SHOULD JURIES HEAR COMPLEX PATENT CASES?

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ABSTRACT

A debate has arisen within the legal community over the existence and constitutionality of a so-called "complexity exception" to the Seventh Amendment. This exception would give a judge the discretion to deny a jury trial in a civil case if he or she feels that the issue is too complex for a jury to decide properly. This iBrief discusses the constitutionality of the complexity exception and the arguments for and against its implementation, with particular emphasis on the application of the exception to patent infringement cases. The iBrief then postulates that, while a blanket exception for patent infringement cases may not be the solution, at a minimum some restructuring of the adjudication process needs to occur in order to ensure that judicial holdings are more than a mere roll of the dice.

INTRODUCTION

¶1 With the rise in both the complexity and the importance of patent infringement cases, as well as the need for consistency in the field of patent law, many legal scholars and practitioners have begun to speculate as to whether juries are competent to hear patent infringement cases. Some commentators argue that a "complexity exception" to the Seventh Amendment right to a jury trial should be invoked, which would give judges discretion to withhold cases from a jury where the complexity of the facts or the underlying legal issues make it impossible for a jury to render a fair and rational verdict. The constitutional support for the "complexity exception" is grounded in Seventh Amendment jurisprudence and on the Fifth Amendment right of due process. This iBrief discusses the constitutionality of the "complexity exception," as well as the advantages and disadvantages of invoking such an exception. It then concludes that, while a blanket exception for patent infringement cases may not be the solution, some restructuring of the adjudication process needs to occur in order to ensure that the judicial holdings are not random or baseless.

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I. THE SEVENTH AMENDMENT

A. Historical Background

¶2 The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[2]

When adopted in 1789, the Constitution did not include the right to a trial by jury in civil cases. The founders considered and rejected the idea of including the right based on the argument that the states' civil trial practices differed so markedly that such a provision would be impossible to draft.[3] However, during ratification of the Constitution, many states objected to the absence of an explicit right to civil jury trials.[4] This objection ultimately led the first Congress to include the Seventh Amendment in the Bill of Rights.[5]

¶3 The task of defining the scope of the Amendment has been arduous, particularly since little guidance can be gleaned from the circumstances surrounding its adoption. No record of the congressional debates surrounding the Amendment's adoption exists,[6] and the debate over the original constitutional provision that was ultimately abandoned is "unilluminating."[7]

¶4 However, the language of the Amendment itself provides some guidance as to its scope. First, as defined, the right applies only to "Suits at common law." Second, the right to a jury is "preserved," as opposed to "guaranteed." The framers arguably chose such vague terms in drafting the

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[2] U.S. CONST. amend. VII.

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> Delegates Pinckney and Gerry formally moved to have the following language added to the Constitution: 'And a trial by jury shall be preserved as usual in civil cases.' . . . Delegates Gorham and King, however, objected, stating that different states constituted their juries differently and used them in different types of actions; the proposed amendment was subsequently rejected.

2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 628-29 (quoted in Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 585 n. 16 (1984)).

[4] King, *supra* note 3, at 585.

[5] *Id*.

[6] Deborah M. Altman, *Defining the Role of the Jury in Patent Litigation: The Court Takes Inventory*, 35 DUQ. L. REV. 699, 704 (1997).

[7] King, *supra* note 3, at 585.

Amendment because of "the fluid state of the right to a jury trial at the time."[8] In addition, the use of the term "preserve" indicates that the drafters intended, not to create a new right, but to recognize an existing one.[9] This then begs the question: What is the scope of the right being preserved?

B. Historical Test

¶5 Justice Story answered this question in *United States v. Wonson*,[10] when he wrote that the right preserved by the Seventh Amendment is the right that existed at English common law and not the "common law of any individual state."[11] History, therefore, attributes Justice Story with devising the "historical test" for applying the Seventh Amendment. Under the "historical test," a "jury trial . . . [is granted] if one would have been granted under similar conditions by English common law"[12]; the test applies the English common law of 1791, the year the Seventh Amendment was adopted.[13]

¶6 However, the question arose as to how courts should apply the test to causes of action unknown to 1791 common law. In *Parsons v. Bedford*,[14] another case heard by Justice Story, the United States Supreme Court held that the right to a jury was not limited to "suits, which the common law recognized among its old and settled proceedings, but [rather the right extends to] suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[15] Therefore, the right to a jury trial was not confined solely to causes of action available at English common law.[16] Rather, as the Supreme Court held in 1987, courts are to look at whether or not the cause of action is analogous to an English common law case for which a jury was afforded.[17] In *Tull v. United States*,

