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Constitutional Law--In re Japanese Electronic Products Antitrust Litigation--Denial of Jury Trial in Complex Litigation

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NOTE

Constitutional Law—*In re Japanese Electronic Products Antitrust Litigation*—Denial of Jury Trial in Complex Litigation

The seventh amendment commands that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[1] The recent move toward denying trial by jury in complex litigation has sparked a significant controversy over the constitutionality of such denials.[2] In its decision in *In re Japanese Electronic Products Antitrust Litigation*,[3] the United States Court of Appeals for the Third Circuit held that the jury trial right may be denied if a case is so complex a jury cannot understand it. Finding that the fifth amendment right to due process guarantees a rational factfinder and that an uncomprehending jury cannot reach a reasoned decision, the court concluded that the more fundamental guarantee of due process outweighs the jury trial guarantee of the seventh amendment.[4] *Japanese Products* puts the Third Circuit at odds with the Ninth Circuit, which has held that jury trial may not be denied because of mere complexity.[5]

In *Zenith Radio Corporation v. Matsushita Electric Industrial Co.*,[6] separate antitrust actions by National Union Electric Corporation (NUE) and Zenith Radio Corporation against several Japanese electronics companies were consolidated for trial in the Eastern District of Pennsylvania. The complaints alleged numerous violations of the antidumping and antitrust laws[7] as part of a pervasive conspiracy to destroy domestic competition in the American electronics market. Both plaintiffs demanded a jury trial. Fourteen of the defendants moved to strike the demand, arguing that the case was too massive

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1. U.S. CONST. amend. VII.

2. *See e.g.*, Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979); Comment, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243 (1980); Best Brief, 1980 National Moot Court Competition, 56 CHI.-KENT L. REV. 911 (1980).

Even Chief Justice Warren Burger has advocated studying ways to limit or eliminate jury trial in long, complex litigation. Remarks of Warren E. Burger to Meeting of Conference of State Chief Justices (Aug. 7, 1979) (unpublished speech; copy on file in offices of N.C.L. REV.) (reported at 48 U.S.L.W. 2118, 2118-19 (Aug. 14, 1979)).

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

4. *Id.* at 1086.

5. *In re* U.S. Financial Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

6. 478 F. Supp. 889 (E.D. Pa. 1979) (memorandum and order of certification).

7. NUE asserted violations of the 1916 Antidumping Act, 15 U.S.C. § 72 (1976), the Sherman Act, 15 U.S.C. §§ 1, 2 (1976) (conspiracy to restrain trade), and the Wilson Tariff Act, 15 U.S.C. § 8 (1976) (applying Sherman Act to import trade). In addition to these violations Zenith alleged violation of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) (price-fixing), and the Clayton Act, 15 U.S.C. § 18 (1976) (illegal acquisition of domestic competitors).

and complex for a jury.[8] The district court refused to strike the jury demand, but certified an interlocutory appeal to the Third Circuit for immediate resolution of the jury trial issue.[9]

With its decision on appeal,[10] the Third Circuit has become the first United States Court of Appeals to recognize a complexity exception to the seventh amendment right to jury trial in civil cases. Chief Judge Seitz, writing for the court, admitted that a private antitrust action involves legal issues which normally merit a jury trial, as opposed to equitable issues which do not.[11] The court ruled, however, that to allow an incompetent jury to decide a case is a denial of the fifth amendment right to due process.[12] In balancing the fifth and seventh amendment guarantees, the court noted that a major purpose of the jury trial guarantee is to act as a check on the arbitrary use of judicial power.[13] Theoretically, the collective wisdom of a lay jury and the exchange of viewpoints during deliberations lead to verdicts that reflect community values, not the capricious views of any individual. When a jury is unable to understand the evidence and the law, however, jury trial produces the type of arbitrary and erroneous verdicts it was designed to prevent.[14] Consequently, "the most reasonable accommodation between the requirements of the fifth

8. The trial court estimated that the trial would last more than one year. Nine years of discovery had produced over 20,000,000 documents including approximately 100,000 pages of deposition transcripts. 478 F. Supp. at 895. The court did not estimate how much of this evidence would be introduced at trial. The trial court did conclude that "this case is at least as large and complex as the others in which jury demands have been struck." *Id.* at 899.

9. *Id.* at 942-46.

10. 631 F.2d 1069 (3d Cir. 1980).

