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THE RIGHT TO TRIAL BY JURY IN COMPLEX LITIGATION

The American legal system inherited from the English common law a simplistic rule defining the right to trial by jury in civil actions: in legal actions there is such a right, while in suits in equity there is not.¹ The English rule is embodied in the seventh amendment, which secures the right to trial by jury in legal actions.² This amendment has been interpreted to preserve the right to jury trial as it existed in English common law as of 1791. This peculiar historical background is relevant to the interpretation of the seventh amendment because the existence of an adequate legal remedy, and thus the availability of a legal action and a jury trial, are determined by historical analysis.³

The introduction of the Federal Rules of Civil Procedure⁴ in 1938 and the resulting merger of law and equity in the federal courts⁵ upset this historical approach. Supreme Court decisions after the enactment of the Federal Rules declared that the Rules expanded legal remedies, thus narrowing the scope of equity.⁶ The courts, therefore, must consider the effect of the Federal Rules, as well as historical factors, before labeling an action as legal or equitable. This ruling on the nature of the action then settles the issue whether the right to trial by jury attaches.⁷

The availability of the right to trial by jury has been especially troublesome in the area of complex litigation. At common law, jurisdiction over complex cases rested in the courts of law and equity concurrently;⁸ the adequacy of the remedy at law determined whether the proceeding was brought properly at law or in equity.⁹

1. See 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[2] (2d ed. 1978) [hereinafter cited as MOORE'S]; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 92 (3d ed. 1976).

2. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII; see FED. R. CIV. P. 38(a), which states: "The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." *Id.*

3. See 5 MOORE'S, *supra* note 1, ¶¶ 38.11[5]-[7]; C. WRIGHT, *supra* note 1, § 92.

4. 28 U.S.C. § 2072 (1970).

5. FED. R. CIV. P. 2.

6. *Ross v. Bernhard*, 396 U.S. 531, 539-42 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-10 (1959).

7. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-10 (1959).

8. 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 442 (9th ed. 1866).

9. *Id.* §§ 442-43.

But the merger of law and equity, which made equitable procedures available to courts of law,¹⁰ has widened the scope of adequate legal remedies. Moreover, complex litigation today bears little resemblance to the complicated cases at common law. Today's cases involve large numbers of plaintiffs and defendants,¹¹ counterclaims¹² and cross-claims,¹³ documents, witnesses, exhibits,¹⁴ and technical facts, causing trials to last several months¹⁵ and to adversely affect both the parties involved and our system of judicial administration.

This increased complexity and the merger of law and equity by the Federal Rules have had a substantial impact on the concept of concurrent jurisdiction, as documented in two Supreme Court decisions, *Beacon Theatres, Inc. v. Westover*¹⁶ and *Dairy Queen, Inc. v. Wood*.¹⁷ A subsequent decision, *Ross v. Bernhard*,¹⁸ apparently has eliminated the procedural impediments of the historical approach by authorizing a case-by-case determination of whether the jury can handle the issues involved in the litigation.¹⁹ Following an examination of the historical background of complex litigation, this Note concludes that the *Ross* test should be interpreted strictly, according to *Beacon Theatres* and *Dairy Queen*, and that courts should examine sympathetically, at every stage of the litigation, factors that would support the adequacy of the remedy at law.²⁰ Following this will be a discussion of ways to reduce the complexity of modern litigation.

HISTORICAL BACKGROUND

The preservation of the right to a jury trial in both the seventh

10. See FED. R. Civ. P. 2.

11. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 62 (S.D.N.Y. 1978); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 706 (S.D. Cal. 1977).

12. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 64.

13. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 706.

14. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 63; *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 707; *Jones v. Orenstein*, 73 F.R.D. 604, 605 (S.D.N.Y. 1977).

15. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 63; *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 713.

16. 359 U.S. 500 (1959).

17. 369 U.S. 469 (1962).

18. 396 U.S. 531 (1970).

19. *Id.* at 538 n.10; see text accompanying notes 100-187 *infra*.

20. The justification for the bias toward jury trial, see *Ross* 396 U.S. at 551 (Stewart, J., dissenting), lies in the existence of a constitutional right to trial by jury and the lack of any equivalent right to a nonjury trial. *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 510.

amendment and Federal Rule 38(a) suggests that the right should be interpreted in the context of its historical origins. Until recently, courts used only an historical-analogy test to determine whether the right to a jury trial existed in a particular case.²¹ Although the historical test is still valid, other factors now must be considered.²² Thus, the proper starting point for an inquiry into the right to trial by jury in complex litigation is examination of the practice at common law.

Nonjury trials in complex litigation began in England with the common law action for an accounting, arising from a relationship between the plaintiff and the defendant which imposed on the defendant the obligation to account.²³ Although the account was one of the most ancient forms of action at common law,²⁴ the equity courts gradually superseded the common law courts in this area.²⁵ Despite periodic attempts to revise them, those common law procedures remained "very dilatory, inconvenient, and unsatisfactory."²⁶

Alternatively, equity procedures, such as discovery, joinder, interpleader, and the class action, were better suited to complex litigation.²⁷ Unlike the common law courts, which had to rely on outside evidence if a party refused to present the documents in question,²⁸ the plaintiff in equity was entitled to discover the defendant's books and papers.²⁹ Accordingly, the matter could be settled more effectively.³⁰ English case law supported equity jurisdiction in complex litigation and recognized that, even if purely legal rights were involved, the jurisdiction of equity was concurrent with that of the law.³¹ Equity jurisdiction was invoked whenever the complicated nature of the accounts and the unwieldy procedures of the courts of

21. See note 3 *supra*.

22. *Ross v. Bernhard*, 396 U.S. at 538 n.10; *Dairy Queen, Inc. v. Wood*, 369 U.S. at 478; *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 506-07.

23. H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 200 (2d ed. 1948). The relationships included situations in which the defendant was "plaintiff's bailiff, factor, partner, or a receiver of money to the use of plaintiff." *Id.*

24. 1 J. STORY, *supra* note 8, § 442.

25. F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 63-4 (1954).

26. 1 J. STORY, *supra* note 8, § 442, at 416.

27. See D. KARLEN, *CIVIL LITIGATION* 217-20 (1978); 1 J. STORY, *supra* note 8, § 450.

28. 1 J. STORY, *supra* note 8, § 449.

29. *Id.* § 443.

30. *Id.* § 449 (quoting 3 W. BLACKSTONE, *COMMENTARIES* * 164).

31. See, e.g., *Shepard v. Brown*, 4 Giff. 208, 66 Eng. Rep. 681 (1862); *O'Connor v. Spaight*, 1 Sch. & Lefr. 305, 309 (1804).

law rendered the legal remedy inadequate.³² Thus, in case of concurrent jurisdiction, convenience was the main consideration.³³

Concurrent jurisdiction, however, was not limited to actions in account. As early as 1603, Lord Egerton, in *Clench v. Tomley*,³⁴ denied a jury trial because the judge was better qualified to render a decision than a jury of ploughmen, though the case involved the interpretation of books and deeds.³⁵ In *Wedderburn v. Pickering*,³⁶ Master of the Rolls Jessel cited the "old" rule in *Clarke v. Cookson*³⁷ that some cases were too complex to be tried conveniently before a jury.³⁸ Thus, the English common law, invoking equity jurisdiction, recognized that complex cases could exceed the jury's limitations, thereby rendering the remedy at law inadequate.

