

# PROCEDURES TO LESSEN REMITTITUR'S INTRUSION ON THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL

## I. INTRODUCTION

The remittitur procedure in the federal courts enables district court judges<sup>1</sup> to offer plaintiffs who have received excessive jury awards the choice of accepting a court-determined reduction in the awarded damages or submitting to a new trial on the claim.<sup>2</sup> Traditionally, neither plaintiffs nor defendants could appeal a judge's decision to invoke the remittitur procedure,<sup>3</sup> but the expansion of appellate review in recent decades has gradually led to changes in the availability of remittitur appeals.

A defendant now can appeal the trial court's denial of either his request for a remittitur or his motion for a new trial.<sup>4</sup> Even when the

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1. Ordinarily, trial courts employ the remittitur procedure, but it is also available to appellate courts. The appellate remittitur is discussed at notes 77-81 *infra* and accompanying text.

2. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.21 (2d ed. 1977); 6A MOORE'S FEDERAL PRACTICE ¶ 59.05[3] (2d ed. 1979) [hereinafter cited as 6A MOORE]; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815 (1973) [hereinafter cited as 11 WRIGHT & MILLER]; Busch, *Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEF. L.J. 521 (1963); Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942); James, *Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 DUQ. L. REV. 143 (1963); Note, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976) [hereinafter cited as *Remittitur Practice*]; Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150 [hereinafter cited as *Appealability of Judgments*]; Note, *Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases*, 43 U. CHI. L. REV. 376 (1976) [hereinafter cited as *Remittitur Review*]; 44 FORDHAM L. REV. 845 (1976); 21 VA. L. REV. 666 (1935); 44 YALE L.J. 318 (1934).

For a discussion of remittitur and additur (a judicial increase of award) in state courts, see Busch, *supra*, 3 CUM.-SAM. L. REV. 150 (1972); 22 LOY. L. REV. 846 (1976); 49 N.C.L. REV. 141 (1970); 24 TENN. L. REV. 115 (1957).

3. [T]he exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial.

Dimick v. Schiedt, 293 U.S. 474, 489 (Stone, J., dissenting) (footnote and citations omitted).

4. The following cases established a defendant's right to appellate review of the trial court's dismissal of his motion for new trial or remittitur as a remedy for an excessive jury award: *Bankers Life & Cas. Co. v. Kirtley*, 307 F. 2d 418 (8th Cir. 1962); *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961); *Whiteman v. Pitrie*, 220 F.2d 914 (5th Cir. 1955); *Ballard v. Forbes*, 208 F.2d 883 (1st Cir. 1954); *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952); *Trowbridge v. Abrasive Co.*, 190 F.2d 825 (3d Cir. 1951); *Smith v. Welch*, 189 F.2d 832 (10th Cir. 1951); *Sebring Trucking*

plaintiff chooses to accept the trial court's remittitur, a defendant can petition an appellate court for a new trial<sup>5</sup> or a larger remittitur.<sup>6</sup>

In contrast, the plaintiff's right to seek reinstatement of the jury verdict from an appellate court is less clear. Prior to the Supreme Court's decision in *Donovan v. Penn Shipping Co.*,<sup>7</sup> the Fifth Circuit had liberalized the traditional rule against remittitur appeals to permit a plaintiff, who accepts a remittitur "under protest" and refrains from collecting the judgment, to request appellate review of the trial court's remittitur order.<sup>8</sup> The Sixth Circuit also had permitted a plaintiff to appeal a remittitur order under a state law,<sup>9</sup> which the court characterized as "substantive" and thus binding on the federal courts under the *Erie* doctrine.<sup>10</sup> Other circuits, however, remained cautious in their consideration of the Fifth Circuit practice<sup>11</sup> and uniformly criticized

*Co. v. White*, 187 F. 2d 486 (6th Cir. 1951); *Boyle v. Bond*, 187 F.2d 362 (D.C. Cir. 1951); *Virginian Ry. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948).

5. See notes 25-29 *infra* and accompanying text.

6. *Id.*

7. 429 U.S. 648 (1977) (per curiam).

8. The Fifth Circuit procedure is described at notes 85-97 *infra* and accompanying text. The plaintiff must accept the remittitur to obtain a final order from which to appeal. See *Remittitur Review*, *supra* note 2, at 377.

9. *Mooney v. Henderson Portion Pack Co.*, 334 F.2d 7 (6th Cir. 1964). The court applied the "outcome determinative" test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), to a Tennessee statute, TENN. CODE ANN. § 27-118 (1955), which authorized the appeal of remittiturs accepted under protest. See, e.g., *Howard v. J.W. Zellner & Sons Transfer Co.*, 539 F.2d 245 (6th Cir. 1976); *Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976) (cross-appeal); *Burnett v. Coleman Co.*, 507 F. 2d 726 (6th Cir. 1974) (per curiam); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974); *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973). See generally *Remittitur Review*, *supra* note 2, at 378 n.11; *Remittitur Practice*, *supra* note 2, at 318-19; *Appealability of Judgments*, *supra* note 2, at 1151-55.

10. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

11. The First Circuit in *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975), assumed that "an appeal lies from a consented-to remittitur," but did not consider plaintiff's right to appeal because the district court had not abused its discretion in ordering the remittitur. *Id.* at 94. The Second Circuit reviewed the Fifth Circuit's appeal procedure in *Reinertsen v. George W. Rogers Constr. Co.*, 519 F.2d 531 (2d. Cir 1975), but withheld its judgment until the issue was directly before the court.

In the Third Circuit a district court allowed plaintiff to accept a remittitur "under protest," specifically leaving the validity of plaintiff's appeal to the appellate court. See *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1171 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (3d Cir. 1973). Because the court of appeals reversed the remittitur on other grounds and remanded the case for a new trial on all issues, it noted but did not settle the appeal issue.

The Seventh Circuit explicitly rejected the Fifth Circuit's remittitur appeal practice in *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970) (direct appeal). In *Shor-line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976), the court spoke favorably of the plaintiff's cross-appeal of a remittitur accepted "under protest," but dismissed the appeal on the basis of prece-

the Sixth Circuit's application of *Erie*.<sup>12</sup>

The Supreme Court attempted to reconcile this conflict among the circuits in *Donovan*. In a per curiam opinion the Court reasoned that the tradition established by four Supreme Court decisions at the turn of the century<sup>13</sup> precludes plaintiffs who accept remittiturs in lieu of new trials from appealing remittitur orders.<sup>14</sup> The Court thus summarily disposed of plaintiff's *direct* appeal for review of the remittitur he accepted under protest: "In order to clarify whatever uncertainty might exist, we now reaffirm the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted."<sup>15</sup>

The *Donovan* Court, however, did not give plenary consideration to the constitutional and policy distinctions between direct and cross-appeals of remittitur orders by plaintiffs. Several courts and commentators had distinguished the unacceptability of direct appeals from the acceptability of plaintiff cross-appeals,<sup>16</sup> *i.e.*, appeals by a plaintiff when the defendant already has sought appellate review of the trial

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dent. *Id.* at 606. For a discussion of the distinction between direct and cross-appeals, see note 16 *supra* and accompanying text.

