1991

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Complex Product Design Litigation: A Need for More Capable Fact-Finders

BY ORA FRED HARRIS, JR.*

INTRODUCTION

Tort law, including the law of products liability, has significant common law underpinnings.1 As a result, it is a creation of juries and judges.2 Tort law is extremely fluid because liability rules are generally developed in relation to existing societal conditions.3 Consequently, tort liability is indeterminate because it tends to vary with the political, economic, and social demands of the particular time and place.4

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1 Little, On Teaching Torts, MB. L. SCH. REP., Jan. 1986, at 1 (“[T]orts retains more common law flavor than most courses.”). However, there have been recent legislative infringements upon the common law domain, “particularly in comparative negligence, workers’ compensation and no-fault automobile reparation statutes.” Id.

2 Little, supra note 1, at 1 (“In the law of torts most of this evolution has occurred by common law process.”).

3 See SPEECH BY RICHARD EPSTEIN, (March 1989) (AALS Torts Law Workshop). Professor Richard Epstein maintains that the most significant problem attending products liability today is its extreme indeterminacy. See also Huber, Insurance, Not Lawsuits, for the Accident Prone, Wall St. J., Sept. 28, 1988, at 24, col. 3 (lamenting the inefficiency spawned by the “infinitely fluid” nature of the tort litigation process).

4 A prime example of the rapidly changing nature of products liability law in view of existing societal conditions is its evolution from the industrial revolution of the 19th century to the decision in MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), where the privity of contract duty limitation was abolished in negligence products cases. Prior to MacPherson, tort law basically was used to subsidize industry by erecting artificial barriers to recoveries, such as caveat emptor and privity. When industry was conceivably no longer in a nascent state, the notion that the risk of loss should fall on the consumer was discarded in favor of raising consumer protection and safety to a higher plane. MacPherson represented a clear shift in this policy direction. See Gregory, Trespass to Negligence to Absolute Liability, 37 VA. L. REV. 359 (1951). But see Schwartz, The Character of Early American Tort Law, 36 UCLA L. REV. 641 (1989) (challenging conventional thinking that nineteenth century tort law was used to promote industrial growth at the expense of individual safety).
As society becomes more sophisticated, products liability litigation inevitably will become more complex. This is certainly true of complex product design litigation, which may be defined generally as those product design cases involving extraordinary complex factual and legal issues. Much product design litigation today involves intricate issues, and highly technical questions attending such litigation are routinely decided as questions of fact by a jury. Do these questions surpass the practical understanding and capacity of conventional fact-finders? If so, should radical changes be made to insure that the fact-finding process remains impartial and rational?

This Article initially addresses the constitutional and practical foundations of the right to jury trial in civil litigation in the United States. Then the focus of this Article shifts to the means available to alter the right to jury trial when warranted by compelling policy notions underlying the administration of civil justice. Several alternative mechanisms are examined to determine whether, in complex design litigation, the net benefits of such changes justify some deviation from the existing jury system. The primary objective of this Article is to ascertain whether the proposed alternatives will render the adjudication of complex design cases more rational, fair, and efficient without transgressing federal and state jury trial guarantees.

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5 See J. Phillips, Products Liability in a Nutshell 191 (3d ed. 1988). Design cases are so complex that expert testimony is invariably required to shed light on the highly technical issues involved, most notably the feasibility of a safer, alternative design. In this vein, Professor Phillips notes that "[s]ome courts and commentators are concerned about the propriety of submitting complex design issues to a jury that lacks the kind of expert knowledge thought necessary to judge such issues." Id.

6 Conventional fact-finders are typically lay people selected from the community to resolve factual disputes arising in civil trials. The apparent virtue of this selection process is that such a body may represent, in some fanciful way, the conscience of the community. Another fundamental concern is that a jury should represent a cross-section of the community. Crook, The Seventh Amendment: Priceless Heritage, 16 Colo. Law 1594, 1599 (1987).

I. HISTORICAL BACKGROUND

A. The Seventh Amendment Right to a Jury Trial in Civil Cases

The seventh amendment to the United States Constitution provides for a jury trial in civil cases involving issues at law as distinguished from matters in equity. But the seventh amendment right to jury trial has not been made applicable to the states through the due process clause of the fourteenth amendment. Consequently, the seventh amendment applies only to federal court proceedings. In product design litigation, this means that the federal constitutional right to a jury trial in civil cases is implicated only when such actions are brought in federal courts sitting in diversity cases.

To understand the relative merits of any proposal calling for deviation from the constitutional norm in complex design litigation, the historical evolution of the right to jury trial in federal civil cases must be scrutinized. An initial observation leads to the conclusion that the right to a jury is firmly entrenched in Anglo-American jurisprudence. For example, the right to a jury trial enjoyed a fair measure of respect in England before the United States was colonized, and the right to jury trial was highly regarded by many of the early English settlers who arrived in Jamestown. This reverence continued during the colonial period,

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8 U.S. Const. amend. VII.
9 It is a well-established rule that the Bill of Rights restricts only the federal government. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833); see also Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916) ("[T]he first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with federal action."); Mountain Timber Co. v. Washington, 243 U.S. 219, 235 (1917) ("It is conceded that [the Seventh Amendment] has no reference to proceedings in the state courts."); aff'g, State v. Mountain Timber Co., 135 P 645 (Wash. 1913). By the process of incorporation, however, certain fundamental rights in the Bill of Rights are made applicable to the states via the due process clause of the Fourteenth Amendment. J. Nowak, R. Rotunda, & N. Young, Constitutional Law 412-14 (2d ed. 1983).
10 Although a greater number of products liability cases are actually filed in state courts (and generally in the state of the plaintiff's residence), some cases continue to be brought in federal district courts when there is a complete diversity of citizenship. W. Keeton, supra note 1, at 22.
12 Id.
13 Id.
and eventually inspired debate at the original constitutional convention about whether the right to jury trial in civil cases should be protected by the United States Constitution.\textsuperscript{14}

The constitutional debate ultimately produced the seventh amendment and its jury trial guarantee “in Suits at common law.”\textsuperscript{15} But some dissension existed. A few detractors voiced concern that a jury, when given such a broad mandate, would inevitably consider questions that exceeded their competence and understanding\textsuperscript{16} and that such matters were more appropriate for courts of equity, not juries.\textsuperscript{17} These dissenting views were not given much consideration by those who drafted the foundational charter of the government of the United States.\textsuperscript{18}

Against this historical background, the United States Supreme Court has repeatedly reaffirmed the venerable status of the right to jury trial in civil cases by noting that the “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care.”\textsuperscript{19} Although the Court’s remarks seem well-founded, circumstances may exist that justify limiting the right to a jury trial in some manner. Further, the policy reasons underlying such curtailment may be so compelling as to withstand the most exacting judicial scrutiny. The common explanation has been that the due process right to a fair and rational analysis of the facts and law supports, under limited circumstances, a departure from seventh amendment precepts.\textsuperscript{20}

\textsuperscript{14} Id. at 420.


\textsuperscript{16} In re United States Fin. Secs. Litig., 609 F.2d at 420 n.30.

\textsuperscript{17} Id.

\textsuperscript{18} Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

\textsuperscript{19} Id. at 420.

\textsuperscript{20} Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (The Court advanced a three-prong analytic framework to determine whether a right to jury trial exists: 1) the pre-merger custom with respect to such issues (i.e., whether a jury trial would have been ordered during the period before the merger of courts of equity and courts of law); 2) the remedy sought (i.e., whether legal or equitable); and 3) the “practical abilities and limitations of juries.”). The third prong has been commonly referred to as “the complexity of litigation” exception to the right to a jury trial in civil cases.
B. The State Right to Jury Trial

Although the seventh amendment is inapplicable in state court proceedings, the right to jury trial in civil cases is generally provided in most state constitutions.\textsuperscript{21} These state provisions typically differ in content and in scope from the seventh amendment.\textsuperscript{22} As a result, a perusal of some of the representative state constitutional provisions should shed some light on the nature and extent of the right to jury trial at the state level.

The genesis of many state constitutional provisions concerning the right to jury trial in civil cases is undoubtedly the English common law.\textsuperscript{23} Many states have explicit statutory provisions that accept the common law of England, except to the extent that it has been modified or changed by statute.\textsuperscript{24} These so-called reception statutes reflect a deep, abiding connection between the various states' laws and the common law of England. Thus, any analysis of the precise contours of any state-based right to jury trial in civil cases must be conducted against the backdrop of the English common law. This seems consistent with traditional seventh amendment analysis in which 1791, the year the amendment was adopted, serves as the English comparative standard to measure the intent of the framers of the Constitution.\textsuperscript{25}

In connection with the various state constitutional provisions, some uncertainty exists concerning the appropriate time frame to determine the intent of the delegates to the various state constitutional conventions. Should one focus upon the English common law as of the date of ratification of the United States Constitu-

\textsuperscript{22} See id. (a discussion of the diverse state constitutional provisions).
\textsuperscript{23} United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) ("Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").
\textsuperscript{25} See Colgrove v. Batkin, 413 U.S. 149 (1973) (Marshall, J., dissenting); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1978), vacated 631 F.2d 1069 (3d Cir. 1980). Ironically, the right to jury trial in civil cases has been virtually abrogated in England. Crook, supra note 6, at 1594. A possible explanation for the civil jury’s persistence in the United States is that this country, unlike Great Britain, has not come to grips with its sovereignty. Thus, the jury serves as a check on permanent governmental power. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U. Chi. Legal F 87, 88. Hence, the primary justification for the civil jury may be more related to politics than to actual fact-finding. Id.
tion? Or as of the date the particular state was admitted into the Union? Or as of the date the particular constitutional provision was ratified? Or should one's judgment be informed by existing interpretations of the seventh amendment to the United States Constitution? These determinations are fraught with uncertainty. Without more illuminating information concerning the intent of state framers, it may be necessary to use one of the foregoing points of reference to determine the boundaries of the state constitutional right to jury trial in civil cases.

The determination of the precise scope of the right to jury trial under state constitutional provisions is not generally a facile undertaking. A cautious approach to this problem requires a searching examination of some diverse, but carefully selected, state jury trial guarantees in civil cases. This analysis should prove helpful in delineating the boundaries of the right to jury trial in state civil cases.

1. Representative State Constitutional Provisions: An Analysis

A close examination of the myriad state constitutional provisions reveals that the vast majority of states provide a constitutional right to jury trial in civil cases. For example, many state constitutions simply declare that "the right of trial by jury shall remain inviolate," or words to that effect. Implicit in this statement is the notion that the right extends not only to criminal

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26 As previously noted, this is the proper measurement of the intent of the framers of the United States Constitution. In re United States Fin. Secs. Litig., 609 F.2d at 421; see also Thatcher, Why Not Use the Special Jury?, 31 MINN. L. REV. 232, 248 (1947) ("[I]n the absence of specific constitutional change, the jury trial guaranteed by the constitutions of all states in which territorial government preceded statehood, is the same as jury trial at common law, the characteristics thereof having been indirectly controlled by the United States Constitution.").

27 Id. ("[A]s each territory attained statehood and adopted a constitution guaranteeing jury trial, the local practice then current must have been continued and preserved as an unalterable feature of the state judicial system.").

