# Note

# A Case for the Jury?: Seventh Amendment Rights in Asbestos Litigation

Victoria Branton*

## I. Introduction

Our federal court system is straining under a recent inundation of mass tort litigation primarily, but not solely, caused by asbestos cases.[1] "[The asbestos crisis] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."[2] An estimated twenty-one million Americans have been exposed to "significant" amounts of asbestos in the workplace and millions more have been exposed to asbestos through environmental contact or through contact with others exposed to asbestos in the workplace.[3] Exposure culminates in conditions ranging from relatively harmless pleural thickening to the fatal cancer, mesothelioma.[4] Yearly since the 1970's, tens of thousands of victims of asbestos-related diseases have fallen ill or died.[5]

Not surprisingly, hundreds of thousands of these victims have filed claims.[6] Now there are so many claims that the federal courts cannot provide individual trials for most of these plaintiffs within their lifetimes.[7] The sheer volume of claims has forced the question: can we bypass the individual trials without violating the litigants' Seventh Amendment rights?

Existing procedures for bypassing individual trials—class actions and consolidation—do not solve the problem. Class actions and consolidations as we

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* B.A., Harvard University, 1995; J.D. Candidate, The University of Texas School of Law 1998. The author would like to thank Jack Ratliff for assistance in selecting this note topic.

1. *See* Cimino v. Raymark Indus., 751 F. Supp. 649, 651-52 (E.D. Tex. 1990). *See also* Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefit of Aggregation and Sampling in Trial of Mass Torts*, 44 STAN. L. REV. 815, 817 (1992) (citing TERENCE DUNGWORTH, PRODUCTS LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS at vi, vii (1988) "Asbestos alone accounted for 25% of the [federal products liability] cases [and] tools/machinery/equipment, pharmaceuticals, and motor vehicles together totaled 35%.")

2. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991), *cited in* Saks & Blanck, *supra* note 1, at 816.

3. *See* Jenkins v. Raymark Indus., 782 F.2d 468, 470 (5th Cir. 1986).

4. *See, e.g., In re* Fibreboard Corp., 893 F.2d 706, 710 (5th Cir. 1990).

5. *See Jenkins*, 782 F.2d at 470.

6. Petition for writ of certiorari at 3, Amchem Prods, Inc. v. Windsor, 83 F.3d 610 (3rd Cir. 1996) *cert. granted*, 117 S.Ct. 379 (1996), MASS TORT LITIGATION REPORTER, Sept. 1996 at 32. By mid-1983, over 20,000 lawsuits had been filed. *Jenkins*, 782 F.2d at 470.

7. Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 464 (1991).

know them only streamline issues common to the class members, such as determinations of defect or gross negligence on the part of the defendant.[8] Asbestos litigation, however, is replete with issues unique to each plaintiff, such as exposure, damages, and comparative fault, that have to be individually tried under existing procedures. Even with the pending asbestos cases consolidated or certified as a class for trial of the common issues,[9] one-by-one trials on these individual issues would still preclude timely adjudication of the pending asbestos cases.[10]

In the few instances where courts have allowed individual fact issues to be tried without individual trials, the issues were ones that could be resolved in a formulaic manner: for example, they involved easily provable numbers, such as property value before and after a taking, and these numbers were plugged into a formula established at trial.[11] The individual issues in the asbestos cases—exposure, personal injury damages, and comparative fault—are not so easily reduced to rote calculation and therefore fall outside of existing applications of the class action and consolidation.

Realizing the novelty of the asbestos crisis, Chief Justice Rhenquist appointed the ad hoc Committee on Asbestos Litigation (the "Committee") in 1990 to find a way to dissolve the asbestos litigation backlog.[12] The Committee proposed that Congress legislate a special forum to manage and divide the assets that will compensate asbestos victims, but few expect Congress to act on the Committee's suggestion.[13] The Committee's principal non-legislative proposal was the process of "case aggregation."[14] "In essence, this process consists of sampling asbestos cases from the total filed within a court's jurisdiction, trying the sample, and then extrapolating the results of the sampled cases to the remaining cases, without subjecting them to individual trials."[15]

This process, called case aggregation, was first applied in the landmark case

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8. *See* FED. R. CIV. P. 23, 42.

9. In *Jenkins*, 782 F.2d at 472-74 the Court of Appeals for the Fifth Circuit affirmed the certification of a class of asbestos plaintiffs for the trial of common issues. However, in *Fibreboard Corp*, 893 F.2d at 712, the Fifth Circuit denied class certification for a group trial of the traditionally individual issues of damages and causation, claiming that there were "too many disparities among the various plaintiffs for their common concerns to predominate." Subsequently, Judge Parker proposed a new plan for trying causation, damages and contributory negligence—the group of individual issues under the rubric of a Federal Rule of Civil Procedure 42 consolidation—and the Fifth Circuit has denied the defendants' mandamus request. *Cimino*, 751 F. Supp 649 (E.D. Tex. 1990), mandamus denied *In re Fibreboard*, No.90-4199 (5th Cir. March 29, 1990) (unpublished order). This represents a breakthrough in the use of consolidation.