This principle of the English common law was incorporated into the American legal system. Alexander Hamilton believed that the introduction of complex questions to a jury would undermine the jury system.³⁹ As early as 1831, the Supreme Court, following Hamilton's theory and the English common law, recognized the English concept of concurrent jurisdiction of equity courts with common law courts in cases of great complexity.⁴⁰ The Court acknowledged equity's jurisdiction not only in actions of account and in actions involving a trustee, but also in cases in which the accounts were

32. See *White v. Williams*, 8 Ves. 193, 32 Eng. Rep. 327 (1803).

33. *Shepard v. Brown*, 4 Giff. 208, 66 Eng. Rep. 681 (1862). "On questions of account, Courts of Equity and Courts of law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience." *Id.* at ____, 66 Eng. Rep. at 681.

34. 1 Cary 23, 21 Eng. Rep. 13 (1603).

35. *Id.*

36. 13 Ch. D. 769 (1879).

37. 2 Ch. D. 746 (1875).

38. 13 Ch. D. at 771; see 2 Ch. D. at 747-48.

39. A. HAMILTON, *THE FEDERALIST* No. 83, at 589 (H. Dawson ed. 1870). Hamilton stated, [T]he circumstances that constitute cases proper for Courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trial by jury. They often require such long, deliberate and critical investigation, as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require, that the matter to be decided should be reduced to some single and obvious point; while the litigations usually in Chancery, frequently comprehend a long train of minute and independent particulars.

Id. at 588-89.

40. *Fowle v. Lawrason*, 30 U.S. (5 Pet.) 495 (1831).

complex, the law imposed some difficulty, or the situation required discovery.⁴¹

In 1887, in *Kirby v. Lake Shore & Michigan Southern Railroad*,⁴² the Supreme Court dealt specifically with the capacity of jurors to understand and decide complex cases. The dispute in *Kirby* concerned a contract for more than 200 shipments of cattle and hogs and over \$350,000 in freight charges.⁴³ Although the Court stated that the complicated nature of the accounts alone supplied the necessary basis for equity jurisdiction,⁴⁴ it further determined that a jury could not "unravel the transactions involved." The Court decided that, under the circumstances, equitable procedures were required to achieve justice.⁴⁵ The approach, then, was to examine both the complexity of the accounts and the limitations of the jury.⁴⁶

The jurisdiction of equity in complex cases, however, was not automatic. In *Fowle v. Lawrason*,⁴⁷ the Court, though noting several situations that warranted equity jurisdiction,⁴⁸ cautioned that not every case involving numerous transactions required concurrent jurisdiction.⁴⁹ Moreover, an even finer distinction was drawn in *United*

41. *Id.* at 503.

42. 120 U.S. 130 (1887).

43. *Id.* at 132.

44. *Id.* at 134.

45. *Id.*; see 1 J. STORY, *supra* note 8, § 451.

46. See, e.g., *United States v. Bitter Root Dev. Co.*, 200 U.S. 451, 475-76 (1906). The lower federal courts also followed the English rule. In *Fidelity & Deposit Co. of Md. v. Fidelity Trust Co.*, 143 F. 152 (C.C.D.N.J. 1906), the Circuit Court for the District of New Jersey noted that even if the complainant had a remedy at law, equity jurisdiction was not precluded if the remedy at law was not as practical and efficient as the remedy in equity. *Id.* at 159. Characterizing the transactions in the case as complicated and intricate, the court found that it would be well nigh impossible for a jury sitting in the ordinary way in a trial at law to remember, consider, and digest the necessary evidence relating thereto. It is not unreasonable to assume that the most patient, intelligent, and fair-minded jury would, under the circumstances, fail to do justice between the parties.

Id. For other lower court decisions recognizing concurrent jurisdiction in complicated cases, see *McNair v. Burt*, 68 F.2d 814 (5th Cir. 1934); *Balfour v. San Joaquin Valley Bank*, 156 F. 500 (C.C.N.D. Cal. 1906). The English common law standard of convenience was reflected in the courts' analyses of practicality and efficiency. See, e.g., *Hattiesburg Lumber Co. v. Herrick*, 212 F. 834 (5th Cir. 1914); *Standard Oil Co. of Ky. v. Atlantic Coast Line R.R.*, 13 F.2d 633 (W.D. Ky. 1926).

47. 30 U.S. (5 Pet.) 495 (1831).

48. See note 41 *supra* & accompanying text.

49. 30 U.S. (5 Pet.) at 502-03. The Court stated:

[I]t cannot be admitted, that a court of equity may take cognisance of every action, for goods, wares and merchandise sold and delivered, or of money ad-

*States v. Bitter Root Development Co.*⁵⁰ In 1906, the United States brought an action to recover the value of certain timber alleged to have been cut and taken wrongfully by the defendants.⁵¹ One of the defendants formed various corporations in an attempt to make proof of his involvement difficult.⁵² The Ninth Circuit affirmed the district court's dismissal of the bill in equity on the ground that there was an adequate remedy at law.⁵³ The Supreme Court affirmed, holding that mere difficulty of proof was not an adequate basis for equity jurisdiction.⁵⁴ Furthermore, in the 1914 case of *Curriden v. Middleton*,⁵⁵ the Supreme Court noted that "mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction."⁵⁶

In summary, although the older decisions seemed to be based on discretion⁵⁷ and convenience,⁵⁸ *Bitter Root* and *Curriden* established that complicated facts and difficulty of proof alone were not sufficient to invoke equity jurisdiction; rather, the determinative issue was whether the case was sufficiently complicated to render the remedy at law inadequate. The distinction, however, was unclear. Although equity procedures were better suited to complicated cases

vanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, on which different sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed, that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted.

Id.

50. 200 U.S. 451 (1906).

51. *Id.* at 451.

52. *Id.* at 472.

53. *United States v. Bitter Root Dev. Co.*, 133 F. 274, 281 (9th Cir. 1904).

54. *United States v. Bitter Root Dev. Co.*, 200 U.S. 451, 472 (1906).

55. 232 U.S. 633 (1914).

56. *Id.* at 636. The district court in *Goffe & Clarkener, Inc. v. Lyons Milling Co.*, 26 F.2d 801 (D. Kan. 1928), *aff'd*, 46 F.2d 241 (10th Cir. 1931), discussed thoroughly when equity jurisdiction was proper in situations involving complicated accounts. 26 F.2d at 802-05. The court found that there were three instances in which actions for an accounting in equity were proper: (1) in cases of mutual accounts; (2) in cases of fiduciary relationships imposing a duty to account, *id.* at 802; and (3) in cases when the accounts, even though only on one side, are complicated or when securing adequate relief at law would be difficult. *Id.* at 803-04. The court held that, given the facts presented, equity jurisdiction was proper because a jury simply could not handle the "difficult, complicated and confusing" account. *Id.* at 801, 804-05.

57. See, e.g., *Balfour v. San Joaquin Valley Bank*, 156 F. 500 (C.C.N.D. Cal. 1906).

58. See, e.g., *Shepard v. Brown*, 4 Giff. 208, 66 Eng. Rep. 681 (1862).

and jurors continued to have difficulty understanding complex transactions, the field of cases properly committed to equity jurisdiction remained narrow.⁵⁹

THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure have had a significant impact on the right to trial by jury in complex cases, primarily because the Rules have expanded legal remedies, thereby limiting the scope of equity jurisdiction. The Supreme Court has interpreted this impact in three major cases.⁶⁰ The first decision, *Beacon Theatres, Inc. v. Westover*,⁶¹ did not deal specifically with complicated cases. *Beacon Theatres* is important, however, because it was the first consideration of the right to jury trial under the Federal Rules of Civil Procedure.⁶² *Dairy Queen, Inc. v. Wood*⁶³ involved complicated accounts to which the Court applied the *Beacon Theatres* test.⁶⁴ The most recent decision, *Ross v. Bernhard*,⁶⁵ set out a new test for determining whether the right to trial by jury exists. The *Ross* test contained a separate provision for complex cases.⁶⁶

Beacon Theatres, Inc. v. Westover

In *Beacon Theatres, Inc. v. Westover*,⁶⁷ the complaint sought a declaratory judgment that certain practices were reasonable and for an injunction to prevent the defendant from instituting an antitrust action based on those practices.⁶⁸ The defendant responded with a counterclaim and a cross-claim alleging violations of the antitrust laws and seeking treble damages and a jury trial.⁶⁹ The district court ruled that the issues raised by the complaint, the counterclaim, and

59. See *Goffe & Clarkener, Inc. v. Lyons Milling Co.*, 26 F.2d 801 (D. Kan. 1928), *aff'd*, 46 F.2d 241 (10th Cir. 1831).