11. *Id.* at 1079. *See* Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916) (jury trial required in treble damage action under Sherman Act).

See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.6 (1973). Dobbs asserts that the legal or equitable nature of an issue is determined primarily by the remedy sought. For example, a suit for an injunction would be equitable because historically, only a court of equity could grant in personam orders whereas an action for damages would be legal because law courts traditionally provided the damages remedy. *Id.* at pp. 68-78. The United States Supreme Court has continued, however, at least to pay lip service to the proposition that the nature of the substantive rights involved as well as the type of remedy afforded is a factor in characterizing the issue. *E.g.*, Curtis v. Loether, 415 U.S. 189, 195-96 (1974) (private action for damages for violation of Civil Rights Act of 1968 is legal because it is analogous to common law tort actions and because the damages remedy is essentially legal).

12. 631 F.2d at 1086.

13. *Id.* at 1085. *See* ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977).

14. 631 F.2d at 1085. *See, e.g.*, Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974) (jury trial denied in complex interpleader action because trial before judge more likely to produce a just result). The court also reasoned that a jury that cannot understand a case does not serve other functions for which we value the institution. For example, normally jury involvement legitimizes the legal decisionmaking process and makes the citizenry more willing to abide by the rules. But decisions by an incompetent jury hardly help breed respect for the judicial process. Likewise, an uncomprehending factfinder cannot effectively perform "jury equity" by adapting the application of laws to particular situations. 631 F.2d at 1085.

The *Japanese Products* court rejected the argument that no irrational jury verdict would be allowed to stand since directed verdict and j.n.o.v. are available to overrule a decision no reasoning person could have reached. The court held that due process requires more than merely limiting the result to a given permissible range of results; rather, there must be some assurance that the jury in fact reached the result through a rational process. *Id.* at 1087-88.

and seventh amendments [is] a denial of jury trial when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards."[15] The case was remanded to the district court for a specific finding on whether such complexity was present in this case.

The *Japanese Products* court articulated three objective criteria for a trial judge to consider in determining whether a case is too complex for a jury: (1) the overall size of the suit as evidenced by the estimated length of trial, the amount of evidence to be introduced, and the number of individual issues; (2) the conceptual difficulty of the legal issues and facts, measured by the amount of expert testimony required and the probable length of jury instructions; and (3) the difficulty of segregating issues, as shown by the number of overlapping claims relating to single transactions or items of proof.[16] In order to protect jury trial in all but the most complicated cases, the court indicated it will require any district court invoking the complexity exception to make explicit findings on the degree of complexity.[17]

In the past American courts have used an historical test to determine whether the seventh amendment guarantees the right to jury trial in a given case. Because the amendment "preserved" the right to jury trial, courts generally looked to the rights that existed in 1791, the date of the amendment's adoption.[18] Consequently, the jury trial guarantee extended to cases that historically would have fallen under the jurisdiction of law courts, but not to those which would have been in equity or admiralty.[19] But in 1959, in *Beacon Theatres, Inc. v. Westover*,[20] the United States Supreme Court abandoned this static historical test. The Court noted that in 1791 the "cleanup doctrine" would have allowed the chancellor to take jurisdiction over a legal claim joined with an equitable claim.[21] The Court found that doctrine obsolete, however, in light of the merger of law and equity under the Federal Rules of Civil Procedure. Thus, a jury trial was required.[22] Shortly after its *Beacon Theatres* decision, in *Dairy Queen, Inc. v. Wood*,[23] the Court ruled that the

15. 631 F.2d at 1086. Judge Gibbons dissented arguing (1) that the issue was not ripe for decision, (2) that a complexity exception gives a trial court virtually unreviewable discretion, and (3) that a single judge probably is no better factfinder than a lay jury. *Id.* at 1091-93 (Gibbons, Cir. J., dissenting).

16. *Id.* at 1088-89.

17. *Id.* at 1089. Although the court says mandamus is available to review any jury denial, *id.*, the dissenting judge complained that an interlocutory appeal is not available by right. *Id.* at 1093 (Gibbons, J., dissenting).

18. *E.g.*, Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

19. Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830) (Under the amendment common law means everything not under equity or admiralty jurisdiction). If a cause of action was unknown to English common law in 1791, courts traditionally look to the closest historical analog in order to categorize the action. *E.g.* Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961). *See generally* James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

20. 359 U.S. 500 (1959).

