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A RATIONALE FOR AN EXCEPTION TO THE
SEVENTH AMENDMENT RIGHT TO A JURY TRIAL:
In re Japanese Electronic Products Antitrust Litigation

FRANK M. LOO*

I. INTRODUCTION

THE SEVENTH AMENDMENT GUARANTEES THE RIGHT to a jury trial in civil suits at law. During the past twenty years, however, courts have been confronted with a number of highly complex securities, anti-trust and products liability cases. These cases are considered by some to be beyond the ability of a jury to decide rationally. The issue to be considered herein is whether such cases ought to be tried before a jury notwithstanding the complexity of the matters with which the jury has to deal. It is asserted by others that any exception to the right to a jury trial will result in the long term dilution of this right. In *Japanese Electronic*,¹ the Third Circuit created an exception to the right to jury trial in complex civil trials based on the fifth amendment due process clause.

The Third Circuit decision is significant because a court, for the first time, denied the demand for a jury trial expressly on due process grounds. This Article will analyze the Third Circuit's decision and reasoning in light of the pervasiveness of the seventh amendment right to a jury trial, and argue that exceptions to the seventh amendment exist, not in spite of, but precisely due to the overriding need for procedural due process. The thesis of this Article is that exceptions to the jury trial right should be permitted, and such exceptions are consistent with this right. The Article will focus especially on the Third Circuit's construction of a three-part test,² and will examine an alternative basis for finding an exception to the seventh amendment,³ as set forth in *Morrissey v. Brewer*⁴ and *Feuntes v. Shevin*.⁵ The inference to which this Article is directed is that the three-part test developed by the Third Circuit for measuring the complexity of a case, when tied to the *Morrissey-Fuentes* due process exception to the seventh amendment, yields a workable model which will guide a court to determine with accuracy when an exception to the seventh amendment is clearly mandated.

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¹ 631 F.2d 1069 (3d Cir. 1980).

² See notes 133-62 *infra* and accompanying text.

³ See notes 92-117, 164-91 *infra* and accompanying text.

⁴ 408 U.S. 471 (1972).

⁵ 407 U.S. 67 (1972).

II. BACKGROUND TO *JAPANESE ELECTRONIC*

The National Union Electric Corporation (NUE) and Zenith Radio Corporation (Zenith) filed two separate actions. NUE's suit was filed in 1970; Zenith Radio's was filed in 1974. These plaintiffs (appellees) alleged an expansive range of antitrust violations: sections 1 and 2 of the Sherman Anti-Trust Act,⁶ and Wilson Tariff Act,⁷ the 1916 Anti-dumping Act,⁸ the Robinson-Patman Act,⁹ and the Clayton Act.¹⁰ The defendants (appellants) were twenty-two Japanese manufacturers of consumer electronic products, their subsidiaries and two American companies.¹¹ In addition, approximately 100 other companies were alleged to be co-conspirators, and were named party defendants.¹² A United States based firm, Sears, counterclaimed against Zenith. Sears and other counterclaiming defendant-manufacturers alleged that Zenith violated the Robinson-Patman Act and sections 1 and 2 of the Sherman Act; that Zenith had filed a sham action; and that Zenith had advertised falsely under the Lanham Act.¹³ Both Zenith's and NUE's action were consolidated in 1980.¹⁴

The Japanese manufacturers moved to strike Zenith's and NUE's timely demand for a jury trial on the ground that the litigation was too complex for a jury.¹⁵ As to the notion of complexity, four arguments were made.¹⁶ First, the manufacturers contended that for a jury to iden-

⁶ 15 U.S.C. §§ 1, 2 (1976).

⁷ *Id.* § 8.

⁸ *Id.* § 72.

⁹ *Id.* § 13(a).

¹⁰ *Id.* § 18. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 892-94 (E.D. Pa. 1979), *vacated*, 631 F.2d 1069 (3d Cir. 1980).

¹¹ 478 F. Supp. at 893.

¹² *Id.*

¹³ *Id.* at 894-95 n.15. The Lanham Act is set forth in 15 U.S.C. §§ 1051-1127 (1976).

¹⁴ *In re Japanese Electronic Products Antitrust Litigation*, 388 F. Supp. 565 (J.P.M.D.L. 1975). The dissent in the circuit court attributed the complexity of the case in point to the liberal rules of joinder and consolidation. *In re Japanese Electronic Antitrust Litigation*, 631 F.2d 1069, 1091 (3d Cir. 1980) (Gibbons, J., dissenting). The dissent determined that the seventh amendment "does not guarantee that a single jury will decide multiple separate claims," and therefore concluded that no constitutional issue was properly before the court. *Id.* However, one of the principal problems in protracted litigation is the lack of central control. 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3861, at 322 (1976). Therefore, a great deal of emphasis is given to the importance of identifying "big" cases at an early stage and assigning the case to one judge who would be responsible for controlling the conduct of the pretrial proceedings. *Id.* at 322-23.

¹⁵ 631 F.2d at 1073.

¹⁶ *Id.*

tify the products suitable for price comparisons under the Anti-dumping Act, the jury would have to "review technical features of thousands of different models and understand how differences between the models relate to cost of manufacture, product performance, and marketability,"¹⁷ an exceptionally difficult task; Zenith and NUE rejected this argument, asserting that the jury was capable of identifying functionally equivalent products, and that such identification would not require massive or highly technical proof.¹⁸

Second, the manufacturers contended that the sheer size and scope of the alleged conspiracy would present an insurmountable barrier for a jury. The conspiracy was alleged to have lasted over thirty years and to have involved more than ninety-seven manufacturers, exporters and importers from various nations.¹⁹ "Millions of documents and over 100,000 pages of depositions" had been produced in over nine years of discovery.²⁰ Zenith and NUE contended, however, that proof of conspiracy would not be difficult since the facts were well established in "unambiguous documentation."²¹ Zenith and NUE asserted further that a possible difficulty in understanding foreign business practices would not arise since this was a "classic" Sherman Act case.²²

Third, the manufacturers contended that, given a mass financial documentation, the jury would have to hear experts in accounting, marketing and other technical matters to assist them.²³ Zenith and NUE argued, however, that financial evidence could be compiled in the format of computer printouts and that they did "not foresee great problems in the jury's understanding of the evidence."²⁴ Finally, the manufacturers pointed out that the mere fact of complexity was further compounded by the presence of conceptually difficult issues including whether there was predatory intent and whether products were of like grade and quality.²⁵

The issue before the district court was "whether trial by jury, usually available as of right in private, treble-damage antitrust cases, is guaranteed even in a case so massive and complex as to be beyond 'the practical abilities and limitations of juries.'"²⁶ In deciding whether to

¹⁷ *Id.* at 1074.

¹⁸ *Id.*

¹⁹ 478 F. Supp. at 897.

²⁰ *Id.* It should be noted that the district court made no estimate of how much of the evidence produced would actually be introduced at trial. 631 F.2d at 1073.

²¹ *Id.* at 1074.

²² *Id.*

²³ *Id.*

²⁴ *Id.* Computer analysis is one of the suggested methods for reducing the complexity of a trial. See note 158 *infra* and accompanying text.

²⁵ 631 F.2d at 1074.

²⁶ 478 F. Supp. at 899, 946.

strike the Zenith-NUE demand for jury trial, the district court was skeptical of the claims made by both sides.²⁷ Moreover, the court found that this litigation was "at least as large and complex as others in which jury demands have been struck [on the ground of complexity]."²⁸ The district court concluded, after a lengthy discussion,²⁹ that the seventh amendment guaranteed the right to a jury trial regardless of the suit's complexity and accordingly denied the motion to strike.³⁰ The court then certified the decision for immediate appellate review pursuant to the Interlocutory Decision Act of 1958.³¹

The United States Court of Appeals for the Third Circuit reasoned that "[t]he appellant's assertions of extraordinary complexity are relevant to the issue of whether the trial of this case to a jury would violate due process and therefore would be beyond the guarantee of the seventh amendment."³² Writing for the court, Chief Judge Seitz, referring to a footnote in *Ross v. Bernhard*,³³ indicated that the Supreme Court had left open the possibility that the seventh amendment right to a jury trial might be restricted.³⁴ After examining the procedural requirements of the due process clause of the fifth amendment and the role of the jury, the Third Circuit concluded that due process precluded any right to a jury trial when the jury is not able to act as a knowledgeable factfinder.³⁵

To guide the district court in determining whether the demand for a jury trial should be struck, The Third Circuit set out a three-part test.³⁶ The first part of the test required the district court to predict whether the suit was beyond the ability of the jury.³⁷ The second part of

²⁷ *Id.* at 899. The plaintiffs, Zenith and NUE, attempted to portray the litigation as a simple, "single conspiracy" case. *Id.* The defendants, the Japanese manufacturers, contended that massive amounts of documents and special interrogatories would have to be submitted to the jury. *Id.*

²⁸ *Id.*

²⁹ The lower court examined the construction of the antitrust statutes to determine whether the court was required to reach the constitutional issue. *Id.* at 900-04. The court also examined the historical test and its relation to accounting cases, other causes of action and treble damages. *Id.* at 904-22. Finally, the court discussed *Ross v. Bernhard*, 396 U.S. 531 (1970), and the test it set forth, recent decisions since *Ross* and the public policy of the seventh amendment. *Id.* at 922-42.