60. *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

61. 359 U.S. 500 (1959).

62. *Id.* at 506-11.

63. 369 U.S. 469 (1962).

64. *Id.* at 472-73.

65. 396 U.S. 531 (1970). *Ross* did not involve complicated accounts but rather was a stockholders' derivative suit. See notes 100-08 *infra* & accompanying text.

66. 396 U.S. at 538 n.10.

67. 359 U.S. 500 (1959).

68. *Id.* at 502-03.

69. *Id.* at 503.

the cross-claim, including the question of competition between the two parties, were essentially equitable.⁷⁰ Accordingly, the trial court, acting under Federal Rules 42(b) and 57, directed that these issues be tried by the court before the jury determined the alleged antitrust violations.⁷¹

The reasonableness of the practices in question depended, in part, on the existence of competition between the two parties.⁷² The district court had determined that the issue of competition was essentially equitable.⁷³ The Supreme Court and the Ninth Circuit noted that this action by the district court could have operated as a collateral estoppel against the defendant as to the issue of the reasonableness of the practices in question.⁷⁴ The court of appeals held that the trial court, acting under Federal Rule 42(b), did not abuse its discretion in trying the equitable cause first even though that might prevent a full jury trial on the issue of the reasonableness of the practices.⁷⁵ The Supreme Court reversed, holding that the separation of issues by the district court deprived the defendant of the right to trial by jury.⁷⁶

Irreparable harm and an inadequate remedy at law historically have been the basis of injunctive relief; the Court reasoned that at least as much was to be required under the Federal Rules to allow equitable claims to be tried before legal claims.⁷⁷ Whether the legal remedy available was inadequate and whether irreparable harm was threatened could be determined only with reference to the rem-

70. *Id.* at 503-04.

71. *Id.* at 503. Rule 42(b), as amended in 1966, provides:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, *always preserving inviolate the right of trial by jury declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.*

FED. R. CIV. P. 42(b) (emphasis supplied to indicate the language added to the Rule after the *Beacon Theatres* decision). Rule 57 reads, in pertinent part: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

FED. R. CIV. P. 57.

72. 359 U.S. at 503-04.

73. See note 70 *supra* & accompanying text.

74. 359 U.S. at 504.

75. *Id.* at 505.

76. *Id.* at 506, 508, 511.

77. *Id.* at 506-07.

edies made available by the Declaratory Judgment Act and the Federal Rules.⁷⁸ In view of these principles, and given the merger of law and equity as reflected in Rules 1, 2, and 18, the Court concluded that all of the issues in *Beacon Theatres* could be settled in one trial.⁷⁹

As to the general effect of the Federal Rules on jury and nonjury trials, the Court noted that the purpose of the Rules was to reform procedure while leaving substantive rights unchanged.⁸⁰ The Federal Rules and the Declaratory Judgment Act expanded the scope of legal remedies;⁸¹ because equity acted only if the remedy at law was inadequate, this expansion narrowed the scope of equity.⁸² Although the Court stated that the trial court had discretion to invoke equity jurisdiction if such action would better protect the plaintiff,⁸³ its declaration that there is no constitutional right to trial by the court similar to the right to trial by jury limited that discretion.⁸⁴ Therefore, the trial court's discretion "must, wherever possible, be exercised to preserve jury trial."⁸⁵

Dairy Queen, Inc. v. Wood

The Supreme Court recognized in *Beacon Theatres* that the Federal Rules had narrowed the scope of equity jurisdiction by expanding legal remedies. The Court's emphasis on practicality suggested

78. *Id.*

79. *Id.* at 508. Before the merger of law and equity in the Federal Rules, subsequent legal actions were enjoined because the legal actions may not have provided the plaintiff in equity with a fair and orderly trial of the issues; therefore, the remedy at law was rendered inadequate. *Id.* at 507.

Rule 1 provides:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FED. R. CIV. P. 1. Rule 2 states: "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2. Rule 18(a) reads: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." FED. R. CIV. P. 18(a).

80. 359 U.S. at 508-09; see 28 U.S.C. § 2072 (1970); FED. R. CIV. P. 39(a).

81. 359 U.S. at 509; see 28 U.S.C. § 2072 (1970); *Id.* § 2201.

82. 359 U.S. at 509.

83. *Id.* at 510.

84. *Id.*

85. *Id.*

that, in addition to the joinder of equitable and legal claims in one civil action,⁸⁶ other provisions of the Rules affected the scope of equity.⁸⁷ The Court's decision in *Dairy Queen, Inc. v. Wood*⁸⁸ supported this suggestion. *Dairy Queen* involved a breach of contract action in which the plaintiff sought an accounting.⁸⁹ The defendant demanded a jury trial, but the trial judge struck this demand upon motion by the plaintiff.⁹⁰ Emphasizing its holding in *Beacon Theatres*,⁹¹ the Supreme Court reversed.⁹² The Court rejected the plaintiffs' argument that, because the complaint sought an accounting and not damages, the action essentially was equitable;⁹³ the availability of a constitutional right did not turn upon the choice of words in the pleading.⁹⁴ To prove the inadequacy of the legal remedy, the plaintiff would have to show that the accounts were so complicated that a jury could not unravel them.⁹⁵

Although the Court found that the accounts were not sufficiently complicated,⁹⁶ it went a step further and declared in a footnote that the procedural changes accomplished by the Federal Rules could diminish the use of traditional equitable remedies even in cases

86. Fed. R. Civ. P. 2, 18(a).

87. The Court concluded in *Beacon Theatres* that the existence of an inadequate remedy and irreparable harm today "must be determined, not by precedents decided under discarded procedures, but in the light of remedies now made available by the Declaratory Judgment Act and the Federal Rules." 359 U.S. at 507.

88. 369 U.S. 469 (1962).

89. *Id.* at 475.

90. *Id.* at 470; *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686 (E.D. Pa. 1961). The defendant then sought mandamus in the Third Circuit, but this was denied without opinion. 369 U.S. at 470.

91. *Id.* at 472-73. The trial court labeled the legal issues as incidental to the equitable issues and denied a jury trial. *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686, 687-88 (E.D. Pa. 1961). The Supreme Court quoted *Beacon Theatres* and held that

where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not.

369 U.S. at 472-73 (quoting *Beacon Theatres*, 359 U.S. at 510-11).

92. *Id.* at 480.

93. *Id.* at 477.

94. *Id.* at 477-78. "The necessary prerequisite to the right to maintain a suit for an equitable accounting . . . is . . . the absence of an adequate remedy at law." *Id.* at 478.

95. *Id.* (citing *Kirby v. Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 134 (1887)).

96. *Id.* at 478-79.

involving complicated accounts.⁹⁷ In such cases the power of the trial court under Federal Rule 53(b) to appoint a master to assist the jury could create a situation in which it would be rare to find the remedy at law inadequate.⁹⁸ The Court warned, however, that the limitation of trial by jury by the appointment of a master seldom should be made, and only in unusual circumstances.⁹⁹

The Court in *Dairy Queen* therefore acknowledged that not every case involving complicated business records called for equity jurisdiction. The Court followed the *Beacon Theatres* approach of determining the adequacy of legal remedies with respect to the Federal Rules of Civil Procedure and noted the possibility of referring complex cases to a special master. Finally, the caveat that the cases in which equity jurisdiction would be appropriate were unusual and rare virtually eliminated the practice of invoking equity jurisdiction for mere convenience.