28 Id. ("In the case of states which were formed without passing through territorial status, it is purely a historical question as to what the practice with respect to special juries was in those states at the time of the adoption of the local constitutional provisions guaranteeing jury trial.").

29 See In re United States Fin. Secs. Litig., 609 F.2d at 419-20.

30 See Constitutions of the United States, supra note 21.

cases, but also to civil cases. The authorities addressing this issue certainly bear this out.\textsuperscript{32}

Another line of state constitutional provisions, however, qualifies the right to jury trial in civil cases. For instance, a common limitation restricts the right to jury trial to actions at law \textsuperscript{33} This limitation highlights the importance of making meaningful distinctions between suits in equity and actions at law because, at common law, the right to jury trial existed only in actions at law \textsuperscript{34}

Additionally, some state constitutions modify the common law right to jury trial by linking it to an amount in controversy \textsuperscript{35} For example, the Alaskan Constitution provides as follows: "In Civil Cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law."\textsuperscript{36} Other constitutional provisions are similar and differ only in the amount necessary to trigger the jury trial guarantee.\textsuperscript{37}

Furthermore, some state constitutional provisions recognize the inviolability of the right to jury trial, but concede that it may be "subject to such modifications as may be authorized by" other provisions of the constitution.\textsuperscript{38} Although such constitutional protection may not be absolute, it does provide a formidable barrier against unwarranted governmental interference.

Finally, some state constitutions do not expressly embrace a right to jury trial in civil cases.\textsuperscript{39} In such states, the state legislature

\textsuperscript{32} Thatcher, supra note 26, at 232 ("[J]ury trial in America is intimately associated with the actuating causes of the American Revolution, and has a deep emotional appeal quite aside from its intrinsic merits as a legal institution."); see also Dwyer, Protecting the Right of Trial by Jury, 25 Trial 77, 79 (June 1989) ("Today, we still have trial by jury in the United States, and it is almost unique in the world. We have it in both civil and criminal cases."); Ga. Const., art. I, ¶ XI (discussing under the rubric of "Right to trial by jury" both the right to jury trial in criminal and civil cases).


\textsuperscript{34} See In re United States Fin. Secs. Litig., 609 F.2d at 416 (court acknowledges that the right to jury trial hinges upon the legal-equitable dichotomy).

\textsuperscript{35} See, e.g., Haw. Const., art. I, § 13 ("In suits at common law where the value in controversy shall exceed one thousand dollars, the right of trial by jury shall be preserved.").

\textsuperscript{36} Alaska Const., art. I, § 16.


\textsuperscript{38} Ky. Const., Bill of Rights, § 7.

\textsuperscript{39} The state of Louisiana is a prime example. Perhaps the absence of a civil jury trial constitutional provision is explicable in terms of Louisiana's French civil code tradition. But see Ga. Const., art. I, § 1, ¶ XI (the right to jury trial is subject to several exceptions, namely, "where no issuable defense is filed and where a jury is not demanded in writing by either party.").
probably can make sweeping changes in civil litigation without necessarily offending any jury trial guarantee. For example, some states have developed alternative dispute resolution mechanisms that totally dispense with the jury and place complete trust in an alternative fact-finding process to resolve disputes. Such procedures may be more suspect in the face of some state constitutional provisions that clearly mandate the right to jury trial in civil cases.

2. Deviations from State Constitutional Norms: Are They Permissible in Connection with Civil Jury Trials?

Dispensing with the right to jury trial in complex design litigation in state courts hinges largely upon the language of the pertinent state constitutional provisions and concomitant judicial interpretations. Fewer obstacles may exist in those states where ambiguous civil jury trial guarantees exist. In those states, a “complexity of litigation” exception to the right to jury trial could

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See, e.g., Motor Vehicle Mfr. Assoc. v. New York, 550 N.E.2d 919 (N.Y. 1990) ("New York Lemon Law, which compels automobile manufacturer’s participation in arbitration of motor vehicle defect claims at consumer’s option, does not violate New York Constitution’s guarantee of right to jury trial or unconstitutionally delegate judicial power to private arbitrators;" such action is equitable in nature and would not have been triable by jury at common law).

See, e.g., FLA. CONST., art. I, § 22 ("The right of trial by jury shall be secure to all and remain inviolate."); IND. CONST., art. I, § 20 ("In all civil cases, the right of trial by jury shall remain inviolate."); ILL. CONST., art. I, § 13 ("The right of trial by jury as heretofore enjoyed shall remain inviolate"). The Illinois General Assembly has authorized the Illinois Supreme Court to mandate arbitration of civil cases not exceeding $15,000 in value. ILL. CODE CIV. PROC. ch. 110, §§ 2-1001A-2-1006A (West 1986). However, a party who rejects the arbitral decision may proceed to a trial before a judge or jury, upon payment of the costs and fees, imposed by the Illinois Supreme Court Rule, arising from the rejection of the arbitration. Id. See also Ill. Supreme Court Rule 93(a) which fixes such cost at $200 and Ill. Supreme Court Rule 93(c) which allows a court to waive the $200 costs in the case of a poor person. Ill. Practice Rules, ch. 110A. ¶ 93 (1987).

The large array of state constitutional provisions present difficult interpretative problems. It is apparent that no ironclad interpretative rule will suffice.

See, e.g., Md. CONST., Declaration of Rights, art. 5 ("That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law."). But the Maryland General Assembly has moved cautiously in the face of this somewhat vague provision. For example, Maryland uses a court-annexed, instead of a binding arbitration system in medical malpractice actions. Under this statutory plan, if a claimant is dissatisfied with the arbitral award, he or she can pursue the claim in court. But the claimant must prove that the arbitration decision was erroneous. Md. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to 3-2A-09 (1989).
be created by either the courts or the state legislatures. Although such state constitutional limitations may allow such corrective action, public policy considerations still may argue in favor of a trial by jury in civil cases. Such policy restrictions, however, may be overshadowed by the need for a mechanism to enhance the likelihood of a fair and rational evaluation of the factual issues in complex design litigation.

A greater obstacle to change may exist in those jurisdictions which maintain that, although the right to jury trial in civil cases exists, it is "subject to such modifications as may be authorized by this Constitution." This statement reflects the exalted status of the right to jury trial, which cannot be undermined in the absence of compelling circumstances. However, this declaration does not mean that the right to jury trial is impregnable. The statement indicates only that modifications should be reserved for exceptional reasons, and thus may be correspondingly more difficult to justify. Some flexibility exists that may allow an exception for complex design cases that exceed the practical abilities of a jury.

Those state constitutions basically providing that the right of trial by jury shall remain inviolate present the greatest obstacle to modification. How can one interpret such straightforward language to allow for any deviation from the norm? The most direct, and perhaps more precarious, route to pursue in such states is a constitutional amendment. Although it is not uncommon for state constitutions to provide for modifications of the right to jury trial in civil cases to the extent of special juries, which existed in England in 1791, and should therefore be permissible under such state constitutions. Thatcher, supra note 26, at 243-49. Moreover, such modification may be authorized by state statute. Fay v. New York, 332 U.S. 261, 296 (1947) (a state's use of special juries is constitutionally permissible) and In re Asbestos Litigation, 551 A.2d 1296, 1298 (Del. Super. 1988) ("juror qualifications have long been treated as matters within legislative control and not being constitutionally fixed").

44 The practical difficulties associated with the “complexity of litigation” exception to the right to jury trial are (1) providing operational guidelines or standards for trial courts to determine what cases are too complex for a jury and (2) avoiding the situation where recognition of the “complexity” exception for one type of case opens the door for other types of cases. See In re Fin. Secs. Litigation, 609 F.2d at 431-432.

45 An important public policy consideration is that a jury represents the vanguard of “justice for all.” See G. SPENCE, WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH 3-4 (1989) (commentator argues essentially that juries, and not judges, provide the frontline defense against the powerful corporate and insurance oligarchies that purportedly threaten individual justice in the United States).


48 It has been suggested that this phrasing refers to the “historical” test for Seventh Amendment analysis and would allow a modification of the right to a jury trial in civil cases to the extent of special juries, which existed in England in 1791, and should therefore be permissible under such state constitutions. Thatcher, supra note 26, at 243-49. Moreover, such modification may be authorized by state statute. Fay v. New York, 332 U.S. 261, 296 (1947) (a state's use of special juries is constitutionally permissible) and In re Asbestos Litigation, 551 A.2d 1296, 1298 (Del. Super. 1988) (“juror qualifications have long been treated as matters within legislative control and not being constitutionally fixed”).
constitutions to be amended, the amendment process remains laden with difficulties. The requirements vary, but political hurdles make this a daunting endeavor.

Offering a limited constitutional exception for complex product design litigation at the expense of other compelling concerns is potentially problematic. For any political coalition to be victorious in obtaining a constitutional amendment of this nature, a number of diverse, and perhaps competing, interests must be placated. In political terms, this means that divergent interests must perceive that their constituent concerns will benefit from such an effort. The real danger is that either very little will be done or, alternatively, that any amendment will be so diluted that it will actually be devoid of any significant meaning and effect. The reform of complex product design jurisprudence will most likely suffer in the process. Thus, as either a practical or political matter, relief from such constitutional provisions may rest with state courts.

In fact, state courts may represent the only hope for meaningful fact-finding reform in complex product design litigation, as it

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49 See W. Dodd, The Revision and Amendment of State Constitutions 132-33 (1910) (Difficulty in the amendment process results from "(1) the actual limitations in the constitutions as to the number, frequency, and character of proposals, and (2) the popular vote required for the adoption of amendments."); A. Sturm, Thirty Years of State Constitution-Making: 1938-1968 1 (1970) ("Although all state constitutions contain provisions for their alteration, the amending process has failed to keep them up to date.").

50 E. Cornwell, Jr., J. Goodman, & W. Swanson, State Constitutional Conventions: The Politics of the Revision Process in Seven States 192 (1975) ("[C]onstitutional revision is a political process. As such it does tap the full range of motives and interests called into play by the other political subprocesses at the state level."). Political gridlock is then a distinct threat to the state constitutional amendment and revision processes. See Recent Constitutional Revision Activities: 1967-1968 (The Council of St. Govts., 1969) (noting that political haggling caused some discord during a past New York constitutional convention). To understand the technical distinction between "amendment" and "revision," see J. Wheeler, Jr., Salient Issues of Constitutional Revision 50 (1961). Amendment usually refers to a change of limited scope involving one or a limited number of provisions of a constitution. More often than not this is initiated by legislative or initiative proposals. Revision, on the other hand, means reconsideration of the whole or a major portion of the constitution and has usually been undertaken through a convention. Id.

51 Political inertia generally will be overcome when the benefits of an activity exceed the political costs. Harris, Communicating the Hazards of Toxic Substance Exposure, 39 J. Legal Educ. 97, 107 (1989).