³⁰ *Id.* at 942.

³¹ *Id.* at 946. The Interlocutory Decisions Act is codified at 28 U.S.C. § 1292(b) (1976).

³² 631 F.2d at 1089.

³³ 396 U.S. 531 (1970). See notes 66-73 *infra* and accompanying text.

³⁴ 631 F.2d at 1080.

³⁵ *Id.* at 1084.

³⁶ See text accompanying notes 133-62 *infra*.

³⁷ 631 F.2d at 1088.

the test required that the district court find that the jury's capabilities could not be enhanced nor that the complexity of the suit could be reduced.³⁸ The third prong required the district court to make explicit findings on the dimensions of the case's complexity when the court denies a jury demand.³⁹ After finding that the district court had not specifically ruled on the issue of complexity, the appellate court vacated the decision and the case was remanded to the district court.⁴⁰

III. THE SCOPE OF THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."⁴¹ In determining whether the seventh amendment guarantee to a jury trial in civil cases is applicable to a specific case, the Supreme Court has traditionally used the so-called historical test.⁴² Under this test, if the action or its closest historical analogue could be tried before a jury under the common practice of England in 1791,⁴³ the action would be classified as legal in nature and could be tried before a jury today.⁴⁴

³⁸ *Id.*

³⁹ *Id.* at 1089.

⁴⁰ *Id.* at 1090. The court of appeals rejected Zenith's and NUE's assertion that the district court had already examined and discarded the appellant's contention of extraordinary complexity. *Id.* at 1089.

⁴¹ U.S. CONST. amend. VII.

⁴² *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); see also Comment, *The Seventh Amendment and Complex Civil Litigation: The Demise Of The Complexity Exception To Trial By Jury And The Search For A Viable Due Process Alternative*, 50 MISS. L.J. 572, 575 (1979) [hereinafter cited as Comment, *Due Process Alternative*]. See also *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

⁴³ *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (the common law of England rather than that of any individual state is determinative of seventh amendment questions); see Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 486 n.3 (1975) [hereinafter cited as Redish]; Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 (1973) [hereinafter cited as Wolfram]. One possible reason why the common practice of England determined seventh amendment questions was that jury practices varied from state to state. See Shapiro and Coquillete, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 449 (1971). See also Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293-94 (1966).

⁴⁴ Comment, *Due Process Alternative*, *supra* note 42, at 575-76. The seventh amendment is only applicable to "suits at common law," and therefore only actions of a legal nature fall in the scope of its provisions. *Parsons v. Bedford*, 28 U.S. (1 Pet.) 433, 446 (1830); Note, *Perserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 99 n.3 (1979) [hereinafter cited as Note, *Preserving the Right*]; Comment, *Due Process Alternative*, *supra* note 42, at 575-76 n.18.

Two factors complicated the application of the historic test. First, it was difficult to determine whether the action should be classified as either legal or equitable.⁴⁵ If the action were equitable it would be tried before the court in any event. Second, in 1938, law and equity were merged in the federal system through adoption of the Federal Rules of Civil procedure.⁴⁶ Merger consolidated civil jurisdiction over both law and equity.⁴⁷ However, merger did not modify the substantive right to jury trial, which was limited to cases at law.⁴⁸ Consequently, with cases consisting of both legal and equitable issues having common questions of fact, the order in which the issues were to be tried became important.⁴⁹ Adjudication of the equitable issues *first* would collaterally estop presentation of legal issues to a jury.⁵⁰ Therefore, if the basic nature of the dispute was legal, the legal issues were tried first.⁵¹

In emphasizing the effect of the Federal Rules of Civil Procedure on the boundaries of legal and equitable jurisdiction, the Supreme Court departed from the historical test in *Beacon Theatres, Inc. v. Westover*.⁵²

⁴⁵ *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891); Comment, *Due Process Alternative*, *supra* note 42, at 567; *see Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 516 (1959) (Stewart, J., dissenting); James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 658-60 (1963) (a clear division between equity and law never existed due in part to their borrowing from each other).

⁴⁶ Comment, *Due Process Alternative*, *supra* note 42, at 567; C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 62, at 292 (3d ed. 1976); *see also* FED. R. CIV. P. 2. The effect was to sweep away the "[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity. . . ." *Ross v. Bernhard*, 396 U.S. 531, 539-40 (1970). *See also Bradley v. United States*, 214 F.2d 5, 7 (5th Cir. 1954). *But see Groome v. Steward*, 142 F.2d 756 (D.C. Cir. 1944) (the difference between equity and law is important in deciding whether a party has a right to a jury trial); *accord, Chichester v. Kramer*, 157 F. Supp. 79, 80 (S.D.N.Y. 1957).

⁴⁷ FED. R. CIV. P. 2; *see* 2 MOORE'S FEDERAL PRACTICE ¶2.02 (2d ed. 1981).

⁴⁸ 28 U.S.C. § 2072 (1976). *See also Connecticut Gen. Life Ins. Co. v. Candimat Co.*, 83 F. Supp. 1, 2 (D. Md. 1949); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947); *Dottenheim v. Emerson Elec. Mfg. Co.*, 7 F.R.D. 343, 344 (E.D.N.Y. 1947); *Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58, 59 (S.D.N.Y. 1943); FED. R. CIV. P. 38(a), 39.

⁴⁹ Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751, 763 (1979) [hereinafter cited as Note, *Jury Trials*].

⁵⁰ 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE: RULES EDITION § 894, at 82 (1961).

⁵¹ *Forstmann Woolen Co. v. Alexander's Dept. Stores, Inc.*, 11 F.R.D. 405, 407 (S.D.N.Y. 1951); *see Ring v. Spina*, 166 F.2d 546, 550 (2d Cir.), *cert. denied*, 335 U.S. 813 (1948); Note, *Jury Trials*, *supra* note 49, at 764 n.74.

⁵² 359 U.S. 500 (1959) (plaintiff sought a declaratory judgment that its contract to show "first-run" pictures did not violate federal antitrust laws). *See McCoid, Procedural Reform and the Rights to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 5, 10-11 (1967) [hereinafter cited as McCoid]; Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401, 408-09 (1973).

Traditionally, one basis for equitable jurisdiction was the inadequacy of a remedy at law.⁵³ In determining whether the remedy at law was adequate, the Court reasoned that legal remedies made available since 1791, specifically the Declaratory Judgement Act⁵⁴ and the aforesaid Federal Rules of Civil Procedure,⁵⁵ had to be taken into account. Thus, the conversion of historically equitable claims into actions at law, through the adoption of modern legal remedies, provided for many more actions which might be tried before a jury.

In 1962, three years after *Beacon Theatres*, the Supreme Court made a further departure from the traditional historical test and again expanded the right to jury trial.⁵⁶ In *Dairy Queen, Inc. v. Wood*,⁵⁷ the Court found that the right to a jury trial could not be defeated merely because the legal issue was "incidental" to the equitable issues in the case.⁵⁸ Parties to a civil action could move for jury trial even though equitable issues predominate.

*Ross v. Bernhard*⁵⁹ stands for the Supreme Court's furthest departure from the historical test.⁶⁰ The Court held that the right to jury trial extended to a stockholder derivative suit which, historically, could only be brought in equity.⁶¹ The Court separated the derivative suit into two parts: the shareholder's equitable claim on one hand, and the corporation's legal and equitable claims on the other.⁶² The Court found that the

⁵³ 359 U.S. at 506-07.

⁵⁴ 28 U.S.C. §§ 2201-2202 (1976).

⁵⁵ 359 U.S. at 507.

⁵⁶ See Note, *Preserving the Right*, *supra* note 44, at 105; Note, *Jury Trials*, *supra* note 49, at 765-66.

⁵⁷ 369 U.S. 469 (1962) (owner of trademark brought suit alleging breach of licensing contracts for the right to use the trademark).

⁵⁸ *Id.* at 470, 472-73. In holding that legal issues must be tried by a jury, the Court relied on *Scott v. Neely*, 140 U.S. 106 (1891), Rule 38(a) of the FED. R. CIV. P., and *Beacon Theatres*. *Id.* at 470-73. The *Dairy Queen* court also found, consistent with *Beacon Theatres*, that if a master can aid the jury in understanding the complexity of an accounting, traditionally an equitable remedy, the remedy at law would no longer be inadequate and jury trial should be granted. 369 U.S. at 478; see *McCoid*, *supra* note 52, at 8-9; Oakes, *The Rights to Strike the Jury Trial Demand in Complex Litigation*, 34 MIAMI L. REV. 243, 275 (1980) [hereinafter cited as Oakes]; Comment, *The Seventh Amendment — A Return to Fundamentals*, 10 URB. L. ANN. 313, 315 n.14 (1975).

