

Trial  
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## Should Juries Decide Complex Cases? The Seventh Amendment v. the Phantom “Complexity” Exception

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According to one school of legal thought, much of today’s commercial litigation is too complicated and important to be entrusted to mere juries. Due process would be almost a certainty, the line of reasoning goes, if only these cases were left solely to judges, the expert factfinders. Yet such arguments appear flimsy when viewed in the light of this thoughtful examination of the Constitution, its drafters’ motives, and the nation’s rich judicial experience.

In suits at common law, where the value in controversy shall  
exceed twenty dollars, the right to trial by jury shall be preserved.  
U.S. Constitution, Amendment VII.

The language of the Seventy Amendment is so remarkably simple, clear, and straightforward that it defies any dispute over its intent. In fact, it defies all dispute regarding the mandate placed on our legal system by the drafters of the Constitution.

Unfortunately, in recent years a minority of lawyers have attempted to pretend that the words of the amendment do not mean what they clearly say. These individuals postulate that, somewhere amidst the unambiguous wording of the amendment lies what they refer to as a “complexity” exception to trial by jury.

To believe otherwise, they claim would threaten an individual’s guaranteed right to due process of law. Close scrutiny of the “complexity” exception theory, however, indicates a strained logic that threatens to undermine our judicial system as we know it and as it was conceived.

The Seventh Amendment unequivocally guarantees a jury trial in any (and thus every) civil case worth more than \$20. The amendment fails to provide the judiciary with any power to reject a jury demand made by a party to the action. The only hurdle in acquiring a jury trial is the minimum value requirement. This obligation is nearly meaningless. The \$20 dollar minimum value, however, strongly indicates the drafters’ belief that only the most financially insignificant case fails to warrant a jury trial. The minimum value implicitly demonstrates the drafters’ conviction that the more money at stake in an action, the more immediate the need for a jury.

Oddly, those cases generally claimed as too “complex” for a jury involve commercial litigation, e.g., antitrust and securities litigation. Cases of this nature deal with vast sums of money and, therefore, are the most appropriate for a jury trial, according to the drafters’ analysis.

It is no accident that the Seventh Amendment failed to grant the judiciary any power to reject a jury demand. While detailed history of the amendment’s development is unavailable, the drafters

of the Constitution considered the use of juries a hedge against the whims and biases of individual judges. As James Madison observed in his documentation of the Constitutional Convention, an underlying purpose for the right to jury trials in civil cases was the “necessity of juries to guard against corrupt judges.”<sup>1</sup>

Thomas Jefferson demonstrated this concern over judicial factfinding when he stated:

We all know that permanent judges acquire an esprit de corps, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative; that it is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side; and that the opinion of twelve honest jurymen gives still a better hope of right than cross and pile does.<sup>2</sup>

Since a crucial function of the jury, then, is to protect against judicial overreaching, it is inconsistent to require judges to determine what type of action is appropriate for a jury, yet, this is precisely, what the proponents of the “complexity” exception argue.

The sum and substance of the “complexity” exception to the Seventh Amendment is as follows:

“The right to a jury trial is not absolute, and may be curtailed when it conflicts with another constitutional right.”

“Juries cannot comprehend the facts and issues in certain complex civil litigation. To require juries to try such a case would create inherent unfairness to the parties involved.”

“This unfairness is a violation of the Fifth Amendment guarantee of due process of law.”

“On balance, due process is more important than a jury trial.”

These arguments are replete with premises that have no proven factual basis; more directly, they are simply false. Indeed, these premises are easily refuted. First, the argument maintains that juries cannot comprehend the facts and issues in complex civil litigation. Second, judges would make better factfinders in complex matters than would juries. Third, the due process clause of the Fifth Amendment requires the removal of juries from complex matters. While these points are inextricably linked, each may be individually dissected and criticized.

## **Competence of Juries**

Sitting as trial judge has reinforced my view that the greatest value

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<sup>1</sup> J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 630 (1966).