Ross v. Bernhard

The approach advanced in *Beacon Theatres* and *Dairy Queen* was modified substantially in *Ross v. Bernhard*.¹⁰⁰ Specifically, the Court held that the right to jury trial in a stockholders' derivative action applied only to those issues on which the corporation would have been entitled to a jury trial had it been suing on its own behalf.¹⁰¹ The significance of *Ross* for the purpose of this discussion lies not in the actual holding but in the new test which the Court presented for determining the right to trial by jury.

The Court introduced its three-part test in a footnote: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger *custom* with reference to such questions; second, the *remedy* sought; and third, the *practical abilities and limitations of juries*."¹⁰² This new test was characterized as the cor-

97. *Id.* at 478 n.19 (citing *Beacon Theatres*, 359 U.S. at 509).

98. *Id.* at 478. Rule 53(b) provides in part: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated" FED. R. CIV. P. 53(b).

99. 369 U.S. at 478 n.18; see *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957). See also *In re Watkins*, 271 F.2d 771 (5th Cir. 1959).

100. 396 U.S. 531 (1970).

101. *Id.* at 532-33.

102. *Id.* at 538 n.10 (emphasis supplied). The Court cited no primary authority in this footnote. The citation to *Simler v. Conner*, 372 U.S. 221 (1963), in the text accompanying the footnote supports only the classification of the nature of the issue in general and provides

rect approach in deciding the nature of the issue as either legal or equitable;¹⁰³ the right to trial by jury thereby was made to depend on the nature of the issue to be tried rather than on the character of the entire action.¹⁰⁴

The Court reiterated its observation in *Beacon Theatres* that the Federal Rules were designed to induce purely procedural reforms¹⁰⁵ and acknowledged the expansion of legal remedies and the resulting effect on the scope of equity.¹⁰⁶ Accordingly, the Court did not propose to overrule or modify *Beacon Theatres* or *Dairy Queen*. Finally, in applying the new test to the facts in *Ross*,¹⁰⁷ the Court characterized the complaint as legal, at least in part, because it alleged breach of contract and gross negligence, and sought money damages.¹⁰⁸ The possible effect on the outcome of the case of the new test's third criterion, the practical abilities and limitations of the jury, was never addressed.

Thus, the decision in *Ross*, although attempting to simplify the question whether the right to trial by jury exists in a particular case, merely added to the confusion. Although *Beacon Theatres* and *Dairy Queen* limited consideration of the jury's capabilities to rare and unusual cases, the *Ross* decision seemed to authorize a case-by-case inquiry. Furthermore, the *Ross* opinion provided no guidance as to the relative weights to be assigned to each of the new test's three factors or as to how to apply the third criterion to a particular factual situation. The question that remained was whether satisfaction of the *Ross* test was mandated by the Constitution as a prerequisite to the right to trial by jury.

ROSS AS A CONSTITUTIONAL MANDATE

The Academic Response

Academic reaction to the *Ross* test's possible constitutional impact was immediate and mixed. Even the supporters of the test

no direct precedent for the test itself. See Fleming, *Right to a Jury Trial in Civil Litigation*, 72 YALE L.J. 655 (1963).

103. 396 U.S. at 538.

104. *Id.*

105. *Id.* at 539-40.

106. *Id.* at 540 (citing *Beacon Theatres*, 359 U.S. at 509).

107. *Id.* at 542.

108. *Id.* "Under these circumstances it is unnecessary to decide whether the corporation's other claims are also properly triable to a jury." *Id.* at 542-43 (citing *Dairy Queen*).

could not agree on an interpretation. The test was characterized by some as a mere affirmance of the historical test¹⁰⁹ and by others as a distinct modification of the strict historical approach.¹¹⁰

The most conservative view was that the third criterion was the modern equivalent of the common law principle of trying complex issues of accounting in equity.¹¹¹ On the other hand, the foremost proponent of the *Ross* approach, Professor Fleming James, found *Ross* to be evidence of an elastic construction of the historical test by the Court.¹¹² Although Professor James believed that the historical test probably would survive because of the difficulty in formulating a new test,¹¹³ he long had espoused a more flexible approach to the right to jury trials, particularly in view of the effect of the Federal Rules of Civil Procedure.¹¹⁴ To Professor James, *Ross* represented a compromise between the historical test and a completely new approach.¹¹⁵

Conversely, the critics expressed a variety of assessments of the problems caused by the *Ross* footnote establishing the three-part test. The footnote was characterized as "seemingly obscure,"¹¹⁶ "a potential bombshell,"¹¹⁷ "problematic,"¹¹⁸ "fleeting,"¹¹⁹ "surprising,"¹²⁰ and "inappropriate."¹²¹ Most critics found the *Ross* test to be a departure from the traditional historical approach and, therefore, a threat to the right to a jury trial as preserved by the

109. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976).

110. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 8.3 (2d ed. 1977).

111. Kirkham, *supra* note 109, at 209.

112. F. JAMES & G. HAZARD, *supra* note 110, § 8.3, at 360.

113. *Id.*

114. *Id.* Professor James argued,

[T]he historical test of jury-trial right embodied in our constitutions is probably not well adapted to the merged or united procedures of the present day. It carries too much of the deadwood of the past. A critical use of history may be an excellent guide to present problems, but a critical use takes account of changes in conditions as well as similarities.

Id.

115. *Id.*

116. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. Rev. 486, 523 (1975).

117. *Id.* at 524.

118. *Id.*

119. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 645 (1973).

120. C. WRIGHT, *supra* note 1, § 92, at 454.

121. 5 MOORE'S, *supra* note 1, ¶ 38.11[9], at 128.23.

seventh amendment.¹²² The opponents argued that the Court impliedly agreed with their view because the test was not applied in the *Ross* decision.¹²³ The footnote was criticized for its lack of cited authority¹²⁴ and for the lack of any indication of the weight to be afforded each factor.¹²⁵

Perhaps the most dangerous aspect of the *Ross* footnote is the discretion left to the trial judge. One commentator believed that this would allow the right to trial by jury to rest on whether the judge valued sophistication in complex matters or the common sense approach that jurors could provide.¹²⁶ Another author suggested that the very purpose of the jury was to curb judicial discretion, a purpose that would be defeated if the ultimate decision was left to the judge.¹²⁷ In effect, judicial discretion was encouraged in an area in which it historically was intended to be minimal. Finally, the critics noted, a balancing approach was not appropriate for such a basic constitutional right.

122. Professor Wolfram noted that "[t]he Court's invocation of the 'practical abilities and limitations of juries' as a criterion for deciding when the seventh amendment requires trial by jury would suggest, for the first time, that the Court is tantalized by an explicitly functional approach to this seventh amendment question." Wolfram, *supra* note 119, at 644. MOORE'S FEDERAL PRACTICE commented that the footnote "strikes the present authors as inappropriate for determining the 'command,' as distinct from the 'influence,' of the Seventh Amendment." 5 MOORE'S, *supra* note 1, ¶ 38.11[9], at 128.23. Similarly, Professor Wright viewed the third factor as "surprising since it seems to invite a balancing approach to the right to jury trial, while the accepted learning has been that that balance was already struck by the Seventh Amendment." C. WRIGHT, *supra* note 1, § 92, at 454. Professor Redish connected the third criterion with the common law action for an accounting. He explained, "With the apparent exception of an action for an accounting, the relative abilities of judge and jury did not influence the characterization of a case as legal or equitable. Thus, the third portion of the *Ross* footnote may have indirectly adopted a balancing test." Redish, *supra* note 116, at 524.