⁵⁹ 396 U.S. 531 (1970).

⁶⁰ See Oakes, *supra* note 58, at 275; Note, *Preserving the Right*, *supra* note 44, at 105.

⁶¹ 396 U.S. at 544, 546 (Stewart, J., dissenting). Derivative actions were heard in equity because the shareholder was threatened with irreparable harm and had no adequate remedy at law when the corporation itself refused to sue. *Id.* at 539.

⁶² *Id.* at 538-39. In examining the corporation's claim, the court in *Ross* concluded: "[We] have no doubt that the corporation's claim is, at least in part, a

corporation's *legal* claim against the directors mandated the shareholders right to a jury trial.⁶³ The *Ross* decision further exemplified the determination of the Court to separate legal claims from equitable claims in order to give the widest possible scope to the seventh amendment right to a jury trial.⁶⁴

A. Applications of the *Ross* Test

In recent years the courts have been confronted with a number of complex cases, most notably in the areas of antitrust and securities, for which demands for jury trial have been made.⁶⁵ The complex nature of antitrust and securities cases has caused courts to question the abilities of juries to rationally decide these cases.⁶⁶ As a result, some courts have sought an exception to the seventh amendment right to a jury trial. In a footnote to the *Ross* opinion, the Supreme Court set forth three factors for determining whether an issue in a case is to be considered legal in respect to the jury right:

As our cases indicate, the "legal" nature of an issue is determined by considering, first the premerger custom with reference to such questions; second, the remedy sought; and, third, the *practical abilities and limitations of juries*. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.⁶⁷

The first two factors have been generally interpreted as reaffirming the tenability of the historical test as modified by *Beacon Theatres* and *Dairy Queen*.⁶⁸ The third factor has been accepted by some commentators as the basis for an exception to the seventh amendment right to a jury trial.⁶⁹ Some of the lower courts have used the *Ross* footnote as a

legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence." *Id.* at 542.

⁶³ *Id.* at 539. This is so despite the fact that the legal issues could not have been tried at law before the enactment of the joinder provisions in the Federal Rules of Civil Procedure. See *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963); see also *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953).

⁶⁴ 396 U.S. at 549 (Stewart, J., dissenting); see *Oakes*, *supra* note 58, at 276 n.165; see also Comment, *Due Process Alternative*, *supra* note 42, at 581; Note, *Preserving the Right*, *supra* note 44, at 105.

⁶⁵ See *Oakes*, *supra* note 58, at 300.

⁶⁶ *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 64-65 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 103-05 (W.D. Wash. 1976).

⁶⁷ 396 U.S. at 538 n.10 (emphasis added).

⁶⁸ *Wolfram*, *supra* note 43, at 643-44; Note, *The Right to a Jury Trial in Complex Litigation*, 92 HARV. L. REV. 898, 902 (1979) [hereinafter cited as Note, *Right to a Jury*]; Comment, *Due Process Alternative*, *supra* note 42, at 582.

⁶⁹ See, e.g., *Kane, Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 *Hastings L.J.* 1, 11, 33-35 (1978); Note, *Right to a Jury*, *supra* note 68, at 910-11;

basis for granting⁷⁰ or denying⁷¹ a jury trial. However, a number of commentators have rejected the third factor, calling it an aberration.⁷² Moreover, the Supreme Court has never given cognizance to the *Ross* footnote, although it has had the opportunity to do so on many occasions.⁷³ Whether the *Ross* footnote is a sufficient basis for an exception to the seventh amendment right to jury trial, then, is not clear.

B. Application of the Fifth Amendment

The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."⁷⁴ The fifth amendment provides an alternate basis for an exception to the seventh amendment right for a jury trial.⁷⁵ The exception is founded on the principle that a fair trial requires the fact finder

Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 793-95, 800 (1978).

⁷⁰ See, e.g., *Pons v. Lorillard*, 549 F.2d 950, 953-54 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978); *Minnis v. UAW*, 531 F.2d 850, 852-53 (8th Cir. 1975); *Farmers-Peoples Bank v. United States*, 477 F.2d 752, 756-57 (6th Cir. 1973).

⁷¹ E.g., *Hyde Properties v. McCoy*, 507 F.2d 301, 305-06 (6th Cir. 1974); *ILC Peripherals Leasing Corp. v. I.B.M. Corp.*, 458 F. Supp. 423, 445-49 (N.D. Cal. 1978), *aff'd sub nom. per curiam on other grounds*, *Memorex Corp. v. I.B.M. Corp.*, 636 F.2d 1188 (9th Cir. 1980); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 66-70 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).

⁷² C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 92, at 454 (3d ed. 1976); Redish, *supra* note 43, at 525-26; Wolfram, *supra* note 43, at 644-45; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 176 n.26 (1970); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 130 (1971).

Some courts have rejected the *Ross* test. See, e.g., *In re U.S. Financial Sec. Antitrust Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.*, *Gant v. Union Bank*, 446 U.S. 929 (1980) (bankruptcy of a large real estate corporation); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (E.D. Mich. 1980); see also *Rosen v. Dick*, 639 F.2d 82, 86 (2d Cir. 1980) (the court questioned any limit on the right to jury trial without some direction from the Supreme Court).

⁷³ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979) (a broader application of collateral estoppel held not to violate the seventh amendment); *Lorillard v. Pons*, 434 U.S. 575, 580-82 (1978) (right to jury trial is present in age discrimination suits); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460-61 (1977) (upheld administrative agency adjudication of OSHA violations); *Pernell v. Southall Realty*, 416 U.S. 363, 376, 381 (1974) (right to jury trial exists in a suit to recover real property under a District of Columbia Code provision); *Curtis v. Loether*, 415 U.S. 189, 191-92 (1974) (no right to demand jury trial for Fair Housing Act violations); *Colgrove v. Battin*, 413 U.S. 149, 159-160 (1973) (seventh amendment is not violated by local rule allowing six-man juries in civil cases); cf. *In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 431-32 (9th Cir. 1979) (the seventh amendment applied without regard to a lawsuit's size or complexity), *cert. denied sub nom.*, *Gant v. Union Bank*, 446 U.S. 929 (1980).

⁷⁴ U.S. CONST. amend. V.

to be able to understand both the issues and the evidence in order to be able to render a reasoned verdict.⁷⁶ The procedure utilized for resolving the issues of law and fact has to be fundamentally fair to the individual, in accordance with the dictates of the fifth amendment.⁷⁷ To the extent that the right to a jury trial defeats the purpose for which that right exists, namely, fundamental fairness, the contention is that, for the sake of fundamental fairness, no right to a jury trial may exist.⁷⁸

In the last five years, three district courts have at least implicitly recognized a complexity exception to the seventh amendment based on the due process clause of the fifth amendment: *In re Boise Cascade Securities Litigation*,⁷⁹ *Bernstein v. Universal Pictures, Inc.*⁸⁰ and *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*⁸¹ All three courts couched their opinions in language which, at a minimum, has overtones of due process analysis.⁸² But recently, the

⁷⁶ Harris and Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L. SCH. L. REV. 611, 620 (1979) [hereinafter cited as Harris and Liberman]; Comment, *Due Process Alternative*, *supra* note 42, at 600.

⁷⁷ J. NOWAK, R. ROTUNDA & N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 501 (1978); *see also* *Kinsella v. United States*, 361 U.S. 234, 246 (1960); *Hannah v. Larche*, 363 U.S. 420, 440-42 (1960); *Galvin v. Press*, 347 U.S. 522, 530 (1954).

⁷⁸ Harris and Liberman, *supra* note 76, at 620-21; Comment, *Due Process Alternative*, *supra* note 42, at 602.

⁷⁹ 420 F. Supp. 99 (W.D. Wash. 1976) (former shareholders in a company which had been acquired by a second company and who received shares of stock of second company brought a securities fraud action against the acquiring company).

⁸⁰ 79 F.R.D. 59 (S.D.N.Y. 1978) (class action by lyricists and composers of music who alleged restraint of trade and monopolization by United Artists Corporation).

⁸¹ 458 F. Supp. 423 (N.D. Cal. 1978) (suit brought alleging monopolization or attempted monopolization by I.B.M. of various markets in the computer industry).

⁸² The *Boise Cascade* court relied heavily on the due process guarantee of fundamental fairness even though due process was not specifically referred to. The court reasoned that

at some point, it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner. When that occurs, the question arises as to whether the right and necessity of fairness is defeated by relegating fact finding to a body not qualified to determine the facts.

420 F. Supp. at 104. *See also* Comment, *Due Process Alternative*, *supra* note 42, at 604.

In *Bernstein*, the court's reliance on due process is evidenced by its conclusion that the failure to strike a demand for a trial by jury would permit a party "at its choice the right to an irrational verdict." 79 F.R.D. at 71; *see* Comment, *Due Process Alternative*, *supra* note 42, at 604.