21. Under the cleanup doctrine, if a court of equity assumed jurisdiction over the case because it contained an equitable issue, then it would also decide the legal issues in the case in order to avoid a multiplicity of suits. *See* D. DOBBS, *supra* note 11, § 2.7.

22. 359 U.S. at 509.

23. 369 U.S. 469 (1962).

seventh amendment right to jury trial attaches to each legal issue in a case even if the case as a whole is equitable.[24]

It is well established that an action under the antitrust or antidumping laws is legal in nature.[25] The remedy of treble damages is punitive, and punitive damages traditionally were available only in law courts. In addition, the rights determined in an antitrust action are analogous to those adjudicated in a common law tort claim, an action which would have received jury trial treatment even in 1791.[26] Although it has been argued that it is solely the type of remedy sought which determines the legal or equitable nature of an issue,[27] recent court decisions have continued to mention the nature of the substantive rights determined as a factor in the characterization.[28]

In recent years, however, efforts have been made to eliminate jury trial in extraordinarily complex antitrust, securities, and patent cases.[29] Opponents of jury trial in these cases argue that if a jury cannot understand the facts and the relevant law, the legal remedy is inadequate and equity jurisdiction attaches.[30] To support this argument, parties point to the historical bill for an accounting which permitted the chancellor to take jurisdiction over an otherwise legal claim when the accounts were too complicated for a jury to unravel.[31] Those who oppose a general complexity exception argue that the exception for accountings was allowed not simply because the accounts were complex, but because the whole package of procedures in law courts provided an inadequate remedy.[32] The accountings exception to the right to jury trial, therefore, should not be extended to other types of cases.

The Supreme Court offered some support for the inadequate legal remedy argument in its famous and enigmatic footnote in *Ross v. Bernard*,[33] in which the Court stated that "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the

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24. *Id.* at 473. For a discussion of the distinction between legal and equitable issues, see note 11 *supra*.

25. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916).

26. Specifically, antitrust violations do not involve confidential relationships, contractual relationships, or fiduciary relationships implied in law; the litigants usually are strangers. The violation alleged is interference with plaintiff's competitive business activities. An antitrust claim thus resembles the common law cause of action for interference with contractual relationships.

27. *See* note 9 *supra*.

28. *E.g.*, Curtis v. Loether, 415 U.S. 189, 195-96 (1974).

29. *E.g.*, Bernstein v. Universal Pictures, 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978) *aff'd per curiam*, 636 F.2d 1188 (9th Cir. 1980); *In re* U.S. Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); *In re* Boise Cascade Sec. Litigation 420 F. Supp. 99 (W.D. Wash. 1976).

30. See Note, *The Right to a Jury Trial*, *supra* note 2, at 905-06. *See generally* H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 43 (2d ed. 1948).

31. *See* Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887).

32. For example, it is argued that several procedural advantages of equity courts, including the power to compel discovery, the power to introduce written depositions into evidence, and the power to fashion a broader range of remedies, allowed equity to take jurisdiction. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 919-20 (E.D. Pa. 1979). *See* James, *supra* note 19, at 661-62.

33. 396 U.S. 531, 538 n.10 (1970).

remedy sought; and third, the practical abilities and limitations of juries."[34] Although many commentators[35] and some federal district courts[36] have seized on the third prong of the *Ross* test as justification for a complexity exception to the seventh amendment, both the Ninth and Third Circuits have recently considered the issue, and have indicated that dictum in a footnote to a Supreme Court opinion should not be interpreted as an announcement of a major change in constitutional interpretation.[37]

The newest argument supporting denial of jury trial relies on the fifth amendment guarantee of due process. In short, the argument is that due process requires a comprehending factfinder;[38] if a jury cannot understand the evidence and the applicable law, it cannot reach a reasoned decision; therefore, the court must balance the seventh and fifth amendment guarantees. Since a fair trial can be had without a jury[39] but cannot be had with an incompetent factfinder, due process outweighs the seventh amendment in these cases.[40] One commentator has suggested that the due process approach and the *Ross* test are merely different formulations of the same principle.[41] According to this argument, taking jury limitations into account in defining a legal issue precludes the danger of an incompetent factfinder and thereby avoids any violation of due process.[42]

A threshold question must be addressed before the *Japanese Products* rationale is examined: Is there any case so complex a jury cannot understand it? A few courts and commentators believe that no such case exists.[43] For exam-

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34. *Id.*

35. *E.g.*, Comment, *The Right to Strike the Jury Trial Demand*, *supra* note 2; Note, *The Right to a Jury Trial*, *supra* note 2.

