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Shareholders in the Jury Box: A Populist Check Against  
Corporate Mismanagement

Ann M. Scarlett  
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**SHAREHOLDERS IN THE JURY BOX:  
A POPULIST CHECK AGAINST CORPORATE  
MISMANAGEMENT**

*Ann M. Scarlett\**

*The recent subprime mortgage disaster exposed corporate officers and directors who mismanaged their corporations, failed to exercise proper oversight, and acted in their self-interest. Two previous waves of corporate scandals in this decade revealed similar misconduct. After the initial scandals, Congress and the Securities and Exchange Commission attempted to prevent the next crisis in corporate governance through legislative and regulatory actions such as the Sarbanes-Oxley Act of 2002. Those attempts failed. Shareholder derivative litigation has also failed because judges accord corporate executives great deference and thus rarely impose liability for breaches of fiduciary duties.*

*To prevent the next crisis in corporate governance, the answer is not to enact more laws but to change the enforcer of the current laws. That enforcer already exists—the civil jury. Most states, however, deny any right to jury trial for shareholder derivative litigation. In these states, shareholders largely fail in their attempts to hold corporate executives liable for breaching their fiduciary duties. Extending a jury trial right to all states would reinvigorate shareholder derivative litigation and offer a populist check against corporate executives' misconduct. This simple change would coerce corporate executives to properly oversee their companies and fulfill their fiduciary duties because they would know that their misconduct would be adjudicated by a jury of average Americans—similar to their shareholders. Empowering the civil jury would also help restore shareholders' trust in corporate management, which could rebuild confidence in the stock markets.*

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\* Assistant Professor of Law, Saint Louis University. This Article has benefited from comments by participants at the Midwest Law and Economics Association's Annual Meeting on October 3, 2008 that was sponsored by the Searle Center on Law, Regulation and Economic Growth at Northwestern University School of Law. It also has benefited immeasurably from comments by participants in workshops at the University of Kansas School of Law and Saint Louis University School of Law. I also want to thank Fred Bloom for his insightful comments, and Nicole Oelrich and Christy Abbott for their excellent research assistance.

## I. INTRODUCTION

The recent subprime mortgage crisis, credit meltdown, and stock market collapse exposed mismanagement, oversight failures, and self-interested transactions by directors and officers of numerous corporations. These events alarmed shareholders, bond investors, and the public as the entire economy suffered. Much of the financial collapse was linked to the securitization of mortgages and related products. Corporate executives created and perpetuated such instruments to benefit themselves through short-term transactions that looked good on paper and increased stock prices, but they failed to conduct due diligence and consider the risks to the long-term interests of their corporations, shareholders, and employees. The current executive compensation system, which rewards directors and officers for these short-term moves, has evolved into a scheme for corporate executives to enrich themselves while swindling shareholders.<sup>1</sup>

The corporate scandals brought to light by the current financial turmoil are not the first of this decade. The first wave of scandals began in 2001 at corporations such as Enron and WorldCom. These scandals revealed corporate officers indulging in “greed-driven schemes and other abuses,” while directors turned a blind eye so long as stock prices continued to rise.<sup>2</sup> Several years later, the second surge of scandals involved directors and officers backdating their stock options to profit themselves at the expense of shareholders.<sup>3</sup> All three waves of scandals this decade share a common thread; all revealed directors and officers acting in their self-interest and without proper regard for their corporations, shareholders, and employees.

Congress responded to the initial scandals by enacting the Sarbanes-Oxley Act of 2002 (SOX), which imposed new requirements on the

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1. See Op-Ed., *With New Pay Rules, Bankers Get What They Deserve*, USA TODAY, Feb. 5, 2009, at 12A.

2. E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441, 441–42 (2003) (noting that the Enron and WorldCom scandals revealed that “(1) officers ran amok, wallowing in greed-driven schemes and other abuses; and (2) directors allowed it to happen, tolerating officers who were managing to the market while they contented the directors with ever-rising stock prices”).

3. See *Desimone v. Barrows*, 924 A.2d 908, 918 (Del. Ch. 2007) (“Stock options ‘backdating’ is a practice whereby a public company issues options on a particular date while falsely recording that the options were issued on an earlier date when the company’s stock was trading at a lower price. The options are purportedly issued with an exercise price equal to the market price on the date of the option grant. But, in fact, because the grant dates were falsified, the options were ‘in the money’ when granted.”); see also Charles Forelle & James Bandler, *As Companies Probe Backdating, More Top Officials Take a Fall*, WALL ST. J., Oct. 12, 2006, at A1 (discussing backdating scandals at, among other companies, Apple Computer Inc., McAfee Inc., Monster Worldwide Inc., and Bed Bath & Beyond Inc.).

officers and directors of publicly traded corporations.<sup>4</sup> The Securities and Exchange Commission (SEC) implemented SOX by adopting numerous new regulations on corporations and corporate executives.<sup>5</sup> Additionally, SOX required the New York Stock Exchange and NASDAQ to impose new requirements on public companies.<sup>6</sup> Shareholders also responded to the initial scandals by attempting to influence corporate governance with nonbinding shareholder proposals designed to prevent directors from entrenching themselves in their positions or from promoting their own interests at the expense of shareholders.<sup>7</sup> Yet the scandals continued.