The Eighth Circuit in *Ag-Chem Equip. Co. v. Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973), noted that the trial court had allowed plaintiff to accept the remittitur under protest without prejudice to its right to appeal, remanded the claim for a new trial, and thus did not reach the appealability issue. *Id.* at 491. In a subsequent personal injury case the Eighth Circuit refused to review plaintiff's remittitur appeal. *See Slatton v. Martin K. Eby Constr. Co.*, 491 F.2d 707 (8th Cir.), *aff'd*, 506 F. 2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). After refusing the remittitur, the court ordered a new trial solely on the damages issue. 506 F.2d at 506. This procedure offers an economic advantage similar to a remittitur, it avoids a full second jury trial and enables both parties to appeal the judge's order for abuse of discretion.

12. *See, e.g.*, *West v. Jutras*, 456 F.2d 1222 (2d Cir. 1972); *Dorin v. Equitable Life Assurance Soc'y*, 382 F. 2d 73 (7th Cir. 1967); *Karlson v. 305 East 43rd St. Corp.*, 370 F.2d 467 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967). *See also Jones v. Wittenberg Univ.*, 534 F. 2d 1203 (6th Cir. 1976) (McCree, J., dissenting).

13. *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Lewis v. Wilson*, 151 U.S. 551 (1894); *Kennon v. Gilmer*, 131 U.S. 22 (1889).

14. 429 U.S. at 649.

15. *Id.* at 650.

16. In *Shor-line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976), the court dismissed plaintiff's cross-appeal but stated:

In our view there is much to be said for allowing an appeal by plaintiff following the acceptance of a remittitur under protest, at least in the context of a cross-appeal. We note in particular that in *Dorin v. Equitable Life Assurance Society of U.S.*, 382 F.2d 73 (7th Cir. 1967), Chief Judge Fairchild acknowledged his personal preference for such a rule.

543 F.2d at 606. *See also Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531, 534 n.3

court's decision. Arguably, therefore, the *Donovan* decision does not "clarify whatever uncertainty might exist" or provide clear guidance to courts faced with plaintiff cross-appeals of remittiturs accepted under protest. Nonetheless, lower court cases since *Donovan* have dismissed cross-appeals,<sup>17</sup> despite the further advantage this grants to defendants who now not only stand to gain the sole benefits that can be derived from a remittitur or new trial, but also hold the exclusive right to appeal an adverse determination on the issue.

This Note argues that the inherent unfairness to plaintiffs under the current remittitur procedure calls for the exemption of cross-appeals from the historical prohibition against plaintiff remittitur appeals. The Note first examines the constitutionality of the federal courts' remittitur procedure, then evaluates the methods presently available to mitigate the procedure's intrusion on plaintiffs' seventh amendment right to jury trial, and finally, sets forth a model for plaintiff cross-appeals and analyzes its suitability in light of the *Donovan* decision and other arguments in opposition to plaintiff remittitur appeals.

## II. THE CONSTITUTIONALITY OF REMITTITUR

The practice of remittitur in the federal courts originates from Justice Story's 1822 circuit decision in *Blunt v. Little*.<sup>18</sup> After citing two English cases that granted the defendant's motion for a new trial based on an excessive jury award,<sup>19</sup> Justice Story declared that the plaintiff could remit part of the award rather than submit to a new trial.<sup>20</sup> Although *Blunt* acknowledged the threat to jury verdicts posed by remittitur or-

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(2d Cir. 1975); F. JAMES & G. HAZARD, *supra* note 2, at 335-36; *Remittitur Practice*, *supra* note 2, at 324-25; 49 N.C.L. REV. 141 (1970).

17. See, e.g., *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873 (5th Cir. 1978); *Spectrofuze Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Keene v. International Union of Operating Eng'rs, Local 624*, 569 F.2d 1375 (5th Cir. 1978).

Significantly, however, when a defendant seeks a further reduction in the plaintiff's award through an appellate remittitur after the plaintiff's acceptance of the remittitur, *Donovan* does not preclude the plaintiff from arguing that the trial judge abused his discretion in ordering the remittitur. See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). *Donovan* also does not preclude the plaintiff's appeal of other claims not included within the accepted remittitur. *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

18. 3 F. Cas. 760 (C.C.A. Mass. 1822) (No. 1578).

19. *Chambers v. Caufield*, 6 East 244, *cited in* 3 F. Cas. at 761; *Hewlett v. Cruchley*, 5 Tawnt. 277, *cited in* 3 F. Cas. at 761.

20. 3 F. Cas. at 762.

ders, subsequent Supreme Court decisions relying on the case have failed to analyze the constitutionality of the remittitur procedure.<sup>21</sup>

The seventh amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.<sup>22</sup>

Several courts and commentators have questioned whether the substitution of a judge-determined award for the jury's verdict violates the seventh amendment.<sup>23</sup> A strict historical interpretation of the amendment would preclude any procedure that enabled a judge to reexamine facts unless that procedure existed in English common law in 1791, the year of incorporation of the Bill of Rights into the Constitution.<sup>24</sup> Because a judge necessarily reexamines facts to determine whether the particular sum awarded by the jury in damages is excessive, the practice of remittitur arguably violates the seventh amendment.

The Supreme Court's sole consideration of the issue occurred nearly forty-five years ago in *Dimick v. Schiedt*.<sup>25</sup> The immediate issue before the *Dimick* Court concerned the constitutionality of additur, a proce-

21. *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Hansen v. Boyd*, 161 U.S. 397 (1896); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Clark v. Sidway*, 142 U.S. 682 (1892); *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Northern Pac. R.R. v. Herbert*, 116 U.S. 642 (1886).

For a description of the Supreme Court's avoidance of a direct ruling on the validity of this procedure, see *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961); *Remittitur Review*, *supra* note 2, at 381-85. The following Supreme Court cases assumed without deciding that the seventh amendment does not preclude appellate review of the trial judge's denial of a motion to set aside an award as excessive: *Neese v. Southern Ry.*, 350 U.S. 77 (1955); *Affolder v. New York, C. & St. L.R.R.*, 339 U.S. 96 (1950); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

22. U.S. CONST. amend. VII.

23. See, e.g., *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 672-73 (5th Cir. 1975) (Goldberg, J., dissenting) (denial of rehearing) ("The doctrine of remittitur rests on a constitutional base of clay."); *Carlin*, *supra* note 2, at 14-24; *Remittitur Review*, *supra* note 2, at 386-91.