123. For example, Professor Wolfram noted that those who would be disquieted were the Court seriously to consider a functional approach. . . . [should remember] that the Court did not even attempt in its opinion to consider whether a jury could better determine the complex corporate questions involved in shareholder derivative litigation. Standing as it does, thus alone, this fleeting expression in *Ross v. Bernhard* of infidelity to the centrality of the traditional historical test in seventh amendment determinations would hardly justify an announcement that the historical test has been superseded in the federal courts.

Wolfram, *supra* note 119, at 645. For further discussion of this aspect of *Ross*, see *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 172, 176 n.26 (1970); Note, 81 YALE L.J. 112, 129-30 (1971).

124. Redish, *supra* note 116, at 523-24.

125. Note, *supra* note 123, at 129.

126. *The Supreme Court, 1969 Term*, *supra* note 123, at 176 n.26.

127. Wolfram, *supra* note 119, at 644.

The Judicial Response

Although the Supreme Court failed to apply the *Ross* test to the facts in that case, the implementation of the approach in other jury trial cases would secure the status of the test as a constitutional mandate. But not only has the Court failed to reaffirm the *Ross* footnote, the decisions in two jury trial cases suggest that ratification of the test is unlikely. *Curtis v. Loether*¹²⁸ involved the issue whether the right to jury trial attached to actions brought under the fair housing provisions of the Civil Rights Act of 1968.¹²⁹ The Court's analysis began with a review of the legislative history of Title VIII¹³⁰ and continued with a discussion of the history of jury trials in actions enforcing statutory rights.¹³¹ The Court concluded that the action sounded basically in tort,¹³² thereby reinforcing the historical-analogy test and not the *Ross* test.¹³³ Likewise, no mention was made of the *Ross* test in a second major jury trial decision, *Pernell v. Southall Realty*.¹³⁴ Instead, the Court again relied on the traditional historical test.¹³⁵

Given the Court's failure to utilize *Ross*' "seemingly obscure" footnote, the constitutional status of the test remains questionable. Accordingly, the lower federal courts initially were hesitant to employ the new approach. For example, the Fourth Circuit virtually ignored *Ross* in *Tights, Inc. v. Stanley*¹³⁶ and based its decision on *Dairy Queen* instead.¹³⁷ The court in *Tights, Inc.* rejected the respondent's argument that "patent cases as a class are inevitably so complicated as to justify their resolution by equitable accounting rather than trial."¹³⁸ The Fourth Circuit refused to include cases potentially too complex and esoteric for a jury to handle within the

128. 415 U.S. 189 (1974).

129. *Id.* at 189-90; 42 U.S.C. § 3612 (1970).

130. 415 U.S. at 191-92.

131. *Id.* at 193-95.

132. *Id.* at 195.

133. Ironically, the Seventh Circuit had applied the *Ross* test to reach the same result. *Rogers v. Loether*, 467 F.2d 1110, 1117-18 (7th Cir. 1972).

134. 416 U.S. 363 (1974).

135. *Id.* at 374-76.

136. 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971).

137. *Id.* at 337-38, 340-44.

138. *Id.* at 340. "[T]he Supreme Court has specifically rejected the argument that equity jurisdiction may be invoked because of the complexity and difficulty of issues of *liability* as distinguished from the complexity of accounting damages." *Id.* at 340-41 (citing *United States v. Bitter Root Dev. Co.*, 200 U.S. 451 (1906)).

scope of equitable accounting.¹³⁹ Moreover, the court noted that the Supreme Court, and not the lower federal courts, retained the prerogative to expand the scope of equitable accounting;¹⁴⁰ Ross was cited to demonstrate that the Supreme Court was unlikely to widen that scope.¹⁴¹

The first intermediate level federal court to use the test in complex litigation was the Sixth Circuit in *Hyde Properties v. McCoy*.¹⁴² *Hyde Properties* was an interpleader action in which one of the defendants demanded a jury trial.¹⁴³ The Court applied the test announced in the Ross footnote to determine the nature of the issue.¹⁴⁴ Although the decision mainly focused on the remedy sought, the jury's abilities also were examined.¹⁴⁵ In *Hyde Properties*, the primary issue for the jury was whether the corporation was solvent or insolvent; therefore, the determination of the accounting procedures employed was critical.¹⁴⁶ The court of appeals, agreeing with the district court that the issues were complex and confusing, concluded that a nonjury trial would be more efficient and just.¹⁴⁷ The court's brief reference to the third criterion provided little guidance for determining whether the complexity of the issues alone is sufficient to justify invoking equitable jurisdiction.

Similarly, district courts seem to concentrate on the first two

139. *Id.* at 341.

140. *Id.* The court concluded that

[i]f the scope of "equitable accounting" is to be expanded to encompass cases felt to be too complex or esoteric for trial to a jury, we think that expansion must come from the Supreme Court. We do not construe any language in the *Dairy Queen* opinion to sanction this further limitation of the right to jury trial.

Id.

141. *Id.* at 341 n.11.

142. 507 F.2d 301 (6th Cir. 1974).

143. *Id.* at 304.

144. *Id.* at 305.

145. *Id.* at 306.

146. *Id.* The determination of the corporation's solvency or insolvency "involved conflicting issues of fact concerning accounting procedures used to list the assets and liabilities of the corporation." *Id.*

147. *Id.* The Court reasoned,

In its opinion, the district court acknowledged that "the issues between the parties were both complex and likely to be confusing in light of the underlying facts and circumstances" We agree with this observation and consequently find as to the third factor that a jury is not especially well-qualified to dispose of such issues and that a non-jury trial of the issues is both more efficient and more likely to produce a just result.

Id.

criteria at the expense of the third. For example, in *Prudential Oil Corp. v. Phillips Petroleum Co.*,¹⁴⁸ the district court applied the Ross test in an action for breach of contract and misappropriation of trade and business information.¹⁴⁹ As in *Hyde Properties*, only one paragraph of the *Prudential Oil* opinion was devoted to the third criterion; however, somewhat more analysis was involved, and the jury trial demand was granted.¹⁵⁰

In 1976, the first detailed analysis of the third criterion in a complex case appeared in *In re Boise Cascade Securities Litigation*,¹⁵¹ involving alleged violations of securities laws.¹⁵² The court, resting its decision primarily on the third part of the Ross footnote,¹⁵³ granted the defendant's motion to strike the plaintiff's jury demand.¹⁵⁴ Three factors led to the decision: the factual issues, the complexity of the evidence, and the time involved.¹⁵⁵ Furthermore, the third criterion of the Ross footnote was considered definitely "of constitutional dimensions."¹⁵⁶ The court viewed this criterion as a limitation on or an interpretation of the seventh amendment and detected no conflict with the Federal Rules.¹⁵⁷

Although the court in *Jones v. Orenstein*¹⁵⁸ denied the defendant's motion to strike the plaintiff's jury demand, its decision was based exclusively on the *Boise Cascade* court's interpretation of the third criterion.¹⁵⁹ Like *Boise Cascade*, *Jones* involved issues of securities law;¹⁶⁰ the court in *Jones*, however, classified *Boise Cascade* as atypical.¹⁶¹ Although not explicitly determined by the court, the third criterion apparently was viewed as a constitutional mandate.

148. 392 F. Supp. 1018 (S.D.N.Y. 1975), *rev'd on other grounds*, 546 F.2d 469 (2d Cir. 1976).

149. *Id.* at 1020.

150. *Id.* at 1023. The court commented that Ross suggested "a third consideration worthy of examination" and then cited *Dairy Queen* in concluding that the jury was capable of deciding the issues involved "upon proper instructions from the trial court." *Id.*

151. 420 F. Supp. 99 (W.D. Wash. 1976).

