Maryland Journal of International Law

Volume 6 | Issue 1 Article 14

The Right to Jury Trial in Complex Litigation: In Re Japanese Electronic Products Antitrust Litigation [1980-2] Trade Cases (CCH) 63,421 (3d Cir., July 7, 1980)

Kenneth D. Pack

THE RIGHT TO JURY TRIAL IN COMPLEX LITIGATION

In Re Japanese Electronic Products Antitrust Litigation,
[1980–2] Trade Cases (CCH) 163,421 (3rd Cir., July 7, 1980)

In *In Re Japanese Electronic Products Antitrust Litigation*[1] the United States Court of Appeals for the Third Circuit held that the Seventh Amendment does not guarantee a right to trial by jury in complex cases where a jury will be unable to "perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards."[2] Writing for the court, Chief Judge Seitz based the decision upon the rationale that a trial before an uncomprehending jury would violate Fifth Amendment due process rights. Therefore, in exceptional cases, district judges may exercise limited discretion to balance Fifth and Seventh Amendment rights and deny a jury trial.[3]

The case is undeniably complex. It involves twenty-four defendants[4] and "close to one hundred alleged co-conspirators,"[5] ranging from major and minor Japanese companies, such as Mitsubishi Corporation, the umbrella Japanese trading company, and Sony Corporation, to international giants such as General Electric Company and N.V. Philips Gloeilamperfabrieken.[5] After nine years of discovery, the case has generated millions of documents and over 100,000 pages of depositions.[6] The trial court has predicted that the actual trial would last a year.[7]

Nor are the issues simple. The litigation began in 1970 when National Union Electric Corporation (NUE) charged several Japanese competitors

---

1. In Re Japanese Electronic Products Antitrust Litigation, [1980–2] TRADE CASES (CCH) ¶ 63,421 (3rd Cir., 1980) [hereinafter JEPA].

2. *Id.* at 76,198.

3. *Id.* at 76,198, 76,200. The Seventh Amendment provides in part that "In suits at common law . . . the right of trial by jury shall be preserved." The Fifth Amendment guarantees no deprivation of "life, liberty or property, without due process of law."

4. *Id.* at 76,186–87. There are ten principal defendants, including two United States companies: Sears, Roebuck and Company and Motorola Corporation. The remaining ten defendants are subsidiaries of the Japanese principals. Zenith Radio Corp. v. Matsushita Electric Industrial Corp., 478 F. Supp. 889, 893 (E.D. Pa. 1979) (district court opinion by Judge Becker, reversed by instant case).

5. 478 F. Supp. at 893.

6. There were in excess of twenty million documents, most of which required translation, produced for discovery. *Id.* at 894–95.

with antitrust and international trade violations.[8] In 1974, Zenith Radio Corporation entered the fray naming all of the NUE defendants, adding several new ones, including Sears, Roebuck, and Company, and repeating the allegations of dumping, conspiracy and intent to destroy domestic competition in the American market. However, Zenith claimed damages for a longer period, 1966 through 1978,[9] expanded the relevant markets beyond television to other electronic equipment, and alleged violations of price discrimination[10] and of § 7 of the Clayton Act.[11] There are, in addition, counterclaims alleging Sherman Act and Robinson-Patman Act violations, as well as charges of sham litigation against Zenith and approximately thirty other co-conspirators.[12] The two suits were consolidated in 1975 before the federal district court in the Eastern District of Pennsylvania.[13]

Plaintiffs NUE and Zenith demanded a jury trial. Judge Becker, in a "thorough and scholarly opinion" denied defendants' motion to strike the demands.[14] In so doing, the court certified its order for interlocutory appeal. The Third Circuit obtained jurisdiction by permitting the appeal to review

---

7. *Id.* at 895.

8. NUE charged its competitors with violations of the 1916 Antidumping Act, 15 U.S.C. § 72 (1976), by maintaining lower prices for televisions sold in the United States than for comparable models sold in Japan. NUE further alleged that the dumping practices are part of a conspiracy which included over ninety conspirators worldwide, in violation of §§ 1, 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and § 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1976). The Wilson Act applies Sherman Act proscriptions to import trade. NUE seeks treble damages under the Antidumping Act and under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). The 1916 Antidumping Act has *never* been construed or interpreted in a trial situation, and the Wilson Act is "rarely used and interpreted" in litigation. 478 F. Supp. at 897.

9. NUE's claim only covers the period between 1966-1970.

10. 15 U.S.C. § 13(a) (1976). The Robinson-Patman Act prohibits price discrimination among American purchasers.