52 Because of political compromising with and influence peddling by special interest groups, the state constitutional amendment process is particularly vulnerable to dilution. See Torts and Retorts 1 (AALS Newsletter, Fall 1989) ("[P]olitics is what lobbyists and legislators engage in.").
is inconceivable that such radical modifications will be implemented without some significant judicial activism. But what amendatory actions are available to the courts in such circumstances? Perhaps the “complexity of litigation” exception will justify some deviation from the norm to promote the due process demands for fair and rational adjudication in complex civil litigation. This may provide a justification for abandoning the right to a jury trial in complex product design cases.

II. THE COMPETING ARGUMENTS ABOUT THE DENIAL OF THE RIGHT TO JURY TRIAL IN COMPLEX CIVIL LITIGATION

A. The Argument in Favor of the Status Quo

Whenever an argument is advanced to abandon the right to jury trial because of the purported complexity of the factual issues involved in the case, strong counterarguments are invariably offered. The counterarguments are generally made on two levels. First, it is argued that juries have time-tested ability to resolve issues inherent in highly complex litigation. Second, assuming that complexity of litigation is the litmus test for denying the right to jury trial in civil cases, “[w]here would the courts draw the line between those cases which are, and those which are not, too complex for a jury” These arguments reflect an uneasiness with any perceived attempt to erode the right to jury trial in civil cases.

Have juries actually demonstrated their practical ability to decide rationally complex civil litigation issues? This question has arisen principally in consolidated antitrust litigation and securities regulations litigation. The complexity of these cases has prompted motions to strike demands for jury trials. Complex design cases

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53 Courts have been frequently called upon to fill the gaps resulting from legislative inaction. See, e.g., Chevron, U.S.A., Inc. v. National Resources Def. Council, 467 U.S. 837 (1984) (Supreme Court approved the use of the “bubble concept” by the states in regulating nonattainment [“dirty” air] areas in the face of Clean Air Act’s unhelpful language and ambiguous legislative history).

54 Spiegel, The Jury and Complex Cases, CASE & COM., Mar.-Apr. 1989, at 13, 15 (The “most recent assault on the Seventh Amendment” is the assertion that “juries are incompetent to sit in judgment on ‘complex’ cases.”).

55 In re United States Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980) (“experience demonstrates that juries are capable of sorting out complex factual issues and applying law to them”).

56 Id.

may likewise come within the ambit of the "complexity of litigation" exception, assuming such special treatment is warranted.\(^5\)

Some staunch supporters of the right to jury trial do not believe that "any case is so overwhelmingly complex that it is beyond the abilities of a jury"\(^5\)\(^9\) Instead, supporters argue "time might be better spent in searching for ways to improve rather than erode the jury system."\(^6\) Although this argument may be compelling in view of the history of the seventh amendment and its state counterparts, it tends to lose much of its appeal in complex product design cases.\(^6\)\(^1\) In such suits serious questions arise about the practical abilities of lay jurors to handle such awesome responsibilities.

Two federal court decisions provide the most forceful arguments in favor of the jury trial system. In *Zenith Radio Corp. v Matsushita Elec. Indus. Co.*,\(^6\)\(^2\) a Pennsylvania federal district court, in a consolidated antitrust case, framed the issue in terms of "whether trial by jury, usually available as of right in private,


\(^{5}\)\(^9\) In *In re United States Fin. Secs. Litig.*, 609 F.2d at 432.

\(^{6}\) Id.

\(^{6}\)\(^1\) In view of the scientific and technical complexity of most product design litigation, it is difficult to imagine that the existing jury system could properly function without some modification. See, e.g., Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292, 294 (1989) (highlighting the complexity associated with toxic tort litigation and concluding "that complex scientific and medical evidence, coupled with voluminous discovery necessary to account for the latency period, are beyond the jury's reach"). Such arguments seem readily transferable to the complex product design litigation context.

\(^{6}\)\(^2\) 478 F Supp. 889 (E.D. Pa. 1979), *vacated* 631 F.2d 1069 (3d Cir. 1980) (Third Circuit held that "complexity of litigation" can provide the basis for denying a jury trial in a civil case; Third Circuit's decision was based on due process considerations mandating rational decision making by the jury). In addressing the issue of operational standards to determine whether a particular case is too complex for a jury, the Third Circuit provided three vague guidelines: (1) the overall size of the suit—taking into consideration the estimated length of the trial, the volume of evidence to be presented, and the number of issues requiring consideration; (2) the conceptual difficulties of the legal issues and the facts supporting them—likely to be determined by the amount of expert testimony to be offered and the length and detail of the jury instructions; and (3) the "difficulty of separating distinct aspects of the case." *In re Japanese Electronic Products Antitrust Litig.*, 631 F.2d at 1088-89.
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."" The court emphatically rejected the suggestion that the complexity of the subject matter of the trial precluded a jury from making a fair and rational determination consistent with the due process clause of the fifth amendment. The court noted that checks existed against a jury's capriciousness, namely, the trial court's power to direct verdicts or grant motions for judgment notwithstanding the verdict. These powers allow the courts to remove the case from the jury to avoid an irrational verdict.

Furthermore, important societal values may be fostered by the jury function. Many individuals believe that the right to trial by a jury representing a cross section of the community has significant social utility. Additionally, jury verdicts that may be "irrational" do not provide an adequate basis for radical departure from the jury process, as such verdicts generally lack precedential value and have correspondingly little systemic effect. Further, supporters argue that a jury has the "right" to deviate from the law in order to promote "justice" in a particular case. The systemic risk from an aberrational decision by a jury in a highly complex case may not be so ominous as to warrant a radical adjustment of the right to jury trial in civil cases.

In view of the foregoing perspectives, juries, even in complex cases, provide a peculiar brand of justice that has sustained our civil justice system for years. According to the court in Zenith Radio, "the jury also provides a needed check on judicial power."

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63 Id. at 899.
64 Id. at 936.
65 Id. at 937, 938 ("proper and frequent judicial guidance" should assuage the problem).
66 Spiegel, supra note 54, at 13 (extolling the virtue of "citizen participation in the administration of justice").
67 Jury verdicts are invariably ad hoc determinations grounded generally on notions of fairness and justice. Such determinations are narrowly focused and are usually limited to the peculiar facts of a case. I O. HARRIS & A. SQUILANTE, WARRANTY LAW IN TORT AND CONTRACT ACTIONS § 3.8 (1989) (commenting on the private tort system in connection with proximate cause determinations).
68 A jury's prerogative to deviate from the "law" to effectuate justice arises from the notion that "a jury is uniquely qualified to interpret the law in accordance with public values and mores." Crook, supra note 6, at 1599. But see Dwyer, supra note 32, at 79 (as a formal matter, jury nullification "lives on today, in one respect, and that is the right of the jury to acquit in a criminal case, no matter what").
69 Zenith Radio Corp., 478 F Supp. at 942.
Thus, the court held that complexity of the litigation was "not a constitutionally permissible reason for striking the plaintiffs' jury demands."\(^7\)

In another decision, *In re United States Financial Securities Litigation*,\(^7\) the Ninth Circuit, in a consolidated securities case, considered the possible existence of a "complexity" exception to the right to jury trial under the seventh amendment. In a thoughtful decision, the court strongly endorsed the jury system in civil cases. The court rejected "complexity" as a standard for determining entitlement to a jury trial. Instead, the court acknowledged that the seventh amendment guarantee is actually a function of whether the action is characterized as either legal or equitable.\(^7\) Thus, if the case is one in law and not in equity, a right to jury trial exists irrespective of the question of complexity and the jury's ability to deal with complex issues adequately.\(^7\)

In addressing the issue of case complexity, the court downplayed the complexity of the case and emphasized the respective roles of attorneys and trial judges in complex civil litigation. The court noted that attorneys can serve a palliative role by simplifying a complex case. Moreover, trial judges can reduce complexity by attempting "to control, manage and direct the course of complex cases."\(^7\)

In connection with the practical abilities of jurors, the court unabashedly noted that "experience demonstrates that juries are capable of sorting out complex factual issues and applying law to them."\(^7\) Regardless of one's feelings about such unwavering devotion to the jury system, the indisputable fact is that juries actually do decide such matters. How juries accomplish this task, however, is an altogether different issue.

As a practical matter, the court in *In re United States Financial Securities Litigation* makes a valid point. Here again, "[w]here would the courts draw the line between those cases which are, and those which are not, too complex for a jury?"\(^7\) This is a legitimate matter of concern for those who champion the "complexity of

\(^7\) Id.
\(^7\) 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929.
\(^7\) Id. at 416.
\(^7\) Id. at 416-17.
\(^7\) Id. at 427.
\(^7\) Id. at 431.
\(^7\) Id.
litigation” exception.77 The primary concern of this Article is whether complex product design cases fall within the boundaries of this exception. Moreover, should the “complexity” exception be restricted to antitrust and securities cases, which previously have been the primary areas of judicial involvement?78

Although the foregoing questions about the “complexity” exception may test the most intrepid soul, they do not present an inscrutable problem. Instead, serious reflection may indicate whether more drastic measures are needed to insure that due process exists in complex design cases. Perhaps some design cases are so complex as to go beyond the capabilities of a jury.79 In such a case, does the seventh amendment or its state constitutional counterparts allow a departure from the right to jury trial in civil cases?

B. The Argument for Change

It seems illogical to contend that juries have the capacity to decide all issues, regardless of the difficulty or complexity involved. Complex product design cases frequently test the outer limits of understanding of a lay person.80 Moreover, such cases generally invoke a battle of the experts on highly technical matters.81 To contend unequivocally that a lay jury can routinely sort out these complex facts seems to ignore reality.

The inherent complexity in complex product design cases raises several plausible justifications for sanctioning a departure from the conventional right to trial by jury. First, the historical dichot-

77 Spiegel, supra note 54, at 15-16 (“no one has or can define what is a complex case”). In view of the apparent difficulty in delineating what is complex, can a court, as a practical matter, properly create a “complexity of litigation” exception to the seventh amendment? But see In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069, 1088 (3d Cir. 1980) (leaving the determination of “complexity” for district court’s consideration on remand).

78 See supra notes 57-58 and accompanying text.

79 See In re United States Fin. Sec. Litig., 609 F.2d at 431-32. In this case, the Ninth Circuit hypothesized whether an airplane design case came within the pale of the “complexity” exception. Such design cases may contain myriad complex issues that defy reasoned analysis by a lay juror.

80 See City of New York v. Pullman Inc., 662 F.2d 910, 919 (2d Cir. 1981). Although the court concluded that the retrofit issue was not too complex for a jury to decide, it did not absolutely reject the “complexity exception.” Id. at 920.

81 In a design case, an expert witness is generally required to deal with the issue of the feasibility of a safer, alternative design. This frequently produces a battle of the experts. See, e.g., Knitz v. Minster Mach. Co., No. L-84-125 (Ohio Ct. App. Feb. 9, 1987) (Westlaw, State directory, OH file).
omy between actions at law and actions in equity allows some deviation from the right to jury trial. Complex design cases arguably can be analogized to an equitable accounting at common law, which was deemed to be so complex as to be triable only by the court. If the English common law of 1791 is the touchstone for determining the right to jury trial under the seventh amendment, complex design cases can be tried, with some historical justification, by means other than a conventional jury.