36. *E.g.*, Bernstein v. Universal Pictures, 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd per curiam*, 636 F.2d 1188 (9th Cir. 1980); *In re* U.S. Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976).

37. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1080 (3d Cir. 1980); *In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 425 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

38. *See In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d at 1084 n.14 and accompanying text.

39. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

40. This rationale is valid only when a case is so complex that it totally escapes the jury's comprehension. If it is merely difficult, but not impossible, for a jury to understand the case, the seventh amendment must prevail. Mere difficulty is not an adequate ground for overriding the jury trial guarantee. *E.g.*, United States v. Bitter Root Dev. Co., 200 U.S. 451, 472-73 (1906). In *Bitter Root* the United States government brought suit against three companies for wrongfully cutting timber from public lands. The Court determined that this was in essence a legal action in trespass or trover and that mere difficulty in presenting the case to a jury did not justify the assumption of jurisdiction by a court of equity. *Id.*

See Comment, *The Right to Strike the Jury Trial Demand*, *supra* note 2, at 285-86; Best Brief, *supra* note 2, at 932-37.

41. Note, *The Right to a Jury Trial*, *supra* note 2, at 911.

42. *Id.*

43. *See, e.g., In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 429-31 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); Higginbotham, *supra* note 13, at 54-55 (1977). Judge Higginbotham (N.D. Texas) contends it is counsel's function to distill and organize a case so a jury can understand it. If an attorney understands the case, he should be able to present it to a jury in comprehensible form. Jury trial should not be denied litigants merely because of the poor preparation or incompetence of counsel. *Id.*

ple, in *In re U.S. Financial Securities Litigation*[44] the Court of Appeals for the Ninth Circuit disputed the premise that any case could be so complex as to escape the comprehension of a jury.[45] A greater number of authorities, however, contend that a few complicated and highly technical matters may escape an ordinary jury's comprehension.[46] The trial court's experience in *ILC Peripherals Leasing Corp. v. IBM Corp.*[47] best supports the position that a case may exceed a jury's abilities. In *ILC Peripherals* the court gave the jury a number of special interrogatories to focus the issues. The jury was unable to answer many of them and a mistrial was declared. When questioned by the judge, the jury foreman said: "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."[48] At least one commentator has suggested, nonetheless, that the *ILC Peripherals* jury was not incompetent to find the facts; it was just confused, perhaps due to unclear instructions, about the means of applying the law to the facts.[49]

The *Japanese Products* court accepted the proposition that some cases may be too complex for a jury. The Third Circuit refused, however, to base its decision on a characterization of the case as equitable and held that complexity was never a defining feature of equity. The majority admitted that equitable accountings sometimes were granted in complex cases, but noted that accountings were ordered only when the case involved issues that made equity jurisdiction otherwise appropriate.[50] Furthermore, an accounting was made only after a jury decided that a party should be subject to an accounting, much like cases today in which a jury decides liability and accountants measure the amount of damages. The court concluded that complexity alone never allowed equity to take an entire case from a law court.[51]

There is general disagreement among federal courts as to whether complexity alone was ever a ground for equity jurisdiction. In the instant case Zenith and International Business Machines Corporation[52] each commis-

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44. 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

45. *Id.* at 429-31.

46. *E.g.*, Bernstein v. Universal Pictures, 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd per curiam*, 636 F.2d 1188 (9th Cir. 1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976). *See* Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751 (1979); Comment, *The Right to Strike the Jury Trial Demand*, *supra* note 2; Burger, *supra* note 2, at 3-5 (1979).

47. 458 F. Sup. 423 (N.D. Cal. 1978), *aff'd per curiam*, 636 F.2d 1188 (9th Cir. 1980).

48. *Id.* at 447. The court concluded that despite diligent efforts, the jurors could not deal with concepts such as "cross-elasticity of supply and demand, market share and market power, reverse engineering, product interface manipulation, discriminatory pricing, barriers to entry, exclusionary leasing, entrepreneurial subsidiaries, subordinated debentures, stock options, modeling, and etc." *Id.* at 448.

49. Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 114 n.78 (1979).

50. For example, an accounting might be ordered when there was a fiduciary relationship between the parties or when fraud was alleged. 631 F.2d at 1080.