11. 15 U.S.C. § 18 (1976). Zenith charges defendants Matsushita and Sanyo Corporations with violating § 7 by acquiring interests in domestic producers of consumer electronic products previously held by American companies.

12. *See* Sherman Act *supra* note 8, at §§ 1, 2. *See* Robinson-Patman Act, *supra* note 10, at §§ 1, 2, 13(a). *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 379–80 (1973) (sham litigation). The charges include territorial allocations, horizontal and vertical price-fixing schemes, key dealer preferences, and price discrimination.

13. In Re Japanese Electronic Products Antitrust Litigation, 388 F. Supp. 565 (Jud. Pan. Mult. Lit. 1975). The court also denied Sony defendants' motion for a separate trial. JEPA, *supra* note 1, at 76,187.

14. 478 F. Supp. 889. Chief Judge Seitz termed the opinion "thorough and scholarly." 1980–2 TRADE CASES at 76,187. If anything, his comment is an understatement. The Court of Appeals for the Ninth Circuit also noted that "Judge Becker's scholarly decision is over one hundred pages in length and is possibly the only decision with its own table of contents." In Re U.S. Financial Securities Antitrust Litigation, 609 F.2d 411, 418 (9th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3694 (April 28, 1980).

two issues: whether the Seventh Amendment must apply to statutory litigation and whether complexity of suit is not a constitutionally permissible reason for striking jury demands.[15]

Judge Becker's lengthy district court opinion concluded that the antitrust laws do not themselves, either expressly or impliedly, guarantee trial by jury. Thus, the issue becomes a Seventh Amendment question. The court rejected the ingenious historical argument that extraordinary complexity renders a suit equitable in nature, and therefore, not subject to the Seventh Amendment requirements.[16] The cornerstone of the district court's ruling was the belief, or assumption, that even in the most difficult, demanding issues, a jury is at least as capable as a judge of reaching a sound decision.

> There is no reason to believe that any of the jury's functions are less important in complex and protracted litigation than in smaller and simpler cases. Indeed, as 'big' cases proliferate and consume an increasing share of our judicial resources, the survival of the peculiar qualities of justice traditionally delivered by juries . . . may depend on the continued availability of juries in such cases.[17]

Once the court accepted this premise, it inevitably concluded that there could be no basis to the claim that a trial by jury could be "fundamentally unfair," thereby denying Fifth Amendment due process rights.[18] The court was swayed by the practical difficulties inherent in implementing a

---

15. The issue "Is our decision that the demand for jury not be strict in this case correct?" was certified pursuant to 28 U.S.C. § 1292(b) (1976). The Appeals Court agreed with the district court that the jury trial issue meets the statutory requirement that the question present a "controlling question of law." 478 F. Supp. at 943–46.

16. Although the Supreme Court has held that some aspects of the Seventh Amendment right to jury trial should reflect the state of the common law in 1791, when that amendment was adopted, *see, e.g.* Dimick v. Schiedt, 293 U.S. 474 (1935), it has not confined the right to causes of action recognized at common law in 1791. The Court has applied the guarantee to suits at law, including those based upon statutory causes of action. *See* Curtis v. Loether, 415 U.S. 189, 193–94 (1974). Appellants developed an interesting argument that the English Chancellor took jurisdiction in equity over cases in accounting, other financial cases and some issues which may have been relatively complex. JEPA, *supra* note 1, at 76,193–96. The Seventh Amendment does not apply to suits in equity. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445–47 (1830) (Story, J.); *see* Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 464 (1962).

17. 478 F. Supp. at 942, 935–42; *see* 609 F.2d at 427–31 (jury as competent as judge); *see, e.g.*, P. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53 (1977).

18. 478 F. Supp. at 936.

balancing test. It feared that in the long run, broad discretion in determining complexity might dilute the right to jury trial.[19] Finally, the court objected to the due process argument because the trial judge can prevent an irrational verdict through its power to direct a verdict or to grant a judgment n.o.v.[20]

On interlocutory appeal, the Third Circuit rejected the findings of the district court on the question of due process. The Court of Appeals agreed with Judge Becker that there is no statutory basis in either the Clayton Act or the Sherman Act for the right to a jury trial.[21] Therefore, the constitutional issue could not be avoided. The Third Circuit also agreed that the fact that there might have been equitable jurisdiction over some complex cases in England, when the Seventh Amendment was adopted, is not a "persuasive reason for incorporating into the Seventh Amendment the policies and probable actions of the English Chancellor of 1791."[22]