10. *Cimino*, 751 F. Supp. at 651; Issacharoff, *supra* note 7, at 468.

11. *See* Issacharoff, *supra* note 7, at 472-78. ("[T]he sole example culled from reported tort cases of administrative resolution of damage claims in nonsettled litigation is Foster v. City of Detroit. . . .There, the court ruled that the devaluation of the plaintiffs' property was compensable. *Id.* at 476. (internal citations omitted)). Administrative resolution of damages has also been permitted in settlements. *See e.g.*, Vargas v. Calabrese, 634 F. Supp. 910 (D.N.J. 1986), *cited in* Issacharoff, *supra* note 7, at 477.

12. Saks & Blanck, *supra* note 1, at 816.

13. *Id.*

14. *Id.*, also referred to as "*collective* trials" (original emphasis).

15. *Id.*

of *Cimino v. Raymark Industries, Inc.* by Judge Robert Parker in the United States District Court for the Eastern District of Texas.[16] The *Cimino* procedure aggregated the claims of over two thousand asbestos plaintiffs whose claims were pending in Judge Parker's court.[17] It consisted of four phases. In Phase I, the common issues of fact were tried as a class action.[18] These fact questions included defect, adequacy of warnings, gross negligence and a punitive damages multiplier for each defendant, the state of the art defense, and the fiber-type defense.[19]

Judge Parker conducted the rest of the trial under Federal Rule of Civil Procedure 42(a) as a consolidation of the cases that formed the class in Phase I.[20] In Phase II, the juries determined the level of exposure necessary to constitute a producing cause of an asbestos-related injury.[21] They further determined the exposure levels attributable to various crafts, work sites, and time periods and accordingly apportioned causation among the defendants.[22]

Phase III was a bellwether trial of the damages issues.[23] In this phase, plaintiffs were divided into five categories based on their asbestos-related symptoms.[24] Plaintiffs sampled randomly from each of the five disease categories received individual trials resulting in individual damage verdicts, taking into account their contributory negligence.[25] The sample plaintiffs received the amount of their actual verdicts.[26] Each non-sampled plaintiff received an award equal to the average verdict of the sampled plaintiffs in his or her disease category.[27] Phase IV was an apportionment of damages to plaintiffs based on their sworn individual circumstances as supported by their employment records.[28]

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16. *Cimino*, 751 F. Supp. 649; *see also Fibreboard*, 893 F.2d 706 (5th Cir. 1990) (Judge Parker's earlier attempt at aggregating the *Cimino* cases, struck down by the Court of Appeals for the Fifth Circuit).

17. *Cimino*, 751 F. Supp. at 653.

18. *Id.* (Phase I used the same procedures approved in *Jenkins* to resolve all common issues. The procedure approved in *Jenkins* was a 23(b)(3) class suit. *Jenkins*, 782 F.2d at 475.)

19. *Cimino*, 751 F. Supp. at 653.

20. Issacharoff, *supra* note 7, at 469 n.33.

21. *Cimino*, 751 F. Supp. at 653.

22. *Id.*

23. *Id.*; *See also In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context." *Id.*

24. *Cimino*, 751 F. Supp. at 653.

25. *Id.* The sample plaintiffs comprised fifteen of the thirty-two plaintiffs with mesothelioma, twenty-five of the one hundred eighty-six plaintiffs with lung cancer, twenty of the fifty-eight plaintiffs with other types of cancer, fifty of the one thousand fifty plaintiffs with asbestosis, and fifty of the nine hundred seventy-two plaintiffs with pleural disease.

26. *Id.*

27. *Id.*

28. *Id.* at 667. I use "Phase IV" to refer to damages apportionment for the sake of clarity in this Note. The *Cimino* court, however, included this step in Phase III.

## II. The Seventh Amendment Objection to Case Aggregation

Though the *Cimino* process has not been tested on appeal, critics have attacked case aggregation as an infringement of the Seventh Amendment right to trial by jury.[29] According to its detractors, case aggregation violates the Seventh Amendment by denying defendants jury trials for individual plaintiffs.[30] A dissenting member of the ad hoc Committee on Asbestos Litigation explained:

> [T]he use of class action "collective" trials (trials by aggregation of claims) . . . is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process[31] and *jury trial rights as to individualized claimants* . . . .[32]

Striking down an earlier attempt to aggregate asbestos claims, the Court of Appeals for the Fifth Circuit expressed a similar sentiment in dicta.[33] It questioned "whether defendants' right to trial by jury [was] being faithfully honored [in the case aggregation procedure]."[34] The court was responding to the defendants' argument that "one-to-one adversarial engagement or its proximate, the traditional trial, is secured by the [S]eventh [A]mendment . . . ."[35] The court described this fuzzy notion of individual justice as "the very culture of the jury trial" and signaled an

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29. Saks & Blanck, *supra* note 1, at 819 (citing JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991) (separate dissenting statement by Judge Thomas F. Hogan)); *In re* Fibreboard 893 F.2d 706, 711 (speculating in dicta that extrapolating group-wide damages from sample trials of thirty plaintiffs, fifteen chosen by each side, violates the defendants' rights to trial by jury). These critics have also argued that case aggregation violates the defendants' due process rights and conflicts with the courts' obligation to apply state law, but these arguments are beyond the scope of this Note.