51. 631 F.2d at 1083. The court noted that the only case to so hold was Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603), and concluded that the case either was poorly reported or was an aberration. *Id.* at 1082-83.

52. IBM appeared as amicus curiae.

sioned exhaustive historical research of the right to jury trial in 1791.[53] IBM contended that in 1791 equity could have asserted jurisdiction on mere complexity grounds had a proper case presented itself, even though it may never actually have done so. In effect, IBM argued that the chancellor had the power to take a complex case away from the law courts; therefore, a complex case may properly be characterized as equitable.[54] The *Japanese Products* majority rejected this potentiality approach with the statement that "[w]e see no persuasive reason for incorporating into the seventh amendment the policies and probable actions of the English chancellor of 1791."[55] The court, however, ignored the real point of the IBM argument. The basic issue is whether "common law," as used in the seventh amendment, is to be considered a body of cases frozen in 1791 or whether it is an evolving concept.[56] If the respective jurisdictions of law and equity were in a continuous state of flux in 1791,[57] it makes sense now to read the seventh amendment broadly enough to incorporate this concept of adaptability in the term "common law." In short, it can be argued convincingly that the language of the seventh amendment never compelled the historical test since it was the right to jury trial, not jury trial in its 1791 form, which was preserved.[58] If in 1791, the province of common law was subject to expansion and contraction, the courts should use the same flexibility in defining "suits at common law" today.

Rather than upset the established interpretation of the seventh amendment's scope, the *Japanese Products* court chose to deal with the complexity problem by balancing the fifth and seventh amendments. The majority found that the right to jury trial is secondary to the due process right to a fair trial,[59] although some historians would argue that nothing has been more fundamental to our system of justice than the right to jury trial. Logically, the guarantee of jury trial should be viewed as a means to the ultimate end of a fair trial. If the jury cannot perform its functions, then there is no reason to preserve a hollow institution at the expense of the ultimate goal of preserving fairness in the judicial system.

The most apparent weakness in this due process argument is the court's failure to investigate whether a judge could be an adequate factfinder when a lay jury could not. The majority listed several inherent weaknesses of the jury

53. *See* Arnold, *supra* note 2 (from research commissioned by counsel for Zenith); Devlin, *supra* note 2 (from research commissioned by IBM as amicus curiae opposing jury trial).

54. 631 F.2d at 1083.

55. *Id.*

56. Charles Wolfram argues that common law was viewed by the framers as a "process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures, rather than that of a fixed and immutable body of unchanging rules." Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 736 (1973). Although Wolfram used this analysis to argue for the expansion of the right to jury trial, the theory supports the abridgement of that right in certain cases.

57. *Id.* at 738.

58. *Id.* at 734-37. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 388-94 (1943) (directed verdict does not violate seventh amendment; all procedural incidents of 1791 jury trial need not be preserved).

59. 631 F.2d at 1084-85.

system that make the average jury less qualified to decide complex cases than the average judge. First, the best qualified jurors frequently will be excused from service in lengthy cases because they cannot miss several months of work. Second, counsel for both sides often challenge the best educated potential jurors so that one juror will not dominate the others. Consequently, the jury in a complex case is likely to be less well educated than normal and will not represent a cross-section of the community.[60] Third, a lengthy trial severely disrupts the personal lives of jurors and makes them less effective.[61] Finally, a jury is likely to be confused by technical subject matters and by the processes of civil litigation with which it is unfamiliar.[62]

The majority believed that the presumption that a judge can cope with a complex case is sound for several reasons. A long trial does not disrupt a judge's personal life; presiding over trials is his profession. A judge's greater familiarity with the processes of civil litigation better enables him to handle a complex case. Furthermore, although the court says that it cannot presume a judge will be more intelligent than a jury or more familiar with technical subject matter,[63] it may be that judges are, on the average, more intelligent than jurors who sit in these cases because the most qualified individuals have been excused from service. Finally, a judge may in fact be more familiar than most jurors with technical business matters if he has dealt with them in previous litigation.

The *Japanese Products* opinion emphasizes the judge's familiarity with the law and with the juducial process in its determination that he is better qualified than a jury to handle a complex case.[64] It is not clear, however, that a judge's knowledge of the judicial process is a relevant consideration when the inquiry is the relative capacities of the judge and jury to understand the facts of the case. A judge should be able to cure a jury's unfamiliarity with the processes of the court with proper instructions. Similarly, a judge's familiarity with certain technical matters may not indicate he has a superior factfinding capacity. Since it is counsel's function to teach the jurors about the issues,[65] perhaps the courts should evaluate the capacity of the jurors to learn rather than the present knowledge of individual jurors.