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[8] Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 869 (1998).
[9] *Id*.
[10] 29 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).
[11] *Id*. at 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.").
[12] Miron, *supra* note 8, at 870-71 (referring to the test as the "mechanistic approach" and restating the rule as "if the right a civil jury trial existed at common law, it must exist under the Seventh Amendment").
[13] Thompson v. Utah, 170 U.S. 343, 350 (1898), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990).
[14] 28 U.S. 433 (1830).
[15] *Id*. at 447.
[16] Altman, *supra* note 6, at 704 (citing *Parson*, 28 U.S at 446-47).
[17] Tull v. United States, 481 U.S. 412, 417 (1987); s*ee also* Chauffers, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 565-66 (1990) (holding that

the Court, in explaining the test, held that while the Seventh Amendment requires "a jury trial on the merits in those actions that are analogous to 'Suits at common law[,]' . . . actions that are analogous to 18th-century cases tried in courts of equity or admiralty, do not require a jury trial."[18] The Court went on to hold that the analysis applies to both common law forms of action and those created by Congress.[19] Under the "historical test," therefore, a judge will afford a jury trial in cases where the cause of action more closely resembles an eighteenth-century legal cause of action, than a cause of action in equity, and where the remedy sought is legal in nature, as opposed to equitable.[20]

¶7 The situation became even more difficult when Congress adopted the Federal Rules of Civil Procedure in 1938, which merged the courts of law and equity.[21] Under these rules, modern cases reached a level of complexity far surpassing that of English common law cases of 1791 making it increasingly difficult to compare modern cases to that of eighteenth-century England.[22] This increase in complexity was due primarily to the "liberalization of civil procedure" and the "unprecedented proliferation of new causes of action" that resulted from the new procedural rules.[23]

¶8 It is argued that one result of the increased difficulty of comparison is that courts are beginning to slightly alter the "historical test."[24] In so doing, these courts recognize that it is more logical and appropriate to apply the rationale that underlies the distinction between cases held in courts of law and courts of equity than to merely refer to a predetermined list of causes of action.[25]

¶9 Therefore, one must ask: Does the complexity of today's cases so surpass that of English common law cases of 1791 that the "historical test" should no longer apply? Were complex cases even heard by the courts of law in 1791?

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the right to a jury trial exists in causes of action unknown at common law that are analogous to eighteenth century forms of action).

[18] *Tull*, 481 U.S. at 417.

[19] *Id*.

[20] Miron, *supra* note 8, at 873.

[21] *See* FED. R. CIV. P. 2.

[22] Miron, *supra* note 8, at 872.

[23] King, *supra* note 3, at 581.

[24] Miron, *supra* note 8, at 873 (citing Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996)); *see also id.* at 887 (citing Ross v. Bernhard, 396 U.S. 531, 538 (1970) (stating that the "practical abilities and limitations of juries" should be considered in the decision to grant a jury trial)).

[25] *Id*. at 873.

II. COMPLEXITY EXCEPTION

¶10 Many legal scholars have proposed a "complexity exception" to the Seventh Amendment that would result in a denial of a jury trial when the jury is unable to perform its task properly because of either the length of the trial or the complexity of the facts or underlying legal issues. Some argue that this exception existed in English common law and thus satisfies the "historical test."[26] Others argue that, while an exception did not exist at English common law, the "historical test" is nonetheless satisfied because the court of law did not in fact hear complex cases even absent an explicit exception.[27] A final argument for validating the exception is based on the Fifth Amendment right of due process.[28]

A. Is There a Basis for the Exception in English Common Law?

1. Complexity exception found in English common law

¶11 In a paper published in 1998, Joseph Miron argued that a "complexity exception" was recognized by the 1791 common law.[29] The English legal system at the time had two courts: the Court of Chancery (Court of Equity) and the Courts of Common Law. Miron alleged that the Chancellor, who decided both the legal and factual issues of cases in the Court of Equity, was permitted to take cases out of the Courts of Common Law, where they would be heard by juries, when the Chancellor "concluded that the case involved issues beyond the understanding of the jury."[30] Accordingly, Miron concluded that "the principle of removing complex cases from a jury was accepted in English common law, and therefore should be part of the Seventh Amendment today."[31]

¶12 In support of his conclusion, Miron pointed to several otherwise legal causes of action involving extensive materials and complex legal issues that were heard by the Chancellor.[32] For example, in 1603 the Chancellor decided *Clench v. Tomley*,[33] a case involving personal property. In asserting jurisdiction over the case, the Chancellor stated that the documents, which amounted to the bulk of the case, were too complex for an average juror to read and comprehend.[34] One court, however, argued