Second, a footnote appearing in the United States Supreme Court decision of Ross v Bernhard seems to lend some credence to the "complexity of litigation" exception. In Ross, the Court suggested that the seventh amendment jury trial guarantee may be subject to a "complexity" qualification. If accepted literally, this comment arguably would allow a court to adopt a new interpretation of the seventh amendment in light of the practical abilities and limitations of juries. A principal issue is whether the Ross footnote deserves such an expansive reading.

Finally, a plausible argument may be advanced that due process concerns militate against allowing a jury to decide claims beyond their comprehension. Although the jury system is easy to attack in this regard, presenting an alternative solution to the problem of adjudicating complex design cases in a fair and rational manner is extremely difficult. Nevertheless, this should not obscure the issue of the jury's possible incapacity in such litigation.

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8 Spiegel, supra note 54, at 16 ("complexity renders a suit equitable in nature").
10 Id. at 538 n.10.
11 Certainly, a plausible argument can be made that the pertinent Ross footnote is merely dictum and should not have any precedential value. See In re United States Fin. Secs. Litig., 609 F.2d at 425 n.43. On the other hand, the issue raised "by the Ross footnote was whether in 1791 an English Chancellor would have considered the 'practical abilities and limitations of juries' and taken into equity a case that he regarded as too complex for jury resolution." Campbell, The Current Understanding of the Seventh Amendment: Jury Trials in Modern Complex Litigation, 66 Wash. U.L.Q. 63, 65 (1988).
12 The due process argument is grounded upon the notion that an uninformed jury verdict is neither impartial nor rational and is bereft of fundamental fairness. Demetrio, Should Juries Decide Complex Cases?, 21 Trial 44, 47 (1985) (presenting arguments in favor of the "complexity of litigation" exception, though ultimately rejecting them).
13 The crucial question is whether a satisfactory alternative to jury trial in civil cases is reasonably available. See Spiegel, supra note 54, at 20.
14 In the event the present jury system should become overwhelmed by burgeoning complex civil litigation, some competent fact-finder must come forward and fill the void. Such informed decision making is an indispensable element of our civil justice system. Campbell, supra note 85, at 66 ("the primary value promoted by due process in fact-finding procedures is 'to minimize the risk of erroneous decisions'").
Although precise evaluation of the relative merits of the competing arguments regarding the “complexity of litigation” exception is probably impossible, the myriad uncertainties attending the evaluation of complex design cases by juries should engender some thoughts, consistent with constitutional doctrines, about less intrusive alternative methods for adjudicating such claims.

III. THE ALTERNATIVES

A. A Jury of Experts

Whenever complex, esoteric issues confront our legal system, it is frequently asked whether conventional fact-finders have the requisite ability to decide such matters. Suggestions ranging from a “Science Court” to a “blue ribbon” jury have been offered as reasonable alternatives.89

Although the foregoing alternatives may provide some benefits, possible drawbacks also exist. For instance, some contend that such a system would be too time-consuming.90 Time costs do present a potential problem, particularly in connection with the selection process. Who will select the “experts” for a special panel of fact-finders? How do you reach a consensus between the parties concerning the qualifications of the “expert” jurors? Certainly, a significant amount of disagreement could surround such issues. Furthermore, along with the problem of delay, significant transaction costs which normally accompany any hotly contested issue could arise.91 Thus, economic inefficiency is a distinct risk of

89 See Note, Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation, 24 ARIZ. L. REV. 715, 728 (1982) (defines a “blue ribbon” jury as “created from a special pool of potential jurors who have specific qualifications well-suited to trying a particular case”); Bazelon, Coping With Technology Through the Legal Process, 62 CORNELL L. REV. 817, 826 (1976-77) (“the most widely publicized suggestion has been that we create a ‘Science Court,’ to resolve technical, factual disputes”).

90 In addition to time costs, other problems may beset the “blue ribbon” jury concept. See Bradley v. A. C. & S. Co., No. 70834, slip op. at 7 (Del. May 23, 1989) (Westlaw, state directory, Del. file) (may inject more of a predetermined philosophy; may actually be more of a prejudicial system; many cases involve more than one area of expertise, etc.).

91 The spectre of huge transaction costs accompanying the “expert jury” process is a source of consternation because it may undermine the efficiency of the fact-finding process. It seems unwise to pursue an alternative fact-finding mechanism that may be as costly, cumbersome, or inefficient as the existing one. However, if uncertainty is exacerbated by the existing civil jury system, along with its concomitant delay, perhaps an expert jury could reduce this uncertainty and promote a more efficient form of civil dispute
empaneling an expert jury. But is the advantage of increased fairness worth these unavoidable costs?

Expert juries also present problems of divorcing fact from policy in legal decision making. The concern is that a jury of "technocrats" may be ambivalent about the social policy ramifications of their decisions. In integrating law and science generally, it is feared that scientists do not sufficiently appreciate social policy impulses. Here again, the chief issue is "fact versus social policy."

Additionally, an expert jury may jeopardize the core value of impartiality, which goes to the heart of the civil justice system in the United States.

The existing lay jury system may be at some risk with this innovation. But is this undesirable in a complex design case? A jury of experts could conceivably harbor some bias—either toward industry or the injured plaintiff—that could have a deleterious effect upon the fair and impartial resolution of the case. But, does this risk differ markedly from the arbitrariness that probably currently exists in the deliberative process of lay jurors in such complex litigation? Further, this concern ignores the existence of voir dire to weed out any bias that may undermine the integrity of the verdict. An effective voir dire should minimize the likelihood of such prejudice. When the reduced risk of bias is weighed resolution. See Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 U. Chi. Legal F 161, 197 (jury system introduces an element of uncertainty that inhibits settlement).


Id. at 1379-81 (scientists conduct research without considering societal or legal consequences).

Bradley, No. 70834, slip op. at 7.

But the bias inherent in an "expert" jury panel may be an inevitable consequence of any fact-finding process subject to human error.

Given the complexity inherent in sophisticated civil litigation, an uninformed lay juror's decision about an arcane issue may be fraught with arbitrariness. Costantino & Master, Jr., The Seventh Amendment Right to Jury Trial in Complex Civil Litigation: Historical Perspectives and a View from the Bench, 12 AIPLA Q.J. 279 (1984).

Voir dire is primarily designed to elicit information from potential jurors to form the basis for either a challenge for cause or a peremptory challenge. When conducted properly, the problems of juror bias may be ameliorated, if not obviated. See Marshall, A View From the Bench: Practical Perspectives on Juries, 1990 U. Chi. Legal F 147, 148 (a key to the proper utilization of the jury is the method of selection).

Although there may be some truth to the notion that even the best efforts of lawyers (or, for that matter, judges) will not assure complete control of the jury, approaching voir dire assiduously should detect the lion's share of discoverable biases among
against the benefits of more enlightened decision making by an expert jury, perhaps an expert jury may be a cost-effective alternative.

It may be imprudent, however, to envision expert juries as a panacea. Some real risks associated with expert juries exist. But the pertinent inquiry is whether the net benefits of expert juries outweigh the net risks or costs. The answer is certainly a matter of judgment.\(^9\) But, in light of the peculiar problems presented in complex product design cases, perhaps serious consideration should be given to having juries composed of individuals with special expertise as the sole arbiters of such cases.

**B. Expert Judges**

To those who consider the risks associated with expert juries to be unacceptably high, an expert judge may be more palatable. The underlying justification for this alternative is essentially the same as for the jury of experts; an expert judge will have greater ability to fairly and rationally decide complex cases.\(^9\)

However, a system that relies on expert judges has at least one drawback. The cost and time associated with training a body of jurists could be staggering.\(^1\) And even the commitment of vast resources will not assure the creation of a cadre of judges with the requisite knowledge to decide complex design cases.\(^1\) Thus, the likelihood of generating a cost-effective solution from this alternative is questionable.

Although the “expert judge” alternative may be impractical, adjustments could enhance its utility. For example, appointing special masters to assist judges in complex design cases may have a desirable effect. This practice is currently sanctioned by the

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prospective jurors. See Frank, *Judging Juries: Some Cases Too Complex?*, 71 A.B.A. J. 26, 27 (Dec. 1985) (“[t]he best lawyer in the world, helped by all the best experts, can’t be sure the light bulb is going on in the jury panel”).

\(^9\) Cost (or risk)/benefit analysis is used to determine the cost-effectiveness of a particular course of action. See Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-34 (1972).

\(^9\) See Spiegel, *supra* note 54, at 16 (“the critics of the jury system say we should leave it to a one man educated judicial dispenser to determine what is too difficult for a jury to understand”).

\(^1\) Training is essential if judges are to become “experts.” Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 115 n.80 (1979) (“judge will probably be as unfamiliar with complex technical matters as the jury”).

\(^1\) See Bazelon, *supra* note 89, at 828 (“we can hardly hope to succeed in raising the judiciary’s scientific consciousness”).
Federal Rules of Civil Procedure and is frequently used to handle complex civil litigation. Rules 16(c)(6) and 53 permit a judge to appoint a special master, and this technique has been frequently used in complex civil litigation. The appointment of the special master is often made during the pretrial conference.

In addition to special masters, some situations lend themselves to the appointment of expert arbitrators. From an economic perspective, expert arbitration may have distinct advantages. Complex product design suits entail massive costs, particularly in discovery and expert witness fees. Arbitration could have a palliative effect in this regard. Moreover, protracted litigation consumes an attorney's valuable time. Expert arbitration may make it easier for attorneys to pursue complex litigation. In addition, an expert arbitrator is more likely to fully comprehend the costs and benefits inherent in complex design cases.

C. Expert Advisors

Some maintain that in complex litigation, including product design cases, judges should simply select an expert advisor to assist them in resolving scientific and technical issues. A division of

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103 See FED. R. CIV P 16(c)(6), 53.
104 Id.

Although special masters may be appointed during the pre-trial conference phase of the litigation, they actually serve an ameliorative function during the trial itself by making "findings of fact and conclusions of law based upon the evidence presented" or, by providing clarification "when the legal issues appear too complicated for the jury to handle adequately alone." Note, supra note 89, at 722; see also Wilkinson, Zielinski, & Curtis, A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases, 37 KAN. L. REV 61, 95 (1988) (perhaps it is "easier and more meaningful for the court to use special masters or court-appointed experts to sort out and determine complex facts in a reasoned and rational manner").


107 Id. at 406-07 ("on average, shorter than trials, involved less attorney preparation time than trials, costs both courts and private litigants less than trials, and generally required less time on the schedule queue than trials").

108 Lawyers who work on a contingency fee basis purportedly operate on the margin regarding cash flow. Thus, it is vital that professional time—an irrecoverable asset—not be squandered. Blum, Big Bucks, But Cash Flow Worries Plague PI Lawyers, Nat'l L.J., Apr. 3, 1989, 1, 46 ("case selection is the most critical decision in contingency work").

109 Hensler, supra note 106, at 399 ("strengthening arbitrator selection procedures can further increase arbitration's contributions to due process").

110 In support of the use of an expert advisor to assist the judge, see Frank, supra note 98, at 26.
opinion exists regarding the appropriateness of such an approach. Some have expressed the somewhat cynical view that these experts will essentially become surrogate judges, because judges will abdicate their responsibilities and leave vital decisions to expert advisors. But how does this process differ significantly from the use of special masters? If the difference is simply one of degree, then perhaps the expert advisor is a viable alternative.