24. See *Galloway v. United States*, 319 U.S. 372, 396-407 (Black, J., dissenting) (arguing for a strict historical interpretation of the seventh amendment). See generally F. JAMES & G. HAZARD, *supra* note 2, at §§ 8.1-8.3; 5 MOORE'S FEDERAL PRACTICE ¶¶38.11[2], [7], .16[4] (2d ed. 1979); Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 AM. JUD. SOC'Y 130 (1936); Hinton, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 U. CHI. L. REV. 111 (1933); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975) (arguing for a strict historical interpretation to limit the use of civil juries). See also Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

25. 293 U.S. 474 (1935).

ture by which the trial judge increases the size of the jury award,<sup>26</sup> but the parallel between additur and remittitur led the Court to discuss the constitutionality of each.<sup>27</sup> The Court held that additur violates the seventh amendment,<sup>28</sup> but gave begrudging approval in dicta to remittitur because of the length of time courts had practiced the procedure.<sup>29</sup>

Although the Court in *Dimick* felt compelled to uphold the constitutionality of remittitur because of its longevity, the Court could not marshal sufficient evidence of its common-law vitality in 1791 to support its constitutionality on an historical theory.<sup>30</sup> Justice Sutherland thus justified the Court's conclusion by distinguishing remittitur and additur in terms of their respective effects on jury verdicts.<sup>31</sup> In this much criticized distinction,<sup>32</sup> Justice Sutherland argued that a remittitur does not intrude on the jury award because it represents a sum included within the original verdict; the final additur award, in contrast, includes a sum that the jury did not award in its verdict.<sup>33</sup> This distinction is spurious; a verdict, in contrast to a sum of money, may not be divided. A verdict represents a specific sum in damages, and any deviation from the jury's award—whether an addition or a subtraction—equally disregards the

26. See generally 6A MOORE, *supra* note 2, at ¶ 59.05[4] (2d ed. 1979); Carlin, *supra* note 2, at 24-29; Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694 (1960) See also *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 536 (3d Cir. 1976) (Rosenn, J., dissenting) (court, in effect, granted appellate additur), *cert. denied*, 429 U.S. 825 (1977); *Novak v. Gramm*, 469 F.2d 430, 432-33 (8th Cir. 1972) (discussion and dismissal of plaintiff's arguments for additur). But see *McCoy v. Wean United, Inc.*, 67 F.R.D. 495 (E.D. Tenn. 1975) (court ordered additur of \$110,000 plus medical expenses based on state law characterized as substantive).

27. 293 U.S. at 482-88.

28. *Id.* at 484-85. The lower federal courts that have passed on the constitutionality of remittitur have followed the *Dimick* dicta. See, e.g., *Ehret Co. v. Eaton, Yale & Towne, Inc.*, 523 F.2d 280, 285 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 976 (6th Cir. 1974); *Meyer v. W.R. Grace & Co.*, 421 F. Supp. 1331, 1336 (E.D. Pa. 1976), *modified*, 565 F.2d 152 (3d Cir. 1977).

29. "[W]e may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day." 293 U.S. at 485.

30. *Id.* at 483-85.

31. *Id.* at 485-87.

32. See *id.* at 494 (Stone, J., dissenting); Carlin, *supra* note 2, at 17-18.

33. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.

293 U.S. at 486.

jury's determination of the facts.<sup>34</sup>

Justice Sutherland's distinction also seems to be an attempt to emphasize the first clause of the seventh amendment, which provides that "the right of trial by jury shall be preserved," but temporize the mandate of the amendment's second clause that "no fact tried by a jury, shall be otherwise reexamined . . . than according to the rules of the common law."<sup>35</sup> This approach suggests that once a challenged procedure satisfies the jury preservation clause of the amendment, less constitutional concern needs to be focused on the historical test of the second clause. In procedures other than remittitur, for example, courts have liberalized the historical interpretation of the seventh amendment to avoid limiting the development of modern procedural devices<sup>36</sup> and the expansion of the jury trial to new causes of action.<sup>37</sup> If this ap-

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34. Carlin, *supra* note 2, at 17-18; 21 VA. L. REV. 666 (1935). *But see* James, *supra* note 2, at 154-55.

35. *See* note 22 *supra*.

36. Examples of modern procedural devices alien to the common law of England in 1791, but that necessarily involve a judicial reexamination of jury-determined facts, include the ability of a trial judge to grant: a new trial, FED. R. CIV. P. 59; a directed verdict, FED. R. CIV. P. 50(a); summary judgment, FED. R. CIV. P. 56; and judgment n.o.v., FED. R. CIV. P. 50(b). For a discussion of modern procedures that constitute reexaminations of jury-determined facts, see Melancon v. McKeithan, 345 F. Supp. 1025, 1045-48 (E.D. La. 1972), *aff'd*, 409 U.S. 1098 (1973); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

37. Traditionally, when confronted with a statutorily based cause of action, a court generally characterizes the action as either at law or in equity to determine whether the parties have a seventh amendment right to jury trial. The court either analogizes the action in question to a previously determined action or characterizes the action by the type of remedy sought. In this context, a rigid historical interpretation would severely limit the expansion of jury-trial availability. *See generally* Redish, *supra* note 24; Wolfram, *supra* note 24.

Since the merger of the law and equity, the present seventh amendment approach is not clear. *Cf.* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977) (collection of OSHA penalties); Pernell v. Southall Realty, 416 U.S. 363 (1974) (landlord-tenant disputes in District of Columbia); Curtis v. Loether, 415 U.S. 189 (1974) (damage suits under Civil Rights Act of 1968); Ross v. Bernhard, 396 U.S. 531 (1970) (stockholder derivative actions); Katchen v. Landy, 382 U.S. 323 (1966) (bankruptcy court); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (complex actions and masters); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (equitable cleanup doctrine). *See generally* Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281 (1978). The Court clearly departed from the historical analogue test in several of these cases to expand the use of the jury trial. In *Beacon Theatres* the Court looked to the broad purposes of the seventh amendment to effectuate its goals in a modern context. *See generally* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967). In addition, there is some indication in *Ross* that the Supreme Court might replace the historical test with one that balances the "practical abilities and limitations of juries." 396 U.S. at 538 n.10. *See generally* Note, *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112 (1971); 65 NW. U.L. REV. 697 (1970).

proach reflects the proper relationship between the two clauses of the seventh amendment, then the historical test need not preclude the constitutionality of remittitur appeals by plaintiffs.