30. In *Cimino*, the plaintiffs agreed to forego individual jury trials; In *Fibreboard*, only the defendants raised the Seventh Amendment argument. 893 F.2d at 709 (5th Cir. 1990). The argument could also be made that because the determinations in Phase I might be reconsidered by the juries in Phases II and III, the procedure violates the Seventh Amendment decree that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *See, e.g., In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995). "This Seventh Amendment objection seems a weak argument, as a series of circuit court decisions have approved the use of successive juries to determine different questions, and [Federal] Rule [of Civil Procedure] 23(c)(4)(A) explicitly contemplates use of such a procedure." John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1440 (1995).

31. *See Cimino*, 751 F. Supp. at 665-66. The *Cimino* court argues that the exactitude with which the extrapolated damage awards can be calculated defeats the defendants' due process interest in individual trials. The court also suggests that the delay inherent in individual trials of asbestos claims may violate the plaintiffs' due process rights in a way that can be weighed against the due process interests of the defendants.

32. Saks & Blanck, *supra* note 1, at 819, quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991) (separate dissenting statement by Judge Thomas F. Hogan) (emphasis added).

33. *See Fibreboard*, 893 F.2d at 712.

34. *Id.*

35. *Id.* at 709.

unwillingness to abandon it.[36] Essentially, critics of case aggregation interpret the Seventh Amendment to guarantee asbestos litigants the traditional one-on-one trial that the *Cimino* procedure is designed to avoid.

If this interpretation of the Seventh Amendment were correct, and the Seventh Amendment did guarantee individual jury trials for asbestos cases, Phase II (group causation), Phase III (bellwether trials of damages), and Phase IV (distribution of average damages verdicts), would all violate the Seventh Amendment. Phase II would violate the defendants' right to individualized justice because it substitutes group-wide exposure findings for traditional, one-on-one jury trials of individual causation. Phase III would violate the defendants' Seventh Amendment rights by eliminating jury trials on damages against the non-sampled claimants.

Under the individualized justice theory, the Phase IV distribution of extrapolated damages might also offend the Seventh Amendment. According to Professor Samuel Issacharoff, the defendants' jury trial rights extinguish upon the transfer of wealth from the defendants to the plaintiffs, and the plaintiffs are not demanding individual jury trials on this issue.[37] The defendants, however, might raise the *plaintiffs'* jury trial rights with regard to Phase IV. Because the individual plaintiffs' interests are adverse to each other with regard to damages apportionment, a jury trial right arguably attaches.[38] Assuming for the moment that the plaintiffs have the right to jury trials in Phase IV, the defendants arguably would have standing under *Phillips Petroleum Co. v. Shutts*[39] to assert the plaintiffs' rights. The *Shutts* rule provides that the defendants have standing to assert the rights of the class members which, if ignored, could leave the defendants (but not the plaintiff class) bound by the judgment.[40] If the plaintiffs had been denied a right to individualized jury verdicts vis-à-vis each other, they might not be bound by the judgment and arguably could reopen their cases against the defendants. Of course, the plaintiffs could waive their Seventh Amendment rights,[41] and presumably would want to do so in order to recover within their lifetimes.

It is not clear, however, whether the *Cimino* plaintiffs have effectively waived their Seventh Amendment rights. Under the *Cimino* consolidation procedure, the plaintiffs' rights to individual trials on damages are considered waived when they fail to respond to notice of their right to opt out of the proceeding.[42] The issue is whether a non-response sufficiently demonstrates a plaintiff's intent to waive a jury trial or whether a clearer statement, like opting in,

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36. *Id.* at 710. *See also* Issacharoff, *supra* note 7, at 469 (arguing that the class action's roots in equity justify non-jury apportionment damages).

37. *See* Issacharoff, *supra* note 7, at 483-484.

38. *Id.* at 484

39. 472 U.S. 797, 805 (1985).

40. *Id.*

41. 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2321 (1972) (parties may waive right to jury trial by conduct or agreement).