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[26] *See id.* at 873-80.
[27] *See* King, *supra* note 3, at 584.
[28] *See* In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084-86 (3d Cir. 1980).
[29] *See generally* Miron, *supra* note 8, at 873-80.
[30] *Id*. at 874.
[31] *Id*.
[32] *Id*. at 876-77, 880.
[33] 21 Eng. Rep. 13 (Ch. 1603).
[34] Miron, *supra* note 8, at 877 (citing *Clench*, 21 Eng. Rep. at 13).

that the report of this decision is likely "inaccurate or incomplete," or, in the alternative, that it is "an aberration, without precedent and subsequently disregarded."[35]

¶13 A second case of relevance, though admittedly decided after 1791, is the Court of Chancery's decision in *Wedderburn v. Pickering*.[36] The plaintiff in *Wedderburn* was granted judicial review of a cause of action over the ownership of land.[37] In granting judicial review, the court held that the case could be "more conveniently tried without a jury," in view of the fact that it involved extensive written materials.[38] The Chancellor initially expressed his usual unwillingness to interfere with a defendant's right to a jury trial, but he admitted an exception "when there is some reason why the case cannot be conveniently tried before a jury."[39]

¶14 By stating that a defendant's common law right to a jury could be taken away in select circumstances, the Chancellor was arguably admitting the existence of a complexity exception. Quoting *Clark v. Cookson*,[40] the Chancellor explained those situations in which the inconvenience of a jury could result in the Chancellor invoking this exception, stating that the rule giving a judge discretion to order the case heard by a judge, rather than a jury, "was flamed expressly to meet cases which would, under the old system, have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and fact, *or from great complexity*, or otherwise, not capable of being conveniently tried before a jury."[41] Miron concluded, therefore, that the Chancellor clearly felt that the Court of Chancery should, and always did, have jurisdiction over complex cases.[42]

¶15 However, at least one court has refuted such a reading of *Wedderburn*. The Court of Appeals for the Third Circuit held in *In re Japanese Electronic Products Antitrust Litigation*[43] that *Clark* and *Wedderburn* should be read to imply exactly the opposite of what Miron argued.[44] The court argued that these cases do not indicate that a

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[35] In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1082-83 (3d Cir. 1980).
[36] 13 Ch. D. 769 (1879).
[37] *Id.* at 769.
[38] *Id*.
[39] *Id*. at 771.
[40] 2 Ch. D. 746 (1876).
[41] *Wedderburn*, 13 Ch. D. at 771 (*emphasis added*).
[42] Miron, *supra* note 8, at 878.
[43] 631 F.2d 1069 (1980).
[44] *Id*. at 1081. However, as discussed *infra*, the Third Circuit ultimately accepted a complexity exception to the Seventh Amendment grounded on a due process argument. *Id*. at 1086.

complexity exception existed; rather they indicate that complexity alone was *never* sufficient grounds for relief in equity.[45] As the court explained, *Clark* and *Wedderburn* were decided after the passage of the Court of Judicature Acts[46] in 1875, which merged the English courts of law and equity.[47] Under the Act, jury trials were available upon request.[48] However, the court could deny a jury trial for an issue that, prior to the Acts, would have been heard by a court of equity.[49] The Chancellor in *Clark* was defining this exception and, according to the Third Circuit, in so doing, "identifie[d] two separate prerequisites to a denial of a jury trial demand: trial of the matter in the court of chancery prior to the merger *and* complexity or other grounds for believing that a jury would be unsuitable."[50] According to the Third Circuit, the Chancellor's use of the conjunction "and" implies that "complexity alone was not a ground for relief in equity."[51] In *Wedderburn*, both prerequisites were satisfied since the plaintiff sought an injunction, i.e., equitable relief.[52]

2. Procedural limitations create the same effect as a complexity exception

¶16 In a paper published in 1984, Douglas King argued that, even lacking an explicit complexity exception in English common law, "the procedural limits within which the jury functioned insured that no complex cases would ever reach the jury."[53] King based his argument on the fact that the limiting effects of the writ system, the strict rules of pleading, and the law of evidence severely narrowed the scope of common law cases heard by juries.[54]

¶17 Under the writ system, a separate writ was required for each of the "narrowly and precisely" defined forms of action brought before the court.[55] According to King, the effect of this system was to "severely limit[] the subject matter of any single lawsuit."[56] It did so by "limit[ing] the questions in any particular case to a few related issues of fact or law raised by a