However, the court reached the contrary conclusion that a given case might be so complex as to elude the intellectual grasp of a jury, which in turn would result in a denial of the parties' constitutional right to due process.[23] This result creates a conflict between the Third and the Ninth Circuits. The Ninth Circuit Court of Appeals found Judge Becker's opinion highly persuasive when it found no violation of due process in *In re U.S. Financial Securities Litigation*.[24]

The Third Circuit began with an historic analysis of the constitutional right to a jury, noting that since 1830 the Supreme Court has applied the jury guarantee to almost any suit at law, including those based on statutory causes of action.[25] The guarantee does not apply to suits in equity or admiralty.[26] Antitrust and antidumping suits are legal in nature; "prior cases have always assumed that the seventh amendment [sic] guarantees a jury trial in antitrust suits . . ."[27] The issue becomes one of whether complexity may constitute an exception to the general rule, which all of the parties to the instant suit agreed normally applies to antitrust suits.

Judge Seitz then turned to the Supreme Court's enigmatic footnote to its opinion in *Ross v. Bernhard*.[28] There, the plaintiff in a derivative stockholder's

---

19. *Id.* at 931–33.
20. *Id.* at 937–38; *see* 609 F.2d at 431.
21. JEPA, *supra* note 1, at 76,192.
22. *Id.* at 76,196.
23. *Id.* at 76,198.
24. 609 F.2d at 411, 427–31.
25. 28 U.S. (3 Pet.) at 446–47 (1830).
26. 415 U.S. at 193–94.
27. JEPA, *supra* note 1, at 76,192; *see* Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 23 (3rd Cir.), *cert. denied*, 439 U.S. 876 (1978); *See* Beacon Theaters, *supra* note 16, at 504.
28. 396 U.S. 531, 538 n.10 (1970).

action claimed the right to trial by jury. The Second Circuit denied the claim on the grounds that the claim was predominantly equitable in nature. The Court reversed, granting the trial by jury and relegating the issue of jury competence to a footnote:

> 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.* (emphasis added)[29]

There is wide disagreement as to the precise meaning of the *Ross* footnote.[30] Many courts have employed the footnote as the definitive Seventh Amendment test, arguing that if an issue is not legal under *Ross*, it is not

---

29. *Id.* Judge Becker argues persuasively that in *Ross*, the issue of whether the case was too complicated for a jury was raised at every level of the courts. The district court found that the issues were not too complicated; the Court of Appeals thought that derivative suits might be too complex, but based its decision on different grounds because "the Seventh Amendment does not ask that we assess the suitability of a given type of litigation for jury trial." *See* Ross v. Bernhard, 275 F. Supp. 569, 570 (S.D.N.Y. 1967), *rev'd on other grounds*, 403 F.2d 909, 915 (2d Cir. 1968), *rev'd on other grounds*, 396 U.S. 531 (1970). Notwithstanding this history, the *Ross* Court determined that the claims were at least partly legal without any mention of the issue of jury comprehension in the body of its opinion. 396 U.S. at 542. Thus, although the issue was raised directly, the Court did not accept the invitation to resolve it. "The omission of any discussion of the jury's ability to deal with the complex issues prsented in *Ross* implies strongly that the Court did not deem it relevant to the Seventh Amendment issue there." 478 F. Supp. at 927–28. Furthermore, the Court has not addressed the question of the status of the third *Ross* criterion despite twice having decided cases in which the lower court opinion relied upon explicit applications of the footnote to grant a jury trial. *See* Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978); Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

30. Several commentators have dismissed the third part of the *Ross* test as an aberration, because the Court placed it in a footnote and failed to cite any precedent for such a major departure. *See, e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 454 (3rd ed. 1976); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw U.L. REV. 486, 526 (1975). Others have recently taken the opposite position. *See, e.g.*, Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 911–14 (1979); Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 776–83 (1978); Note, *Congressional Provision for Non-Jury Trial Under the Seventh Amendment*, 83 YALE L.J. 401, 411–12 (1973) ("long and distinguished lineage" of the third part of *Ross* test in traditional resort to equity for "procedural inadequacies").

subject to the Seventh Amendment.[31] Others have either questioned its scope or ignored it entirely.[32] The Supreme Court itself has refused to elaborate.[33] Judge Becker held that *Ross* might not be read as "requiring or permitting" consideration of the ability of juries in determining whether the right to a jury extends to matters committed by Congress or the common law to the federal district courts.[34] His construction is unique and in direct contravention of the literal language in *Ross*.