42. Issacharoff, *supra* note 7, at 484 (citing Jack Ratliff, *Special Master's Report in Cimino v. Raymark Industries, Inc.*, 10 REV. LITIG. 521, 535 (1991)).

for instance, is necessary to waive a jury trial.[43]

An opt-out procedure has been held adequate to waive personal jurisdiction;[44] however, it may be more difficult to waive the right to a jury trial because it historically has been considered one of the most sacred rights granted by the Constitution.[45] For instance, at the Virginia Constitutional Convention, Patrick Henry called civil juries the "best appendage of freedom," one "which our ancestors secured [with] their lives and property."[46] Thomas Jefferson said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution."[47] Furthermore, the chronicles of the ratification debates in all thirteen states reveal that the absence of a provision for civil juries was one of the most important subjects of division between the Federalists and the Anti-Federalists.[48] Thus, the eighteenth century records unanimously tout the importance of the civil jury right.[49]

In light of the jury trial's historical significance, an opt out procedure may be inadequate to waive the right to trial by jury despite its adequacy for waiving personal jurisdiction; defendants may have the right under *Shutts* to challenge the adequacy of the plaintiffs' waiver.[50]

To summarize, if the critics of case aggregation were correct and the Seventh Amendment did guarantee a traditional one-on-one jury trial, *Cimino* would violate the defendants' Seventh Amendment rights in Phase II (group-wide causation) and Phase III (bellwether damages) and possibly the plaintiffs' rights in Phase IV (damages apportionment). This reading of the Seventh Amendment would bring the attempt to provide justice for asbestos victims to a grinding halt because, as Judge Parker observed of his docket, "without the ability to determine damages in the aggregate, the Court cannot try these cases."[51]

Fortunately, there is hope for the asbestos litigation; the history and judicial interpretation of the Seventh Amendment do not support the notion that it guarantees individualized justice in mass tort cases.

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43. Both Issacharoff and Ratliff have asserted that the opt out procedure does allow plaintiffs to effectively waive their jury trials for Phase IV. Issacharoff, *supra* note 7, at 484; and Ratliff, *supra* note 42, at 535.

44. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

45. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338-44 (1979) (Rhenquist, J., dissenting).

46. Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1008-09 (1992) (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF FEDERAL CONSTITUTION 324, 544 (Jonathon Elliot ed., 2d ed. 1836)).

47. *Id.* at 1009, (citing 15 THE PAPERS OF THOMAS JEFFERSON 267 (Julian P. Boyd ed., 1958) (letter to Thomas Paine dated Paris, July 11, 1798)).

48. *Id.* at 1010, (citing Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966)).

49. *Id.*

50. 472 U.S. at 805.

51. *Cimino*, 751 F. Supp. at 667.

## III. The Seventh Amendment Does Not Guarantee Individualized Justice in Mass Tort Cases

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[52] Problematically, the Seventh Amendment does not specify which lawsuits are "Suits at common law,"[53] and at the time of ratification, the line between law and equity varied tremendously from state to state.[54] Of the Constitution's silence on the subject of the civil jury trial, Hamilton wrote:

> [N]o general rule could be fixed upon by the convention which would have corresponded with the [jury trial practices] of all of the States; and secondly, . . . more or at least as much might have been haphazard by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as it had been left, to legislative regulation.[55]

Thus, available eighteenth century records indicate the Seventh Amendment to be no more than a general declaration of the necessity of civil jury trials, leaving the details to be filled in by legislation and common law.[56]

Based on this history, practitioner Kenneth S. Klein has argued that we would best execute the intent of the Framers and ratifiers by fashioning a "coherent, integrated system of jury practice based on the perceived goals of the jury system, and the capabilities and limitations of juries."[57] Under Klein's rational system of jury entitlement, the asbestos litigation could be tried without individual jury trials because they would delay the adjudication process to the point of denying the plaintiffs justice. Unfortunately for mass tort plaintiffs and despite its probable correctness, Klein's theory is unlikely to generate much judicial fanfare because it would require the Supreme Court to overrule almost two centuries of case law.[58]

The current interpretation of the Seventh Amendment evolved from the

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52. U.S. CONST. amend. VII.

53. *Id.*

54. Klein, *supra* note 46, at 1014, (citing 12 THE PAPERS OF THOMAS JEFFERSON 440 (Julian P. Boyd ed., 1958). Thomas Jefferson wrote, "[T]here has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial . . . ." In fact, all of the states had unique jury trial guarantees.).

55. *Id.* at 1014-17 (citing THE FEDERALIST No. 83 (Alexander Hamilton)). Even though the Constitution included no guarantee of a civil jury trial, the Federalists committed to adding one in the First Congress.

56. *Id.* at 1005-20.

57. *Id.* at 1033.

58. For a summary of the case law, see WRIGHT & MILLER, *supra* note 41, § 2302.1 (R 38) (1995).

"historical test," announced in the year 1812 in *United States v. Wanson*.[59] The *Wanson* historical test reigned supreme from 1812 until 1959, and remains an important part of the modern analysis of the right to jury trial. Under the historical test, the right to jury trial attaches to cases which, had they been brought in England in 1791, would have been tried at common law rather than in courts of equity.[60]

A brief review of the English court system of 1791 demonstrates that only the simplest lawsuits could have been suits at common law; procedurally complex, multi-party lawsuits were brought in equity.[61] At English common law, plaintiffs had to initiate lawsuits by "writ."[62] The writ stated a single, very narrowly defined cause of action.[63] In most common law cases, the plaintiff could only submit one writ for consideration by the jury, a practice that usually limited the subject matter to a single transaction among a small number of parties.[64] Courts of equity, in contrast, had no such simplifying writ system and therefore heard all cases of significant complexity.[65] Indeed, Douglas King's statistical study of litigation during the years 1789 to 1791 reveals that only the simplest cases brought during those years were submitted to common law juries; procedurally complex cases were tried in courts of equity.[66] Furthermore, most common law cases had only two parties,[67] whereas most cases in equity had four or more parties.[68] Therefore, litigants with multi-party, complex disputes looked to courts of equity for justice in late eighteenth century England.[69]

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59. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (citing United States v. Wanson, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750)).