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[45] *Id*.
[46] 36 & 37 Vict., ch. 66 (1873), 38 & 39 Vict., ch. 77 (1875) (cited in *In re Japanese*, 631 F.2d at 1081).
[47] *In re Japanese*, 631 F.2d at 1081.
[48] Order XXXVI, Rules 2, 3 (cited in *In re Japanese*, 631 F.2d at 1081).
[49] *Id*. Rule 26 (cited in *In re Japanese*, 631 F.2d at 1081).
[50] *In re Japanese*, 631 F.2d at 1081 (*emphasis added*).
[51] *Id*.
[52] *See id*. *See* Miron, *supra* note 8, at 878-89 (discusses cases that demonstrate that the Court of Chancery invoked the complexity exception).
[53] King, *supra* note 3, at 584.
[54] *Id*. at 586-89.
[55] *Id*. at 587 (citing 3 W. BLACKSTONE, COMMENTARIES *153-66).
[56] *Id*.

narrowly defined form of action."[57] King argued that "this limitation made it unlikely that a case presented to a jury would involve more than a single transaction among a small number of parties."[58]

¶18 King also argued that the rules of pleadings and the law of evidence each contributed to the narrowing scope of the cases and ultimately "restricted the complexity of the cases that could be put before a jury."[59] Under the strict rules of pleadings, every plea was required to be "simple," "connected," and "confined to one single point."[60] In addition, parties were not permitted to enter pleas that would require a variety of different answers or involve numerous issues.[61] Thus, the argument continued, this strict system of pleadings was implemented for the purpose of preventing juries from being overtaxed by complex issues.[62] This strict system combined with the required writ system ensured that cases were short and simple, with the ordinary case lasting no longer than a day.[63]

3. Colonial support

¶19 Modern commentators are arguably not alone in their belief that some version of a complexity exception existed in English common law. In the Federalist No. 83,[64] Alexander Hamilton indicated that he believed that the English common law of 1791 withheld complex cases from juries.[65]

¶20 Hamilton stated:

> My conventions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and *primary use of a court of equity is to give relief in extraordinary cases*, which are exceptions to general rules. . . . [T]he circumstances that constitute cases proper for courts of equity are in many instances *so nice and intricate, that they are incompatible with the genius of trials by jury*. They require such long, deliberate, and critical investigation as would be impracticable to men called from

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[57] *Id*. at 588.
[58] *Id*.
[59] *Id*.
[60] 3 W. BLACKSTONE, *supra* note 55, at 311 (cited in King, *supra* note 3, at 588).
[61] *Id*.
[62] King, *supra* note 3, at 588.
[63] *Id*. at 589 (citing Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 58 (1980)).
[64] Alexander Hamilton, *The Federalist No. 83* (McLean's ed.), *available at* http://www.civnet.org/resources/document/historic/fedpaper/fed83.htm (last visited Mar. 24, 2004).
[65] Miron, *supra* note 8, at 881.

> their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that *the matter be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars*.[66]

¶21 Arguably, Hamilton believed that "intricate" cases requiring "long, deliberate, and critical investigation," in other words, complex cases, were "incompatible with the genius of trials by jury," and instead were "cases proper for courts of equity," or judges. He felt that only cases involving some "single and obvious point" should be heard by the courts of common law, and, therefore, juries. If this interpretation of Hamilton's statements is accepted, it arguably represents the early American jurists' interpretation of "Suits at common law," which should dictate the scope of the Seventh Amendment today, making it of particular relevance to the complexity exception debate.

B. Even Lacking a Basis in English Common Law, is it Otherwise Constitutional?

¶22 A completely separate argument for a complexity exception is premised on the Fifth Amendment right of due process. This argument was in fact accepted by the Third Circuit in *In re Japanese* when the court held that, when attempting to accommodate both the Fifth and Seventh Amendment, the appropriate action for a court to take is to deny the right to a jury where, due to an inability to understand the evidence and the relevant legal standards, a jury will be unable to perform its task of rational decisionmaking.[67]

¶23 Due process requires that a jury "resolve each disputed issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules."[68] This requirement presumes that a jury is able to comprehend the evidence and the relevant legal rules.[69] If it cannot, there is "no reliable safeguard against erroneous decisions," the "primary value promoted by due process in factfinding procedures."[70] The Third Circuit, therefore, found that a conflict exists between the Fifth and Seventh Amendments when a lawsuit is so complex that it renders a jury unable to decide the issues in a rational manner, and

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[66] Hamilton, *supra* note 64 (e*mphasis added*).
[67] In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980).
[68] *Id*. at 1084.
[69] *Id.*
[70] *Id*.

decided the conflict in favor of the Fifth Amendment.[71] Specifically, the court held that "the due process objections to jury trial of a complex case implicate values of fundamental importance," while the denial of a jury trial does not, and further that in complex cases, "the interests protected by this procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial."[72] The Third Circuit, therefore, upheld a complexity exception to the Seventh Amendment grounded on a Fifth Amendment due process argument.