In dissent Justice Stone spurned the distinction advanced by Justice Sutherland, but agreed that the seventh amendment was never intended to strap modern courts with eighteenth-century procedures; rather, the amendment dictates only that courts "preserve the essentials" of the common-law jury trial.<sup>38</sup> This interpretation also blends the second clause of the amendment into the first; thus, a judge may constitutionally reexamine facts so long as he preserves the essence of the jury trial.<sup>39</sup>

According to this interpretation, however, whether a court-offered choice between remittitur and new trial preserves the essential seventh amendment right to elect trial by jury depends directly on whether the plaintiff's acceptance of a remittitur is freely made. Certainly, a court that substitutes a sum of damages for the jury's award without granting plaintiff's the option of a new trial unconstitutionally invades the province of the jury.<sup>40</sup> Even the freedom of choice meaningfully available

38. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parson v. Bedford*, 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit.

Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.

293 U.S. at 490-91 (1935) (Stone, J., dissenting) cited in *Dagnello v. Long Island R.R.*, 289 F.2d 797, 803-04 (2d Cir. 1961). See *Galloway v. United States*, 319 U.S. 372, 390-92 (1943) (seventh amendment does not bind courts to exact common-law procedures); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (seventh amendment not intended to codify rigid form of jury practice).

39. See 293 U.S. at 492.

40. See *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889); *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2d Cir. 1975) (plaintiff's appeal allowed because trial judge reduced award without plaintiff's consent); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 976 (6th Cir. 1974) ("The district court cannot, without the consent of the parties, substitute its judgment for that of the jury on the issue of just compensation. To permit the Court to do so would erode the parties' Seventh Amendment

to a plaintiff who is granted the option, however, is only apparent, not real.<sup>41</sup> Under the traditional procedure, the plaintiff who wishes to contest a remittitur order must first undergo the delay and expense of a second trial to obtain a final judgment from which to appeal.<sup>42</sup> If the second jury verdict is significantly smaller than the first, the plaintiff may then move for a new trial.<sup>43</sup> If the trial court denies the motion, the plaintiff finally acquires the right to appellate review of the trial court's action, but even then the scope of review is limited to whether the trial court abused its discretion in ordering the remittitur after the first trial or denying plaintiff's motion for a new trial.<sup>44</sup> In light of the uncertainty, delay, and expense inherent in this procedure, the acceptance by a plaintiff of a remittitur over a new trial represents the product of a subtle, but effective, coercion. The unfairness—if not unconstitu-

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guarantee of a jury trial." (citations omitted)); *Stewart v. Atlantic Pipe Line Co.*, 470 F.2d 738 (5th Cir. 1972), *modified*, 479 F. 2d 311 (5th Cir. 1973).

41. When a remittitur is used, however, the coercive effect upon a plaintiff is very great. He is offered a reduced verdict right away. Should he refuse, in order to regain the full amount of the verdict he must first undergo the delay and trouble of a second trial, perhaps obtain a lower verdict, and then try to persuade an appellate court that the trial judge erred in reducing the first verdict. It should be no surprise that, as the majority puts it, "most plaintiffs now accept the remittitur thus necessitating a second trial in only a small minority of cases." If this is so, it proves appellant's point, which is that the present system deprives him of any real opportunity to challenge the judge's use of a remittitur.

. . . Why should we allow a plaintiff to be coerced into giving up his chance to challenge an alleged invasion of the jury's prerogative?

*Donovan v. Penn Shipping Co.*, 536 F.2d 536, 539 (2d Cir. 1976) (Feinberg, J., dissenting), *aff'd*, 429 U.S. 648 (1977). See generally *Remittitur Practice*, *supra* note 2, at 311-13.

42. See, e.g., *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531 (2d Cir. 1975); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

43. See, e.g., *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531 (2d Cir. 1975). Where the quantum of the plaintiff's second trial award is similar to that of the first award, the trial judge can again declare the verdict excessive and require the plaintiff to choose again between a remittitur or a new (third) trial. In theory, the trial judge could continue to order new trials until either plaintiff accepted remittitur or a lower verdict is reached. See *Donovan v. Penn Shipping Co.*, 536 F.2d 536, 539 n.4 (2d Cir. 1976) (Feinberg, J., dissenting), *aff'd*, 429 U.S. 648 (1977); *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976). Some courts assert that when the first award is excessive as a matter of law, a second jury award of a comparable sum also should be struck as excessive as a matter of law. See, e.g., *Nelson v. Keefer*, 451 F.2d 289, 296 n.15 (3d Cir. 1971) (dictum). But see 11 C. WRIGHT & A. MILLER, *supra* note 2, § 2815 at 105 n.8.

44. See, e.g., *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531 (2d Cir. 1975); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

Appellate courts will grant less deference to trial courts, however, when the trial judge's order conflicts with the jury's verdict. *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 147-49 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

tionality—of this procedure calls for the recognition of plaintiff remittitur appeals.

Courts also circumvent the constitutional rule against reexamination of jury-determined facts by characterizing their actions as the review of law rather than of fact.<sup>45</sup> Courts thus frequently state that remittitur is required because the jury's verdict is excessive as "a matter of law."<sup>46</sup> Clearly, however, any change in a jury verdict entails a reexamination of facts upon which the jury justified its award, and thus necessarily results in some degree of intrusion upon the jury's verdict.<sup>47</sup> Furthermore, there is no readily identifiable point at which a remittitur order constitutes a review of law rather than of fact. The ambiguity of this distinction only makes it easier for courts mistrustful of juries to rationalize decisions actually based on a policy preference for greater control over jury verdicts.<sup>48</sup>

The *Dimick* Court's affirmation of remittitur,<sup>49</sup> the availability of remittitur appeal to defendants but not plaintiffs,<sup>50</sup> and the manner in which the remittitur procedure coerces plaintiffs or leaves them open to

45. See *Melancon v. McKeithen*, 345 F. Supp. 1025, 1045-46 (E.D. La. 1972). See also Blume, *supra* note 24.

46. See, e.g., *Community Television Serv., Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214, 218 (D.S.D. 1977) ("the court finds the verdict excessive as a matter of law"); *Treadway Companies, Inc. v. Brunswick Corp.*, 364 F. Supp. 316, 326 (D.N.J. 1973) (new trial or remittitur ordered in Clayton Act suit as jury's award was excessive as a matter of law).

47. *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972).

Although the determination whether to grant a new trial for this reason is often denominated a "question of law", it must necessarily involve a reassessment of facts. So too, when a trial court grants a motion for judgment notwithstanding the verdict . . . on the basis of insufficiency of the evidence . . . , it must necessarily involve re-examination of facts despite the "legal" nature of the question presented. Further, when an appellate court grants a motion for a jury trial . . . it is technically issuing a delayed ruling on a motion for directed verdict; yet the ruling must necessarily involve fact re-examination.