60. *Id.* In the first case to interpret the Seventh Amendment, Justice Story read the Seventh Amendment as a black-letter rule that the right to trial by jury attached to suits that would have received a jury under English law in 1791. Justice Story did not explain the choice of English common law other than to observe that his reasoning was too obvious to merit an explanation. It is obvious that using an American standard would have been impossible due to the diversity of states' jury practices at the time. None of the prolific records of the eighteenth century suggest that the Framers or ratifiers ever intended to preserve the English jury practice. However, no court has since questioned Justice Story's interpretation. *See also* Klein, supra note 46 (citing United States v. Wanson, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750), arguing that legislatures should be able to decide the details of the right to trial by jury).

61. Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 614 (1984) (arguing that no Seventh Amendment right to a jury trial attaches to complex cases because such cases were not cases at common law in 1791 England).

62. *Id.* at 586-587.

63. *Id.* at 587.

64. "Every plea must be simple, intire [sic], connected and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require many different replies, and introduce a multitude of issues upon one and the same dispute. For this would embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of parties." *Id.* at 588, quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 311.

65. King, supra note 61 at 604.

66. *Id.* at 603-604.

67. *Id.* at 592.

68. *Id.* at 604.

69. *Id.*

Had *Cimino* been filed in England in 1791, the class action determination of common issue in Phase I would have relegated the case to equity, for early class actions (called Bills of Peace) could only be heard in equity.[70] The number of asbestos defendants and the complexity of the causation issues would probably also have excluded the *Cimino* plaintiffs from courts of law. The asbestos litigation falls squarely into the historical domain of equity and, therefore, under the *Wanson* historical test, involves no entitlement to jury trial whatsoever. The historical test, however, emerged at this end of the twentieth century as a substantially different creature.

Though the *Wanson* historical test became the "central thread in the fabric of our jury practice,"[71] a trilogy of twentieth century cases has significantly expanded the right to a civil jury trial.[72] The new historical test retains the focus upon the distinction between law and equity in England in 1791.[73] However, it has narrowed its focus; instead of characterizing lawsuits as equitable or legal, according to which court would have opened its doors to the suit in 1791, the new test characterizes individual issues or rights as equitable or legal.[74] If the issue is a legal one, then a jury right attaches to that issue even if the case as a whole could not have gained entry to a common law court of 1791.[75] The new test reflects two twentieth century realities: first, unlike in 1791, law and equity are now administered by the same court so practically speaking equity and law can act on an issue by issue basis; second, the Federal Rules of Civil Procedure (the "Federal Rules"), adopted in 1938, procedurally enable the courts to provide just such issue by issue treatment.[76] The jury trial right has, therefore, expanded to include legal issues that are presented in the context of a traditionally equitable case.[77]

The principle underlying this expansion is simple: equity only acts in the absence of an adequate legal remedy.[78] Since the Federal Rules and federal legislation have expanded the availability of adequate legal remedies, the scope of equity has shrunk correspondingly.[79] The right to jury trial now attaches to claims that would traditionally have been heard in equity to the extent that procedural improvements since 1791 have created adequate remedies at law.[80]

The Supreme Court in *Beacon Theatres, Inc. v. Westover* first announced

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70. Issacharoff, supra note 7. at 486 (citing 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1751, at 7 (1986); Zachariah. Chafee, Cases in Equity 200-01 (3d ed. 1951); Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977)).

71. Klein, supra note 46 at 1022.

72. See, e.g. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970).

73. *See, e.g.*, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1989).

74. Ross v. Bernhard, 396 U.S. 531, 538 (1969).

75. *See, e.g., Chauffeurs*, 494 U.S. at 564.

76. *Ross*, 396 U.S. at 539-40.

77. *Id.* at 538-40.

78. *Beacon Theatres, Inc.*, 359 U.S. at 509.