The *ILC Peripherals* court reasoned that the purpose of the jury was a protective shield against arbitrary government decisions. 458 F. Supp. at 448. Moreover, this ideal would be subverted if juries were required despite the substantial risk of an arbitrary decision. *Id.* at 448-49.

Ninth Circuit in *In re U.S. Financial Securities Litigation*⁸³ held that there is no exception to the seventh amendment right to jury trial.⁸⁴ In that case purchasers of stocks and debentures alleged violations of state and federal securities laws, common law fraud and negligence.⁸⁵ With respect to the due process issue, the Ninth Circuit challenged the two assumptions upon which the right to a competent factfinder is based, "complexity [of the issues] and the inability of a jury to serve [competently] as a fact finder."⁸⁶ As to complexity, the court indicated that both attorneys and judges, utilizing suggestions from the *Manual for Complex Litigation*,⁸⁷ could readily analyze and synthesize complex facts and issues into one coherent concise theory.⁸⁸ As to juries, the court noted that little substantive research had been done on the subject of competence.⁸⁹ The court stated that "no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case."⁹⁰ The court expressed grave reservations as to whether a meaningful test could be developed to find a fifth amendment exception to the seventh amendment.⁹¹ Hence, the tenability of a fifth amendment exception to the seventh amendment remains, at best, indecisive.

IV. ANALYSIS OF THE THIRD CIRCUIT'S DECISION

A. *No Application of the Ross Test*

In holding that the seventh amendment right to jury trial may not apply to complex civil trials, the Third Circuit in *Japanese Electronics* relied, at least partially, on the *Ross* footnote. The court agreed with the lower court that "it was unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion,"⁹² but added "at the very least, the Court has left open the possibility that the 'practical abilities and limitation of juries' may limit the range of suits subject to the seventh amendment and has read its prior seventh amendment decisions as not precluding

⁸³ 609 F.2d 411 (9th Cir. 1979).

⁸⁴ *Id.* at 432.

⁸⁵ *Id.* at 413.

⁸⁶ *Id.* at 427.

⁸⁷ See notes 153 and 157 *infra* and accompanying text.

⁸⁸ 609 F.2d at 427-29.

⁸⁹ *Id.* at 430. See Note, *Preserving the Right*, *supra* note 44, at 114-15; *Recent Cases*, 49 U. CIN. L. REV. 506, 513 n.57 (1980).

⁹⁰ 609 F.2d at 431.

⁹¹ *Id.* at 431-32.

⁹² 631 F.2d at 1080.

⁹³ *Id.* See also the lower court's thoughtful and comprehensive discussion of the *Ross* footnote at 478 F. Supp. 889, 926-34.

such a ruling."⁹³ On the basis of the court's findings, the *Ross* test implies only that an exception to the seventh amendment is *possible*, but not at the moment decisive.⁹⁴ The court next turned to consideration of the plausibility of the fifth amendment due process exception.

B. Three Primary Values

In examining due process, Chief Judge Seitz acknowledged that there were no specific precedents for "finding a due process violation in the trial of any case to a jury."⁹⁵ Instead the court considered three primary values promoted by due process during a trial. First, the court, relying on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*⁹⁶ and *Matthews v. Eldridge*,⁹⁷ found that the primary benefit of due process in fact finding procedures "is to minimize the risk of erroneous decisions."⁹⁸ A jury that cannot understand the evidence nor the legal rules to be applied to a case *cannot* provide a reliable safeguard against erroneous verdicts.⁹⁹ Second, the Court, noting that the law presumes the jury will decide the case rationally,¹⁰⁰ could reasonably infer that the jury should "resolve each disputed issue on the basis of a fair and reasonable assessment of the evidence, and a fair and reasonable application of relevant legal rules."¹⁰¹ To the extent that a jury cannot

⁹⁴ See notes 72-73 *supra* and accompanying text.

⁹⁵ 631 F.2d at 1084. The Court of Appeals for the Third Circuit did cite *Citron v. Arco Corp.*, 377 F.2d 750 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967), in which it was "found that frequent interruptions of the plaintiff's presentation of evidence had left the jury unable to understand some very difficult aspects of the plaintiff's case." 631 F.2d at 1084 n.14. The *Citron* court concluded that this violated plaintiff's due process rights. However, the Third Circuit in *Japanese Electronic* did not determine *Citron's* stare decisis effect, but merely noted its similarity to *Japanese Electronic*. *Id.*

In its analysis, the *Japanese Electronic* court did not rely on decisions from other jurisdictions including *Boise Cascade*, *ILC Peripherals* and *Bernstein*, which implicitly recognized a due process violation problem in some complex trials to a jury. See text accompanying notes 79-82 *supra*. Nor did the court attempt to refute or even discuss the recent Ninth Circuit decision, *In re Financial Sec. Litigation*. 631 F.2d at 1086-87. See notes 83-91 *supra* and accompanying text.

⁹⁶ 442 U.S. 1 (1979) (reasonable entitlement is not created merely because the state provides the possibility of parole).

⁹⁷ 424 U.S. 319, 335 (1976) (risk of an erroneous decision was a major factor in the Court's holding that the due process clause did not require, prior to the termination of Social Security disability benefit payments, an opportunity for an evidentiary hearing).

⁹⁸ 631 F.2d at 1084, *quoting* *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1079.

¹⁰¹ *Id.* at 1084.

decide the case rationally, the very utility of a jury, as fact-finder, is open to question. Third, the court, relying on *Goldberg v. Kelly*,¹⁰² concluded that "in the context of a completely adversary proceeding, like a civil trial, due process requires that the 'decisionmaker's conclusion . . . rest *solely* on the legal rules and the evidence adduced at the hearing.'" ¹⁰³

On the basis of these three primary due process values, the court concluded that due process requires a denial of a jury trial when a jury will not be able to perform its task of rational decision making with a reasonable understanding of the evidence and the relevant legal standards.¹⁰⁴ The analysis of the court's third primary value is troublesome. By using the "solely on the legal rules and evidence adduced at the hearing" language, the court appears to saddle the jury with a fact finding burden as high as that placed on administrative agencies.¹⁰⁵ In most federal cases involving jury trials, a general verdict procedure is used which merely requires that a jury find for one of the parties.¹⁰⁶ In fact, verdicts need not be strictly internally consistent,¹⁰⁷ or consistent among juries considering the same issue.¹⁰⁸

There are at least two reasons for deferring to the jury and allowing it to give results without reason. First, juries can decide the hard cases *equitably* since, unlike judges, juries are not bound by precedent and would not be making law.¹⁰⁹ Second, juries serve a legislative function by crystallizing and infusing community values into the judicial process.¹¹⁰ It is clear that the standard set down for jury verdicts is

¹⁰² 397 U.S. 254 (1970) (Court held that a state termination of public assistance payments to a particular recipient without affording recipient the opportunity for an evidentiary hearing prior to termination is violative of procedural due process considerations).

¹⁰³ 631 F.2d at 1084, *quoting* *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (emphasis added).

¹⁰⁴ 631 F.2d at 1084.

¹⁰⁵ This burden is evidenced by the court's discussion of directed verdicts and judgements notwithstanding the verdict. *Id.* at 1087-88. In the discussion, the court reasoned that both motions were insufficient to prevent erroneous decisions because they "call for no inquiry into whether the jury will rest or has rested its verdict solely on the evidence and relevant rules of law." *Id.* at 1088.

¹⁰⁶ C. WRIGHT, *LAW OF FEDERAL COURT* § 94, at 465 (3d ed. 1976).

¹⁰⁷ *Hamling v. United States*, 418 U.S. 87, 101 (1974); *Dunn v. United States*, 284 U.S. 390, 393 (1932).

¹⁰⁸ *Miller v. California*, 413 U.S. 15, 26 n.9 (1973); *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957).

¹⁰⁹ See Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 56-57 (1977) [hereinafter cited as Higginbotham]; see also Oakes, *supra* note 58, at 250; Note, *Jury Trials*, *supra* note 49, at 754.

¹¹⁰ Oakes, *supra* note 58, at 250; Note, *Jury Trials*, *supra* note 49, at 753-54; Comment, *Due Process Alternative*, *supra* note 42, at 572-73.

much lower than the "solely on the legal rules and evidence adduced at hearing" standard created by the court in the instant case. The root of the problem is found in the court's reliance on *Goldberg v. Kelly*,¹¹¹ a case tried before an administrative agency.¹¹²

The Federal Administrative Procedure Act¹¹³ requires in formal adjudication that the federal agencies document the "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record."¹¹⁴ The standard of judicial review for administrative agency determinations is the extent to which the conclusions are supported by substantial evidence in the record.¹¹⁵ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹¹⁶ The *Japanese Electronic* court's "solely on the legal rules and evidence" standard appears to be as high, if not higher, than the administrative requirements and standards of review. The Third Circuit's reliance on administrative law as a source for the standard of review for jury verdicts undercuts the court's due process exception to the seventh amendment.