<sup>2</sup> T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 483-84 (1853)

of the jury is its ability to decide cases correctly.<sup>3</sup>

The jury system is a unique and important feature of our legal process. Yet, since its inception, the jury has been a touchstone of controversy.<sup>4</sup>

One of the most frequent criticisms is that a jury cannot handle the “difficult” case. That is, juries cannot comprehend issues and cannot distill the facts in multi-issue, technical matters. However, as Justice Anderson stated in *In re U.S. Financial Securities Litigation*:<sup>5</sup>

This argument unnecessarily and improperly demeans the intelligence of the citizens of this nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equaled in other areas of public service.<sup>6</sup>

Justice Anderson implicitly blames lawyers and judges for jury confusion: Proper communication and instruction will do much to preclude jury incompetence.

The jury has attributes which make it clearly preferable to a single judge or even several judges in both simple and “complex” matters. Judges, because they are human, cannot simply set aside personal values, prejudices, and idiosyncracies. Judges will necessarily shape their opinions based on their predispositions. A jury, while it may also be subject to influence by personal notions, is less likely to act on individual motive because of the number of individuals serving and the unique nature of the deliberative process. Thus, the collective experience and wisdom of a jury are much more likely to lead to a fair decision.

The civil jury is not a new institution, nor is the “complex” case new to our legal system. Throughout its history, the civil jury has performed admirably and has merited preservation in all civil actions. As Chief Justice Earl Warren once noted:

The men and women who are called upon to serve on juries in both out federal and state courts have maintained a standard of fairness and excellence throughout the history of our country. They have demonstrated a vision and a will toward the administration of

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<sup>3</sup> Joiner, *From the Bench*, in THE JURY SYSTEM IN AMERICA(1975).

<sup>4</sup> See Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV, 639, 656-66 (1973).

<sup>5</sup> 609 F.2d 411 (9<sup>th</sup> Cir. 1979).

<sup>6</sup> *Id.* At 430

justice that is a well-spring of inspiration.<sup>7</sup>

Clearly, the track record of the civil jury belies the idea that the jury cannot handle “complex” matters. The jury, by its nature, is superior to other factfinders in such matters.

### **Judges as Factfinders**

Judges do not answer questions of fact; juries do not answer questions of law.<sup>8</sup>

The proponents of the “complexity” exception to the right to trial by jury in civil cases maintain that a judge makes a better factfinder than a jury. Again, the words of Justice Anderson, in his ringing rejection of a complexity exception in *In re U.S. Financial Securities Litigation*, are dispositive of this fallacy:

While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior factfinder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees’ argument, “that a single judge is brighter than the jurors collectively functioning together.”<sup>9</sup>

There is no empirical evidence of the superiority of judges as factfinders. While examples of jury inadequacy can be found, similar examples of judicial factfinding inadequacy are also available.<sup>10</sup>

Certainly, it cannot be asserted that all judges possess more technical knowledge than “mere” jurors. Elimination of the jury in complex cases would not reduce the need for careful organization and a thorough presentation of the evidence to a judge. Expert testimony would still be necessary to ferret out technical concepts. In fact, requiring judges to hear complex cases could indirectly spur sloppy lawyering. Attorneys in such matters could stand back on their heels, believing that they need not thoroughly outline their case or properly object to certain evidence, because they think a judge is capable of understanding all issues and will not consider inadmissible evidence. While this may hold true in a few cases, it is not the attitude that should be promoted among lawyers.

The jury, therefore, is at least as well suited for complex matters as a single judge. Judge Becker,

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<sup>7</sup> Quoted in C. JOINER, CIVIL JUSTICE AND THE JURY vi (1962).

<sup>8</sup> B COKE 308

<sup>9</sup> *Financial Securities Litigation*, 609 F. 2d 411, 431 (quoting Higginbotham, *Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53, (1977)).

<sup>10</sup> Sperlich, *The Case for Preserving Trial by Jury in Complex Civil Litigation*, 170 JUDICATURE, March-April 1982, at 413.

in refusing to strike a jury demand in *Zenith Radio Corp, V. Matsushita Electrical Industrial Co.*,<sup>11</sup> cogently analyzed the issue when he states that:

A jury, applying its collective wisdom, judgement, and common sense to the facts of a case (in the light of proper instructions on the law) is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so.<sup>12</sup>

## **Due Process**

Where fundamental rights of the citizen are concerned, the adversary system with its plan of trial by jury constitutes the best method yet evolved to safeguard those rights from being enveloped and ultimately destroyed.<sup>13</sup>