152. *Id.* at 101.

153. *Id.* at 104.

154. *Id.* at 105.

155. *Id.* at 103.

156. *Id.* at 105.

157. *Id.*

158. 73 F.R.D. 604 (S.D.N.Y. 1977).

159. *Id.* at 606.

160. *Id.* at 605.

161. *Id.* at 606. The court explained that "[i]n the *Boise Cascade* litigation, the sheer number of marked documents alone weighed against the advisability of trial by jury." *Id.*

In re U.S. Financial Securities Litigation,¹⁶² involving eighteen lawsuits and about one hundred defendants,¹⁶³ was a mammoth securities litigation. The district court not only adopted the *Ross* test to determine whether a case is legal or equitable in nature¹⁶⁴ but also formulated guidelines for applying the third criterion.¹⁶⁵ Thus, the court in *U.S. Financial* found sufficient constitutional dimensions to the *Ross* test to warrant the development of guidelines for its application.

In contrast, the United States District Court for the Eastern District of Michigan reverted to the *Hyde Properties* approach in *SEC v. Associated Minerals, Inc.*,¹⁶⁶ another securities case. Though the court characterized the *Ross* test as "sophisticated,"¹⁶⁷ the third criterion was afforded only cursory treatment in the decision to deny a jury trial.¹⁶⁸ Having previously determined that both the claims presented and the remedies sought were equitable in nature,¹⁶⁹ the court seemed to doubt the relevancy of this inquiry; the right to a jury trial is not constitutionally guaranteed in suits in equity.¹⁷⁰ Therefore, even within the difficult area of securities litigation, the approaches and results have been inconsistent.

162. 75 F.R.D. 702 (S.D. Cal. 1977).

163. *Id.* at 706. The court demonstrated the sheer volume of this litigation in two appendices to its opinion, covering over eight pages and listing the cross-complaints and cases that were consolidated. *Id.* at 715-23 app.

164. *Id.* at 710.

165. *Id.* at 711. The court's guidelines were:

First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution.

Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.

And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for jurors to function effectively throughout the trial.

Id.

166. 75 F.R.D. 724 (E.D. Mich. 1977).

167. *Id.* at 725.

168. *Id.* at 726.

169. *Id.*

170. *Id.* The court expressed this doubt as follows:

Finally, to the extent that a jury's ability to properly decide an action may be relevant to determining whether the constitutional right to a jury is involved, the Court believes that the issues of fraud and noncompliance with the registration provisions of the securities laws presented in this action are indeed complex and for this reason are not especially suited for resolution by a jury.

Id.

Although the *Ross* test received inconsistent application in the securities cases with conflicting results, these cases similarly interpreted *Ross* as authorizing a case-by-case analysis of the practical limitations of juries. However, in *Radial Lip Machine, Inc. v. International Carbide Corp.*,¹⁷¹ a patent infringement case, the district court found in *Ross* a test to determine the nature of an entire class of claims.¹⁷² Rejecting the securities cases' interpretation, the court in *Radial Lip Machine* stated that the only support for the case-by-case approach was the narrow *Dairy Queen* exception for complicated accounts.¹⁷³ Ruling that the patent infringement action did not fall within the *Dairy Queen* exception, the court denied the motion to strike the jury demand.¹⁷⁴

Most recently, the *Ross* test was applied in two complex antitrust cases.¹⁷⁵ *Bernstein v. Universal Pictures, Inc.*¹⁷⁶ characterized the third criterion of the test, directed at the limits on jurors' abilities, as a restatement of equity's concurrent jurisdiction in complex cases¹⁷⁷ and denied trial by jury on several grounds.¹⁷⁸ The second antitrust case, *ILC Peripherals Leasing Corp. v. IBM Corp.*,¹⁷⁹ was unique in that the court based its decision on prior experience with a deadlocked jury and a mistrial.¹⁸⁰ After a mistrial was declared, the court, having granted a directed verdict for the defendant, reconsidered the defendants' motion to strike the plaintiff's jury demand in the event of a remand for retrial.¹⁸¹ The court, using the

171. 76 F.R.D. 224 (N.D. Ill. 1977).

172. *Id.* at 227. "The three *Ross* criteria are guides for determining whether a claim typically has a sufficient quantum of legal elements so that it must be tried to a jury. . . . The portion of the *Ross* test which weighs the practical abilities and limitations of juries contemplates a general analysis of the problems typically presented by those claims, not a specific case-by-case analysis of the complexity of the litigation." *Id.* (citations omitted).

173. *Id.* 228.

174. *Id.* at 228-29.

175. *ILC Peripherals Leasing Corp. v. IBM Corp.*, No. C-73-2238 (N.D. Cal., filed Aug. 11, 1978); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978).

176. 79 F.R.D. 59 (S.D.N.Y. 1978).

177. *Id.* at 67.

178. *Id.* at 71. The court denied trial by jury on grounds of (1) the length of the trial, (2) the complexity of the relationships among the parties, (3) the sheer size of the litigation, and (4) the complexity of the accounting procedure involved. *Id.* at 70. The court rejected the plaintiff's suggestion that a special master be appointed pursuant to Federal Rule 53. The court stated that "any role that a Special Master might be able to play in this case is so peripheral that the underlying complexities will necessarily remain." *Id.*

179. No. C-73-2238 (N.D. Cal., filed Aug. 11, 1978).

180. *Id.*, slip op. at 1.

181. *Id.* at 39.

third criterion of *Ross* and relying on personal observations, stated, "[T]he magnitude and complexity of the present lawsuit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally"¹⁸² The courts in both *Bernstein* and *ILC Peripherals*, therefore, proceeded on the assumption that satisfaction of the *Ross* test was a constitutional prerequisite.

These cases demonstrate that although that portion of the *Ross* test regarding the practical limitations and abilities of juries has been applied in complex litigation, it has not received universal acceptance. To the extent that *Ross* seems to authorize a case-by-case analysis, courts should use the test cautiously because of its questionable constitutional status.

The Supreme Court stated in *Dairy Queen* that the case in which the remedy at law could be found to be inadequate would be rare.¹⁸³ Furthermore, in *Beacon Theatres*, the Court noted that because no party was guaranteed a nonjury trial by any constitutional provision,¹⁸⁴ the trial court's discretion must be exercised to preserve jury trial whenever possible.¹⁸⁵ Therefore, superficial treatment of the third factor in *Ross*¹⁸⁶ permits the trial judge too much discretion. If the *Ross* test is to be used, the courts' analyses should be thorough and should include a consideration of the improved procedures available under the Federal Rules. The test for the right to jury trial remains the adequacy of the remedy at law.¹⁸⁷ Therefore, absent further instruction from the Supreme Court, the *Ross* test should be applied according to the guidelines discussed in *Beacon Theatres* and *Dairy Queen*.

REDUCING THE COMPLEXITIES

Pretrial Proceedings

The considerations involved in trying to reduce the intricacy of complex litigation include factors present at every stage of the litigation, beginning with pretrial proceedings. Pretrial discovery

182. *Id.* at 48.

183. 369 U.S. at 478.

184. 359 U.S. at 510.

185. *Id.*

186. See, e.g., *Hyde Properties v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974); *SEC v. Associated Minerals, Inc.*, 75 F.R.D. 724, 726 (E.D. Mich. 1977); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F. Supp. 1018, 1023 (S.D.N.Y. 1975).