C. Is There Supreme Court Support for a Complexity Exception?

1. The famous footnote 10

¶24 The Supreme Court fueled the debate over the existence of a complexity exception in its famous footnote 10 of *Ross v. Bernhard*.[73] The issue in *Ross* was whether the Seventh Amendment guarantees a jury trial in shareholder derivative actions.[74] The Court ultimately held that, with respect to those issues in a shareholder derivative action to which a right to a jury would attach had the corporation been suing in its own right, the right is afforded to the corporation's shareholders.[75] More important than the holding, however, was the Court's discussion of what causes of action would be entitled to a jury. In this discussion, the Court cited *Parsons v. Bedford*[76] to introduce the proposition that the Seventh Amendment preserved the right to a jury in suits involving legal rights and remedies, and not those involving equitable rights and remedies.[77] It further stated that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."[78] In clarifying how the nature of the issue can be determined the court then added, in a footnote: "[a]s our cases indicate, the 'legal' nature of an issue is determined by considering first, the pre-merger custom with reference to such questions; second, the remedy sought; and *third, the practical abilities and limitations of juries*."[79]

¶25 The Third Circuit has cited footnote 10 for the proposition that the Supreme Court has at least "left open the possibility" that the range of suits subject to the Seventh Amendment right to a jury may be limited by the

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[71] *Id*. at 1084, 1086.
[72] *Id*. at 1084.
[73] 396 U.S. 531 (1970).
[74] *Id*. at 531.
[75] *Id*. at 532-33.
[76] 28 U.S. 433 (1830).
[77] *Ross*, 396 U.S. at 533.
[78] *Id*. at 538.
[79] *Id*. at 538 n. 10 (*emphasis added*).

"practical abilities and limitation of juries" and that the Court does not feel that its prior Seventh Amendment cases preclude such a ruling.[80] In addition, at the other end of the spectrum, the footnote is credited with "originating the complexity exception" altogether.[81] However, some are leery of giving significant weight to the Court's statement, since it was made in a footnote. The Ninth Circuit, in rejecting the constitutionality of the "complexity exception," held that it was "doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."[82] The Third Circuit, on the other hand, while also finding it unlikely that the Court would make such an "important new application of the [S]eventh [A]mendment [sic] in such a cursory fashion," held that:

> The third prong of the test plainly recognizes the significance, for purposes of the [S]eventh [A]mendment [sic], of the possibility that a suit may be too complex for a jury. Its inclusion in the three prong test strongly suggests that jury trial might not be guaranteed in extraordinarily complex cases, even though the *Parsons v. Bedford* line of Supreme Court cases, reflected in the first two prongs, would read the [S]eventh [A]mendment [sic] as applying to the suits.[83]

¶26 Some argue that the Supreme Court reigned in any speculation surrounding *Ross* in 1987 when it decided *Tull v. United States*.[84] In *Tull*, the Court began its opinion by explaining that the process for determining whether a constitutional right to a jury trial exists required looking to both the nature of the cause of action and the remedy sought.[85] In a footnote, the Court stated that it "has also considered practical limitations of a jury trial and its functional compatibility with proceedings outside the traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings," but that "the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment."[86] This footnote has been interpreted by some as an indication that the "practical abilities and limitations of juries" should only be a factor in determining whether the Seventh Amendment applies to *administrative* law courts and not as a factor in determining

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[80] In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1080 (3d Cir. 1980).
[81] Miron, *supra* note 8, at 886.
[82] In re U.S. Fin. Sec. Litig., 609 F.2d 411, 425 (9th Cir. 1979).
[83] *In re Japanese*, 631 F.2d at 1079-80.
[84] 481 U.S. 412 (1987).
[85] *Id*. at 417-18.
[86] *Id*. at 418 n. 4 (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1997); Pernell v. Southall Realty, 416 U.S. 363, 383 (1974)).

whether the Seventh Amendment applies to civil cases generally, and thus as a repudiation of the complexity exception.[87]

2. Functional considerations

¶27 The Supreme Court may have again given credence to the complexity exception, however, in *Markman v. Westview Industries, Inc.*[88] when Justice Souter listed "functional considerations" as a factor that district courts hearing patent cases should consider in deciding whether to grant a jury trial.[89] In *Markman*, the Court held that "[w]here history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury."[90] The Court went on to cite *Miller v. Fenton*[91] for the proposition that "when an issue 'falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned to decide the issue in question.'"[92] The Court then held that, in the case at issue, judges were better capable of determining the acquired meaning of patent terms.[93] The Court's conclusion was based on the reasoning that judges, who are "unburdened by training in exegesis," construct written instruments more frequently and better than jurors.[94] The Court went on further to state:

> Patent construction in particular 'is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be.'[95]

