inadequacy of the legal remedy, or more specifically, the inability of the jury to handle the case and render a fair decision, as the Court noted in *Dairy Queen*." 75 F.R.D. at 710.

The trial court in *United States Financial* quoted the following from *Dairy Queen*:

> The necessary prerequisite to the right to maintain a suit for an equitable accounting . . . is . . . the absence of an adequate remedy at law. Consequently, in order to maintain such a suit [in equity] on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.

Id. (quoting 369 U.S. at 478). The court did not quote the next line of that section, which stated that it would be a "rare case" in which the plaintiff could make the required showing. *Id.* The court also did not discuss the difference between actions "for an account," such as the action in *Dairy Queen*, and other forms of action. *See* note 44 *infra*.

31. 458 F. Supp. at 447; 75 F.R.D. at 710.

32. *See* H. McCLINTOCK, *supra* note 13, at 103. *See also* Dairy Queen v. Wood, 369 U.S. 469, 478 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959); Kirby v. Lake Shore & Mich. S.R.R., 120 U.S. 130 (1887); Fowle v. Lawrason, 30 U.S. (5 Pet.) 494 (1831); Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603). *But see* Curriden v. Middleton, 232 U.S. 633 (1914) (complication of fact and difficulty of proof alone are not sufficient to confer equity jurisdiction); United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906) (same). *See also* note 44 *infra* and accompanying text.

33. 79 F.R.D. at 67; 75 F.R.D. at 708.

34. The court in *Boise* said:

> [T]he procedural safeguards inherent in our legal system provide the impression and fact of fairness. . . . Indeed, under the Fifth and Fourteenth Amendments, the legitimacy of government action is measured in terms of fairness. Central to the fairness which must attend the resolution of a civil action is an impartial and capable fact finder.

420 F. Supp. at 104. The *Ross* footnote was the only precedent cited for the above statements. *Id.*

35. *In re* United States Financial Sec. Antitrust Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63,421 (3d Cir.).

36. 609 F.2d at 432; 478 F. Supp. at 942.

seventh amendment. One court found that the footnote was too isolated and unexplained to be a new constitutional test.[37] These courts also concluded that other rationales given for denying jury trials were unpersuasive.[38] Because the courts adjudged that jury trials were at least as fair as bench trials, they ruled that jury trials in complex litigation were not inadequate remedies at law.[39] One court also expressly rejected the argument that complex cases were "historically" equitable[40] after examining precedent and finding that only a single case actually supported that assertion.[41]

In *Japanese Electronic Products* the Third Circuit agreed that most arguments previously given for denying jury trials in complex cases were insufficient. The court stated that although *Ross* left open the possibility that jury ability could be considered,[42] the footnote was too unsubstantiated to be a new constitutional test.[43] The *Japanese Electronic Products* court also rejected the argument that complex cases were "historically" equitable after finding insufficient support for that proposition.[44] The court, following traditional doctrine, found that the action in question was "legal," and recognized the existence of the right to a jury trial.[45]

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37. 609 F.2d at 425-26; 478 F. Supp. at 931-34.

38. *See* 609 F.2d at 427-31; 478 F. Supp. at 934-38. *See also* notes 30-34 *supra* and accompanying text.

39. 609 F.2d at 427-31; 478 F. Supp. at 934-38.

40. 478 F. Supp. at 915-18.

41. *Id.*

42. The court stated that, "at the very least, the Court has left open the possibility that the 'practical abilities and limitations of juries' may limit the range of suits subject to the seventh amendment and has read its prior seventh amendment decisions as not precluding such a ruling." [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,193.

43. The court found that it was "unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion." *Id.*

44. The court noted that in some of the cases cited to show conferral of equity jurisdiction based on complexity, clear grounds for equity existed apart from complexity. *Id.* at 76,194. *See* Wedderburn v. Pickering, 13 Ch. D. 769 (M.R. 1879); Clarke v. Cookson, 2 Ch. D. 746, 747-48 (V.C. 1876). Other cases cited involved a specialized form of action, actions for accounts, in which complexity has traditionally played a role in determining equity jurisdiction. The court, however, observed that suits for money damages in trespass or tort, such as antitrust cases, are not analogous to actions in accounts. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,194. *See* Kirby v. Lake Shore & Mich. S.R.R., 120 U.S. 130 (1887); Fowle v. Lawrason, 30 U.S. (5 Pet.) 494 (1831). Ultimately, the court found only one case, Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603), to support the historical equity jurisdiction argument; the court deemed that case, however, to be of such dubious reliability that it had little precedential value. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,195-96.