*Id.* at 1046.

48. For criticism of the civil jury trial, see J. FRANK, *COURTS ON TRIAL* (Princeton ed. 1973); L. GREEN, *JUDGE AND JURY* (1930); Devitt, *Federal Civil Jury Trials Should be Abolished*, 60 A.B.A.J. 570 (1974); Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152; Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A. J. 950 (1970); Redish, *supra* note 24, at 502-08; Stewer, *The Case Against the Jury (A Brief Without Citations)*, 47 N.Y.S.B.J. 101 (1975).

For support of the civil jury trial, see Calvin, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964). See also Kirst, *supra* note 37; Shaffer, *Judges, Repulsive Evidence and the Ability to Respond*, 43 NOTRE DAME LAW. 503 (1968); Wolfram, *supra* note 37; Wright, *The Invasion of the Jury: Temperature of the War*, 27 TEMP. L.Q. 137 (1953); Wright, *Instructions to the Jury: Summary Without Comment*, 1954 WASH. U.L.Q. 177.

49. See note 29 *supra* and accompanying text.

50. See note 4 *supra* and accompanying text.

judicial manipulation, all decidedly tip the balance of fairness in favor of defendants to the detriment of plaintiffs, who lose jury awards. This intrusion on the jury function requires the adoption of methods to mitigate the unconstitutional impact of the current remittitur practice in the federal courts.

### III. METHODS TO MITIGATE REMITTITUR'S INTRUSION ON JURY VERDICTS

Among the methods presently employed to lessen the inequitable impact of remittitur on plaintiffs, four deserve particular attention for their promise, yet limited utility or desirability.

One means to control abuse of remittitur is for courts to adopt a uniform and strict standard for determining when a jury award is excessive and thus justifies usage of the remittitur procedure. Unfortunately, present standards vary greatly<sup>51</sup> because determinations of excessiveness are left to trial judges<sup>52</sup> whom appellate courts will reverse only for abuse of discretion.<sup>53</sup> One standard requires that the excessiveness of the jury's verdict "shock the judicial conscience,"<sup>54</sup> or "[repel] the trial judge's concept of justice and reason";<sup>55</sup> another standard requires only that the verdict lack support of "substantial evidence."<sup>56</sup>

Further divisions occur out of reliance on the judge's perception of the extent to which the jury's "passion or prejudice" manifested itself in

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51. See generally *Remittitur Practice*, *supra* note 2, at 302-04.

52. 6A MOORE, *supra* note 2, at ¶59.05[3].

53. The appellate standard of review for the grant or denial of a new trial or remittitur motion is abuse of discretion. See notes 44 *supra* and 78-79 *infra* and accompanying text.

54. See, e.g., *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 507 n.3 (8th Cir. 1974) ("grossly and shockingly excessive"), *cert. denied*, 421 U.S. 931 (1975); *Brents v. Freeman's Oil Field Serv., Inc.*, 448 F.2d 601, 603 (5th Cir. 1971) ("the verdict is not unsupported by the evidence and contrary to all reason . . . nor is it so excessive as to shock the conscience of the court"); *Rogers v. Exxon Research & Eng'r Co.*, 404 F. Supp. 324, 337-38 (D.N.J. 1975) ("shocking to the judicial conscience or so grossly inadequate as to constitute a miscarriage of justice"), *vacated and remanded*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Collum v. Butler*, 288 F. Supp. 918, 920 (N.D. Ill. 1968) ("shocks the judicial conscience"), *aff'd*, 421 F.2d 1257 (7th Cir. 1970).

55. See, e.g., *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148-49 (D.C. Cir.) (miscarriage of justice or beyond maximum reasonable range), *cert. denied*, 396 U.S. 835 (1969); *Fratelli Gardino, S.p.A., v. Caribbean Lumber Co.*, 447 F. Supp. 1337, 1343-44 (S.D. Ga. 1978) (justice in each case), *modified*, 587 F.2d 204 (5th Cir. 1979).

56. See, e.g., *Shipe v. Leavesley Indus., Inc.*, 55 F.R.D. 190, 192 (E.D. Tenn. 1971); *Knight v. Nurseryman Supply, Inc.*, 248 F. Supp. 925, 926 (E.D. Tenn. 1965).

the verdict.<sup>57</sup> When the jury's emotion may have affected the jury's judgment of the defendant's liability, the circuits generally require a new trial rather than a remittitur,<sup>58</sup> but when the prejudice seems to have influenced only the amount of damages awarded by the jury, the circuits conflict over whether a new trial, or a new trial solely on the damages issue, or a remittitur, should be granted.<sup>59</sup> This conflict exists even though the Supreme Court has held that jury emotionalism is not grounds for trial de novo.<sup>60</sup>

A related method to limit the extent to which the practice of remittitur thwarts the jury's will and skirts the bounds of unconstitutionality concerns the standards employed by trial judges to determine the amount a plaintiff must remit to avoid a new trial.<sup>61</sup> Courts generally employ one of three standards. Under the "minimum recovery" rule, judges offer plaintiffs the lowest sum that a reasonable jury could have awarded.<sup>62</sup> Judges who prefer a standard somewhat less unfavorable to

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57. See, e.g., *Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1088-89 (6th Cir. 1978) (enlargement of photographs without distortion not prejudicial); *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873, 882-83 (5th Cir. 1978) (neither brief jury discussion of case prior to deliberation nor verdict reached within fifteen minutes indicated passion or prejudice); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970) (presence of facially disfigured plaintiff at trial evoked prejudice), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921, *rehearing denied*, 409 U.S. 899 (1972).

Some courts assert that the excessiveness of the verdict alone indicates passion or prejudice. See, e.g., *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967); *Bankers Life & Cas. Co. v. Kirtley*, 307 F.2d 418 (8th Cir. 1962); *Community Television Serv. Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214 (D.S.D. 1977) (dictum). See also *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978) (trial judge's determination of "prejudice" based on "shocking" verdict dismissed because jury's award was lower than that supportable by the evidence and judge's shock was at treble damage requirement).

58. See, e.g., *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 282-83 (5th Cir. 1975). See also 6A MOORE, *supra* note 2, at ¶ 59.05[3].

59. See, e.g., *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520 (1931) (remittitur overturned because jury bias requires full new trial); *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89 (1st Cir. 1975) (remittitur allowed); *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 511 F.2d 839, 846 (4th Cir. 1975) (second trial limited to damages proper when "liability and damage issues are [not] inextricably interwoven"); *Bankers Life & Cas. Co. v. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962) (court offered remittitur of exemplary damages or new trial on all issues when prejudice affected exemplary but not compensatory damages).

60. See *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520 (1931). Cf. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 161 (1967) (prejudice determined solely from excessiveness of award).