187. *Dairy Queen*, 369 U.S. at 478, *Beacon Theatres*, 359 U.S. at 506-10.

under the Federal Rules,¹⁸⁸ especially the provision for admissions,¹⁸⁹ can be used to narrow the issues in the suit,¹⁹⁰ thereby limiting the trial to the facts actually in dispute. These discovery procedures, however, may be abused by parties asserting a dubious claim.¹⁹¹ This potential for abuse demonstrates the need for responsible discovery, well supervised by the judge or a special master.¹⁹² Generally, though, proper use of discovery could narrow the issues before the jury, thus eliminating some of the major problems facing juries in complex litigation. This, of course, would require the use of pretrial conferences¹⁹³ to simplify the issues for the jury.¹⁹⁴

The Court in *Dairy Queen* stated that reference to a special master¹⁹⁵ was an important method of preserving jury trials in complex litigation.¹⁹⁶ Although reference to a master has been rejected in some cases,¹⁹⁷ the courts generally have considered using masters more frequently in complex cases.¹⁹⁸ This decision must be made carefully, however, since the Supreme Court commented in *Dairy Queen* that "[e]ven this limited inroad upon the right to trial by jury 'should seldom be made, and if at all only when unusual circumstances exist.'"¹⁹⁹ Some commentators have suggested amending Rule 53 to insure that the unusual circumstances requirement does not bar the expanded role of masters²⁰⁰ in supervising the discovery process and in expediting complex litigation.²⁰¹

Although the Federal Rules have provided tools to alleviate complexity, the rules concerning compulsory counterclaims,²⁰² permis-

188. FED. R. CIV. P. 26-37.

189. FED. R. CIV. P. 36(a).

190. 5 MOORE'S, *supra* note 1, ¶ 38.25, at 201. See generally 4 *id.* ¶ 26.02[2], at 26.64 to 26.68.

191. Kirkham, *supra* note 109, at 204.

192. See notes 195-201 *infra* & accompanying text.

193. FED. R. CIV. P. 16.

194. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 714 (S.D. Cal. 1977).

195. FED. R. CIV. P. 53(b). See generally 5 MOORE'S, *supra* note 1, ¶ 38.25, at 201; 5A *id.* ¶ 53.05[2], at 2946-62; Note, 65 YALE L.J. 1057 (1956).

196. 369 U.S. 469, 478 (1962).

197. *E.g.*, *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 70-71 (S.D.N.Y. 1978); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 713.

198. 5A MOORE'S, *supra* note 1, at 2958 n.41.

199. 369 U.S. at 478 n.18 (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957)). See also *In re Watkins*, 271 F.2d 771 (5th Cir. 1959).

200. *E.g.*, 5A MOORE'S, *supra* note 1, at 2958 n.41.

201. See *Hart v. Community School Bd.*, 383 F. Supp. 699, 765 (E.D.N.Y. 1974).

202. FED. R. CIV. P. 13(a).

sive counterclaims,²⁰³ cross-claims,²⁰⁴ third-party claims,²⁰⁵ joinder of claims,²⁰⁶ necessary joinder,²⁰⁷ and permissive joinder²⁰⁸ have complicated civil litigation. The Rules include a device for prevention of such complications through the severance of claims,²⁰⁹ but severance increases the amount of time spent in court²¹⁰ and increases the possibility of inconsistent verdicts.²¹¹ Consequently, the Federal Rules relating to multiple parties and multiple claims create a major problem without suggesting a solution.

The Trial

Because of the disparity between the legal and practical aspects of a jury trial in complex litigation, the right to trial by jury has become "the right to an irrational verdict."²¹² The easiest solution to this problem is within the power of the parties themselves. A party must make a timely demand in order to secure the right to trial by jury; the right is not automatic.²¹³ The parties, therefore, must decide whether their reasons for the jury trial demand outweigh the burden on the judicial system. Thus, a means for reducing complexities that requires no change in the jury system is available, requiring only responsible decisions by the parties.

The trial itself may be the major problem in complex litigation. The number of civil suits in federal courts has increased dramatically in recent years,²¹⁴ and individual trials are becoming more time

203. FED. R. CIV. P. 13(b).

204. FED. R. CIV. P. 13(g).

205. FED. R. CIV. P. 14.

206. FED. R. CIV. P. 18.

207. FED. R. CIV. P. 19.

208. FED. R. CIV. P. 20(a).

209. FED. R. CIV. P. 42(b); see *Berstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 714 (S.D. Cal. 1977).

210. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 714.

211. *Berstein v. Universal Pictures, Inc.*, 79 F.R.D. at 70.

212. *Id.* at 71.

213. FED. R. CIV. P. 38(b).

214. From 1971 to 1976, pending civil cases increased by more than 25,000; complex cases, especially class actions, increased at the highest rate. Kirkham, *supra* note 109, at 204-05. "In the last decade, the number of private antitrust lawsuits filed annually in federal court has tripled, reaching 1,611 cases in fiscal 1977. The number of federal cases involving securities, commodities and stock exchanges has gone up even faster. In fiscal 1977, the total was 1,960 cases." Shaffer, *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16 col. 4.

consuming.²¹⁵ These changes affect the judicial system, the composition of the jury, and the jurors themselves. In order to solve these problems, it may be necessary to abolish juries altogether in complex litigation. Given the preference for jury trials in this country, however, any such attempts probably will fail.

The preference for jury trials results in prolonged proceedings which adversely affect the federal judicial system,²¹⁶ a system already overburdened by the vast number of pending cases.²¹⁷ During a long trial, the district court usually will not be assigned new cases, hence increasing the workloads of the other courts in that district.²¹⁸ In addition, a long jury trial increases the expense of judicial administration.²¹⁹

A lengthy trial also affects the composition of the jury, which the Jury Selection and Service Act of 1968 guarantees to be a fair cross section of the community.²²⁰ The courts, realizing that people normally cannot spend considerable time away from their jobs,²²¹ usually excuse prospective jurors upon a showing of hardship or inconvenience.²²² Accordingly, the available jurors often do not have commercial or business experience, thus depriving the litigants of a trial before a fair cross section of the community.²²³ The courts view

215. Trial lengths in various cases were estimated at four months, *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 63 (S.D.N.Y. 1978), four to six months, *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104 (W.D. Wash. 1976), and two years, *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 713 (S.D. Cal. 1977). Actual trials have lasted five months, *ILC Peripherals Leasing Corp. v. IBM Corp.*, No. C-73-2238, slip op. at 1 (N.D. Cal., filed Aug. 11, 1978), and over a year, see Shaffer, *supra* note 214, at 16, col. 6.

216. See note 214 *supra*.

217. See generally Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96 (1976); Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971); Note, *supra* note 123, at 123-26.

218. See *ILC Peripherals Leasing Corp. v. IBM Corp.*, No. C-73-2238, slip op. at 47 (N.D. Cal., filed Aug. 11, 1978).

219. In the *ILC* case, a mistrial was declared after a five-month trial, during which the government paid over \$32,000 in jury expenses. *Id.* See generally Shapiro & Coquillette, *supra* note 217.

220. 28 U.S.C. § 1861 (1970). The Act reads in part: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . ." *Id.*

221. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 68-9; *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104.

222. 28 U.S.C. § 1866(c) (1970).

223. See *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 68; *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104. See also *ILC Peripherals Leasing Corp. v. IBM Corp.*, No. C-73-2238, slip op. at 46-47 (N.D. Cal., filed Aug. 11, 1978).

the lack of a fair cross section as defeating the primary purpose of the jury, the "determination of facts by impartial minds of diverse backgrounds."²²⁴ Thus, a long trial's effect on jury composition weighs against the use of a jury in complex litigation, particularly since individuals with the background and experience for understanding the complex issues often are excused from jury duty because of business inconvenience.