These new statutes and regulations failed to prevent future crises in corporate governance. Litigation remains the primary remedy for shareholders when corporate executives commit acts of mismanagement, malfeasance, abuse, or abdicate their responsibility to oversee corporate employees. Shareholder litigation, however, rarely succeeds in holding corporate executives liable for breaching their fiduciary duties. Shareholder derivative litigation often fails because judges have historically protected directors and officers from liability for such breaches. Rather than change the laws governing corporations again, a change in the enforcer of the existing fiduciary duty laws is needed. That enforcer already exists—the civil jury. Making civil juries the enforcer would prevent the next crisis by reinvigorating shareholder derivative litigation.

Most states deny any right to a jury trial in shareholder derivative litigation. This is unfortunate because extending the right to a jury trial to shareholder derivative litigation offers a populist check against corporate executives and judges. Giving juries the power to hold corporate executives liable for their actions will strike fear in the hearts of corporate executives, who routinely avoid juries at all cost. Knowing

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4. See Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 78j-1 & 7241 (2006).

5. See David Martin, *Compliance Obligations under Sarbanes-Oxley Act and Related SEC Regulations*, BANKING & FIN. SERVS. POL'Y REP., June 2005, at 6 (summarizing the numerous SEC regulations adopted in response to the Sarbanes-Oxley Act).

6. See, e.g., 15 U.S.C. § 7264 (forcing listing companies to impose more restrictive requirements on public companies); NYSE, LISTED COMPANY MANUAL § 303A.02 (2004) (stating new, more restrictive definition of director independence); NASDAQ STOCK MKT., INC., MARKETPLACE RULES R. 4200(a)(15) (2004) (similar).

7. See Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 527–28 (2005) (stating that during the 2003 proxy season, shareholder proposals achieved majority votes on initiatives such as eliminating staggered boards, separating the CEO position from the chairman of the board position, limiting executive compensation, and eliminating poison pill defenses); see also Alistair Barr, *Settlement Fever Grips Companies as Proxy Season Looms*, THOMSON FIN. NEWS, Mar. 4, 2006 (reporting in 2006 that more companies were settling with activist shareholders to avoid potentially damaging and embarrassing proxy contests at annual meetings).

they will be judged by a jury of American citizens similar to their shareholders, corporate executives' conduct may become more aligned with the interests of shareholders than their own. Empowering juries may help restore the confidence of shareholders, bond investors, and stock markets.

After briefly explaining shareholder derivative litigation, Part II of this Article summarizes the key events that contributed to the current financial plight. Although Congress and the SEC have unsuccessfully attempted legislative and regulatory responses to previous corporate governance crises, the civil jury has not yet been fully utilized to check corporate executives' behavior. Part II next describes the current right to a jury trial, and explains that most states do not allow any right to a jury trial in shareholder derivative litigation because derivative litigation has historically been considered equitable and civil juries have been viewed negatively. Part III considers the negative views of the civil jury and demonstrates such criticisms are undermined by empirical research examining civil juries. Part IV then explains why juries are preferable to judges. It examines the strong historical and democratic foundations of the civil jury in the United States and explains the benefits of a civil jury as the decisionmaker. Finally, Part V explains how to expand the right to a jury trial in all shareholder derivative litigation. It also considers the potential advantages and disadvantages, both theoretically and normatively, of such an expansion and methods for improving civil juries' performance in derivative actions. The Article concludes that expanding jury trials in shareholder derivative litigation may improve corporate oversight by coercing directors and officers to fulfill their fiduciary duties lest they be judged by a jury.

## II. SHAREHOLDER DERIVATIVE LITIGATION, THE FINANCIAL CRISIS, AND THE RIGHT TO A JURY TRIAL

An inherent tension exists between authority and accountability in publicly held and large privately held corporations because of the separation between management and ownership. Shareholders elect the corporation's board of directors<sup>8</sup> and the law gives the board virtually unlimited authority to manage the corporation.<sup>9</sup> So if the shareholders

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8. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 211(b) & 212(b) (2009); MODEL BUS. CORP. ACT §§ 7.29 & 8.03(c) (2005).

9. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2009) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . ."); MODEL BUS. CORP. ACT § 8.01(b) (2005) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . .").

believe that the corporation's directors are not acting in the corporation's best interests, they may theoretically hold those directors accountable by electing new directors to the board.<sup>10</sup> In reality, however, the existing board nominates the slate of directors on which shareholders vote at the shareholders' annual meeting.<sup>11</sup> Shareholders who want to nominate their own slate of directors usually must mount a costly and difficult proxy contest.<sup>12</sup> Shareholders possess even less power on other matters, because they have "no power to initiate corporate action" and have the right to vote only on mergers, sales, dissolution, and amendments to the corporate charter and bylaws.<sup>13</sup> Consequently, when shareholders believe directors and officers have mismanaged the corporation, failed to exercise proper oversight, or acted in their self-interest, they commonly resort to a shareholder derivative lawsuit.

A shareholder derivative lawsuit is filed by shareholders on behalf of the corporation. In such lawsuits, the cause of action and any monetary recovery belongs to the corporation because it was corporation that was injured.<sup>14</sup> Generally, the board of directors controls the corporation's litigation because it has the statutory authority to manage the corporation and its assets.<sup>15</sup> A shareholder may bring a derivative action only after presenting the board with a demand, which is a request that the board rectify the challenged decision.<sup>16</sup> If the board rejects the

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10. Cf. Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability and Global Governance* 3–4 (Harv. Univ. John F. Kennedy Sch. Gov't, Politics Research Group, Working Paper No. 01-4, 2001) ("Accountability can be created through actions 'in the shadow of elections.'").

11. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 105–06 n.133 (2004).

12. ROBERT CHARLES CLARK, CORPORATE LAW § 9.5.4, at 394–96 (1986). However, the advent of electronic proxy voting may make such proxy contests cheaper and easier. Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 807 n.47 (2007) (stating that electronic proxy voting may "make it much cheaper and easier for dissenting shareholders to mount a proxy battle").

13. Bainbridge, *supra* note 11, at 105 (listing shareholder rights as "election of directors and approval of charter or by-law amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution." *Id.* at 105 n.133). Bainbridge also noted that "only electing directors and amending the by-laws do not require board approval before shareholder action is possible." *Id.* at 105 n.133 (citing DEL. CODE ANN. tit. 8, §§ 109, 211 (2001)); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 569–72 (2003) (discussing the weak control rights of shareholders).

14. STEPHEN M. BAINBRIDGE, CORPORATE LAW AND ECONOMICS § 8.2, at 362 (2002). A shareholder may file a direct action if the cause of action belongs to the shareholder individually, for example in claims involving oppression of minority shareholders. *Id.* § 8.2, at 362–63.

15. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2009) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . ."); MODEL BUS. CORP. ACT § 8.01(b) (2005) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . .").

16. *See, e.g.*, FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.

demand, then the shareholder must demonstrate that the demand was wrongfully rejected.<sup>17</sup> In some states, the shareholder can forego making a demand and argue that demand is excused, if the shareholder can show that demand would be futile.<sup>18</sup> To establish that demand would be futile or that the board wrongfully rejected the demand, the shareholder must typically show that a majority of directors either participated in the challenged decision or are otherwise interested in the challenged transaction.<sup>19</sup> In other words, a trial court will permit a shareholder derivative lawsuit to proceed only when the board of directors is disabled by some conflict of interest. The law presumes that directors will not agree to sue themselves in such circumstances.

Shareholder derivative litigation encompasses three primary categories: (1) actions against directors to enjoin pending mergers or sales, (2) actions against third parties seeking monetary recovery on behalf of the corporation, and (3) actions against directors or officers seeking monetary recovery for misconduct, malfeasance, abuse, or failure of oversight. Because injunctive relief is always an equitable decision for a judge, derivative actions in the first category are not the focus of this Article.<sup>20</sup> The derivative actions in the other two categories seek monetary recovery for the corporation and would possess the right to a jury trial if the corporation itself pursued the actions. This Article focuses primarily on the third category because it is the category most directly implicated by this decade's corporate scandals.

Shareholder derivative litigation rarely succeeds in holding directors liable for their decisions because such litigation faces many judicial obstacles. A primary obstacle is the business judgment rule defense. The Delaware Supreme Court, which is commonly followed by other states on corporate law matters,<sup>21</sup> articulates the business judgment rule defense as a presumption that directors have acted consistent with their fiduciary duties in making corporate decisions.<sup>22</sup> This defense is based

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17. BAINBRIDGE, *supra* note 14, § 8.5, at 395; *see also* Lisa Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 408 (2005) (stating that "although shareholders can challenge" directors' rejection of a demand request, "most courts defer to boards on this matter").