61. See generally *Remittitur Practice*, *supra* note 2, at 307-09.

62. See, e.g., *Durant v. Surety Homes Corp.*, 582 F.2d 1081 (7th Cir. 1978). See also *Remittitur Practice*, *supra* note 2, at 308 nn.62-65 and accompanying text.

plaintiffs grant that award which a "proper functioning jury" should have awarded.<sup>63</sup> The Fifth Circuit applies yet a third remittitur standard by which judges award the maximum amount that a reasonable jury could have awarded.<sup>64</sup> The "maximum recovery rule" is based on the view that the jury, by the excessiveness of its award, intended to grant plaintiff the largest possible sum in damages.<sup>65</sup>

Of the three standards, the maximum recovery rule most favors plaintiffs and least violates the integrity of jury verdicts because its application least reduces the jury's award. The Fifth Circuit devised the rule out of concern for plaintiffs' seventh amendment rights,<sup>66</sup> and other courts have adopted it for the protection it affords jury verdicts.<sup>67</sup>

The maximum recovery rule, however, also imposes greater hard-

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63. 6A MOORE, *supra* note 2, at ¶ 59.05[3]; *see, e.g.*, *Lanfronconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967); *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960).

64. Application of the Fifth Circuit maximum recovery rule entails a two-step process. The appellate court must first decide whether the trial court should have interfered with the jury's determination of damages; *i.e.*, if the "quantum of damages found by the jury was *clearly* within 'the maximum limit of a reasonable range.'" *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970) (quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969)), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921, *rehearing denied*, 409 U.S. 899 (1972). The court then determines whether the remittitur is "the amount which, under the evidence in the case, was the maximum that the jury reasonably could find to be compensatory for appellant's loss." 456 F.2d at 181. *See, e.g.*, *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665 (5th Cir. 1974), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975); *Jenkins v. Aquatic Contractors & Eng'rs*, 446 F.2d 520 (5th Cir. 1971). *See generally Remittitur Review, supra* note 2, at 392-97.

The Fifth Circuit standard makes it difficult for plaintiffs to contend that the remittitur should be increased, because it presumes that the trial judge reduced the verdict to the maximum award; thus, the burden is on the plaintiff to "point to credible evidence which would support a greater recovery." *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 670 (5th Cir. 1974), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975). This presumption has been criticized as inequitable to the plaintiff. *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 671-73 (5th Cir. 1975) (Goldberg, J., dissenting) (denial of rehearing). *See* notes 47-50 *infra* and accompanying text.

The Fifth Circuit does not use the maximum recovery standard to calculate remittiturs from punitive damage awards. *See, e.g.*, *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1966).

65. 6A MOORE, *supra* note 2, at ¶ 59.05[3]; *Remittitur Practice, supra* note 2, at 307-08.

66. *See Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 669 (5th Cir. 1974), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975). The use of the "maximum reasonable recovery" rule to review trial court denials of new trial or remittitur motions also protects the plaintiff's seventh amendment rights by limiting the scope of appellate interference with jury awards.

67. *See, e.g.*, *Howard v. J.N. Zellner & Sons Transfer Co.*, 529 F.2d 245 (6th Cir. 1976); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974); *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396

ships on defendants than the other rules.<sup>68</sup> The defendant who appeals for a larger reduction in the remittitur, or for a new trial, must demonstrate that the post-remittitur award not only exceeds a "reasonable" award, but also oversteps the "maximum reasonable" award. The maximum recovery rule also may harshly treat defendants when the excessive verdict results not from the jury's intention to award plaintiff the maximum sum, but from the effect of some neutral factor such as the jury's misinterpretation of a jury instruction.<sup>69</sup>

Courts may also mitigate the inequities in the present remittitur procedure through confinement of its use to liquidated damages cases.<sup>70</sup> A jury verdict may be excessive, for example, solely because the jury misapplied a legal principle to the facts of the case, such as the miscalculation of a contractual formula.<sup>71</sup> Recalculation of liquidated damages in this example essentially entails nothing more than the proper selection or application of the formula, which is a matter of law. Because the seventh amendment prohibits only the reexamination of jury-determined facts,<sup>72</sup> the court's recalculation of liquidated damages does not intrude upon the jury's constitutional province. In contrast, the determination of unliquidated damages, such as compensation for pain and suffering, does not rely on legal formula; rather, the award depends on subjective evaluations of fact, which is the function of the jury. In determining whether to grant a remittitur or a retrial on damages, therefore, judges should consider the extent to which the jury's award is based on readily calculable injury rather than on intangible factors.<sup>73</sup>

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U.S. 835 (1969); *Schotka v. American Export Isbrandtsen Lines, Inc.*, 311 F. Supp. 77 (S.D.N.Y. 1969).

68. See *Remittitur Practice*, *supra* note 2, at 307. Because the protections of the seventh amendment extend to defendants and plaintiffs alike, a defendant may complain that the final award does not approximate what a properly functioning jury would assess.

69. See, e.g., *Durant v. Surety Homes Corp.*, 582 F.2d 1081 (7th Cir. 1978) (after trial judge used remittitur following improper instruction that included "mental distress" as compensatory damage factor, appellate court corrected remittitur to reduce award to lowest sum defendant's evidence would support).

70. See generally *Remittitur Review*, *supra* note 2, at 389-91; *Remittitur Practice*, *supra* note 2, at 305-06.

71. See, e.g., *Alover Distrib., Inc. v. Kroger Co.*, 513 F.2d 1137 (7th Cir. 1975) (action on contract); *Fratelli Gardino, S.p.A. v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978) (action on contract); *Community Television Serv., Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214 (D.S.D. 1977) (valuation of collapsed tower); *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009 (D.N.J. 1976) (antitrust action), *rev'd*, 570 F.2d 72 (3d Cir. 1977).