The Third Circuit's approach is flawed in that it allows the denial of jury trial with no guarantee that a judge is better qualified to find the facts of the case. The majority believes it is appropriate to presume the judge understands

60. *Id.* at 1086. Of course a particular jury need not be a cross-section as long as the jury pool is drawn without systematic exclusion of any identifiable group. Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). *See* 28 U.S.C. § 1861 (1976) (Declaration of Policy). Because of the special economic and personal hardships posed by extended jury service, however, a jury in a long trial is likely to have a disproportionate number of unemployed persons, housewives, retired citizens and the like. Comment, *The Right to Strike the Jury Trial Demand, supra* note 2, at 247.

61. 631 F.2d at 1086. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 465-69 (1978) (Appendix).

62. 631 F.2d at 1086. *See, e.g.*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 447-48 (N.D. Cal. 1978), *aff'd per curiam*, 636 F.2d 1188 (9th Cir. 1980).

63. 631 F.2d at 1087.

64. *Id.*

65. *See* note 44 *supra*.

the case since such understanding is necessary for him to rule on evidentiary motions as well as motions for summary judgment and directed verdict.[66] The *Japanese Products* court refused to consider the possibility that the case may exceed the understanding of both judge and jury,[67] which would necessitate either acceptance of irrational decisionmaking or reorganization of our entire judicial system. The court concluded that until the issue is properly raised, "the best course to follow is to presume the judge's ability to decide a complex case and to focus inquiry on the jury's ability."[68] Logically, however, the two inquiries should be simultaneous. Due process should override the jury trial guarantee only if it is shown that the judge has the ability to understand the case, and the jury does not.[69] If both judge and jury cannot understand the case, then jury trial should be retained because the seventh amendment requires it and because the jury at least brings to the task a sense of community fairness.

The *Japanese Products* formulation of a due process complexity exception is incomplete at best. One minor problem that may arise if a complexity exception is upheld concerns the scope of judicial review. Even though a writ of mandamus will be available to any litigant denied a jury trial under this exception, the dissent predicts that trial court rulings on complexity will be virtually impossible to overturn since the standard of review will be abuse of discretion.[70] If trial judges do have virtually unreviewable discretion to deny a trial by jury, then the complexity exception may swallow up the seventh amendment rule. For example, there is no logical reason why the exception could not apply to deny jury trial in complicated products liability and tax cases as well as antitrust, securities, and patent matters. The due process rationale might even be used to eliminate jury trial in complex criminal antitrust matters. As long as the trial judge says that he based his ruling on those factors listed by the majority,[71] an appellate court could hardly find an abuse of discretion.[72]

It is possible that courts will develop an alternative to the abuse of discretion standard because of the importance of a right to jury trial.[73] Since courts are especially sensitive to abrogations of the right to jury trial, an appellate

66. 631 F.2d at 1087.

67. *Id.*

68. *Id.*

69. The dissent in *Japanese Products* implicitly recognized the need for such a showing: "I cannot conceive of a case in which . . . a separate claim for relief . . . sufficiently comprehensible to a trial judge to satisfy due process, would be too complex for trial to a jury. There may be such a case, but it is inconceivable to me that it could be recognized as such in the absence of a trial record." *Id.* at 1092 (Gibbons, J., dissenting). *See, e.g., In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 431 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (judge not a superior factfinder to jury functioning collectively).

70. 631 F.2d at 1093 (Gibbons, J., dissenting).

71. *See* text accompanying note 16 *supra*.

72. *See* Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 244-45 (1964) (mandamus is appropriate to determine the appropriate factors the district court should consider, but an appellate court may not simply substitute its judgment on the same criteria for that of the trial court).