The Third Circuit agreed with the district court that the footnote is too brief to "authorize a major departure from the traditional construction of the Seventh Amendment."[35] It did, however, hold that the third prong of the *Ross* test "plainly recognizes the significance, for purposes of the Seventh Amendment, of the possibility that a suit may be too complex for a jury."[36] Therefore, the Court of Appeals concluded that the Supreme Court left open the *possibility* that the range of suits subject to the Seventh Amendment may be limited by the practical abilities and limitations of jurors and that the Court has not *precluded* such a ruling.[37] Thus, the appeals court did not use the footnote as a test, but seized upon the Court's language as *enabling*, or permissive of, authorization of the fashioning of a new constitutional balancing test.

The Court of Appeals propounded a three-pronged constitutional argument: the primary value of due process in fact-finding procedures is that of minimizing the risk of erroneous decisions;[38] a jury's conclusion must rest "solely on the legal rules and evidence adduced at the hearing;"[39] and a jury

---

31. Several courts have employed *Ross* as the test in denying a trial by jury on the ground of size and complexity. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 702, 712–14 (S.D. Cal. 1977). In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 104–05 (W.D. Wash. 1976); Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974). Others have employed the test in granting trial by jury. *See, e.g.*, 549 F.2d at 953; Minnis v. UAW, 531 F.2d 850, 852–53 (8th Cir., 1975); 467 F.2d at 1118; Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977); Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977) (*Ross* clearly directs courts to inquire into jury competence).

32. *See* 609 F.2d 411; Barber v. Kimbrell's, Inc., 577 F.2d 216, 225 n.25 (4th Cir. 1978), United States v. J.B. Williams Company, Inc., 498 F.2d 414, 428–29 (2d Cir. 1974); SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2d Cir. 1978) (ignoring *Ross* footnote entirely).

33. *See Pons* and *Loether, supra* note 29.

34. 478 F. Supp. at 926.

35. JEPA, *supra* note 1, at 76,193.

36. *Id.*

37. *Id.*

38. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979).

39. Goldberg v. Kelly, 397 U.S. 254,271 (1970).

cannot base its decision upon that which it does not understand.[40] The law presumes that a jury will decide rationally. A decision without understanding leads to the conclusion that "due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and the legal rules."[41]

But the court's argument did not end there. If the action is one at law, a conflict results between the Fifth and Seventh Amendments. Such a result should require a balancing test between the competing constitutional provisions.[42] In effect, the competition is between the right to a fair trial under the Fifth Amendment, and the right to a jury trial under the Seventh. The due process objections "implicate values of fundamental importance"[43] because: (1) jury verdicts will be erratic and completely unpredictable; (2) factual determinations will be inaccurate, therefore legal remedies will not be consistent with the purposes of the law; and (3) jury decisions which are not based upon a sufficient understanding of the evidence and legal rules will defeat the objectives of most rules of evidence and procedure. The net result undermines the ability of the court to render basic justice.[44]

Judge Seitz balanced the loss of the right to a trial by jury in a case too complex for a jury to comprehend against the effective absence of due process, *i.e.*, a fair trial. He found that the same "fundamental concerns" are not implicated. He stressed the ability of federal courts to provide fair trials without a jury requirement in equitable and maritime actions. Furthermore, the Supreme Court refuses to construe the Fourteenth Amendment as requiring the states to preserve the right to a civil jury trial.[45] The essence of the court's reasoning, then, is that where due process rights are implicated, there is, by definition, a greater possibility that a just decision will not be reached, but where, under similar circumstances the right to a jury trial is denied, there remains a substantial likelihood that a court may reach a fair decision. The essence of the balancing test is the extent to which "fundamental concerns" are implicated by the competing provisions.

This reasoning is persuasive, but only if one accepts the underlying assumption that an individual judge is more likely to be capable of understanding the legal rules and evidence which are presented in complex

---

40. JEPA, *supra* note 1, at 76,197.

41. *Id.*

42. *See* Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

43. JEPA, *supra* note 1, at 76,197.

44. *Id.*

45. *Id.*; Palko v. Connecticut, 302 U.S. 319, 324–25 (1937); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1972), 409 U.S. 1098 (1972).

litigation. Unfortunately, the issue ultimately is resolved by faith or instinct, rather than through the logical use of data, which are limited.[46] The Court of Appeals recognized the special strengths of a jury as decisionmaker. Decisionmaking by "black box"[47] may temper harsh legal results with equitable justice. Jury verdicts may serve to legitimize decisions which require a determination of degree, for example, in "drawing the line" between negligence and recklessness. Finally, the jury may provide a check or restraint on judicial power.[48] Nonetheless, the Court of Appeals found it difficult to justify these advantages in a context in which the jury's decision has absolutely no basis in fact or in law.