The jury's composition, however, could be improved in two ways. First, a fair cross section could be achieved by limiting excuses from jury service because of hardship or inconvenience.²²⁵ This measure must be accompanied by cooperation from employers in compensating employees for jury duty and allowing for more flexible work schedules. Second, special juries consisting only of professionals with business experience, known as "blue-ribbon" juries, could be authorized. This, however, would require an amendment to the Jury Selection and Service Act of 1968,²²⁶ which was passed to prohibit blue-ribbon juries.²²⁷ The amendment could take the form of an exception for complex litigation in general or for specific types of litigation involving antitrust laws or securities regulations. Whatever the method, the composition of the jury must be altered to achieve well-reasoned verdicts, and therefore to solve one of the major problems with jury trials in complex litigation.

The courts also have considered the problem of the effect of a long trial on the jury itself.²²⁸ The United States District Court for the Southern District of California termed it unconscionable to ask jurors to sit for long periods of time.²²⁹ Career advancement and proficiency could be affected,²³⁰ and chances of unforeseen personal occurrences would increase with the length of time.²³¹ Most impor-

224. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104; see *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 68 (S.D.N.Y. 1978).

225. See note 222 *supra*.

226. See note 220 *supra*.

227. 28 U.S.C. § 1865(a) (1970). This section was amended specifically to prohibit blue-ribbon juries. See H.R. REP. NO. 1076, 90th Cong., 2d Sess. —, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1792, 1795.

228. See, e.g., *ILC Peripherals Leasing Corp. v. IBM Corp.*, No. C-73-2238 (N.D. Cal. filed Aug. 11, 1978); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).

229. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 713.

230. *Id.*; *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104.

231. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 714.

tantly, problems with interest and attention could impair the jury's performance.²³²

Thus, a lengthy jury trial adversely affects the judicial system, the litigants' right to a diversified panel of jurors, and the jurors themselves. Alternatively, a nonjury trial can decrease the impact on the judicial process and eliminate jury problems. A major advantage in a trial to the court is the judge's experience in commercial litigation, both in practice²³³ and on the bench.²³⁴ Since the judge already is familiar with the pleadings filed,²³⁵ opening statements by counsel can be eliminated, thus shortening trial time.²³⁶ Furthermore, a court trial can be scheduled more flexibly than a jury trial.²³⁷

During the trial of a complex case, the court has various judicial tools that are not available in a jury trial.²³⁸ The judge can address direct questions to witnesses for immediate clarification²³⁹ and study exhibits in depth.²⁴⁰ Depositions can be admitted directly into evidence without being read aloud.²⁴¹ In addition, the judge has the opportunity to review daily transcripts and selected portions of testimony from the reporter's notes.²⁴² After the testimony has been taken in a trial to the court, no more court time is required.²⁴³ No summations are needed, and the judge can take his notes to his chambers or to his home if he cannot reach a decision immediately.²⁴⁴ Thus, a trial to the court can be preferable to a jury trial

232. *Id.* at 711; Kirkham, *supra* note 109, at 208.

233. Redish, *supra* note 116, at 505 n.82.

234. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104; Redish, *supra* note 116, at 505 n.82.

235. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 105; Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455, 456 (1956).

236. Peck, *supra* note 235, at 456.

237. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 105. For example, one court suggested appointing special masters to review and organize the documentary evidence and scheduling three days of actual trial and a fourth day for the judge and the masters to review the evidence presented. *In re U.S. Financial Sec. Litigation*, 75 F.R.D. at 714.

238. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104-05. *Contra*, Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977).

239. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 105; Redish, *supra* note 116, at 505 n.82.

240. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 105.

241. *Id.*

242. *Id.*

243. Peck, *supra* note 235, at 456.

244. *Id.*

with respect to the impact on the judicial system, especially in terms of court time.

With proper instructions, however, these judicial tools can be used in a jury trial to assist the jury.²⁴⁵ For example, in a complex antitrust case,²⁴⁶ Judge Conti of the Northern District of California gave instructions that filled ninety pages of the trial transcript and diagrammed the thought processes the jurors were to employ.²⁴⁷ The judge also permitted the jury to take 3,000 exhibits and the trial transcript into the jury room.²⁴⁸ In a similar case, the judge not only provided the jury with guidelines and transcripts²⁴⁹ but also instructed the jury before the trial and allowed the jurors to take notes.²⁵⁰ Some commentators question the effectiveness of such instructions; no matter how well instructed by the court, a jury cannot be expected to maintain the interest and attention necessary both to collate the evidence and to understand it.²⁵¹ The use of effective, clear instructions, however, must be considered when weighing the propriety of a jury trial in complex cases.²⁵²

Post-Trial Motions

The courts, when confronted with a demand for a jury trial, should consider the possibility of post-trial motions,²⁵³ particularly those for a directed verdict,²⁵⁴ a judgment notwithstanding the verdict,²⁵⁵ and a new trial.²⁵⁶ These motions can be granted if the jury's verdict is clearly erroneous.²⁵⁷ This factor was examined expressly in only one of the cases discussed,²⁵⁸ perhaps because these motions are raised after the trial and after the problems have occurred.

245. See *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F. Supp. 1018, 1023 (S.D.N.Y. 1975). See generally Shaffer, *supra* note 214.

246. *Memorex Corp. v. IBM Corp.*, No. C-73-2239 (N.D. Cal., filed Aug. 11, 1978).

247. Shaffer, *supra* note 214, at 16, col. 4.

248. *Id.*

249. *Id.*

250. *Id.*

251. *E.g.*, Kirkham, *supra* note 109, at 208.

252. *Dairy Queen*, 369 U.S. at 479.

253. See *Curtis v. Loether*, 415 U.S. 189, 198 (1974).

254. FED. R. CIV. P. 50(a).

255. FED. R. CIV. P. 50(b).

256. FED. R. CIV. P. 59.

257. *Jones v. Orenstein*, 73 F.R.D. 604, 606 (S.D.N.Y. 1977); cf. *Curtis v. Loether*, 415 U.S. at 198 (use of Federal Rules 50 and 59 to insure proper verdicts for victims of discrimination).

258. *Jones v. Orenstein*, 73 F.R.D. at 606.

The motions that would be most helpful in alleviating problems with jury trials in complex litigation are actually those made before and during the trial, such as motions to strike,²⁵⁹ motions for a more definite statement,²⁶⁰ motions for judgment on the pleadings,²⁶¹ and motions for dismissal for failure to state a claim upon which relief can be granted.²⁶² Therefore, although post-trial motions must be considered if an erroneous verdict is possible, motions made before and during trial, correcting the problems before they occur, would be more effective.

CONCLUSION

The federal courts should not consider the *Ross* decision as a license to strike a jury demand simply upon a finding that the issues are complex. The strong language in *Beacon Theatres* and *Dairy Queen* regarding the limited application of such a determination, coupled with the Supreme Court's silence as to the proper application of the *Ross* test, indicate that the test for determining whether a right to a jury trial exists has not changed since *Beacon Theatres*. The basis for equitable jurisdiction remains the inadequacy of the remedy at law. The advantages of a nonjury trial must be weighed against the provisions of the Federal Rules to determine the adequacy of the legal remedy. In a close decision, the courts must recognize the constitutional bias in favor of trial by jury.

The most effective means of preventing problems with jury trials in complex litigation lie in the parties' capacity to decline trial by jury. If a jury trial is demanded, however, measures less radical than the abolition of the jury itself can correct the problems of jury trials in complex litigation. Limiting excuses from jury duty and authorizing blue-ribbon juries could insure that the jury reaches a well-reasoned decision, thus eliminating the problem of irrational verdicts. Effective use of pretrial discovery, motions, jury instructions, and other judicial tools available through the Federal Rules also can reduce the complexities. In any event, the importance of the right to trial by jury generally outweighs the advantages of a trial to the court in complex cases if an adequate legal remedy exists.

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259. FED. R. CIV. P. 12(f).

260. FED. R. CIV. P. 12(e).

261. FED. R. CIV. P. 12(c).

262. FED. R. CIV. P. 12(b)(6).