The final major premise underlying the complexity exception is the notion that due process of law is violated when a jury tries a complex case. The proponents of the exception maintain that the due process clause of the Fifth Amendment guarantees a competent factfinder and, they assert, a jury in complex litigation is incompetent. Therefore, requiring a jury would conflict with due process rights. Those who favor eliminating juries in complex actions believe that the Fifth and Seventh Amendments should be balanced and “in striking such a balance, the Fifth Amendment appears to have the edge.”<sup>14</sup>

This out-of-hand dismissal of the right to a jury trial demonstrates a notable lack of depth in constitutional analysis. One right is not preeminent to another in all instances, and most rights are reconcilable. In fact, the Fifth and Seventh Amendments are reconcilable.

The first case to use the due process argument to justify a complexity exception was *In re Boise Cascade Securities Litigation*.<sup>15</sup> The *Boise* court was content to strike a jury demand in five consolidated securities fraud cases, rather than use available methods to clarify and expedite matters, e.g., ordering separate trials pursuant to Federal Rule of Civil Procedure 42(b), or using pretrial mechanisms to isolate and crystallize the issues.

The court reached its decision to throw the proverbial baby out with the bath water through the use of an imperfect consideration of various factors, including guessing how long the trial could

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<sup>11</sup> 478 F. Supp, 889 (E.D. Pa. 1979)

<sup>12</sup> *Id.* At 935

<sup>13</sup> Norvell, *Bureaucracy of Jury Trial?* 8 FOR THE DEFENSE 42 (1967)

<sup>14</sup> Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?* 24 N.E. L. SCH. L. REV. 611, 624 (1979).

<sup>15</sup> 420 F. Supp. 99 (W.D. Wash, 1976).

last, guessing how many witnesses could appear, and guessing the number of exhibits that could be presented. In fact, the *Boise* court itself stated that, “the point at which a jury’s limitations exceed its abilities is not precise nor is it easy of definition.”<sup>16</sup>

While some courts have followed the rationale of *Boise Cascade*, other courts have flatly and reasonably rejected the holding. In *In re U.S. Financial Securities Litigation*,<sup>17</sup> the court ruled that the Fifth Amendment due process clause does indeed guarantee the right to a competent factfinder and that the jury was unequivocally “a competent factfinder in complex cases.”<sup>18</sup>

Simply stated, no conflict between the Fifth and Seventh Amendment arises and no “complexity” exception, real, imagined, or created, exists.

In *Financial Securities*, the chief criticism of the due process claim for the “complexity” exception espoused in *Boise Cascade* was the latitude accorded trial judges in determining which actions are “complex” and which are not. The court stated that it had “grave reservations about whether a meaningful test could be developed were we to find such an exception. Where would the courts draw the line between those cases which are, and those which are not, too complex for a jury?”<sup>19</sup>

This lack of objective criteria by which judges could make a before-the-fact decision regarding complexity, renders the complexity exception unmanageable. Moreover, to allow judges to make a ruling along those lines could, in itself, violate due process inasmuch as parties bringing lawsuits could never be assured of their right to a jury trial.

## Conclusion

The issue in these cases, then, is not whether a jury is competent in its factfinding but, rather, whether lawyers properly perform their jobs (for which they are well compensated), so that the simple, clear, and obvious purpose of the Seventh Amendment guaranteeing the right to civil jury trials is preserved. Through the proper and effective use of tools already available to the trial lawyer- rules of procedure and pretrial discovery, to name just two- juries can be adequately educated and informed on all relevant issues.

To summarily strike a jury demand because a case seems “complex” implies that an attorney is uncreative, uncommunicative, and perhaps in the wrong profession. It also implies that the common men and women who comprise the average jury are dense and untrustworthy. Certainly,

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<sup>16</sup> *Id.* At 104.

<sup>17</sup> 609 F. 2d. 411.

<sup>18</sup> *Id.* At 427.

<sup>19</sup> *Financial Securities Litigation*, 609F. 2d 411, 431-432, accord, *Kian V. Mirro Aluminum Co.*, 88 P.R.D. 351 (E.D. Mich. 1980).

these generalizations are not true. The nobler, as well as the safer and smarter, route is to continue conducting the legal system as we have since the inception of our government-by preserving the right to trial by jury in all civil cases.