73. *Compare* La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957) (mandamus appropriate because there was a clear abuse of discretion by trial court in denying jury trial) *with* Dairy

court should be able to substitute its judgment for that of the trial court under the doctrine of "constitutional fact."[74] The denial of jury trial under the due process test should be so extraordinary that allowing broad review should not burden appellate courts. Indeed, broad review on mandamus is essential since an interlocutory appeal is not available by right.[75] In addition, an appeal after final judgment probably would be fruitless if the only error were the questionable denial of jury trial. An appellate court might be reluctant to find error in such a case and thereby waste a long and otherwise proper trial.[76] Perhaps the majority recognized the need for broad interlocutory review when it required that a trial judge invoking the complexity exception make specific findings as to the degree of complexity in the case.[77]

Another problem that the court failed to consider in *Japanese Products* is the possibility that counsel, in order to avoid jury trial, may manufacture complexity. In pretrial conferences counsel might be able to inject factual issues that are only tangentially relevant to the case. Also cumulative or largely irrelevant evidence might be produced, creating the illusion that the case is exceptionally large or difficult. Many attempts at obfuscation can be detected by a good trial judge during trial. The decision to deny jury trial, however, must be made before trial when a judge may be unable to evaluate adequately the true complexity of the case. If after denying jury trial, a judge determined the case was not overly complex, he might be reluctant to order a partial retrial thus wasting the court time already spent on the case.

Japanese Products represents an overbroad attempt to cope with the complexity problem. The court does attempt to limit the exception to cases that elude a jury's comprehension despite the appointment of special masters and the use of other jury aids.[78] But trial courts still will have substantial freedom to determine whether a lay jury can cope with a case. It may be that normal juries do not perform adequately in gargantuan cases. The first step, however, should be to modify jury trial rather than eliminate it in such cases. Instead of allowing a single judge to try a complex case, other less drastic remedies should be used if a fair trial can be obtained thereby. For example, individual claims could be severed and tried separately in order to simplify a complex

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Queen, Inc. v. Wood, 369 U.S. 469, 479-80 (1962) (mandamus should be used to correct erroneous denial of jury trial).

In Bernstein v. Universal Pictures, 79 F.R.D. 59 (S.D.N.Y. 1978) the district court certified for interlocutory appeal the question whether the denial of jury trial constituted an abuse of discretion, apparently acting on the assumption that a finding of abuse of discretion was required on an interlocutory appeal. *Id.* at 71. *See generally* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE §§ 3934-35 (1977).

74. The doctrine of constitutional fact provides for substitution of judgement review of factual determination upon which hinge certain constitutional rights. For example, an appellate court can exercise de novo review of the "actual malice" finding required by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in media libel cases. *See generally* Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

75. 631 F.2d at 1093 (Gibbons, J., dissenting); *see* 28 U.S.C. § 1292(b) (1976).

76. 631 F.2d at 1093 (Gibbons, J., dissenting).

77. *Id.* at 1089.

78. *Id.*

case so that a lay jury could understand it.[79] Alternatively, special blue ribbon juries could be assembled to try particularly difficult matters.[80]

One argument against the *Japanese Products* approach of giving the case to the trial judge is that the complexity problem is largely the result of liberal joinder of claims permitted by the Federal Rules of Civil Procedure. Judge Gibbons, dissenting, argued that the Constitution does not provide for joinder and consolidation but does specifically guarantee jury trial in suits at common law, and thus the case must be simplified procedurally to its common law form—a single claim against a single defendant—before a denial of jury trial can be considered. Only if a single claim is too complex for a jury should the due process complexity exception be invoked.[81] Judge Gibbons acknowledges that severance of claims will produce inefficiency in adjudication, but concludes that "the provisions of the Bill of Rights which limit the way in which the federal courts conduct their business are designed to promote values other than efficiency."[82]

Another alternative to normal jury trial is renewal of the use of special juries to find facts in complex cases.[83] In seventeenth century England juries

79. The lay jury's capacity might also be increased through other procedures such as allowing jurors to take notes, view exhibits in the jury room, and ask questions of witnesses. The use of special masters to aid jurors could also be expanded. Special interrogatories are often submitted to the jury to focus the issues.

80. Use of a special jury is not unprecedented. *See* Fay v. New York, 332 U.S. 261 (1947).

Another proposal to get an expert factfinder is for Congress to create an administrative agency to adjudicate complex cases. *See* Note, *Jury Trials*, *supra* note 46, at 771-73. Such an administrative board could be made up of expert economists, businessmen, or professors who understand the complexity of the case. Of course these board members would be employees of the government and conceivably could become agents of government oppression. But litigants at least would avoid the sometimes arbitrary and idiosyncratic judgments of a single judge. Furthermore, appellate review of board decisions is a readily available safeguard since administrative findings must be specific, 5 U.S.C. § 557(c) (1976) and since they can be overturned if not supported by "substantial evidence". *E.g.*, Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 447 (1977). *See* Note, *Jury Trials*, *supra* note 46, at 773 n.122.