79. *Id.*

80. WRIGHT & MILLER, supra note 41 § 2302.1 (R 38) (1995).

this principle.[81] The plaintiff, Fox West Coast Theatres, Inc., had asked for declaratory judgment against Beacon Theatres, Inc., regarding an antitrust controversy.[82] Fox operated a movie theater in San Bernardino, California and had contracts with movie distributors that provided Fox an exclusive right to show first-run pictures in the San Bernardino area.[83] Beacon had notified Fox that it believed the exclusive first-run contracts violated the antitrust laws.[84] Fox filed a lawsuit requesting a declaration that its contracts were not in violation of antitrust laws.[85] Fox further prayed for an injunction to prevent Beacon from instituting an antitrust lawsuit against Fox on the grounds that the threat of such a lawsuit did irreparable harm by depriving Fox of the valuable right to negotiate exclusive first-run contracts.[86] Beacon counterclaimed against Fox on antitrust grounds and cross-claimed against an exhibitor who had intervened.[87] Beacon then demanded a jury trial for the factual issues involved in its antitrust claim.[88]

Though Beacon would receive a jury trial, it would not receive a jury determination of every fact issue in its complaint.[89] The district court considered the issues raised by Fox's complaint as essentially equitable and directed that they be tried to the court before Beacon's antitrust claim went to the jury.[90] Some of the fact issues in Beacon's antitrust claim also appeared in Fox's claims, therefore, the court's fact findings in Fox's claim would operate by way of collateral estoppel or res judicata to preclude jury determination of those same fact issues in Beacons claim.[91]

The Supreme Court held that issues common to a legal claim and an equitable claim brought in the same proceeding must be tried first to a jury, whose verdict would then be considered binding on the court for purposes of the equitable claim.[92]

The Court's rationale rested upon the remedies made available by the liberal joinder provisions of the Federal Rules (and the Declaratory Judgment Act).[93] Before these procedural improvements, an injunction of a subsequent legal action, like Beacon's antitrust suit, was sometimes the only way to protect the right of the equity plaintiff to a fair and orderly adjudication of the controversy.[94] Under the Federal Rules, however, Fox could seek permanent injunctive relief after the jury returned its verdict on Beacon's antitrust claim.[95] Since under the Federal Rules

81. *Beacon Theatres, Inc.*, 359 U.S. at 509.
82. *Id.* at 502.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 502-503.
87. *Id.* at 503.
88. *Id.*
89. *Id.* at 504.
90. *Id.* at 503-504.
91. *Id.* at 504.
92. *Id.* at 508-510.
93. *Id.* at 509.
94. *Id.* at 507.
95. *Id.* at 508.

the District Court could provide a jury trial, it had to provide one.[96] The Court explained:

> Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction . . . must be reevaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.[97]

*Dairy Queen, Inc. v. Wood* reiterated the premise of *Beacon Theatres*: when the Federal Rules afford an adequate remedy at law, a court does not have equity jurisdiction regardless of how the case would have been decided in 1791.[98] In *Dairy Queen*, the plaintiff demanded an accounting for money due him under a contract that licensed the defendant to use the plaintiff's trademark; in addition, the plaintiff asked for an injunction to enjoin the defendant from using the plaintiff's trademark.[99] An accounting was traditionally an equitable remedy because accounts were considered beyond the competence of jurors.[100] The Court held that because Federal Rule 53(b) now enables a court to appoint a special master to help the jury understand accounts, an adequate remedy at law exists unless the accounts are unusually complicated.[101] Furthermore, the demand for a money judgment could not be tried to a court as "incidental" to the requested injunction, since the liberal joinder provisions of the Federal Rules[102] now enable a court to try the legal issues to a jury and decide the equitable issues separately.[103]

The last of the trilogy, *Ross v. Bernhard*, premised the new Seventh Amendment test, whereby the right to jury trial attaches to legal issues, upon the expansion of adequate remedies at law.[104] In *Ross*, the Supreme Court held that in a stockholder's derivative action the right to jury trial attaches to issues for which the corporation would receive a jury trial if it were suing in its own right.[105] Before the merger of courts of law and equity, derivative suits had been treated as entirely equitable cases since stockholders could only achieve standing to sue in equity and issues in the same case could not be divided between law and equity.[106] Now,

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96. *Id.* at 509.
97. *Id.* (citations omitted).
98. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); *See also* WRIGHT & MILLER, supra note 41 § 2302.1 (R 38) (1995).
99. 369 U.S. at 475 (1962).
100. WRIGHT &MILLER, supra note 41§ 2302.1 (R 38) (1995).
101. Dairy Queen, 369 U.S. at 478.
102. FED. R. CIV. P. 1, 2, 18.
103. *Dairy Queen*, 369 U.S. at 470-72.
104. 396 U.S. 531, 537-38 (1969).
105. *Id.* at 539.
106. *Id.* at 534.

however, equity and law are administered in the same court and the Federal Rules enable the court to decide the equitable issue of standing and then impanel a jury to try the corporate claim for damages.[107] The joinder provisions of the Federal Rules, therefore, remove the procedural impediments to trying the merits of a derivative action at law.[108] Adopting the *Beacon Theatres* theory that an "expansion of adequate legal remedies . . . necessarily affects the scope of equity," the Court held that the right to jury trial also attaches to legal issues raised in a derivative suit.[109] In dicta, the Court suggested that the same rationale requires jury trial of legal issues in class actions.[110] Because the same court can decide the equitable issue of class certification, and then submit to a jury the legal issues raised by the class, the legal issues entail a right to jury trial.