By basing its decision, at least in part, on what judges are likely to do better than juries, the Supreme Court arguably admitted that there is an exception to the general right of jury trial guaranteed by the Seventh Amendment where judges "are more likely to be right" than juries.[96]

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[87] Altman, *supra* note 6, at 706.
[88] 517 U.S. 370 (1996).
[89] Miron, *supra* note 8, at 887 (citing *Markman*, 517 U.S. at 388).
[90] *Markman*, 517 U.S. at 388.
[91] 474 U.S. 104 (1985).
[92] *Markman*, 517 U.S. at 388 (citing *Miller*, 474 U.S. at 114).
[93] *Markman*, 517 U.S. at 388.
[94] *Id*.
[95] *Id*. at 388-89 (citing Parker v. Hulme, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (No. 10,740)).
[96] *See* Miron, *supra* note 8 at 887, 891 (Miron argued that by relying on "functional considerations," which bear no relationship to the nature of the cause of action or the remedy sought, the Court is evidencing its support for the

¶28 Assuming that a "complexity exception" is constitutional, either because it was recognized in the English common law or because it is necessary to satisfy the Fifth Amendment, and assuming that the Supreme Court has not foreclosed such an exception, the question remains: Is an exception necessary or even beneficial with respect to patent infringement cases?

III. COMPLEXITY EXCEPTION AS APPLIED TO PATENT INFRINGEMENT CASES

¶29 Patent litigation involves some of the most complex legal theories and underlying factual issues of any type of litigation today. The actors involved in patent infringement cases are highly specialized in their respective scientific fields. For example, most patent attorneys received some form of technical training prior to pursuing a career as an attorney. It is clearly debatable whether an average individual would be able to acquire enough knowledge concerning the legal nuances of patent law and the underlying technology specific to the case within the confines of a trial to render a verdict that is based solely on the facts and legal issues of that case.

¶30 Some argue that "[p]atent litigation is inherently complex."[97] This argument is based primarily on the "arcane" rules for drafting claims and examining patents and the heightened complexity of the scientific principles underlying patents today.[98] For example, in a patent claim the terms "comprising," "consisting of," and "consisting essentially of" have drastically different consequences on the scope of the patent.[99] These principles, arguably, were "not anticipated by early patent law jurisprudence."[100]

¶31 Commentators on the other side of the argument contend that "it is not the case that all patent cases, by their very nature, are too complex for a jury."[101] These commentators further argue that even when a case is in fact overwhelmingly complex, there is still no compelling reason to remove the case from the jury's consideration at least in part because "[j]udges are no more knowledgeable than the average citizen with regard to complex

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existence of a "complexity exception," and is going beyond the "historical test" to consider "other facets of the English common law that had been ignored.").

[97] Altman, *supra* note 6, at 699.

[98] *Id*.

[99] UNITED STATES PATENT AND TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE (8th ed., 2001), *available at* http://www.uspto.gov/web/offices/pac/mpep/index.html (last modified Feb. 2003) (describing additional rules of patent law).

[100] Altman, *supra* note 6, at 699.

[101] Louis S. Silvestri, *A Statutory Solution to the Mischiefs of Markman v. Westview Industries, Inc.*, 63 BROOKLYN L. REV. 279, 299 (1997).

scientific subject matter."[102] In addition, others argue that "while the evidence may be complex, the counsel's task, as an officer of the court, is to make it understandable to the average juror."[103] However, a counterargument to this second point is that this rationale for denying the complexity exception "misses the point of why a complexity exception exists," since "presenting the issues [in a complex case] in an 'understandable' way may involve glossing over many of the intricacies and result in an inaccurate picture of the facts."[104]

¶32 One byproduct of speculation that juries are unable to comprehend the subject matter of patent infringement cases is the concern that the decisions they render are arbitrary, unpredictable, and based on considerations other than the relevant law. It is argued that "[j]ury verdicts in patent cases are . . . often unpredictable and inconsistent," and because patents are becoming increasingly important in our economy, both nationally and globally, there is a "pressing need for uniformity in the application of patent law."[105] It is questionable whether a jury can provide such uniformity when it bases its decision on only a rudimentary understanding of the law and the inventions at issue.