Some commentators support the use of expert science advisors. One commentator suggests that fears concerning excessive influence can be minimized by properly defining and limiting the advisor's role. The benefit derived from an expert advisor may overshadow the concomitant risks. Because a particular risk/benefit analysis will invariably reflect an individual's judgment as to the propriety of this alternative to the traditional jury system, a cost/benefit analysis will not always yield hard and fast answers.

An interesting question surrounding the expert advisor alternative is to what extent it would supplant the jury system. In theory, the advisor would simply counsel the judge. Hence, controversial factual questions such as defectiveness in design and causation would remain within the province of the jury. It would be incumbent upon the attorneys to utilize adeptly their expert witnesses or be bound by the potentially unaided, uninformed judgment of the jury. Furthermore, whenever such expert witnesses disagree on the interpretation of any factual issue, their expert

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111 See Bazelon, supra note 89, at 828 ("we could appoint expert science advisors, to sit at the right hand of a judge when he is considering a case with scientific overtones"). Judge Baselon ultimately rejects the expert advisor alternative. Id.
112 Id. (commentator concludes that the attendant risk is not worth any corresponding benefit that might be derived from a scientific advisor).
113 Id.
115 Leventhal describes the appropriate role as a "hybrid between a master and a scientific law clerk." Id.
116 One commentator has observed that rarely has a preordained mathematical formula been the sole basis for decision making. See, e.g., Rodgers, Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking, 4 HARV ENVTL. L. REV. 191, 210 (1980) ("It is impossible to discover a single example of decision making being reduced to simple computation.").
117 Despite its drawbacks, risk-benefit analysis is a "helpful analytical tool." W Keeton, supra note 1, at 59. Obviously, it is not the only approach to resolving multifaceted problems.
opinion will not be binding on the jury. The jury, then, could rely upon their own judgment concerning the facts.

Under the expert advisor alternative, therefore, a lay jury would not be completely removed from the deliberative process. In fact, the ultimate fact-finding function would fall squarely upon the jury. This, of course, heightens the likelihood that different juries will reach divergent results. But if a jury's judgment is reasonably informed, this may actually be irrelevant. Unfortunately, this is most likely only when the expert witnesses are in complete agreement about the matter at issue. How frequently will this occur in a complex design case replete with scientific and technological uncertainty? Infrequently at best. Consequently, the expert advisor proposal probably will not provide absolute protection against arbitrary and capricious decision making by a lay jury. But this minor flaw does not undermine the utility of this approach as one tool in an overall package of meaningful reform.

D. Leave "AS IS" with No Radical Changes

Is there any reason to recommend the preservation of the status quo? To be sure, the existing right to jury trial is designed to insure an impartial and rational determination of the issues raised during civil litigation. Are these objectives achievable in complex product design cases? Perhaps not in a purely theoretical sense. But perhaps from a practical perspective.

Historically, juries have been viewed as representing a cross section of the community. Because of this unique status, a jury's

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119 Id. at ¶ 23.06[2][a] ("conflicting testimony of experts raises an issue for the trier of fact").
120 This, again, is consistent with the fundamental notion that juries must weigh the credibility of expert witnesses regarding factual issues in dispute. See, e.g., Brueng v. American Family Ins. Co., 173 N.W.2d 619, 625 (Wisc. 1970) (jury rejected an expert witness' testimony concerning the foreseeability of plaintiff's conduct).
121 But ad hoc decision making has long been a distinct element of the American civil justice system. For example, individual justice is purportedly the essence of the law of torts. Rosenberg, Class Actions for Mass Torts: Doing Individualized Justice by Collective Means, 62 Ind. L.J. 561, 561 (1987) ("the common law tradition of individual justice").
122 A well-informed decision is the stuff of which due process is made. Drazan, supra note 61, at 292, 297 ("procedural due process issue raised by special juries centers around the litigants' right to an impartial and capable jury").
123 See G. Spence, supra note 45, at 91, intimating that, when the jury controlled the fact-finding process, there was justice for all.
124 In re Asbestos Litig., 551 A.2d 1296, 1298 (Del. 1988) (selection "criteria must insure a cross section of the population suitable in character and intelligence for that civil duty") (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)).
verdict has been frequently characterized as reflecting the community's sense of justice and fairness.\footnote{125} Thus, the jury's common sense notions of how the matter should be resolved frequently coincide with what the community views as correct and proper.\footnote{126} This confluence of philosophical impulses may not exist, however, in an intricate product design case.\footnote{127} In such instances, is a deviation from the existing right to jury trial justified? Some cogent arguments support the maintenance of the status quo.

A primary justification for the existing right to jury trial in complex product design cases is that the system has the "blessing of age."\footnote{128} Given this, some resistance to modification is understandable.\footnote{129} Some advantage in clinging to such a venerable institution exists.\footnote{130}

Although some maintain that the jury is technically illiterate in complex civil cases,\footnote{131} this bare assertion should not be allowed to negate the countless years of undeniable success.\footnote{132} No alternative has such a proven track record. To dispense with the trial by jury guarantee, and to replace it with an alternative method of adjudication shrouded in uncertainty, may be ill-advised.

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122 Crook, \textit{supra} note 6, at 1599 ("a contemporaneous expression of community values").
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123 Higginbotham, \textit{Continuing Dialogue: Civil Juries and the Allocation of Judicial Power}, 56 \textit{Tex. L. Rev.} 47, 58 (1977) ("[T]he jury's verdict provides the judicial process with a contemporaneous expression of the community values that bear on the issues of each case.").
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127 To be sure, the typical lay juror's expectations as to complex design features may markedly differ from those within the general community who are not enlightened by the testimony of expert witnesses. Thus, a jury decision may occasionally deviate from community norms.
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128 Uncritical acceptance of long-standing practices is not unique to product design cases. For example, rather than receiving the disdain it deserved, the venerable English common law rule denying a cause of action for wrongful death was accepted by American courts without question. O. HARRIS, \textit{ARKANSAS WRONGFUL DEATH ACTIONS} § 1-1 (1984) (citing Moragne v. States Marine Lines, 398 U.S. 375, 386 (1970)).
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129 Spiegel, \textit{supra} note 54, at 13 (championing the value of the right to jury trial in civil cases).
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130 One of the many benefits of the current jury system is the "element of safety in numbers when one desires to have a factual dispute resolved under the law," Spiegel, \textit{supra} note 54, at 13.
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131 \textit{See}, e.g., Schwarzer, \textit{Communicating with Juries: Problems and Remedies}, 69 \textit{CALIF. L. Rev.} 731 (1981) ("The jury's capacity to serve as the repository of the people's justice, reason, and fair play is being questioned" in complex, lengthy trials.).
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132 Though a jury may be technically illiterate, a good track record, coupled with a feasible means to eliminate this deficiency, may still warrant the retention of the existing regime.
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The answer may instead lie in fine-tuning the existing jury trial system, not radically altering it. This would probably do less violence to the notion of a trial by jury reflecting a cross section of the community, which has a sense of the community's ideal of acceptable behavior regarding product design. In this connection, a number of ideas merit consideration.

1. **Possible Modifications to the Existing System**

   **a. The Simplification of the Data**

   A modest, but feasible, modification of the existing jury system is to simplify the management of the technical data inherent in design cases. This may facilitate the jury's assimilation and understanding of the intricate issues involved in a complex design case. But how would this simplification process work in a "real world" setting? Unfortunately, when one contemplates such a process, the "Plain English" simplification movement established for Insurance Law quickly comes to mind. In that context, simplification in insurance policy language has perhaps heightened the confusion. This also may happen under the foregoing simplification proposal.

   Assuming that simplification of the technical data warrants some consideration, several possible methods exist. First, the increased use of special masters (or court-appointed experts) has been occasionally mentioned. On its face, this may serve to

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133 As occasionally noted, "if it ain't broke, don't fix it!" Perhaps this personifies the punctilious attitude that should dominate the debate about modifying the right to trial by jury in complex civil cases.

134 See McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 491 (1986) (suggesting a number of innovative management techniques for handling complex civil litigation generally, such as, "computer-assisted negotiation, scorable game, appellate expert, and case evaluation decision support system").

135 In many cases, attorneys and judges can simplify the complexity and promote the jury's understanding. See Spiegel, *supra* note 54, at 22; see also G. Spence, *supra* note 45, at 250 ("Plain talk! That is the secret to the art of advocacy.").


137 *Id.* ("an attempt to simplify may in fact obscure"). But see Costantino & Master, *supra* note 96, at 286 (extolling the value of jury instructions in "Plain English").

138 See Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev 394 (1986), highlighting the increased uses of special masters "to help manage complex civil cases." In this vein, the commentator notes a
simplify the complex issues involved. In the past, special masters have fulfilled this role under a more comprehensive mandate.\textsuperscript{139} It seems that a narrower role would be within the special master’s competence. Such individuals could converse with the judge who, in turn, could provide simplified instructions to the jury.\textsuperscript{140}

Second, skillful and exhaustive use of the pretrial conference may constitute another simplification device. During the pretrial conference, the judge, the attorneys, and the court-appointed expert could sort out the intricate technical questions and reach a consensus about their presentation to the jury in a comprehensible fashion.\textsuperscript{141} The advantage of this alternative is that it utilizes a time-tested procedure to simplify trial issues.\textsuperscript{142} Certainly, this method is not a striking departure from existing legal processes and should face less opposition to its implementation.

Third, the reasonable use of a “panel of experts” may enhance the simplification process.\textsuperscript{143} Caution is advised here, however, because of the risks inherent in the selection of a “panel of experts.”\textsuperscript{144} Who should make the selection? How can the selection process be depoliticized? How will it be determined who is an “expert” regarding the pertinent issues? This litany of questions highlights the uncertainty surrounding this option.

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\textsuperscript{139} See supra notes 103-05 and accompanying text.

\textsuperscript{140} Providing comprehensive jury instructions fosters rational decision making. See, e.g., Goodman, Greene, & Loftus, What Confuses Jurors in Complex Cases, TRIAL 65, 71-72 (Nov. 1985), where the commentators highlight the difficulty that some jurors experienced in understanding voluminous jury instructions arising from an 11-week asbestos case. Certainly, such bewildering jury instructions exacerbate the problems attending the adjudication of complex products liability cases. See also Note, Improving Jury Comprehension in Complex Civil Litigation, 62 ST. JOHN’S L. REV 549, 550 (1988) (suggesting a number of methods to improve the existing system: ordering the issues for trial, conducting the evidentiary portion of a trial, determining the form of the jury verdict).

\textsuperscript{141} This does not differ substantially from a vital function served by the pretrial conference: trial simplification. See Clark, Objectives of Pre-Trial Procedure, 17 OHIO ST. L.J. 163, 164 (1956); Peckham, The Federal Judge as Case Manager: The New Role in Guiding A Case From Filing to Disposition, 69 CALIF. L. REV. 770, 785 (1981) (“can easily save litigants and the court time and money”).

\textsuperscript{142} Clark, supra note 141, at 164.