45. The court determined that the suit in question was "plainly legal in nature" because it

The court's analysis, however, did not end with that conclusion. After disposing of the contention that a statutory right to a jury trial existed in this case,[46] the court delineated its own argument for denying the right to a jury trial in complex litigation. First the court asserted that trials by juries, which lack the experience[47] and legal tools[48] available to judges, create such a high risk of erroneous decisions in extraordinarily complex cases[49] that due process rights are violated.[50] A

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sought relief "traditionally associated with courts of law: compensatory and punitive damages" and because prior cases "have always assumed that the seventh amendment guarantees a jury trial in antitrust suits." [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,192. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 23 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

46. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,189-92. The court found that comments in the legislative history showing that jury trials were expected were based on the assumed applicability of the seventh amendment, and therefore did not indicate an intent to create a statutory jury guarantee. The court also found that a statement in Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27, 29 (1916), that treble damage statutes provide the remedy of "the verdict of jury in a court of common law" and "provide[s] no other [remedy]" did not create a statutory jury right in treble damage actions. The court agreed that under *Fleitman* treble damage suits must either be brought "at law," or dismissed, but concluded that *Fleitman* did not consider the status of cases brought "at law," but without the right to a jury. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,190-91.

47. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,199. The court stated:

> Although we cannot presume that a judge will be more intelligent than a jury or more familiar with technical subject matters, a judge will almost surely have substantial familiarity with the process of civil litigation, as a result of experience on the bench or in practice. This experience can enable him to digest a large amount of evidence and legal argumentation, segregate distinct issues and portions of evidence relevant to each issue, assess the opinions of expert witnesses, and apply highly complex legal standards to the facts of the case.

Id.

The court also noted that judges have an advantage in trying long and complex cases because such cases do not interrupt their careers and activities, as they do for jurors. *Id.*

48. The examples given by the court were colloquies with expert witnesses and the option of reopening trial for clarification or additional evidence. *Id.*

49. The court defined an "extraordinarily complex" case as one so complex that it "renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules." *Id.* at 76,200. Although the court stated that most judges would have "sufficient familiarity" with jury ability to know if a case is too complex for a jury, the court did delineate guidelines involving three factors for judging complexity:

> first, 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 . . . 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 . . . .

Id.

The sole dissenter, Judge Gibbons, asserted that these guidelines still allowed too much judicial discretion. Judge Gibbons advocated disjoinder of claims and separate jury trials if a case is too

conflict then exists between the right to a jury trial under the seventh amendment and the right to due process under the fifth amendment.[51] When such a conflict arises, the court must balance the respective constitutional rights.[52] Due process outweighs the right to a jury trial because due process is essential to "basic justice,"[53] while juries, as shown by their absence in courts of equity, are not essential to the administration of justice.[54] The court concluded, therefore, that due process requires a nonjury trial in extremely complex cases.[55]

The *Japanese Electronic Products* court stated that the essential problem in jury trials in complex cases is that juries may be incapable of correctly understanding massive amounts of complicated information, and thus may be unable to reach a rational, fair decision.[56] Courts that sidestep the fairness issue by relabelling suits as "equitable" focus attention away from the real issues.[57] A court's determination that jury trials are "inadequate remedies"[58] identifies the problem, but does not confront the real due process issue[59] because the cause of the "inadequacy" is the danger of an erroneous or irrational decision.[60]

complex for a jury, rather than eliminating the right to a jury. *Id.* at 76,203 (Gibbons, J., dissenting).

50. *Id.* at 76,196-201. After conceding that no specific precedent existed for finding a due process violation in the trial of a case to a jury, the court nevertheless found that the "principles" defining due process limited the range of cases that can be submitted to a jury. The court noted that one of the primary values of due process is to "minimize the risk of erroneous decisions." *Id.* (citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979) and Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). It then reasoned that where a jury "cannot understand the evidence and the legal rules to be aplied," there is "no reliable safeguard against erroneous decisions." *Id.* at 76,197.

51. *Id.*

52. *Id.* For other examples of "balancing" to resolve conflicts between constitutional rights, see Gannett Co. v. De Pasquale, 443 U.S. 368, 392-93 (1979) (right to freedom of speech v. right to a fair trial); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (same).

53. The court rejected arguments that due process carried less weight in this case because the violation was "hypothetical" and "prospective." The court stressed that due process requirements by their nature are "prospective" because they are "safeguards against the possibility of erroneous and arbitrary deprivations of liberty and property." But, the court concluded, they are no less important because of that characteristic. [1980-2] Tradè Cas. (CCH) ¶ 63,421, at 76,197-98.

54. *Id.*

55. *Id.*

56. *Id.* at 76,196-201.

57. *See* notes 30-34 *supra* and accompanying text.

58. *See* notes 30-33 *supra* and accompanying text.

59. *See* notes 47-50 *supra* and accompanying text. *See also* Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 830 n.4 (1980).

60. *See* note 47 *supra* and accompanying text.