72. See note 22 *supra* and accompanying text.

73. See *Remittitur Review*, *supra* note 2, at 389-91.

When the award is substantially unliquidated, retrial is preferable to remittitur.<sup>74</sup>

The Supreme Court has not as yet adopted this distinction between remittiturs in liquidated and unliquidated damages cases.<sup>75</sup> Other courts and commentators, however, have further differentiated the two types of cases to assert that a court may simply substitute its recalculated award, without offering the plaintiff a choice of remittitur or new trial, when the damages are clearly ascertainable and no factual determinations are necessary.<sup>76</sup> Ironically, this procedure may be more beneficial to plaintiffs than the "voluntary" choice of remittitur or new trial offered under the present system because of plaintiffs' inability to appeal remittitur orders. The danger, however, in allowing courts to recalculate and substitute awards without plaintiffs' consent is that courts may expand the practice to cases that do entail factual determinations.<sup>77</sup>

A final means to alleviate the adverse effects of the remittitur procedure on the jury function is to limit the use of appellate remittiturs. Reexamination of jury-determined facts is likely to occur whether the trial court or the appellate court first considers remittitur, but appellate

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74. Although punitive damages are unliquidated and fall within the expertise of the jury, some courts assert that both trial and appellate courts should exercise greater control over punitive damage awards. *See, e.g.,* *Morrissey v. National Maritime Union*, 544 F.2d 19, 34-35 (2d Cir. 1976); *cf. Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975) (the standard to determine a remittitur for punitive damages is not the "maximum" standard used with compensatory damages). Under the majority rule the trial judge will apply the same standard of review for both punitive and compensatory awards, if not grant greater deference to the jury in reviewing punitive damages. *See, e.g., Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F. 2d 716 (2d Cir. 1977) ("shockingly or grossly excessive"); *Lanfranco v. Tidewater Oil Co.*, 376 F.2d 91, 94-98 (2d Cir.) ("manifestly and grossly excessive"), *cert. denied*, 389 U.S. 951 (1967); *Bankers Life & Cas. Co. v. Kirtley*, 307 F.2d 418 (8th Cir. 1962) ("at least as narrow as that applied to compensatory damage situations").

75. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), Justice Sutherland noted that under English common law the judge's alteration of a jury award depended upon whether the damages were liquidated or unliquidated, but he did not suggest that the use of remittitur or additur should be dependent upon this distinction.

76. *See, e.g.,* 6A MOORE, *supra* note 2, at ¶ 59.05[3]; A. SCOTT, *FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 142 (1922). *See also Staplin v. Maritime Overseas Corp.*, 519 F.2d 969, 973 (2d Cir. 1975) (dictum).

77. *See, e.g., Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2d Cir. 1975) (appellate court reinstated jury award for lost wages because trial judge's method for calculation of lost wages had not been communicated to the jury as the required method). *See also Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 535-36 (3d Cir.) (Rosenn, J., concurring and dissenting) (majority remolded jury award and granted additur; method of calculating damages disputed), *cert. denied*, 429 U.S. 825 (1976).

review constitutes a more remote reexamination, which commentators criticize as an even greater intrusion upon the seventh amendment right to trial by jury.<sup>78</sup> Moreover, when a jury finds a particular quantum of damages and the trial judge refuses defendant's request for remittitur or new trial, an appellate court should not grant a remittitur order. The trial judge's "opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record . . . [reinforces] the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages."<sup>79</sup> On the other hand, an appellate remittitur is more acceptable when the trial judge disagrees with the jury's award and grants a remittitur, because the appellate remittitur essentially changes only the amount to be remitted from an award that already has been judicially recognized as excessive.

Even with this limitation on the use of appellate remittiturs, however, the right to appeal the trial court's determination on the issue vests solely in defendants under the present doctrine.<sup>80</sup> Even when defendants raise appeals, plaintiffs may not file cross-appeals.<sup>81</sup> Like the other three methods discussed above, therefore, the use of appellate remittitur does not obviate the fundamental inequity in the present system—the unavailability to plaintiffs of some means of remittitur appeal.

#### IV. PLAINTIFF REMITTITUR APPEALS<sup>82</sup>

Before the Supreme Court's decision in *Donovan v. Penn Shipping Co.*,<sup>83</sup> remittitur appeals by plaintiffs offered an appropriate counterbalance to remittitur and remittitur appeals by defendants. Limited to

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78. See, e.g., Busch, *supra* note 2, at 550; Hulderson, *Remittitur and Other Things*, 28 J. Mo. B. 81 (1972) (regarding state practice); *Remittitur Review*, *supra* note 2, at 397-99 (favoring new trial orders in unliquidated damage cases); *Remittitur Practice*, *supra* note 2, at 310-11 ("[a] jury verdict becomes a tenuous thing when cloistered appellate judges feel free to tamper with it"). See also Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). But see 33 Mo. L. REV. 637, 644 (1968). See also Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969).

79. *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.) (in the context of the standard of review of trial judge's remittitur-new trial order after second trial), *cert. denied*, 396 U.S. 835 (1969).

80. See notes 4-7, 13-15 *supra* and accompanying text.

81. See note 17 *supra* and accompanying text.

82. See generally *Remittitur Review*, *supra* note 2, at 378-81; *Remittitur Practice*, *supra* note 2, at 315-18.

83. 429 U.S. 648 (1977) (per curiam).

its facts, *Donovan* precludes only direct appeals of remittitur orders by plaintiffs. Only through the Court's sweeping dicta are plaintiff cross-appeals foreclosed.<sup>84</sup> This part of the Note describes the plaintiff remittitur appeal procedure and analyzes the *Donovan* decision and other arguments against plaintiff cross-appeals.

The Fifth Circuit pioneered the use of plaintiff's remittitur appeal. The circuit's first indication that it would allow plaintiffs to appeal appeared in its 1963 decision of *Delta Engineering Corp. v. Scott*.<sup>85</sup> The court in this case asserted in dicta that a plaintiff who accepts a remittitur, but who has not collected the judgment, might be able to challenge the remittitur order.<sup>86</sup> The court formally adopted a remittitur appeal procedure three years later in *Steinberg v. Indemnity Insurance Company of North America*.<sup>87</sup>

To successfully challenge a trial judge's remittitur order on either direct appeal<sup>88</sup> or cross-appeal,<sup>89</sup> the Fifth Circuit procedure first requires a plaintiff to accept the remittitur "under protest"<sup>90</sup> and to refrain from collecting on the judgment.<sup>91</sup> This requirement serves to protect defendants from detrimental reliance on the remittitur. The plaintiff then must establish that the trial judge abused his discretion in concluding that the verdict was excessive. An abuse of discretion oc-

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84. See notes 13-16 *supra* and accompanying text.

85. 322 F.2d 11 (5th Cir. 1963), *rehearing denied*, 325 F.2d 432 (5th Cir.), *cert. denied*, 377 U.S. 905 (1964).

86. 322 F.2d at 14.

87. 364 F.2d 266 (5th Cir. 1966).

88. See, e.g., *Gilbert v. St. Louis-San Francisco R.R.*, 514 F.2d 1277 (5th Cir. 1975); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921, *rehearing denied*, 409 U.S. 899 (1972).

89. See, e.g., *Turner v. Delta Steamship Lines, Inc.*, 546 F.2d 676 (5th Cir. 1977) (*per curiam*); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665 (5th Cir. 1974), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *United States v. 1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970).

90. See *Minerals & Chemicals Phillips Corp. v. Milwhite Co.*, 414 F.2d 428, 431 (5th Cir. 1969) (plaintiff's cross-appeal dismissed because plaintiff had failed to accept remittitur "under protest").