On the other hand, the Third Circuit emphasized the probable effect of the constraints which operate upon a jury in complex cases; the court focused upon the constraint of the impact of prolonged trials. Lengthy trials can distract concentration by disrupting careers and personal lives and can weed out professionals who may be more qualified to comprehend complex issues.[49] Additionally, the court noted that juries are not likely to be familiar with the technical subject matter of complex cases. This factor, coupled with their unfamiliarity with the process of civil litigation, may well result in further confusion.[50] In contrast, an individual judge might be expected to allocate the time required for the trial without undue personal disruption. He may be

---

46. 609 F.2d at 430 (little practical research on jury's ability to comprehend); *see* Comment, 10 CONN. L. REV. *supra* note 30, at 777, 786 (statistical analysis of jury selection process in complex litigation demonstrating elimination of disproportionate number of college educated jurors, or those employed in technical or managerial fields); Strawn & Buchanan, *Jury Confusion: A Threat to Justice,* 59 JUD. 478, 483 (1976) (college educated jurors tend to have higher comprehension than others, many jurors confused by judge's instructions).

47. JEPA, *supra* note 1, at 76, 198. Judge Becker accorded the "black-box" advantages great weight. 478 F. Supp. at 938 ("results without reasons"). The theory of the "black-box" is that the jury receives input from the trial and produces a decision by an unknown and unknowable process. *See* CALABRESI & BOBBITT, TRAGIC CHOICES 57–59 (1977) ("a responsible agency"); Higgenbotham, *supra* note 17, at 56–57.

48. JEPA, *supra* note 1, at 76, 198; *see* 478 F. Supp. at 942; Higgenbotham, *supra* note 17, at 58–60.

49. JEPA, *supra* note 1, at 76, 199; *see* Comment, 10 CONN. L. REV., *supra* note 30, at 776–83.

50. JEPA, *supra* note 1, at 76, 199. This point is supported by the analysis and examples presented in Note, 92 HARV. L. REV., *supra* note 30, at 908–09:

> Like a jury of persons who cannot see, hear, or understand English, a jury composed of non-economists or nonbusiness persons may well be unable to grasp evidence in an antitrust case presented in technical language with which it has no familiarity, such as evidence concerning cross-elasticity of demand, market power, exclusionary leasing, subordinated debentures, interfaces, and reverse engineering. *Id.* at 908.

neither more intelligent than a jury nor more familiar with highly technical subject matter, but he will have had sufficient exposure to the legal process. He should be equipped to assess the evidence accurately (specifically the opinions of experts) to segregate issues, and to apply complex legal standards to the facts. Finally, even where a case proves too complex for a judge, the addition of a jury would not improve the solution. The presence of a jury would not relieve the judge of the need to understand the issues in order to guide the jury and to rule on motions.[51]

The trial court considered the power of the trial judge to prevent irrational verdicts by granting or denying motions for a directed verdict or for a judgement n.o.v. to be a sufficient safeguard against an uncomprehending jury.[52] The Court of Appeals rejected this position of the district court. These procedural devices afford inadequate protection because the standards to support such motions are extremely high. The court may not take the verdict from the jury where the evidence might reasonably support a verdict for either side.[53] Nor is there any assurance under those standards that the verdict rests exclusively upon the legal rules and evidence from trial.[54]

The appellate court feared the potential for abuse of the discretionary power it would vest with trial judges. The Third Circuit recognized the need to prescribe guidelines to prevent confusion when the new test is applied. Therefore, the court imposes a high standard:

> It is not enough that trial to the court would be preferable. The complexity of a 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. Moreover, the district court should not deny a jury trial if by severance of multiple claims, thoughtful use of the procedures suggested in the Manual for Complex Litigation, or other methods, the court can enhance a jury's capabilities or can reduce the complexity of a suit sufficiently to bring it within the ability of a jury to decide. Due process should allow denials of jury trials only in exceptional cases.[55]

District courts should consider three factors in determining if a case is too complex for a jury: (1) overall size; (2) legal and conceptual difficulty, and; (3) inseparability of distinct components. Overall size is indicated by the

---

51. JEPA, *supra* note 1, at 76,199.

52. 478 F. Supp. at 938.