Creation of such an agency may not be feasible, however. First, Congress would have to make the politically unpopular move of creating a new federal bureaucracy. Second, a single agency may not be sufficient because complex cases arise in several areas such as antitrust, securities, patent, products liability, and tax. Finally, because of sheer volume, such a board could not deal with all cases of a given type. There should be some screening process to ensure that only the large and complex cases go to the board. Again, to avoid jury trial and get before the board, counsel might fabricate complexity; the pretrial screening process could be as difficult for the agency as it is for the courts.

Some decisions indicate that Congress cannot constitutionally create an agency to adjudicate claims that normally merit a jury trial. *E.g.*, Curtis v. Loether, 415 U.S. 189, 194 (1974). More recent decisions have upheld nonjury administrative adjudications in cases in which the government sues to enforce public rights. *E.g.*, Atlas Roofing Co. v, OSHRC, 430 U.S. 442, 450 (1977). More importantly, in Parklane Hosiery v. Shore, 439 U.S. 322 (1979), the Supreme Court held that an SEC finding that a proxy statement was materially false and misleading should be given collateral estoppel effect in a subsequent private suit even though those issues otherwise would merit jury trial. *Id.* at 332 n.19. If in establishing the agency Congress provided for adequate appellate review, and explained that the board is necessary to fill in gaps in the judicial system, then administrative factfinding in such cases might be constitutional.

81. 631 F.2d at 1091-92 (Gibbons, J., dissenting). *See In re* U.S. Financial Sec. Litigation, 609 F.2d 411, 428 n.58 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

82. 631 F.2d at 1091 (Gibbons, J., dissenting).

83. *See, e.g.*, Devlin, *supra* note 2, at 80-83; Note, *The Right to a Jury Trial*, *supra* note 2, at 916-17.

comprised of merchants sometimes were assembled to try cases dealing with business matters.[84] Perhaps it would be possible to select a jury for a complex case from a pool of businessmen or other individuals with expertise in the matters at issue. Since these trials often last for months, however, these jurors would have to be adequately paid or they might successfully claim that their liberty or property is being taken without due process or just compensation.[85] Although there are certain duties of citizenship that all citizens owe, perhaps months of jury duty with minimal compensation is more than an individual has bargained for in the social contract. What is more, businesses need to have some assurance that their executives will not be periodically conscripted for months of jury duty, thus causing major interruptions in their business enterprises.

Increased use of special juries offers many of the advantages of normal jury trial. Although the jury would not represent a cross-section of the community, some sense of community values would be involved. A special jury is not likely to act as a tool of government oppression because special jurors are not permanent government employees. Even if a normal jury is inadequate, a special jury theoretically preserves most of the valuable jury functions. The real question is whether a special jury is a workable alternative. Chief Justice Burger has implied that it is not, because of the economic hardship imposed on the jurors.[86] But perhaps if special juries were allowed only in the most complex cases, then adequate fees could be paid to expert jurors without making the cost of justice prohibitive. Perhaps some of the costs of a special jury could be assessed to the litigants demanding jury trial. In any event, these compromise solutions should be explored thoroughly before courts give up on the jury system altogether in complex litigation.

The *Japanese Products* opinion serves to validate nonjury trials whenever a normal jury cannot understand the case. Appellate courts should be alert to the possibility that the exception will be invoked too often and should exercise de novo review of any denial. Furthermore, trial courts should exhaust all less drastic remedies such as severance and the use of special jury aids before allowing trial before a single judge in a complex case. Finally, Congress should anticipate a possible endorsement of the due process approach by the United States Supreme Court and should provide a statutory alternative such as use of a special jury in complex cases so that erosion of the seventh amendment right to jury trial will be minimal.

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84. See discussion in Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 300 (1892). It has been argued that in the eighteenth century, either party to a case had a statutory right to a special jury at bar and at assizes. Comment, *The Right to Strike the Jury Trial Demand*, *supra* note 2, at 256.

85. *See* Burger, *supra* note 2, at 5 (1979). Of course this argument could be made by any normal juror. The denial of the opportunity to earn money simply is more pronounced when the juror earns larger amounts because of special training and ability.

86. *Id.* In the eighteenth century adequate compensation for special jurors would not have posed a severe problem since trials lasting weeks and months were unknown.