\textsuperscript{143} A “panel of experts” could serve the role traditionally performed by lay jurors.

\textsuperscript{144} See Bazelon, supra note 89, at 827-28 (illustrating the difficulty in selecting experts for qualitative scientific issues).
Perhaps advocates of reform should emulate some existing practices in selecting an “expert panel” to be fact finders in complex litigation. For example, in a voluminous asbestos litigation, a federal district court in the Southern District of Ohio used a special panel to screen asbestosis claims stemming from the inhalation of asbestos. The panel’s primary function was to determine which claims had the requisite causal nexus. Those claims that failed to reflect such causal connection were dismissed by the court.¹⁴⁵

An interesting feature of the screening panel was the manner in which its members were selected. Under the federal district court’s plan, one panel member was chosen by the plaintiff, one by the defendant, and the third member by the court.¹⁴⁶ Presumably, the reason for this particular selection method was to enhance the likelihood of choosing a fair and impartial panel. Moreover, from a political perspective, this process most likely appealed to a broad range of political persuasions.¹⁴⁷ As a result, strong political opposition to the panel was probably averted.

The foregoing mechanism should be easily applicable to complex design cases. A “panel of experts” could be chosen in a politically neutral fashion without compromising competence. Such a panel could be invaluable in resolving arcane technical issues associated with a complex design case. Concerns about bias, political or otherwise, could be ameliorated and perhaps obviated. Additionally, a fair and rational determination of the complex issues would be more likely. The commonly expressed argument that a “panel of experts” may usurp the traditional function of a court is not convincing, given the number of diverse selection methods available.¹⁴⁸ By selecting experts from different professional and political backgrounds, the ability to maintain judicial control over the panel should be greatly enhanced. Perhaps this selection technique typifies a beneficial side of the “divide and conquer” philosophy.¹⁴⁹

¹⁴⁶ Id.
¹⁴⁷ At a bare minimum, both industrial and consumer perspectives are involved in such an arrangement. Accommodating these two points of view should minimize any political haggling.
¹⁴⁸ Diversifying the panel of experts makes it less likely that any coalition will usurp the traditional functions of a court.
¹⁴⁹ Normally, the “divide and conquer” philosophy carries a negative connotation.
b. The Conservative Approach

The “conservative” approach involves less manipulation of the current system and considers a less drastic modification of the existing jury trial mechanism as a more prudent course of action. Under this approach, the burden of ensuring that complex issues are within the competence and understanding of a jury rests solely with the trial judge and trial attorneys. First, a trial judge’s responsibilities can be accomplished by carefully drawn jury instructions that simplify complex issues. Drafting jury instructions is a principal judicial responsibility in civil litigation, but it is a particularly important task in complex civil litigation. Additionally, by exercising the power to direct a verdict or to grant a motion for judgment notwithstanding the verdict, a judge can take a case from a jury if, in the court’s estimation, it is clearly too complex to allow a fair and rational decision. These tools are proven methods to reduce possible confusion without eroding the venerable right to trial by jury in civil cases. Some commentators argue that once the erosion of the right to trial by jury becomes firmly established, the exceptions will eventually swallow the general rule, spelling the ultimate demise of the right to jury trial in civil cases.

Second, trial attorneys can lessen the complexity by developing clear, cogent evidentiary presentations and arguments. Perhaps nothing is more illuminating to a jury than well-focused, organized arguments. Additionally, attorneys can further the jury’s understanding by contributing to the drafting of jury instructions. Proposing explicit jury instructions not only furthers the trial, but assists in making a record for appeal. This is important because

That is, by drawing the parties apart, they can more likely be overwhelmed. But in this Article’s proposal such approach may actually have a salutary effect.

Spiegel, supra note 54, at 22.

Well-crafted jury instructions may increase a jury’s appreciation of the intricate questions inherent in complex design litigation.

Judges have typically insured the fair and accurate outcome of a trial by the use of post trial procedural safeguards. See Note, supra note 89, at 726-27 (“safeguards include directed verdicts, judgments notwithstanding the verdict, and the ordering of a new trial”).

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding. Spiegel, supra note 54, at 22 (quoting Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 479 (1928)).

This is generally true in product design cases where the standards, particularly for defectiveness, are extremely vague. W. Keeton, supra note 1, at 186.

See Nichols v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980).
erroneous jury instructions occasionally do constitute reversible error. Thus, from a trial advocacy perspective, it behooves an attorney to assist in eliminating the complexity, and the resulting confusion, inherent in product design cases.

The conservative approach favors an improvement of the existing jury trial guarantee in civil cases instead of its wholesale modification or abandonment. A definite virtue of such a proposal is that it builds on a system steeped in constitutional history and practical politics. Moreover, the proposed modifications are consistent with the generally accepted powers and responsibilities of judges and attorneys in trial litigation. The conservative proposal seems less radical than many of those included within the “erosion principle.” But can it accomplish the desired objectives?

The attainment of this approach’s objectives depends mainly on how well it will operate within the existing adversarial system. If the primary objective of the adversarial system is to arrive at the truth, perhaps attorneys will be more willing to elucidate the technical evidence to simplify these issues for the jury. On the other hand, if revealing the truth is not the primary concern of the system, then it is doubtful that there will be a strong desire to facilitate understanding by the jury. Instead, there may be some sense of urgency to obfuscate the issues. In this event, very little, if any, faith should be placed in trial attorneys to provide the necessary corrective action in complex civil cases.

The thought that trial judges can make extremely complex cases more manageable may have some validity irrespective of the underlying purposes of the adversarial system. The unique position that judges occupy in a trial probably substantiates this contention more than anything else. Judges, in theory, preside over a trial to

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156 Id. (In a strict tort design case, an instruction reflecting the consumer expectancy test of defectiveness was deemed to constitute reversible error. An appropriate jury instruction would have defined unreasonably dangerous in terms of risk-benefit analysis.).

157 See Spiegel, supra note 54, at 22.

158 As a policy matter, there has been a longstanding debate over the primary objective of the judicial system. That is, does it seek truth, or does it secure justice through the adversarial process? See Wessel, Forum: Alternative Dispute Resolution for the Socioscientific Dispute, 1 J.L. & Tech. 1, 4 (1986) (“the judicial system seeks to provide justice. Justice is not always the same as the scientific truth of a matter”).

159 If there were no perceived virtue in truth, then few litigators would actually pursue it. Instead, being the prevailing party would assume a higher level of prominence. Id. at 5 (“Truth is, of course, a goal of the judicial system, but it is only one goal, and rarely the main one.”).

160 If obfuscation often triumphs, then a rational litigator is likely to pursue it.
insure that justice and fairness are meted out evenhandedly. Concern about the preeminence of truth as a necessary product of the adversarial process is, therefore, more likely within the judges' concerns. Thus, drafting jury instructions that shed light on the meaning of technical and scientific evidence seems consistent with a judge's role in facilitating the jury's understanding.

But how will judges acquire the expertise to do this?

It is doubtful that judges are sophisticated enough to handle these intricate issues. In fact, it is common knowledge that judges generally have not displayed the facility to integrate law and science. Perhaps this will not be true in succeeding years if the gap between law and science continues to narrow. In fact, one commentator surmises that this process has begun. But bridging the gap between law and science remains basically an aspiration; a judge, therefore, will often face formidable odds in meeting this challenge. Thus, it may simply be a classic case of wishful thinking to argue that the existing civil jury trial system can function with only minor changes. Relying on trial attorneys and trial judges to correct the system's inability to deal with complex product design issues reflects a naive understanding of the magnitude of the problem in coping with the scientific and technical nuances associated with complex product design litigation.

It seems unfair to generalize that, "if there be a justifiable criticism of our jury system, it should be laid at the doorsteps of our educational institutions for not preparing our future judges and lawyers for the tasks they will face in the future." Instead,

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161 But see G. Spence, supra note 45, at 109 (suggesting that only a few judges have refused to sacrifice justice "at the altar of Power").

162 But some judges have occasionally engaged in outlawry to promote the phenomenon of "homecooking." See R. Neely, The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts 75 (1988) ("in many other areas of the law where there is no nationally imposed unity, state judges are victimized by the competitive race to the bottom by being forced to do things that they know are wrong both from the perspective of sound national and sound state policy").

163 The primary purpose of a trial judge's instruction to the jury is to heighten the fact-finder's understanding of the factual issues of the case.

164 See, e.g., Rosenblum, Legal Education and Professionalism, The President-Elect's Address, Association of American Law Schools (No. 87-1), Jan. 1987, at 12 (on "the need to develop legal standards for utilizing contributions of the sciences").

165 See Goldberg, supra note 92, at 1379.

166 Id.

167 Lawyers, for example, must generally acquire the services of expert witnesses in complex design cases at a significant cost. To be sure, this frequently leads to costly, inefficient litigation.

168 See Spiegel, supra note 54, at 22.
any deficiency is probably inherent in the system's use of fact-finders who are incapable of fairly and rationally deciding the complex questions that frequently abound in product design litigation. The answer does not lie in simply improving the conventional jury system pursuant to the "conservative" approach. Instead, more drastic reform measures may be necessary.

IV. A Reform Plan

A. The Basic Outline

Reform simply for the sake of reform is generally misguided. Thus, any drastic modification of the existing jury trial system should probably be undertaken only as a last resort. This is especially true in view of the constitutional underpinnings—both federal and state—of the right to jury trial in civil cases. Moreover, juries, in theory, represent the views of a cross section of the community; as a result, their decisions may reflect community ideals of justice and fairness.

In response to concerns about the possible lack of fairness and rationality in jury decisions, it has been postulated that a jury enjoys the unique "right" to deviate from the clear dictates of the law to reflect the conscience of the community regarding fairness and justice. It is doubtful that such a bald assertion enjoys any legal legitimacy, although some contend this has been practiced sub silentio for years. An improper practice cannot be miraculously transformed into a permissible one by virtue of cus-

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169 Certainly, the general lack of capable fact-finders significantly undermines the due process underpinnings of a complex design case. Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C.L. Rev 511, 533 (1979) ("it seems absurd to delegate the task of factfinding in complex cases to a decision making body of dubious competence").

170 *Harris, Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 Sw. L.J. 909, 950 (1986).

171 See supra notes 8-41 and accompanying text.

172 See *Crook, supra note 6*, at 1599 ("civil jury trial further contributes to the judicial system by providing a unique platform for a contemporaneous expression of community values").

173 See *G. Spence, supra note 45*, at 90-91 ("the old principle of jury nullification had worked just as the Founding Fathers had intended").

174 In torts, for example, juries reportedly invoked comparative negligence principles long before the general repudiation of the common law contributory negligence rule. W Prosser, J. Wade, & V Schwartz, *Cases and Materials on Torts* 566 (8th ed. 1988) [hereinafter Prosser & Schwartz].
tomary adherence over time. In tort law common prudence is not necessarily reasonable prudence. It seems unreasonable to allow the fact-finding process in complex design cases to be subverted by a flawed, albeit common, practice.

B. What Reform Plan Will Succeed?

Any reform effort may be subject to attack by those wedded to the existing jury system. Moreover, as previously noted, the right to trial by jury in civil cases enjoys the imprimatur of both the federal and state constitutions. To think that such a firmly entrenched guarantee will be easily surrendered is extremely naive.