91. In *Delta Eng'r Corp. v. Scott*, 322 F.2d 11 (5th Cir. 1963), the court indicated in dictum that a plaintiff would not be able to appeal a remittitur if "the fruits of a judgment" were accepted. *Id.* at 15. In allowing the plaintiff's remittitur appeal in *Steinberg v. Indemnity Ins. Co.*, 364 F.2d 266 (5th Cir. 1966), the court noted that "[m]oreover plaintiff has not collected the judgment as reduced." *Id.* at 268. Although in *United States v. 1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970), the court noted that plaintiffs' acceptance of their judgment was appropriate in an eminent domain action to avoid depriving them of both the use of their land and their judgment. *Id.* at 912-13.

curs if "the jury's original verdict was *clearly within* the universe of possible awards which are supported by the evidence."<sup>92</sup> If unsuccessful in this assertion, the plaintiff may still argue that the amount of the award remaining after the remittitur exceeds the maximum award that the evidence could support.<sup>93</sup> This argument, however, requires the plaintiff to overcome a presumption that the trial court's award was proper.<sup>94</sup>

Although this burden discourages frivolous appeals, it also limits the effectiveness of the appeal procedure in mitigating the negative impact of remittitur on plaintiffs.<sup>95</sup> The trial judge should be required to substantiate his award by "making findings of fact and explicating the theory or rationale for the damages."<sup>96</sup> This modification of the Fifth Circuit procedure would provide an "explicit foundation for the trial judge's action, allowing a basis for appellate review in this constitutionally sensitive area."<sup>97</sup>

The primary objection to this procedure is the Supreme Court's decision in *Donovan v. Penn Shipping Co.*, in which the Court asserted that a "line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed."<sup>98</sup> *Donovan*, however, lacks the analysis necessary to support its summary rejection of any system for plaintiff remittitur appeals.

Initially, the *Donovan* Court misplaces its reliance on precedent.<sup>99</sup> In

92. *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (emphasis in original), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975). For a further discussion of the "maximum recovery" standard, see notes 66-69 *supra* and accompanying text.

93. *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665 (5th Cir. 1974), *rehearing denied*, 512 F.2d 671 (5th Cir. 1975).

94. [T]he appellate court must determine whether the amount of the award which remains after the remittitur reflects the maximum award which the evidence will support or whether it merely represents the trial court's opinion of what the proper award should have been. At this point deference will be given to the trial court's determination since he, and not the appellate court, was present during the ebb and flow of the trial, and it will be presumed that the amount which he has chosen is the amount which will reduce the jury's verdict to the "maximum possible" award unless the party opposed to the remittitur can point to credible evidence which would support a greater recovery.

*Id.* at 670.

95. *Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 671-73 (5th Cir. 1975) (Goldberg, J., dissenting) (denial of rehearing).

96. *Id.* at 673.

97. *Id.*

98. 429 U.S. 648, 649 (1977).

99. For more detailed discussions of the precedential value of the early Supreme Court decisions, see *Remittitur Review*, *supra* note 2, at 377-78; *Remittitur Practice*, *supra* note 2, at 313-15; *Appealability of Judgments*, *supra* note 2, at 1155-57.

*Kennon v. Gilmer*,<sup>100</sup> for example, the Court upheld remittiturs in general as “voluntary,” but permitted plaintiff to appeal in this instance because the trial court imposed the remittitur without offering plaintiff the choice of a new trial.<sup>101</sup> As discussed earlier, however, the “voluntary” nature of a remittitur procedure that does not permit plaintiff appeals is only apparent, not real.<sup>102</sup> *Lewis v. Wilson*<sup>103</sup> also may be distinguished on the ground that plaintiff did not attempt to appeal until two years after he signed a statement acknowledging his satisfaction with the remittitur.<sup>104</sup>

The *Donovan* Court’s reliance on precedent also fails to recognize that these early cases were decided before defendants could appeal trial court denials of requests for remittitur or motions for new trial.<sup>105</sup> The significant procedural advantage to defendants resulting from this change in remittitur law threatens to undermine the fundamental fairness of current remittitur doctrine.<sup>106</sup>

Most notably, the *Donovan* Court failed to give plenary consideration to the distinctions between direct appeals and cross-appeals by plaintiffs. The arguments against a system of plaintiff remittitur appeals are more applicable to direct appeals than to cross-appeals. Critics of remittitur appeal argue that appellate review of lower court decisions increases the likelihood of judicial reexamination of jury-determined facts in violation of the seventh amendment.<sup>107</sup> When a plaintiff’s appeal is in response to the defendant’s appeal, however, the increment of fact reexamination attributable to plaintiff’s cross-appeal is minimal. Another argument that applies less convincingly to cross-appeals than to direct appeals is that plaintiff remittitur appeals would increase the judicial workload.<sup>108</sup> Because the defendant initiates any

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100. 131 U.S. 22 (1889).

101. *Id.* at 30.

102. See notes 41-44 *supra* and accompanying text.

103. 151 U.S. 551 (1894).

104. *Id.* at 554.

105. See notes 3-6 *supra* and accompanying text.

106. See notes 22-24 *supra* and accompanying text.

107. See note 22 *supra* and accompanying text.

108. A plaintiff would have nothing to lose by accepting a remittitur “under protest,” thereby guaranteeing himself a minimum verdict, and then proceeding to the court of appeals in an effort to restore the sum which had been disallowed by the district judge. The proliferation of appeals would be the inevitable consequence.

*Donovan v. Penn Shipping Co.*, 536 F.2d 536, 537 (2d Cir. 1976), *aff’d*, 429 U.S. 648 (1977). See generally *Remittitur Practice*, *supra* note 2, at 321-24; *Appealability of Judgments*, *supra* note 2, at 1161-62.

appeal, however, the plaintiff does not create an additional administrative burden through a cross-appeal. Furthermore, plaintiff cross-appeals may improve judicial economy. The threat to defendants that the appellate court may increase the plaintiff's award in response to plaintiff's cross-appeal might diminish the number of frivolous appeals by defendants.

#### V. CONCLUSION

The Supreme Court's summary rejection of plaintiff remittitur appeals in *Donovan* inadequately disposes of an important constitutional issue. Neither the precedent relied upon by the Court nor the sweeping language interpreted by lower courts to apply to both direct and cross-appeals justifies the unavailability to plaintiffs of a procedure for remittitur appeals.

Plaintiff cross-appeals advance two significant goals: judicial economy and a balance between the plaintiff's right to a jury-determined award and the defendant's right to a fair verdict. The latter objective, in particular, calls for the incorporation of cross-appeals into remittitur practice to limit the arguably unconstitutional features that presently exist in federal remittitur law.

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