Future litigation in the area of the availability of juries in complex trials will probably center on the due process issue. The Third Circuit's conclusions that jury trials in complex litigation increase the risk of erroneous decisions[61] and that this constitutes a violation of due process,[62] will be crucial points of contention because this reasoning is not universally accepted.[63] The court convincingly demonstrates that a jury is less qualified than a judge to unravel the facts in massive, complicated cases. A jury does not have a judge's experience in segregating distinct issues, his understanding of legal terms and processes, or his power to guide the trial.[64] Thus, jury trials involve greater risks of erroneous decisions than do bench trials because of the greater risk of misinformed triers of fact.[65] Because a crucial function of due process in factfinding procedures is "to minimize the risk of erroneous decisions,"[66] the court is correct in asserting that jury trials in extraordinarily complex litigation constitute a violation of due process.[67]

Once that due process violation is identified, a clear conflict exists between two constitutional rights. Both reason and precedent[68] dictate that a court must balance the conflicting rights to determine which is more essential. Because due process is required in all trials, while juries are required only in some,[69] due process is more fundamental. Furthermore, jury trials in complex cases may hinder a court's ability to render "basic justice."[70] Certainly, both the fifth and seventh amendments guarantee important rights; but if a conflict exists, the right to a fair trial outweighs the right to a jury trial.

The Third Circuit has clarified the issues involved in jury trials of

61. *See* note 47 *supra* and accompanying text.

62. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,200.

63. *See In re* United States Financial Secs. Antitrust Litigation, 609 F.2d 411, 430 (9th Cir. 1979) *cert. denied*, 100 S. Ct. 1866 (1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 934-36 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, [1980-2] Trade Cas. (CCH) ¶ 63, 421 (3d Cir.). *See also* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 54 (1977) (trial to a jury forces lawyers to present evidence more clearly); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964) (survey of 600 judges shows that judges and juries agree in 79% of civil cases and that disagreement does not increase in cases rated as "difficult").

64. *See* note 49 *supra*.

65. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,198-200.

66. *Id.* at 76,197. *See* notes 47-50, 60 *supra* and accompanying text.

67. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,198.

68. *See* note 50 *supra*.

69. [1980-2] Trade Cas. (CCH) ¶ 63,421, at 76,197.

70. *Id.*

complex litigation and proposed a reasonable method for resolving those issues. The Supreme Court should settle the controversy surrounding the availability of jury trials in complex litigation by examining and endorsing the Third Circuit's rationale and result.

ANTITRUST LAW—LIABILITY OF PROFESSIONS—PHYSICIANS' AGREEMENTS TO SET MAXIMUM FEES IN FOUNDATIONS FOR MEDICAL CARE ARE NOT PER SE VIOLATIONS OF THE SHERMAN ACT. *Arizona v. Maricopa County Medical Society*, [1980-1] Trade Cas. (CCH) ¶ 63,239 (9th Cir.). The State of Arizona brought an antitrust action in federal district court against two foundations for medical care (FMCs)[1] and a county medical society, alleging that the groups established fixed medical fees in violation of section 1 of the Sherman Act.[2] Arizona sought to enjoin the FMC physicians from setting maximum prices for their medical services. On a motion for summary judgment, the state argued that price-fixing agreements among competitors are per se[3] illegal. The district court, denying the motion,[4] ruled that the agreements were not price-fixing per se, and that rule of reason[5] analysis should determine the legality of the agreement. On appeal[6] the court affirmed, and *held*: Agreements among FMC physicians setting maximum prices for fees are not per se price-fixing arrangements, and a rule of reason analysis

1. FMCs are associations of physicians in traditional private practices. The associations are sponsored by county medical societies. FMCs have two basic purposes: (1) To provide prepaid health services to consumers, and (2) to control health care costs and improve the quality of medical services through peer review. FMCs approve and administer insurance plans underwritten by private insurance companies. Physicians directly bill the third-party insurer for the individual medical services provided to patient-policyholders.

One way that FMC physicians control costs is by collectively agreeing to set maximum prices that they will charge to FMC insurance plans for services. Price ceilings are periodically set by majority vote. FMCs also cut medical costs through review systems that weed out unnecessary medical procedures and hospital visits. *See generally* C. STEINWALD, AN INTRODUCTION TO FOUNDATIONS FOR MEDICAL CARE (1971); Egdahl, *Foundations for Medical Care*, 288 NEW ENG. J. MED. 491 (1973).

2. 15 U.S.C. § 1 (1976) in pertinent part provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

3. *See* notes 13-15 *infra* and accompanying text.

4. *See* Arizona v. Maricopa County Medical Soc'y, [1979-1] Trade Cas. (CCH) ¶ 62,694 (D. Ariz.), *interlocutory appeal aff'd*, [1980-1] Trade Cas. (CCH) ¶ 63,239 (9th Cir.).

5. *See* notes 10-12 *infra* and accompanying text.

6. Appeal was brought under 28 U.S.C. § 1292(b) (1976).