C. *Resolution Of A Conflict: Four Arguments Raised By the District Court and the Circuit Court*

The creation of an exception to the seventh amendment based on fifth amendment due process results in a conflict between the two amendments.¹¹⁷ The court resolved the conflicting guarantees of the Constitu-

¹¹¹ 397 U.S. 254, 263-64 (1970).

¹¹² See note 102 *supra* and accompanying text.

¹¹³ 5 U.S.C. § 557(c) (1976).

¹¹⁴ *Id.*

¹¹⁵ Note, *Jury Trials*, *supra* note 49, at 773 n.122.

¹¹⁶ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See Note, *Jury Trials*, *supra* note 49, at 773 n.122. The language of the statute may provide such a standard. *E.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (1976). In some instances, including that of *Consolidated Edison*, the Court supplies the standard to which the statute was silent. See, *e.g.*, *Ellens v. Railroad Retirement Bd.*, 132 F.2d 636, 639 (2d Cir. 1943).

¹¹⁷ See Comment, *Due Process Alternative*, *supra* note 42, at 614; Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 798 (1978) [hereinafter cited as Comment, *Incompetent Jury*]. There are two possible methods to resolve the constitutional ambiguity. First, one can construe the fifth amendment as a limitation on the seventh amendment. This is supported by a number of articles that have asserted that the *Ross* test accommodates the fifth amendment by recognizing certain limits to jury competence. *E.g.*, Oakes, *supra* note 58, at 298-99; Note, *Right to a Jury*, *supra* note 68, at 614-15. Another approach to resolving the conflicting guarantees of the Constitution is by a balancing process which was utilized by the *Japanese Electronic* court. See Harris and Liberman, *supra* note 76, at 624; Comment, *Due Process Alternative*, *supra* note 42, at 615. Balancing has been used in other areas of constitutional litigation. *Branzburg v. Hayes*, 408 U.S. 665, 687-91 (1972); see also *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

tion by balancing them, and thereby found that the due process objections to a jury trial implicated values of fundamental importance.¹¹⁸ Consequently, the court determined that the requirements of due process took priority over the right to a jury trial.¹¹⁹

The Third Circuit examined four arguments raised by the district court against a due process exception to the seventh amendment. First, the district court challenged the premise that a case could exceed a

¹¹⁸ The court relied on *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (conflict between the defendant's right to a fair trial with the rights of the press and the public to go to a pretrial suppression hearing), and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (prior restraint of the publication of the confessions or admissions made by the accused on the grounds of the sixth amendment right to a fair trial). *Japanese Electronic* considered the constitutionally protected interests with an eye toward more reasonable accommodations. 631 F.2d at 1084. The court found three values of fundamental importance which were implicated by due process. First, factual determinations in judicial decisions must bear some reasonable degree of accuracy in order for legal remedies to be applied consistently with the purposes of the law. Second, erratic and completely unpredictable jury verdicts would be inconsistent with even-handed justice. Third, the objectives of most rules of evidence and procedure in promoting a fair trial would be lost unless the jury understands the evidence and legal rules sufficiently. *Id.* See *Harris and Liberman*, *supra* note 76, at 624-25 (enumeration of practical considerations in weighing the competing values of the fifth and seventh amendments). Although the court cited no support for these due process values of fundamental importance, these values are generally consistent with the principles of due process. See notes 74-78 *supra* and accompanying text.

Unlike the due process values of fundamental importance, the court found that the loss of the right to jury trial does not implicate the same fundamental concerns. 631 F.2d at 1084-85. The court reasoned that the absence of jury trial requirements in equitable and maritime actions indicates that fair trial and basic justice can be provided in the federal courts *without* a jury. *Id.* at 1085. See *United States v. Reynolds*, 397 U.S. 14, 18-19 (1970) (condemnation proceedings); *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966) (certain bankruptcy proceedings); *Shillitani v. United States*, 384 U.S. 364, 365 (1966) (actions for civil contempt); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (actions to deport aliens); *Northwest Airlines, Inc. v. Air Line Pilot Ass'n Int'l*, 373 F.2d 136, 142 (8th Cir.), *cert. denied*, 389 U.S. 827 (1967) (actions to enforce arbitration awards). Moreover, the seventh amendment is one of the few provisions of the Bill of Rights which has not been applied to the states through the fourteenth amendment. 631 F.2d at 1085. See also *Harris and Liberman*, *supra* note 76, at 624.

¹¹⁹ The appellees, Zenith and NUE, contended that the due process objection carried less weight than the preservation of the right to jury trial; this was argued because due process concerns raise merely a "hypothetical prospect" of an improper jury verdict and would be applied prospectively prior to trial. 631 F.2d at 1085. See Comment, *Due Process Alternative*, *supra* note 42, at 613; Note, *Preserving the Right*, *supra* note 44, at 114. It requires a judge to predict the competence of an untested jury and the complexity of an untried case. See Note, *Preserving the Right*, *supra* note 44, at 114. However, the court of appeals reasoned that there was a substantial possibility of an erroneous verdict if the jury was unable to understand the evidence and the legal rules. 631 F.2d at 1085. Moreover, the procedural requirements of due process are by nature prospective, but that fact has never diminished its importance. *Id.*

jury's competency and contended that a jury is at least as able as a judge to try a complex case.¹²⁰ But the court of appeals replied that long trials would invariably interrupt the personal life of a juror and thereby eliminate many jurors whose professional background qualified them to hear the case.¹²¹ The court pointed out that a jury would probably not be familiar with the technical subject matter, nor with the litigation process.¹²² The experience and abilities of judges, however, negated many of these difficulties.¹²³ Second, the district court argued that the due pro-

¹²⁰ 631 F.2d at 1086. The district court relied on three assumptions: (1) juries possess the wisdom, experience and common sense of twelve persons; (2) juries force counsel to organize the mass of information into an understandable form and to clarify controlling issues; and (3) the competence of the jury can be enhanced by special trial techniques such as preliminary and interim charges by the judge. See Note, *Jury Trials*, *supra* note 49, at 753-54; Higginbotham, *supra* note 109, at 54.

¹²¹ 631 F.2d at 1086. See also Note, *Jury Trials*, *supra* note 49, at 756. Furthermore, the court of appeals reasoned that any assessment of the jury's competence to pass on complex cases should also include considerations of the jury's limitations and the abilities of judges. 631 F.2d at 1086.

In most courts jury duty averages approximately ten days. However, there is a great deal of variation. Some courts have a one day or one trial method, whereas others require duty of thirty days or more. RESEARCH AND INFORMATION SERVICE, NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 32-33 (1976). The length of some modern suits can range from four months to two years. *Berstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 63-64 (1978) (the minimum estimate of the duration of the trial as to the named plaintiffs alone was four months); *ILC Peripherals Leasing Corp. v. International Business Mach. Corp.*, 458 F. Supp. 423, 444 (N.D. Cal. 1978) (five-month trial, nineteen days of jury deliberation); *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (S.D. Conn. 1978), *rev'd on other grounds*, 599 F.2d 32 (2d Cir. 1979) (fourteen month trial; thirty-eight days of jury deliberation); *In re U.S. Financial Sec. Litigation*, 75 F.R.D. 702, 713 (S.D. Cal. 1977) (trial estimated to last two years or more). See also, Note, *Right to Jury*, *supra* note 68, at 899. Moreover, these long periods eliminate many jurors whose background qualifies them to hear the case. Comment, *Due Process Alternative*, *supra* note 42, at 608-10; Comment, *Incompetent Jury*, *supra* note 118, at 776-83.

Although the court of appeals considered the limitations of judges in complex trials, it did not discuss one major limitation, which is possible bias or corruption. See Note, *Jury Trials*, *supra* note 49, at 753 n.10 and accompanying text; Note, *Preserving the Right*, *supra* note 44, at 115 n.80 and accompanying text.

¹²² 631 F.2d at 1086.