In view of the formidable challenge of successfully advocating an alternative to the venerable jury trial guarantee in civil cases, a reformer must present a compelling, reasoned analysis to justify any modification. The paralysis spawned by many years of accepted practice cannot be easily overcome. This rings particularly true for a right that goes to the core of American jurisprudence. Thus, advocating a radical reform of the conventional right to trial by jury in civil cases perhaps smacks of temerity.

C. The Reform Proposal

The principal thesis of the reform proposal is that ordinary jurors do not possess the requisite competence and knowledge to decide fairly and rationally complex issues emanating from product design cases. This view is not a broad, general condemnation of the right to trial by jury, but simply a frank acknowledgment of

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175 See Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903) ("[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not") (quoting Wabash Ry. Co. v. McDamels, 107 U.S. 454 (1882)).

176 See supra note 8-41 and accompanying text.

177 This phenomenon is currently reflected in the debate surrounding the use of alternative dispute resolution in medical malpractice cases. See, e.g., Malpractice Plan Angers Trial Bar, 2 WASH. LAW 17 (March/April 1988) (lawyers critical of a plan of "the American Medical Association (AMA) that would take malpractice cases out of the courts and put them in the hands of a specially created state panel"). In connection with motor vehicle defect disputes, the Court of Appeals of New York upheld the constitutionality of the New York Lemon Law, which mandates private arbitration of such claims at the consumer's option. Motor Vehicle Mfr. Ass'n v. New York, 550 N.E.2d 919 (N.Y. 1990).

178 See supra notes 8-41, for a discussion of the longstanding importance of trial by jury in civil cases.
the limitations of the existing fact-finding process in resolving complex technical and scientific issues.\textsuperscript{179}

The expert jury is probably the most feasible method to eliminate the mystery surrounding complex product design cases.\textsuperscript{180} Some built-in mechanism to insure that the search for fair and rational decision making does not unduly disrupt the delicate balance within the courtroom must exist.\textsuperscript{181} A balance must be struck between increased efficiency and equity on the part of the fact-finder and the trial judge’s ability to control adequately the processes leading to the fact-finder’s decision. With respect to the trial judge’s exercise of control, the pertinent issues relate to 1) the selection of the expert jury, 2) the management of the evidence presented, and 3) the content of the jury instructions.

1. Selecting the Expert Jury

The perception that an expert jury will somehow seize control of the litigation is frequently expressed as a basis for rejecting the use of such a jury to resolve difficult law and science issues inherent in product design litigation.\textsuperscript{182} The principal reason for this concern is that the jurors’ superior knowledge of highly scientific and technical matters may greatly exceed the judge’s, thus creating an imbalance between the court and the jury in the management of the trial.\textsuperscript{183} This apprehension is not necessarily groundless given

\textsuperscript{179} Detractors of the jury trial system in civil litigation have readily highlighted its deficiency as a fact-finding tool in a wide range of cases. A graphic illustration of such harsh criticism, attributable to Carl Becker, reads as follows;

\begin{quote}
Trial by jury, as a method of determining facts, is antiquated and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him.
\end{quote}

\textit{In re United States Fin. Secs. Litig.}, 609 F.2d 411, 429 n.66 (9th Cir. 1979), \textit{cert. denied}, 446 U.S. 929 (1980) (quoting J. FRANK, COURTS ON TRIAL 124 (1949)).

\textsuperscript{180} The expert jury should further both efficiency (less cumbersome, costly adjudications) and equity (more rational, impartial decisions) and, to that extent, may exceed a macroeconomist’s wildest expectations. \textit{See}, \textit{e.g.}, A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983) ("[o]ne important question is whether there is a conflict between the pursuit of efficiency and the pursuit of equity").

\textsuperscript{181} A paramount concern is that an expert jury will somehow seize control of a trial to a degree previously unheard of, thus distorting the trial process. \textit{See} Bazelon, \textit{supra} note 89, at 828 (attributing the same risk to the participation of an expert advisor).

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.}
recent litigation in which trial judges have demonstrated that integrating law and science is not their forte. But this risk can be avoided by the careful selection of an expert jury.

Here again, the selection method should mirror the one used in asbestos litigation in the federal district court for the Southern District of Ohio. Judge Carl Rubin used screening panels drawn from the defendant (industry), the plaintiff, and the court to determine which claimants' injuries actually resulted from exposure to asbestos. Such a process is likely to lead to the selection of a balanced fact-finding body. This is not to say that an impartial body will result in every instance, but any unfair advantage to a given party is improbable. Diminishing the likelihood of coalitional monopolies in the decisionmaking process should bolster the trial judge's ability to maintain control of the proceedings.

In selecting the expert jury, the immediately affected interests—industry and the injured plaintiff—should be asked to nominate individuals who possess expertise regarding the particular design issue. From this pool, a panel can be drawn after voir dire conducted by either the judge, the attorneys, or both. Any challenges to a prospective juror should be restricted to those "for cause" on the basis of background information which reflects that such juror will be unable to assess the evidence in a fair and impartial manner. Since the proposal's primary objective is to arrive at a fair and rational decision, eliminating peremptory challenges should not frustrate this purpose.

2. Managing the Evidence Presented

In complex civil litigation, a basic problem centers around the admissibility of items of evidence, both testimonial and documen-
Such evidence relates normally to very esoteric matters. Understanding the substantive content of such evidence, much less the evidentiary questions surrounding it, places some strain upon the civil justice system.\textsuperscript{190}

The primary objective of the rules of evidence is to ensure that only competent evidence whose probative value outweighs its possible prejudicial effect is considered by the trier of fact.\textsuperscript{191} This is the essence of due process. In an ordinary case involving a lay jury as the fact-finder, the application of the rules of evidence is vital to a fair and rational determination.\textsuperscript{192}

In cases involving intricate evidentiary matters, genuine questions about accuracy, justice, and fairness still exist. Although the problem may be ameliorated by empaneling expert jurors, profound questions still remain. For example, a judge still has to make a threshold determination of the admissibility of such evidence.\textsuperscript{193} To conclude that an unsophisticated judge can make rational rulings about such matters without the aid of an expert is wishful thinking.\textsuperscript{194}

Determining the admissibility of testimonial, documentary, and even demonstrative evidence relating to highly technical and scientific matters can be extremely complicated.\textsuperscript{195} As a result, the process of fair and impartial adjudication can be facilitated by the use of an expert advisor to provide advisory assistance to the trial judge.\textsuperscript{196}

\textsuperscript{190} A common evidentiary problem in complex product design litigation relates to what an expert can testify. For example, can an expert witness voice an opinion about the ultimate issue in the case? For years, courts struggled with this issue before it was finally resolved. See Fed. R. Evid. 704 (expert can state an opinion on the ultimate issue).

\textsuperscript{191} See Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ").

\textsuperscript{192} The judicious application of the rules of evidence shields the fact-finder from either incompetent or unduly prejudicial evidence that may distort the fact-finding process. For a general discussion of the dynamics of this process, see E. Cleary, McCormick on Evidence § 185 (3d ed. 1984).


\textsuperscript{194} See, e.g., Wells v. Ortho Pharmaceutical Corp., 615 F Supp. 262 (N.D. Ga. 1985), aff'd as to liability, modified as to damages, 788 F.2d 741, 744-45 (11th Cir.), cert. denied, 107 S. Ct. 437 (1986) (spermicide case in which trial judge accepted the plaintiff's expert testimony primarily on the basis of witnesses' demeanor). An expert advisor could probably have prevented such an uninformed judicial decision.

\textsuperscript{195} See E. Cleary, supra note 192, at § 203 ("To deal effectively with scientific evidence, the attorney must know more than the rules of evidence. He must know something of the scientific principles as well").

\textsuperscript{196} The expert advisor could illuminate the technical evidence to demonstrate its relevancy. Improving the quality of such determinations allows a court to better decide the bare minimum element of admissibility: relevancy. See M. Ladd & R. Carlson, Cases and Materials on Evidence 623 (1972).
It should be underscored that the expert’s opinion will be advisory only; the ultimate decision on the admissibility of evidence will rest with the judge.¹⁹⁷ Undoubtedly the judge will give some deference to an advisor’s technical opinion, but the integrity of the fact-finding process will be preserved by reserving the power to rule on the admissibility of evidence in the trial judge.

Although fears that this proposal may allow expert advisors to become surrogate judges should not be treated cavalierly, no apparent reason exists to doubt seriously the likelihood of a successful interaction between a judge and a technical expert. Moreover, any risks are outweighed by the benefits derived from a fair and impartial determination of complex issues. Thus, the benefits overshadow the risks.¹⁹⁸

3. Giving Jury Instructions

A judge can assert some control over the jury by instructing them on the law of the case. In many instances, such jury instructions are usually so mundane that they are reduced to “model” forms.¹⁹⁹ But in complex design litigation, “model” jury instructions are rare.²⁰⁰ In complex design cases, considerable thought must be given to drafting instructions that are precise, accurate, and reasonably clear.

To integrate applicable scientific principles into jury instructions, a trial judge must rely upon the special knowledge of an expert advisor.²⁰¹ The expert’s understanding of scientific methodology should be exceedingly helpful in drafting instructions.²⁰² For example, an expert advisor could prevent a judge or jury from giving unwarranted credence to disreputable scientific evidence. This

¹⁹⁷ See E. Cleary, supra note 192, at § 51.
¹⁹⁸ See W. Prosser, supra note 193, at 171. In negligence actions, the pivotal question is “whether ‘the game is worth the candle,’” (quoting Restatement (Second) of Torts § 291 comment a) or, stated differently, do the advantages of an activity outweigh the disadvantages?
²⁰⁰ It is extremely difficult, for example, to formulate an instruction on the legal meaning of defectiveness in design cases. Prosser & Schwartz, supra note 174, at 727.
²⁰¹ See supra notes 110-22 and accompanying text.
²⁰² The value of illuminating jury instructions in complex cases was underscored by the Ninth Circuit in the following manner: “JURORS, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service.” In re United States Fin. Secs. Litig., 609 F.2d at 430, quoted in Schwarzer, supra note 131, at 759.
would be a vast improvement over the existing civil justice system. Fears that an expert advisor will usurp the trial judge's power seem unfounded given the judge's ultimate power to control the substantive content of jury instructions. Such an advisor could provide invaluable guidance without unduly undermining the fundamental integrity and balance of the fact-finding process. A net benefit would accrue to the civil justice system. An expert advisor to the judge and an expert fact-finder may provide the optimal chance for fair and rational decision making in complex design litigation.

In sum, this reform proposal provides adequate safeguards against an imbalance among the trial judge, the expert advisor, and the expert jury that might be harmful to the civil justice system. Under this proposal, the judge retains virtually unfettered control over the adjudicative process. The experts will simply facilitate the process; they will neither undermine nor, more significantly, seize control of it. Additionally, allowing an expert jury to decide the facts, pursuant to carefully crafted jury instructions, seems an efficient and equitable method of decision making. This is surely within the letter and the spirit of the adjudication model of the existing civil justice system. Allowing experts to decide complex scientific factual issues and to provide advisory assistance to the judge regarding esoteric questions of law and science makes good sense. Certainly, the compelling benefits attending this proposal outweigh the unavoidable costs and argue for its serious consideration and perhaps ultimate adoption.