In *Ross,* the Court articulated the current Seventh Amendment test's focus on issues:

> The Seventh Amendment question depends on the *nature of the issue* to be tried rather than the character of the overall action. . . . 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.[111]

The first two factors, especially the remedy sought, have come to be the focus of the Seventh Amendment inquiry.[112] For example, the right to jury trial attaches to statutory rights if the issues presented resemble issues a court of law in 1791 could have addressed, and more importantly, the remedy sought is legal rather than equitable.[113] Thus, in recent Seventh Amendment cases, the Court focuses on the status of the remedies and issues involved in eighteenth century

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107. *Id.* at 540.

108. *Id.* at 539 ("Under the Federal Rules of Civil Procedure, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices [*e.g.*, the derivative suit] by which the parties happen to come before the court. The "expansion of the adequate legal remedies provided by the Federal Rules necessarily affects the scope of equity" (quoting *Beacon Theatres, Inc.* 359 U.S. at 509.))

109. *Id.* at 540, quoting *Beacon Theatres, Inc.* 359 U.S. at 509.

110. *Id.* at 541-42 *cited in* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.1 (R 38) (1995).

111. *Id.* at 538, 538 n.10 (emphasis added) (citing James, *Right to a Jury Trial in Civil Actions,* 72 Yale L. J. 655 (1963)).

112. *See, e.g.,* Wooddell v. Int'l Brotherhood of Electrical Workers, Local 71, 502 U.S. 93, 97 (1991);Wooddell v. Int'l Brotherhood of Electrical Workers, Local 71, 502 U.S. 93, 97 (1991). The third factor, "the practical abilities and limitations of juries," has spawned the controversial "complexity exception" whereby the Court of Appeals for the Third Circuit has denied jury trial of a case that was beyond the jury's comprehension. *See generally,* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.1 (R 38) (1995 and 1997 pocketparts) (citing *in re* Japanese Electronic Products Antitrust Litigation 631 F.2d 1069 (3rd Cir. 1980), reversed on other grounds, 475 U.S. 574 (1986)). The asbestos litigation probably cannot squeeze into "complexity exception" because personal injury issues are among the few that are unequivocally "legal" in nature. Ross v. Bernhard, 396 U.S. 531, 533 (1969) (describing personal injury claims as clearly "legal").

113. *See, e.g.,* Wooddell, 502 U.S. at 97; Chauffeurs, 494 U.S. at 565.

English courts of law.

The rights and remedies involved in the asbestos litigation are clearly legal in nature.[114] A perfunctory analysis, therefore, might suggest that under the new test the right to jury trial belongs to the asbestos litigants. However, such a mechanical application of the new test would frustrate its purpose: to expand the right to jury trial to the extent that procedural improvements since 1791 have expanded the availability of adequate remedies at law. To be true to its underlying principle, the new test can only require a jury trial where an adequate remedy at law will now result.

According to *Beacon Theatres*, *Dairy Queen* and *Ross*, the Federal Rules and federal legislation have carved out a category of cases that traditionally would have been heard in equity and have given them adequate remedies at law instead.[115] As to this category of cases, equity surrenders its jurisdiction and the right to a jury trial attaches. However, historically equitable cases remain equitable where the Federal Rules have *not* created an adequate legal remedy.[116]

The asbestos cases fit into this latter category. Historically, the multi-issue and multi-party asbestos litigation could only have been brought in equity. Assuming that the Seventh Amendment guarantees traditional, one-on-one justice, no adequate remedy at law has been created for the asbestos plaintiffs that would alter the historically equitable status of the case.

As the court said in *Beacon Theatres*, "[i]nadequacy of remedy [is] a practical term,"[117] and practically speaking, one-on-one jury trials constitutes an inadequate remedy. The federal courts cannot resolve most of the asbestos cases by individual jury trials within the plaintiffs' lifetimes.[118] Furthermore, abnormally high transaction costs result from the notion that individual trials are due asbestos litigants.[119] Knowing that individual trials would mean that most of the asbestos cases would never be tried, the defendants have adopted a "fortress mentality" to achieve exactly this result.[120] Judge Parker described their strategy as a sound one and one that is being used by asbestos defendants all over the United States.[121] It is an attempt to avoid liability by asserting a right to individual trials in every case and contesting over and over again "every contestable issue involving the same products, the same warnings, and the same conduct."[122] While asbestos defendants one by one declare bankruptcy depriving future plaintiffs of hope for recovery, the

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114. Ross, 396 U.S. at 533.

115. *Id.* at 540.

116. *See, e.g.* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) ("If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first.").

117. *Beacon Theatres, Inc.*, 359 U.S. at 507.

118. Issacharoff, *supra* note 7 at 464,493(citing *Cimino*, 751 F. Supp. at 651-52).

119. *Cimino*, 751 F. Supp. at 651-52.

120. *Id.* at 651.

121. *Id.* at 651-52.

122. *Id.*

transaction costs of the litigation have consumed $.61 of each asbestos litigation dollar.[123] The plaintiffs, both present and future, cannot obtain an adequate remedy by means of individual trials; therefore, the jury trial right, interpreted as a right to traditional one-on-one trials, does not extend to asbestos litigation.