¹²³ It is presumed that a judge is competent to decide a complex case. *Id.* at 1086-87. See Harris and Liberman, *supra* note 76, at 622-23; see also Comment, *Due Process Alternative*, *supra* note 42, at 610-11. *Contra*, Note, *Preserving the Right*, *supra* note 44, at 115 n.80 and accompanying text. The court's first consideration is that a long trial will not greatly disrupt the professional and personal life of a judge. Second, although it cannot be assumed that a judge is more intelligent or more familiar with the technical subject matter than the jury, the judge has substantial familiarity with the process of litigation from the bench and practice. 631 F.2d at 1087. See Harris and Liberman, *supra* note 76, at 622; Comment, *Due Process Alternative*, *supra* note 42, at 610-11. This familiarity enables the judge to "digest a large amount of evidence and legal argument, segregate distinct issues and the portions of evidence relevant to each issue, assess the opin-

cess exception failed to account for the special benefits juries bring to civil litigation including community values and wisdom.¹²⁴ The court of appeals replied that without the jury's ability to understand the evidence and rules of law, these special benefits were of no effect in a complex trial.¹²⁵ Third, the district court asserted that motions for directed verdict or judgment notwithstanding the verdict would ensure against arbitrary verdicts by the jury.¹²⁶ The court of appeals replied that these motions were not an effective safeguard since a court could not grant these motions "if the evidence might reasonably support a verdict for either side."¹²⁷ Due to the substantial property rights that

ions of expert witnesses, and apply highly complex legal standards to the facts of the case." 631 F.2d at 1087. Moreover, the judge is able to make better use of special trial techniques. *Id.* See Harris and Liberman, *supra* note 76, at 623. Third, FED. R. CIV. P. 52(a) requires that a judge, in a trial without a jury, issue findings of fact and conclusions of law. This requirement "offsets the substantial tendency to overlook issues in order that a verdict might be reached in these difficult cases." 631 F.2d at 1087. Fourth, FED. R. CIV. P. 59(a) allows the judge to reopen the trial to obtain clarification or additional evidence if during the deliberations the judge becomes confused or unable to decide. *Id.*

¹²⁴ In its rejection of the due process exception, the district court enumerated three special benefits. 631 F.2d at 1085. First, a jury issues a verdict without an opinion or explanation. This allows the jury to modify harsh results to conform to community values. *Id.* See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 348-50 (6th ed. 1938); see Note, *Jury Trials*, *supra* note 49, at 753-54. Second, a jury grants greater legitimacy to decisions that require factual determinations of degree rather than absolutes, and thus makes line-drawing seem less arbitrary. 631 F.2d at 1085. See Higginbotham, *supra* note 109, at 52, 59-60; Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967). See also Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899). Third, the jury provides a needed check on judicial power. Note, *Jury Trials*, *supra* note 49, at 753; Note, *Preserving the Right*, *supra* note 44, at 115 n.80. Alexander Hamilton felt that the only legitimate reason for the use of the civil jury trial was to protect the parties from corrupt judges. THE FEDERALIST No. 83, at 563-65 (J. Cooke ed. 1961).

¹²⁵ The court of appeals noted that "when the jury is unable to determine the normal application of the law to the facts of a case and reaches a verdict on the basis of nothing more than its own determination of community wisdom and values its operation is indistinguishable from arbitrary and unprincipled decision making." 631 F.2d at 1085.

¹²⁶ Directed verdicts or judgments notwithstanding the verdict are governed by the same standard, which requires that "if the evidence is of such character that reasonable men, in the impartial exercise of their judgment may reach different conclusions, the case should be submitted to the jury." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978), quoting *Silverii v. Kramer*, 314 F.2d 407, 409 (3d Cir. 1963); see *Roger v. Exxon Research & Engineering Co.*, 404 F. Supp. 324, 335-36 (D.N.J. 1975). Consequently, the district court reasoned that there was "little or no room for an 'irrational' verdict." 478 F. Supp. at 938.

¹²⁷ 631 F.2d at 1087. However, this type of post-verdict analysis of complexity has been advocated as an effective means of dealing with complexity as well as preserving the right to jury trial. *In re U.S. Financial Sec. Litigation*, 609 F.2d 411, 432 (1979); see Comment, *Due Process Alternative*, *supra* note 42, at 613; Note, *Preserving the Right*, *supra* note 44, at 118-19.

often are at stake in an action at law, the court found that due process required a greater measure of reliability.¹²⁸ Finally, the district court asserted that once an exception is allowed it would eventually lead to a systematic dilution of the right to a jury trial.¹²⁹ Any test would be too speculative to apply practically.¹³⁰ But the court of appeals determined that this was not a problem since the court's three-part test required that a district court make explicit findings of complexity whenever it denies the right to a jury trial.¹³¹ Moreover, any erroneous denial of jury trial could always be remedied through a writ of mandamus.¹³²

D. *The Creation of a Three-Part Test*

The three-part test devised by the Third Circuit was designed to deny one's seventh amendment right to a jury trial on due process grounds only in exceptional cases, thereby preventing a dilution of the right.¹³³ The test is detailed and comprehensive. It includes all the important factors which have been discussed in the cases and literature,¹³⁴

¹²⁸ 631 F.2d at 1088; Note, *Right to a Jury*, *supra* note 68, at 911.

¹²⁹ 631 F.2d at 1088; *see also In re U.S. Financial Sec. Litigation*, 609 F.2d at 431-32 (1979); *Radial Lip Machine, Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 228 (N.D. Ill. 1977) (the "likely result [of the case-by-case application of *Ross*] would be a dilution of the right to jury trial."); Wolfram, *supra* note 43, at 644 (the *Ross* footnote raises "the spectre of federal judges using a disturbingly broad discretion in their determination of whether a jury ought to be interposed in particular cases."); Note, *Preserving the Right*, *supra* note 44, at 112.

¹³⁰ 478 F. Supp. at 931-34; *see also In re U.S. Financial Sec. Litigation*, 609 F.2d at 432 (1979); Note, *Preserving the Right*, *supra* note 44, at 114-15.

¹³¹ 631 F.2d at 1089. Another safeguard cited by the court of appeals was the overwhelming support for the preservation of jury trial by trial judges. *Id.*

¹³² Supreme Court decisions have been interpreted as "requiring review and correction by mandamus, no matter how difficult or uncertain the law surrounding the jury trial question may be. . . ." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3935, at 243 (1977). *See Dairy Queen v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959); *In re Zweibon*, 565 F.2d 742, 745-46 (D.C. Cir. 1977); *In re Union Nacional de Trabajadores*, 502 F.2d 113, 115-16 (1st Cir. 1974).

¹³³ 631 F.2d at 1088.

¹³⁴ There are a number of factors which have consistently been utilized by courts. First, the complexity or conceptual sophistication of the issues is a major factor. Comment, *Due Process Alternative*, *supra* note 42, at 589 n.96 and accompanying text; Note, *Preserving the Right*, *supra* note 44, at 102; *see Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 70; *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. at 446. Like accounting, there are other issues which courts have found not especially suited for jury trials. *Tights, Inc. v. Stanley*, 441 F.2d 336, 342 (4th Cir. 1971); *Securities & Exchange Comm'n v. Associated Minerals, Inc.*, 75 F.R.D. 724, 725 (E.D. Mich. 1977); *Railex Corp. v. Joseph Guss & Sons, Inc.*, 40 F.R.D. 119, 124 (D.D.C. 1966). This factor was also considered by the court in *Japanese Electronic*. 631 F.2d at 1088.

A second factor is the mass of evidence, or the number of facts that must be

and compares favorably with other tests that have been devised to measure complexity.¹³⁵

1. Part One

The first part of the test requires that the "complexity of the suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules."¹³⁶ Trial directed to the bench cannot be merely *preferable*.¹³⁷ The rationale for this high requirement is the recognition of the the jury trial's status as a constitutionally protected interest.¹³⁸ To determine the degree of complexity of an unusually complicated case, the court set forth three factors.¹³⁹

The first factor refers to the overall size of the suit, which is in turn dictated by three considerations. One consideration involves the estimated length of the trial.¹⁴⁰ Those excused from jury duty due to the length of the trial, i.e., employed persons,¹⁴¹ are likely to be the very in-

retained and considered by a jury. See *Davis-Watkins Co. v. Service Merch. Co., Inc.*, 500 F. Supp. 1244, 1252 (M.D. Tenn. 1980); Comment, *Due Process Alternative*, *supra* note 42, at 589 n.97; Note, *Preserving the Right*, *supra* note 44, at 102.

A third factor is the estimated length of trial. *Davis-Watkins Co. v. Service Merch. Co., Inc.*, 500 F. Supp. at 1252; Note, *Preserving the Right*, *supra* note 44, at 102 n.23 and accompanying text. The number of parties is an additional factor considered by courts. Note, *Preserving the Right*, *supra* note 44, at 103 n.24.

A final factor is the "efficacy with which procedural devices and trial techniques bring the issue within the competence of the jury." Comment, *Due Process Alternative*, *supra* note 42, at 589 n.98 and accompanying text; Note, *Preserving the Right*, *supra* note 44, at 116-118; Note, *Right to a Jury*, *supra* note 68, at 915. The three-part test in *Japanese Electronic* utilized all of these factors, except the last one. 631 F.2d at 1088-89.

¹³⁵ A test based on *Mathews v. Eldridge*, 424 U.S. 319 (1976), used four factors to determine the risk of an erroneous decision. Comment, *Due Process Alternative*, *supra* note 42, at 607-10. The factors enumerated were the conceptual sophistication of the issue; the number of facts that must be remembered by the jury; the ease with which procedural devices and trial techniques bring the issue within the competence of the jury; and the impanelment of jurors at random from a cross section of the community. *Id.* This test does not have the detail and comprehensiveness of the *Japanese Electronic* three-part test. See notes 133-34 *supra* and notes 136-61 *infra* and accompanying text.

¹³⁶ 631 F.2d at 1088.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1088-89.

¹⁴⁰ *Id.* at 1088.