V RECONCILING THIS REFORM PROPOSAL WITH EXISTING JURY TRIAL GUARANTEES

A. The Argument for Reconcilable Differences

Careful consideration must be given to developing a harmonious relationship between the reform proposal and the traditional

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203 See, e.g., Wells v. Ortho Pharmaceutical Corp., 788 F.2d at 744-45.
204 A judge may control the trial with carefully crafted jury instructions. See, e.g., Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982) (an environmental tort case arising from the contamination of potable water supplies involving the primary issue of whether a causal nexus existed between the defendant's activities and the contamination of the plaintiff's wells). A curious twist in this case was the ultimate holding that it was not reversible error for the trial judge to fail to give a jury instruction on causation in fact, ostensibly the key issue in the case.
205 The existing litigation process will more likely endure when supplemented by expert advisors. See, e.g., Leventhal, supra note 114, at 546-52.
right to jury trial in civil cases. To the extent this can be accomplished, the prospects for acceptance of reform should markedly increase. Several arguments are advanced in this section of the Article about how to achieve this coexistence in certain discrete areas.

1. The Injunction That a Jury Should Represent a Cross Section of the Community

The proposed use of an expert jury to unravel complex factual design issues will not necessarily violate the right to jury trial in civil cases as guaranteed by either the federal Constitution or its state counterparts. The use of an expert jury may actually foster the predominant objectives of these various guarantees by achieving more fairness and rationality in complex design litigation.

A common objection to an expert jury is that such a jury does not truly represent a cross section of the community. But is this interest necessarily defeated by this reform proposal? Probably not. For instance, the concept "cross section of the community" is not self-defining. As a consequence, it cannot be categorically asserted that this element is incongruous with a proposal that espouses an expert jury as an informed fact-finder.

Certainly, a jury of experts that is carefully selected by tried methods will be as representative of a cross section of the community as a lay jury currently empaneled under existing selection procedures. Not only will such an expert jury be as representative, but also they will more likely provide a fair and rational

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206 The use of special juries in England in 1791 has been cited in support of the validity and constitutionality of such juries under the United States Constitution and the individual state constitutions. Thus, special juries fit under the historical test for the determination of the right to a jury trial. See Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 Colum. L. Rev. 43, 80-82 (1980); Thatcher, Why Not Use the Special Jury?, 31 Minn. L. Rev. 232, 234-42 (1947); Note, Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation, 24 Ariz. L. Rev. 715, 728 (1982).

207 An expert jury, in theory, should have a greater appreciation of the such complex issues. Bazelon, supra note 89, at 826-27 ("[s]cientists are uniquely competent to address scientific/factual issues—science is elitist") (emphasis in the original).

208 See, e.g., Haas v. United Technologies Corp., 450 A.2d 1173, 1183 (Del. 1982) ("[t]he Supreme Court has reiterated the basic principle that a jury must be drawn from a pool that is truly representative of a cross-section of the community).

209 Who is to say that a panel of experts will not be as representative of the community as a lay jury selected by conventional methods? The only possible difference, to be sure, is that voter registration lists will no longer provide the pool of potential jurors.
determination because of their superior understanding and appreciation of the scientific and technical issues inherent in a design case.\textsuperscript{210} Because of this significant benefit, any slight deviation from conventional wisdom about what constitutes a cross section of the community seems acceptable. This analysis is probably relevant only to state courts based on interpretation of individual state constitutions or state statutes. In the federal courts, however, special or expert juries are probably prohibited by the Federal Jury Selection and Service Act of 1986. Under this federal statute, jurors must be "selected at random from a fair cross section of the community."\textsuperscript{211} Thus, any use of a special or expert jury in federal courts would require legislative amendment of the existing Act.

2. The Notion That a Jury Reflects the Conscience of the Community

Some have argued that a jury may deviate from the letter of the law if such action is dictated by notions of justice and fairness.\textsuperscript{212} This sort of "jury nullification" is tolerated in our civil justice system.\textsuperscript{213} Assuming this is a desirable feature of a system that metes out justice in an ad hoc fashion, there is no reason to believe that it would be incompatible with an expert jury system. What may be needed is to enlighten these experts about the social policy ramifications of their scientific decisions\textsuperscript{214} to insure that

\textsuperscript{210} Again, enhanced knowledge should facilitate decision-making in complex design issues. That is, an informed fact-finder is more likely to make a factual determination that comes within the pale of acceptable scientific accuracy. See Task Force of the Presidential Advisory Group on Anticipated Advances in Science and Technology, The Science Court Experiment: An Interim Report, 193 Sci. 653 (1976) (extolling this fact-finding feature of the Science Court).


\textsuperscript{212} See, e.g., G. SPENCE, supra note 45, at 90-91 (suggesting that a jury's right to deviate from the law is consistent with the framers' view of justice).

\textsuperscript{213} Here again, this was manifested whenever the jury was instructed by the court that the plaintiff's contributory negligence was a complete bar to recovery; instead, many juries seemed to apportion liability between the parties on the basis of their comparative fault or responsibility. This reflects the ameliorative device of making contributory negligence a jury question. PROSSER & SCHWARTZ, supra note 174, at 566.

\textsuperscript{214} See Goldberg, supra note 92, at 1385 ("the best scientists in the future must master policy issues."
fairness and justice will never be routinely sacrificed on the altar of inflexible scientific decision making.

With proper indoctrination, an expert jury can reflect the conscience of the community. More importantly, such a jury will probably dole out "justice" in a basically evenhanded manner because of their ability to avoid confusion by complex scientific data. In the final analysis, a more accurate determination guided by notions of fairness and justice seems inevitable.


The right to jury trial in civil cases has its genesis in both the federal Constitution's seventh amendment and the various state constitutions. As a general rule, this right exists in actions at law. Consequently, products liability design cases merit jury trial treatment. Does an expert jury comport with these guarantees?

As previously noted, the jury trial guarantee in England in 1791 is the barometer, at least for seventh amendment analysis, of the precise contours of the right to jury trial in civil cases. Does this proposal for an expert jury fit within this mold? Upon close examination, a strong argument can be made that it does because special juries existed at English common law in 1791. This, therefore, meets the "historical" test for preserving the right to trial by special juries in complex civil cases.

In a similar vein, a primary objective of the framers was to create a fact-finding mechanism capable of consistently arriving at a fair and rational determination. Implicit in this is the

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212 Jury confusion with regard to expert testimony and complex jury instructions permeates the design litigation process. Goodman, Greene, & Laftus, What Confuses Jurors in Complex Cases, Trial 65, 65 (Nov. 1985).

213 See supra notes 8-41 and accompanying text.

214 Products liability actions sound at law. Such actions are frequently hybrid in nature and personify the melding of contract and tort. Warranty actions, for example, represent the classic intersection of contract and tort. See I O. HARRIS & A. SQUILIANTE, supra note 67, at xi.

215 Wilkinson, Zielinski, & Curtis, supra note 105, at 68 ("the constitution's framers intended to preserve the right to jury trial for all cases at English common law for which such a right existed in 1791, the year the amendment was adopted") (citation omitted).

216 Thatcher, supra note 206, at 248-49. To be sure, it seems that the use of special juries has historical justification under both the Seventh Amendment and many of its state counterparts.

217 The framers probably wanted to insure that due process guarantees would inhere in civil trial procedures. This desire is reflected in "the due process considerations of the fifth amendment." Note, supra note 89, at 715.
requirement as a matter of procedural due process, that a fact-finder be able to grasp fully the issues presented during a trial.\textsuperscript{221} Certainly, some of the intricate issues inherent in complex design cases defy reasoned analysis by an ordinary juror.\textsuperscript{222}

It seems appropriate to offer a fact-finding process that promotes the sensible resolution of the complex questions associated with product design litigation. This result would be particularly fitting if it could be achieved without unduly eroding the principles underlying the jury trial guarantee. The expert jury proposal may actually attain this result.

Potential risks associated with this proposal exist. Some risks are inevitably attendant to a different approach to fact-finding.\textsuperscript{223} But the query is whether the benefits to be derived outweigh the risks. In this instance, the risks of insensitivity to the policy impulses of scientific analysis, of bias in the selection of jury members, and of the scientific aura surrounding an expert jury's determination, which may stifle further research, are all recognizable. But these risks may be either reduced or avoided by the mechanisms built into the proposal or may be actually overshadowed by the benefits derived from it. The expert jury system will be a cost-effective way to decide such issues. And this supports its adoption as a modification to the existing jury system in both state and federal courts.\textsuperscript{224}

There is nothing in historical precedent nor public policy to warrant the uncritical acceptance of the existing jury system as the sole method to adjudicate complex product design cases. To the contrary, a change in the times and the concomitant public policy considerations favor some dramatic modifications. The reform proposal presented in this Article fulfills this need while

\textsuperscript{221} Id.

\textsuperscript{222} The concept of "defectiveness" in complex product design cases presents several problems. Courts have, for instance, floundered about in attempting to develop discrete tests for defectiveness in both negligent and strict tort design cases. D. FISCHER & W POWERS, JR., PRODUCT LIABILITY—CASES AND MATERIALS 57-58 (1988).

\textsuperscript{223} For example, the special expert jury may present problems in terms of the expertise of its members as well as their natural prejudices. See Bradley v. A. C. & S. Co., No. 70834, at 7 (Del. Super. May 23, 1989) (WESTLAW, State directory, Del. file). But, here again, these are not insuperable barriers to implementation. And, in view of the unavoidable risks associated with any deviation from the norm, the apposite inquiry is "[w]hen are these risks worth taking?" McGovern, supra note 134, at 491.

\textsuperscript{224} As noted earlier, the Federal Jury Selection and Service Act would have to be amended to allow special or expert juries in federal courts. See supra note 211. Congress, to be sure, should enact such an amendment in the interest of fair and rational decision making in complex civil litigation.
meeting constitutional mandates concerning the right to jury trial in civil cases.

CONCLUSION

It is perhaps naive to assert dogmatically that the existing jury system is well-suited to handle complex product design cases. It is, moreover, extremely simplistic to contend that any problems in this system can be eliminated without significant reform. The crux of the problem is certainly the vast amount of scientific and technical complexity surrounding product design cases. In many cases, the level of intricacy may exceed the capacity of the ordinary jury. In such instances, fair and rational decisionmaking is probably an illusion.

An expert jury, combined with an expert advisor to the trial judge, is a reasonable alternative to the existing civil justice system. From this combination, a decisionmaking process should arise that comports with due process without subverting the constitutional right to jury trial in civil cases. Thus, the solution to the conundrum of reaching a rational and impartial determination in complex product design cases lies in striking such a balance. The proposal presented in this Article should achieve this feat, thus making the fact-finding process in complex product design litigation more consonant with the peculiar demands for fairness and justice of the 1990s and beyond. Such proposed reform should insure the reasonable survival of an integral component of the civil justice system, the right to trial by jury.