53. *See* Patzig v. O'Neil, 577 F.2d 841, 846 (3rd Cir. 1978) (court may enter judgment against any party that has not submitted at least a "minimum quantity" of evidence necessary for jury to decide reasonably in its favor).

54. JEPA, *supra* note 1, at 76, 200; *see* 397 U.S. at 271.

55. *Id.* at 76, 200.

estimated length of trial, the amount of evidence, and the number of issues which will require individual consideration. The conceptual difficulty is reflected by the amount of expert testimony and the probable length and detail of jury instructions. The difficulty the jury might have in segregating distinct components of the case is indicated by the number of "separately disputed issues related to single transactions or items of proof."[56] As a final safeguard, district courts which deny a jury trial on these grounds must make explicit findings on the dimensions of complexity.

This decision may well herald a new era in the conduct of complex litigation. The majority consciously recognized the potential impact of its departure. This recognition is reflected in the majority's careful attempt to limit the use of the new rule by the prescription of stringent standards and by the formulation of an explicit test.

Judge Gibbons dissented. He would have vacated leave to take appeal from the district court's ruling because the case was "hypothetical" and, therefore, not ripe for decision on the issue of whether any single case could be too complex for jury trial. His argument is that the case could have been rendered comprehensible by reducing it to the "separate components that it would have presented at common law."[57] Admittedly, this approach would result in the loss of economy and efficiency. Judge Gibbons conceded that his decision would be close,[58] but had he reached the merits, he would have affirmed the district court. He could not conceive of a case too complex for a jury; he disapproved of permitting trial courts to exercise what might become, in effect, unreviewable discretion. He would prefer the majority's rule if interlocutory review were available as a matter of right.[59] The latter suggestion would appear to be meritorious, in view of the constitutional right to be abrogated and of the requirement that the rule be invoked only in exceptional cases. If the courts adhere to the latter requirement, the appellate court would not be overburdened with interlocutory appeals on the issue. If they do not, and invoke the rule frequently, such frequency should

---

56. *Id.* at 76, 201.

57. *Id.* at 76, 203–04.

58. *Id.* at 76, 203 ("I dissent in this case with a good deal less confidence in my position than in most cases in which the majority has failed to persuade me.").

59. *Id.* at 76, 204. *See* Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935) (permitting interlocutory appeal of order staying action at law pending decision in equity on ground stay was injunction); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 190–92 (1942) (reaffirming *Enelow* after adoption of Federal Rules of Civil Procedure); *compare, e.g.*, Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 184 (1955) (refusing to permit interlocutory appeal of order refusing to stay action pending arbitration because order not injunction).

signal the need for strict, uniform appellate review because a multiplicity of cases could hardly be termed "exceptional."

The decision in *Japanese Electronic Products* is significant. It signals a major departure from the traditional requirements for conducting complex litigation. Fortunately, both Chief Judge Seitz for the Third Circuit Court of Appeals, and Judge Becker for the district court, accorded the legal and factual issues the respect they deserve. Neither did they yield to the temptation to launch a major initiative from the shaky platform of the *Ross* footnote, nor did they resort to arcane distinctions between law and equity.[60] The Third Circuit's balancing test between Fifth Amendment due process rights and Seventh Amendment jury rights is reasonable and compelling, subject only to the very real question of whether a jury might in truth be more subject to confusion than would a judge in complex cases, and whether that confusion could be sufficient to amount to a violation of due process.[61] Ideally, Congress should answer this question when the issues present violations of the antitrust, trade, or securities statutes. Realistically, the Supreme Court will make the determination of whether under some circumstances the ends of justice might be served better by a single judge, or by a collective intelligence, in which the whole might transcend the individual limitations of the parts.

Kenneth D. Pack

---

60. By refusing to employ the *Ross* footnote as a definitive test, the Third Circuit circumvented the issue of whether complex litigation is, by definition, equitable in nature. *Ross* tests the "legal" nature of an issue and implies that issues which fail the criteria are equitable. 396 U.S. at 538 n.10. Indeed, the court's balancing test strongly suggests that "legal" issues need not be redefined as equitable in order to avoid the Seventh Amendment requirement. Rather, the issue is framed in terms of overriding constitutional considerations, in this case, Fifth Amendment due process.

61. There is now a conflict between the Third and the Ninth Circuits. *See* 609 F.2d 411. The Court denied certiorari in U.S. Financial Securities, *supra* note 14, and neither Zenith nor NUE has petitioned the instant decision. The issue will inevitably arise again.