¹⁴¹ *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104 (1976); Harris and Liberman, *supra* note 76, at 625; Note, *Jury Trials*, *supra* note 49, at 757-58; see also Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 69-70 (1978); Note, *Preserving the Right*, *supra* note 44, at 102 n.23 and accompanying text.

It should be noted that there is no guarantee that a complete panel of jurors will remain until the completion of the trial. *In re Financial Sec. Litigation*, 75 F.R.D. 5762, 114 S.W.2d 144 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (1979).

dividuals whose commercial background would help them to understand and decide a complex suit.¹⁴² Moreover, long trials cause the jurors to become bored and lose their effectiveness.¹⁴³ The other two considerations enumerated by the court involve the quantity of evidence to be introduced¹⁴⁴ and the number of issues which will require individual consideration,¹⁴⁵ stressing the retention capabilities of the factfinder.

The second factor in measuring the complexity of a case refers to the conceptual difficulties that arise in the context of the legal issues and corresponding facts.¹⁴⁶ The court found that these conceptual difficulties were likely to be reflected in the amount of expert testimony, and by way of the predicted length and detail of the jury instructions.¹⁴⁷ The expert's problems in explaining specialized knowledge and opinion to the jury "include: a) specialized language; b) differences in the qualification of experts; c) bias on the part of the experts employed by the adversary parties; d) controversy concerning underlying factual data; e) difficulty experienced by laymen in choosing between inconsistent specialized theories; and f) difficulty in weighing contradictory opinions or statements of fact."¹⁴⁸ With regard to jury instructions, there appears to be an indirect relationship. The greater the length and detail of the jury instructions, the more conceptually difficult the case is likely to be.¹⁴⁹

The third factor for measuring complexity refers to the difficulty in segregating distinct aspects of the case,¹⁵⁰ namely, the number of

¹⁴² See *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. at 69-70 (the court suggests that parties would be left with housewives whose children are grown, welfare recipients, retired persons or the rich who do not have to work); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 104; Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 527 (1979).

¹⁴³ Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 208 (1976).

¹⁴⁴ 631 F.2d at 1088. See Comment, *Due Process Alternative*, *supra* note 42, at 589 n.97 and accompanying text; Note, *Preserving the Right*, *supra* note 44, at 102 n.22 and accompanying text.

¹⁴⁵ 631 F.2d at 1088. See MANUAL FOR COMPLEX LITIGATION 6 (1977) ("Cases of the following types may require special treatment in accordance with the procedures in this Manual: . . . (k) other civil and criminal cases involving unusual multiplicity or complexity of factual issues."); see also 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3861, at 320 (1977).

¹⁴⁶ 631 F.2d at 1088. See Note, *Preserving the Right*, *supra* note 44, at 102 n.21, 115 (one of the two basic hurdles that a jury must overcome is the conceptual sophistication of the issues); Comment, *Due Process Alternative*, *supra* note 42, at 589 n.97 and accompanying text.

¹⁴⁷ 631 F.2d at 1088-89.

¹⁴⁸ MANUAL FOR COMPLEX LITIGATION 94 (1977).

¹⁴⁹ See E. KEETON, *TRIAL TACTICS AND METHODS* 238 (2d ed. 1973) (clarity of the question or instructions may have a material bearing on the verdict).

¹⁵⁰ 631 F.2d at 1089.

separately contested issues relating to single transactions or items of proof.¹⁵¹ The likely purpose of this factor would involve determining whether the order of proof could be rearranged in order to simplify fact finding and shorten the trial.¹⁵²

2. Part Two

The second part of the Third Circuit's three-part test required that the district court try either to enhance the jury's capabilities or to reduce the complexity of the litigation.¹⁵³ The two methods specifically mentioned by the court involve severance of multiple claims and thoughtful use of the procedures suggested in the *Manual for Complex Litigation*.¹⁵⁴ Under rule 42(b) of the Federal Rules of Civil Procedure,¹⁵⁵ separate trials of separate issues should be considered by a court before trial starts.¹⁵⁶ It is recommended that separate trials be used when it results "in a more orderly presentation of evidence, a better understanding of the evidence in relation to the particular issue of issues under consideration by the trier of facts, and . . . avoid[s] an unnecessary trial of the issues."¹⁵⁷ The *Manual for Complex Litigation* enumerates a

¹⁵¹ *Id.*

¹⁵² See MANUAL FOR COMPLEX LITIGATION 142 (1977). See also Harris and Liberman, *supra* note 76, at 623; Note, *Preserving the Right*, *supra* note 44, at 116 n.82 and accompanying text; see also *In re Boise Cascade Sec. Litigation*, 420 F. Supp. at 105.

¹⁵³ 631 F.2d at 1088.

¹⁵⁴ *Id.* Severance of multiple claims is governed by rule 21 of the FED. R. CIV. P. which operates as "a mechanism for remedying either the misjoinder or non-joinder of parties." 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1683, at 322 (1977). In other words, it "applies when the claims asserted by or against the joined parties do not arise out of the same transaction or occurrence or do not present some common question of law or fact." *Id.* However, no problem of this nature has been asserted and the issue is more of the advisability of separate trials than of separate issues. "Severance" and "separate trials" are often used interchangeably by courts. 9 C. WRIGHT, & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2387, at 277 (1971). Consequently, the focus will be on Rule 42(b) which governs separate trials, and not on Rule 21.

The use of separate trials is also discussed in the *Manual for Complex Litigation*. MANUAL FOR COMPLEX LITIGATION 139-42 (1977).

¹⁵⁵ FED. R. CIV. P. 42(b) authorizes the court to "order a separate trial of any claim, cross claim, counterclaim, or third-party claim, or of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution. . . ." *Id.* Separate trials will usually result in a single judgment unlike severed claims which become entirely independent actions. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387, at 277 (1971).

¹⁵⁶ *In re U.S. Financial Sec. Litigation*, 609 F.2d at 428; Note, *Preserving the Right*, *supra* note 44, at 116 n.83 and accompanying text.

¹⁵⁷ MANUAL FOR COMPLEX LITIGATION 139 (1977). However, the requirements of jury trial set down by *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Ross v. Bernhard*, 396 U.S. 532 (1970), must not be violated in ordering separate

number of ways for a court to simplify a complex case. Examples include having judges preside over depositions, early stipulations of facts and the use of summaries, polls, charts and computer analysis.¹⁵⁸

3. Part Three

The third part of the test required the district court to make explicit findings on the dimensions of complexity when it denies a jury trial on grounds of complexity.¹⁵⁹ This requirement is useful for, unlike actions tried on the facts without a jury, situations where no findings of facts and conclusions of law are required to deny demand for a jury trial.¹⁶⁰ Rule 39(a) of the Federal Rules of Civil Procedure requires that the trial of all issues so demanded shall be by jury subject to one major qualification:

[I]f the court *upon motion or of its own initiative* finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.¹⁶¹

This is, in effect, a motion to strike demand for jury trial that may be made by a party or accomplished *sua sponte* by the court.¹⁶² Under Rule 52(a), findings of fact and conclusions of law are not required upon the decision of a motion.¹⁶³ Consequently, requiring the district court to make explicit findings was necessary, since the district court is not required to make findings or conclusions when denying the demand for a jury trial.

V. THE MORRISSEY-FUENTES ALTERNATIVE

Although the Third Circuit's three-part test is fundamentally sound, there are some difficulties with the court's due process exception to the seventh amendment right to a jury trial.¹⁶⁴ One alternative¹⁶⁵ for a workable due process exception proceeds from a line of cases following *Morrissey v. Brewer*¹⁶⁶ and *Fuentes v. Shevin*.¹⁶⁷ From these cases, the

trials. MANUAL FOR COMPLEX LITIGATION 139-40 (1977). The Manual enumerates a number of issues which might be considered for separation. *Id.* at 140-42.

¹⁵⁸ *Id.* at 91, 99-100, 135-36.

¹⁵⁹ 631 F.2d at 1089.

¹⁶⁰ See FED. R. CIV. P. 52(a) ("[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . .").

¹⁶¹ FED. R. CIV. P. 39(a) (emphasis added).

¹⁶² 5 MOORE'S FEDERAL PRACTICE ¶39.04 (2d ed. 1979).

¹⁶³ *Wood v. Zapatha Corp.*, 482 F.2d 350, 356-57 (3d Cir. 1973); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2575, at 692-93 (1971).

¹⁶⁴ See notes 92-117 *supra* and accompanying text.

¹⁶⁵ *Oakes*, *supra* note 58, at 285-89.

¹⁶⁶ 408 U.S. 471 (1972).