The expanding sea of Seventh Amendment entitlement has not submerged asbestos litigation, but perhaps it laps at its shores. Arguably, under the reasoning of *Beacon Theatres, Dairy Queen,* and *Ross*, the right to jury trial does attach to asbestos litigation in so far as it can be honored without depriving the litigants of an adequate remedy. Clearly, one-on-one jury trials deprive litigants of an adequate remedy, but jury trials in the aggregation procedure of *Cimino* do not. In other words, the *Cimino* procedure provides an adequate remedy at law. Theoretically, at least, the principle of *Beacon Theatres, Dairy Queen,* and *Ross* should, therefore, require the jury trials provided in the *Cimino* trial plan. Identifying the jury trial required by the *Beacon Theatres, Dairy Queen,* and *Ross* trilogy is beyond the scope of this Note, but Judge Parker might very well have described it in his *Cimino* opinion.

## IV. Conclusion

The nationwide asbestos litigation crisis has spawned a creative attempt to process vast numbers of asbestos cases in a unified proceeding called case aggregation. According to the critics of case aggregation, the Seventh Amendment inherently promises "one-on-one adversarial engagement"[124] for suits at common law, and that notion of individualized justice is violated by determining issues that are unique to the individual plaintiffs in the aggregate, i.e., via group-wide causation and bellwether damages assessment.

The asbestos litigation, however, is not necessarily composed of suits at common law. In eighteenth century England, the asbestos litigation could only have been brought at equity. Under a pure historical interpretation of the Seventh Amendment, therefore, equity would govern this litigation from beginning to end; proponents of individual trials of asbestos cases would not have a Seventh Amendment leg to stand on.

The question arises, however, whether the recent expansion of the jury trial right under *Beacon Theatres, Dairy Queen,* and *Ross* has engulfed the asbestos litigation. In *Beacon Theatres, Dairy Queen,* and *Ross*, the Supreme Court held that the expansion of adequate legal remedies provided by the Federal Rules of Civil Procedure (the Federal Rules) necessarily shrinks the scope of equity.[125] The Federal Rules in many cases have enabled courts to provide jury trials of legal issues even though the case as a whole would not, historically, have been a suit at common law. The new Seventh Amendment test providing the right to jury trial for legal issues as opposed to equitable issues has arisen from these cases. Arguably,

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123. *Id.* at 650-51.
124. *In re* Fibreboard Corp., 893 F.2d 706, 709, 710-711 (5th Cir. 1990).
125. *Ross*, 396 U.S. at 540.

under the new test, a right to individual jury trial attaches to all of the abundant legal issues raised in the asbestos cases. Such a mechanical application of the new test ignores its goal: to expand the jury trial right where an adequate remedy at law has been created by the procedural improvements since 1791.

The Federal Rules have not made individual jury trials a practical possibility for asbestos plaintiffs, as most of them would predecease the resolution of individual trials, and the volume of individual cases creates abnormally high transaction costs. Since the Federal Rules have not created an adequate remedy at law for the asbestos plaintiffs, the scope of equity must remain intact, at least insofar as a remedy at law is considered to entail "one-on-one adversarial engagement."[126]

Otherwise, the impending host of mass tort cases could devastate the federal court system along with the plaintiffs. The asbestos litigation is not an isolated phenomenon. Antihemophilic factor, silicone breast implants, and bendectin have each been the focus of recent mass product liability litigation.[127] Tobacco litigation might one day make the asbestos litigation seem puny.[128] Moreover, the factors responsible for the increase in mass tort litigation show no signs of disappearing. Mass marketing of products, mass media attention to consumer and safety issues, and the medical community's increasing ability to prove the causal nexus between exposure to a particular product and injury, promise future mass product liability litigation.[129]

To interpret the Seventh Amendment's applicability to mass tort litigation, courts must look well into the future and the past. The future promises a ruinous volume of mass tort cases if we insist on trying these cases one-by-one. Past cases, however, provide the answer. The extension of jury trials to historically equitable suits was premised in *Beacon Theatres*, *Dairy Queen*, and *Ross* on the availability of an adequate remedy at law. Mass tort victims subjected to individual trials of their claims have no adequate remedy at law. Any guarantee of individual trials required by the Seventh Amendment, therefore, cannot be extended by current doctrine to mass tort litigation.

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126. *In re Fibreboard*, 893 f.2d at 709-711 (speculating that the Seventh Amendment entails a guarantee of one-on-one adversarial engagement).

127. Heather M. Johnson, Note, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(B)(3) Class Actions*, 64 FORDHAM L. REV. 2329, 2330 (1996).

128. Smoking kills 434,000 Americans each year. OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., Preventing Tobacco Use Among Young People A Report of the Surgeon General (1994) *cited in* Irene Scharf, *Breathe Deeply: The Tort of Smokers' Battery*, 32 HOUS. L. REV. 615, 616 (1995).

129. *Id.*