1. Practical implications

¶33 When asked to comment on the practical implications of a complexity exception with respect to patent infringement cases, Patrick Elsevier, patent litigator, stated that, while the complexity exception is a "good start[,] . . . it does not go far enough."[106] As an additional step, he suggested having "dedicated patent trial courts."[107]

> In my opinion, it would be wise to have specialized trial courts dedicated to hearing patent cases. Just as there was a need for the

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[102] *Id*.
[103] Miron, *supra* note 8, at 884 (citing generally Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 830 (1980); Maxwell M. Blecher & Candace E. Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 UTAH L. REV. 727, 744; Maxwell M. Blecher & Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47, 48 (1980); James L. Flannery, Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Rights to Trial by Jury*, 42 U. PITT. L. REV. 693, 694 (1981); Lisa S. Meyer, *Taking the "Complexity" Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 341 (1993)).
[104] Miron, *supra* note 8, at 884.
[105] Altman, *supra* note 6, at 699.
[106] Email interview with Patrick Elsevier, Ph.D., Associate, Alston & Bird (Feb. 26, 2004).
[107] *Id.*

> Federal Circuit to hear appeals from patent cases in order to create more uniformity in the law, likewise, it makes sense to have dedicated patent trial courts to address inconsistency at the trial court level.[108]

¶34 Elsevier further suggested that the complexity exception is inadequate. He stated that "[a]lthough there are trial judges who have a technical background and/or an affinity for patent cases, there are many judges who have no technical background and have had little, if any, exposure to patent law whatsoever."[109] The complexity exception, therefore, is inadequate, in his opinion, because if one of the latter judges were assigned a complex patent case, "there is little reason to believe that such a judge would decide the case much better than a competent jury."[110] He states that the "Federal Circuit's high rate of reversal in patent cases, whether decided by judge or jury, bears this out."[111]

¶35 This high rate of reversal by the Federal Circuit is also evidence that "*Markman* has made the initial trial little more than a trial run."[112] This is seen by Elsevier as yet another reason to create specialized patent trial courts. He argued:

> It does not seem to be good use of judicial (and the parties') resources to have a trial judge go through the effort of interpreting the claims if the Federal Circuit is going to give little deference to that judge's decision. It also makes it more likely that the loser at trial will appeal if it knows that there is a good chance that the decision at trial will be overturned. If there was a specialized trial court that construed claims correctly the majority of the time, it is more likely that parties, having a good understanding of their case, would settle after the *Markman* hearing without going through the expense of a trial or, that if the case did go to trial, that the losing party would forgo the expense of an appeal.[113]

¶36 Randal Ayers, also a patent litigator, stated that he too would favor judges over juries in patent cases if we were "writing on a clean slate."[114] He has seen first hand that some patent cases are "extremely complex and simply too much for a jury to handle."[115] While admitting that he has seen numerous judges struggle to apply patent law principles, he felt that they

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[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] Email interview with Randal Ayers, Partner, Myers, Bigel, Sibley & Sajovec (Mar. 5, 2004).
[115] *Id*.

"clearly do a better job than juries and are better at wading through the smokescreen put up by the lawyers and experts."[116]

¶37 However, Ayers recognized that we are not in fact writing on a clean slate.[117] In fact, he finds unconvincing the arguments that a complexity exception was in existence in the 1791 common law.[118] He argued instead that the commentators have selected "a predetermined result" and attempted to justify that result with a "selective reading of history."[119] Ayers feared that "[i]f citations to a few outlying cases justifies reversing centuries of decisions deciding the exact opposite we would not have any laws."[120]

¶38 In general, Ayers argued that implementing a complexity exception to the Seventh Amendment for patent infringement cases was not necessary despite the advantage of a reduction in the cost of patent litigation.[121] He warned that it would be both difficult and inconsistently applied.[122]

2. Need for restructuring of adjudication process

¶39 From a practical perspective, suppose that you are IBM and you have spent countless man-hours and millions of dollars developing and promoting your "MEMS RF switch with low actuation voltage."[123] How comfortable would you feel allowing a jury of average individuals to decide the fate of your product where the claims of your patent look like this:

> 1. A MEMS (micro-electromechanical) RF switch apparatus operable under low actuation voltage, the apparatus comprising:
>
> a substrate;
>
> a first electrode attached to the substrate;

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[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] Ayers stated that:

> [P]atent cases are phenomenally expensive, and in many cases a relatively fast ruling on a dispositive defense could quickly resolve the case (if the defendant wins) or facilitate settlement. If judges know they will have to decide the case anyway they will look for ways to focus discovery on the best defenses early and then move quickly to summary judgment motions. This could reduce the costs of patent cases tremendously.

Id.
[122] *Id*.
[123] U.S. Patent No. 6,639,488 (issued Oct. 28, 2003).