¹⁶⁷ 407 U.S. 67 (1972).

alternative set down minimal due process requirements necessary to avoid arbitrary decisions.¹⁶⁸ In *Morrissey*, the Court confronted the issue as to whether the due process clause of the fourteenth amendment required that the state of Iowa allow a parolee opportunity to be heard before revoking the individual's parole.¹⁶⁹ After finding that a liberty interest was present the Court examined the question of what procedural due process was owed the parolee.¹⁷⁰ The Court found that parole could only be revoked if certain minimum due process requirements were achieved.¹⁷¹ One of the requirements set down by the Court mandated that parolees be allowed hearings before "neutral and detached" hearing bodies like the traditional parole board.¹⁷² In the 1973 case of *Bagnon v. Scarpelli*,¹⁷³ the Court reaffirmed and broadened the *Morrissey* holding to encompass probation revocation proceedings.¹⁷⁴ Later that year, in *Wolff v. McDonnell*,¹⁷⁵ the Court extended *Morrissey* to proceedings that involved the issue of whether "good time" credits were to be awarded the prisoner.¹⁷⁶ Under the *Morrissey* line of cases, one of the

¹⁶⁸ Oakes, *supra* note 58, at 289.

¹⁶⁹ 408 U.S. at 477-481.

¹⁷⁰ The examination of what process is due is the second part of the traditional two-part due process test. The first part of the test determines whether the due process clauses apply by examining whether the challenged government action violates a liberty or property interest protected by due process. Note, *Constitutional Law—Due Process—Termination of Social Security Disability Benefits—Prior Evidentiary Hearing Not Required*, 60 MARQ. L. REV. 128, 131 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1510 n.2 (1975). Since the first part of the test requires only *pro forma* scrutiny, the main focus is on the second part's balancing function. Oakes, *supra* note 58, at 285-86.

¹⁷¹ 408 U.S. at 485.

¹⁷² *Id.* The other five requirements were:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses . . . ;
- (f) a statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

¹⁷³ 411 U.S. 778 (1973).

¹⁷⁴ The primary issue in *Gagnon* was whether a probationer was entitled to an attorney at a probation revocation hearing. The Court held that whether an attorney should be appointed should be decided on a case-by-case basis. *Id.* at 790.

¹⁷⁵ 418 U.S. 539 (1973).

¹⁷⁶ Nebraska prisoners could accumulate "good time" credits that could be taken away if the prisoner were found guilty of serious misconduct. The Court held that the decision of whether the prisoner was guilty of such misconduct was deemed sufficiently critical to require minimal due process. This would include a hearing before an impartial adjudicator. *Id.*

minimum due process requirements that must be met includes a hearing before a "neutral and detached" fact finding body.¹⁷⁷

In the *Fuentes v. Shevin*¹⁷⁸ line of cases, the capabilities of the factfinder are considered. In *Fuentes*, the Florida and Pennsylvania statutes allowed the issuance of *ex parte* writs, which authorized the seizure of an individual's possessions without notice.¹⁷⁹ The issue before the Court was whether procedural due process mandated that a state afford the opportunity for a hearing prior to state authorized seizure of an individual's property.¹⁸⁰ The Court struck down the provisions, holding that both notice and hearing were required when the deprivation could still be prevented.¹⁸¹

Fuentes was a narrowly drawn decision and was explained one year later in *Mitchell v. W.T. Grant Co.*¹⁸² The Court in *Mitchell* examined a sequestration statute which allowed seizure of property following a judge-approved *ex parte* application.¹⁸³ In upholding the statute, the Court distinguished *Fuentes*¹⁸⁴ and found that "[t]he nature of the issue at stake minimizes the risk that the writ will be wrongfully issued by a judge."¹⁸⁵ Consequently, *Fuentes* and *W.T. Grant* are to be interpreted as holding that "due process requires a member of the judicial system capable of understanding the factual matters to take an active role before any repossession occurs, and that absent a capable factfinder to

¹⁷⁷ See note 172 *supra* and accompanying text.

¹⁷⁸ 407 U.S. 67 (1972).

¹⁷⁹ *Id.* at 73-76 nn.6-7. The Florida statute merely "requires that the applicant file a complaint initiating a court action for repossession and reciting in a conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond. . . ." *Id.* at 74. In other words, the state abdicated state control over state power and therefore was acting in the dark. *Id.* at 93. The Pennsylvania law bears an even lower requirement. Oakes, *supra* note 58, at 287. The statute "does not require that there *ever* be opportunity for hearing on the merits of the conflicting claims to possession of the replevied property." 407 U.S. at 77 (emphasis in original). Moreover, the party seeking a writ "need not even formally allege that he is lawfully entitled to the property." *Id.* at 77-78.

¹⁸⁰ *Id.* at 80.

¹⁸¹ See *id.* at 96.

¹⁸² 416 U.S. 600 (1973).

¹⁸³ *Id.* at 606. The sequestration statute enacted by the state of Louisiana was quite similar to the statutory provisions at issue in *Fuentes*. In neither case was the purchaser in possession entitled to receive prior notice of the seizure, or given an opportunity to rebut the allegations of the vendor before the property was to be taken from him.

¹⁸⁴ 416 U.S. at 615.

¹⁸⁵ *Id.* at 609-610; see also *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 606 (1974). The Court also indicated that the situation was suited to documentary proof since the proceeding concerned possession pending trial and turned on the existence of the debt. 416 U.S. at 609.

oversee the procedure, the taking of property is a denial of due process."¹⁸⁶ In 1974, the Court in *North Georgia Finishing, Inc. v. Di-Chem*¹⁸⁷ confirmed that a judge's superior capabilities as factfinder distinguished him from other members of the judicial system, such as clerks or jurors.¹⁸⁸

The *Morrissey* and *Fuentes* line of cases suggests that minimal due process standards have to be met to avoid arbitrary decisions. The cases indicate that two of those standards include an impartial adjudicator and an adjudicator able to understand the factual context of a case.¹⁸⁹ In a jury trial the judge plays a limited role.¹⁹⁰ If the jury is incapable of acting as a reasoned decisionmaker, the judge is nonetheless precluded from performing that role.¹⁹¹ Hence, under the *Morrissey-Fuentes* line of cases there exists an exception to the seventh amendment whenever due process standards are in danger of being undermined.

VI. CONCLUSION

The Third Circuit's due process exception to the seventh amendment requires the denial of jury trial when a jury would be unable to resolve each and every disputed issue on the basis of a fair and reasonable assessment of the evidence, and on the basis of a fair and reasonable application of relevant legal rules. The court's due process exception is undercut by two difficulties. First, the court relies upon the "solely on the legal rules and evidence" language of *Goldberg*, an administrative law case. Consequently, the fact finding burden placed on a jury by this standard is stricter than normally required. Second, the court interprets the *Ross* footnote as leaving open the possibility that the Supreme Court would not preclude an exception to the seventh amendment. Recently, this interpretation has been attacked.¹⁹²

The future of the Third Circuit's due process exception is not promis-

¹⁸⁶ Oakes, *supra* note 58, at 288

¹⁸⁷ 419 U.S. 601 (1974).

¹⁸⁸ "[A] bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing. . . ." 419 U.S. at 606 (emphasis added).

The Supreme Court in *Di-Chem* also rejected the argument that *Fuentes* and *W.T. Grant* only supported application of due process provisions to consumers and not in a commercial setting where parties supposedly have equal bargaining power, while *Di-Chem* dealt with the application of due process in the business setting. *Id.* at 608.

¹⁸⁹ Oakes, *supra* note 58, at 289 n.236 and accompanying text.

¹⁹⁰ *Id.* at 289.

¹⁹¹ *Id.*

¹⁹² There are a number of recent cases that have rejected the *Ross* test. See, e.g., *In re U.S. Financial Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.*, *Gant v. Union Bank*, 446 U.S. 929 (1980); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 (E.D. Mich. 1980).

ing. Although the exception has been followed by a Tennessee district court,¹⁹³ the Second Circuit has recently questioned the plausibility of the exception.¹⁹⁴ Furthermore, a district court in Michigan has rejected the Third Circuit's approach and followed the "thoughtful and thorough" *In re U.S. Financial* decision of the Ninth Circuit.¹⁹⁵

One possible alternative to the Third Circuit's due process reasoning is the *Morrissey-Fuentes* approach. Although this approach is founded on administrative law principles, it is well designed and supported. Moreover, it does not saddle the jury with too high a fact finding burden and does not rely on the tenuous *Ross* footnote.

Of all the tests, the Third Circuit's three-part test is in the final analysis the most comprehensive. Probably a combination of the *Morrissey-Fuentes* approach, making use of a due process exception, and the Third Circuit's three-part test would best yield a tenable model, enabling a court to decide whether, in a given case, an exception to the seventh amendment is clearly mandated.

¹⁹³ *Davis-Watkins Co. v. Service Merch. Co., Inc.*, 500 F. Supp. 1244, 1251-52 (M.D. Tenn. 1980) (exclusive distributor for microwave ovens sued retail merchandising firm for violation of the Robinson-Patman Act).

¹⁹⁴ *Rosen v. Dick*, 639 F.2d 82, 86 (2d Cir. 1981) (action by trustee in reorganization against director of corporation undergoing reorganization and the corporation's accounting firm).

¹⁹⁵ *Kian v. Mirro Aluminum Company*, 88 F.R.D. 351, 354-55 (E.D. Mich. 1980)(litigation for breach of patent license agreement).