> a first layer of dielectric material having a dielectric constant above 10 on the first electrode;
>
> a second electrode positioned above the first electrode creating a first space having a height less than 5000 Angstroms between the first layer of dielectric and the second electrode; and
>
> a support element for suspending the second electrode when the switch is in an open position and for moving the second electrode when the second electrode is pulled to the layer of dielectric material when the switch is in a closed position in response to a voltage between the first and second electrodes.[124]

¶40 Now imagine that you are a juror, and you are asked to determine the validity of Glaxo Wellcome S.A.'s, patent for antifungal sordaricin derivatives[125] with the following general desciption:

> A compound of general formula (I) and physiologically acceptable salts wherein R represents phthalidyl, (2-oxo-5-methyl-1,3-diox-olen-4-yl)methyl or the group CHR.sub.4 OCO(O)pR.sub.5 wherein R.sub.4 is hydrogen or C.sub.1-4 alcyl, p is zero or I, R.sub.5 is C.sub.1-6 alkly, C.sub.5-8 cycloalyl (optionally substituted by C.sub.1-3 alkyl or carboxyl), C.sub.1-4 alkyl substituted by C.sub.1-3 alkoxy or carboxy), C.sub.1-4 alkyl substituted by one or more groups selected from amino, (C.sub.1-4 alkylamino di(C.sub.1-4 alkyl)amino or carboxyl, phenyl (optionally substituted by carboxyl or aminoalkyl, C.sub.1-4 alkylaminoalkyl or di(C.sub.1-4 alkyl)aminoalcyl, or R.sub.5 is a 5-8 membered heterocyclic group containing 1 or 2 heteroatoms selected from oxygen or nitrogen, processes for their preparation, pharmaceutical compositions containing them and their use in medicine.[126]

How comfortable would you be with the responsibility of determining whether this patent is valid? If at the end of closing statements you are still unsure of the meaning of certain technical terms or do not fully understand the legal issues, but you have been out of work for two weeks, will you be tempted to render a verdict based on your feelings about the parties or their attorneys rather than strictly on the facts of the case?

¶41 Jurors in patent cases are put in a unique position given the highly complex nature of the subject matter they are asked to consider. There is no doubt that some will be able to readily understand the relevant laws and the underlying technology, but many will struggle. There is also no doubt that some cases come down to nothing more than a battle of "he said, she said"

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[124] *Id*.
[125] U.S. Patent No. 6,645,960 (issued Nov. 11, 2003).
[126] *Id*.

requiring no technical expertise whatsoever. However, patents have become too important and trials have become too expensive for their outcomes to be left to such uncertain destinies. Merely invoking a blanket exception for all patent cases may nonetheless be inappropriate, since judges with no background in either the technology or patent law generally will arguably be no better suited than jurors to try a complex patent infringement case, and, as stated above, the exception may not be necessary in all cases.

¶42 The government's decision to direct all patent appeals cases to a single court of appeals was definitely a step towards creating uniformity in patent verdicts. In view of the fact that the Court of Appeals for the Federal Circuit is now well versed in patent law and has been given vast exposure to various fields of technology, it is arguably well-equipped to render rational and consistent verdicts. However, this hardly seems sufficient. Trials are expensive and time consuming. Why wait until the appellate level to have triers of fact that are prepared to render accurate and consistent verdicts? While no one solution seems without flaw, it is undeniable that some restructuring of the adjudication system needs to occur in order to prevent patent infringement cases from being left to mere chance.

CONCLUSION

¶43 The Seventh Amendment guarantees a trial by jury for "Suits at common law." The scope of this guarantee has traditionally been interpreted based on the scope of the right at English common law in 1791. It has been argued, therefore, that because the Courts of Common Law (which utilized juries) under certain circumstances did not hear complex cases, either because the Chancellor invoked his right to remove those cases to the Court of Chancery or because the cases heard involved no more than a single issue of fact or law, the Seventh Amendment does not guarantee a jury trial in complex cases. It has also been argued that even if the Seventh Amendment guarantees a jury trial in all cases analogous to English common law cases, simple or complex, the Fifth Amendment right of due process trumps this Seventh Amendment guarantee where a jury would be unable to perform its job because of a failure to grasp the legal issues or the underlying facts of a case.

¶44 Assuming a complexity exception is constitutional, and even supported by the Supreme Court, the debate continues as to whether or not invoking the exception is necessary in patent infringement cases. The legal issues behind patent drafting claims, the validity of patents, and patent infringement are difficult for even the average individual to understand given time and an opportunity to study. It is questionable whether a jury could understand these complex legal issues sufficiently given the limited amount of instruction and time they are given within the confines of a trial.

In addition, patent cases certainly involve subject matter that was never conceived of in 1791. Therefore, we must ask: Does it make sense to compare patent infringement cases to cases heard by the English Courts of Common Law in 1791? It is also debatable whether a judge with no scientific background or experience with patent law will be able to decide a case any better than a jury. Presumably, a judge will have a better base from which to understand the legal issues, but the technical and scientific facts may be completely foreign to him or her. In either case, it seems apparent that some restructuring needs to occur in order to increase the uniformity in patent infringement cases and to prevent their holdings from being no more than a roll of the dice.