18. *Aronson v. Lewis*, 473 A.2d 805, 814–15 (Del. 1984), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

19. *See id.*; *see also* *Beneville v. York*, 769 A.2d 80, 85 n.9 (Del. Ch. 2000).

20. *See infra* Part II.B.

21. *See, e.g.*, *Mullen v. Acad. Life Ins. Co.*, 705 F.2d 971, 973 n.3 (8th Cir. 1983) ("[C]ourts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law."); Andrew D. Arons, *In Defense of Defensive Devices: How Delaware Discouraged Preventive Measures in Omnicare v. NCS Healthcare*, 3 DEPAUL BUS. & COM. L.J. 105, 130 (2004) ("[M]ost states look towards Delaware's corporate law decisions for guidance in their own holdings . . .").

22. *See, e.g.*, *Brehm v. Eisner (In re The Walt Disney Co. Derivative Litig.)*, 906 A.2d 27, 52

on the justification that the board of directors is vested with the statutory authority to manage the corporation.<sup>23</sup> Defendants in derivative actions can invoke the business judgment rule defense at multiple points during litigation—including in pretrial motions for dismissal or summary judgment, and even at trial.<sup>24</sup> Consequently, the judge possesses a great deal of power to end shareholder derivative litigation in favor of defendants. Indeed, judges invoke the business judgment rule defense to protect boards of directors from legal liability in the vast majority of such cases.<sup>25</sup>

In response to the initial corporate scandals of this decade, Delaware courts began to more narrowly interpret and apply the business judgment rule defense,<sup>26</sup> which may lead to more shareholder derivative actions surviving until trial. Like Delaware, however, in many states even if a shareholder derivative action reaches trial no right to a jury trial exists. For instance, in one of the highest profile cases of this decade, *In re The Walt Disney Co. Derivative Litigation*, the plaintiffs survived multiple pretrial motions only to lose at trial.<sup>27</sup> After a lengthy trial, the trial judge ruled that the business judgment rule defense protected the *Disney* directors' decisions, despite finding that the directors' conduct fell "short of what shareholders expect and demand from those entrusted with a fiduciary position" and that their conduct "does not comport with

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(Del. 2006); *McMullin v. Beran*, 765 A.2d 910, 916–17 (Del. 2000).

23. See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 927 (Del. 2003) ("The business judgment rule, as a standard of judicial review, is a common-law recognition of the statutory authority to manage a corporation that is vested in the board of directors."); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (stating the business judgment rule "protect[s] and promote[s] the full and free exercise of the managerial power granted to Delaware directors"), *superseded by statute as stated in Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).

24. See *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005) (holding after a lengthy trial, that the defendants were entitled to business judgment rule protection), *aff'd*, 906 A.2d 27 (Del. 2006); *In re BHC Commc'ns, Inc. S'holder Litig.*, 789 A.2d 1, 4 (Del. Ch. 2001) ("[I]t is a bedrock principle of Delaware corporate law that, where a claim for breach of fiduciary duty fails to contain allegations of fact that, if true, would rebut the presumption of the business judgment rule, that claim should ordinarily be dismissed under Rule 12(b)(6)."); *Weinberger v. United Fin. Corp. of Cal.*, Civ. A. No. 5915, 1983 WL 20290, at \*6 (Del. Ch. Oct. 13, 1983) (noting that to defeat a summary judgment motion, a plaintiff can "allude to facts in the record which are undisputed or which are disputed but, if true, are sufficient to rebut the presumption" of the business judgment rule).

25. See *Fairfax*, *supra* note 17, at 409 ("[T]he tremendous deference courts grant to board decisions means that courts hold directors liable for only the most egregious examples of director misconduct."); see also TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* 183–84 (2006) (noting "the historical strong protection of corporate boards").

26. See Ann M. Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts' Response to Recent Corporate Scandals*, 60 FLA. L. REV. 589 (2008).

27. See *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003); *In re The Walt Disney Co. Derivative Litig.*, No. Civ. A. 15452, 2004 WL 2050138, at \*8 (Del. Ch. Sept. 10, 2004). The trial occurred between October 2004 and January 2005. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d at 697.

how fiduciaries of Delaware corporations are expected to act.”<sup>28</sup> Thus, in the end, the *Disney* plaintiffs’ fate was the same as always—defeated by a judge’s decision to protect directors from liability for their misconduct.

As described in the next subpart, the recent financial collapse has revealed corporate scandals that are generating shareholder derivative litigation—similar to the prior scandals of this decade. If such litigation is filed in states which, like Delaware, do not permit jury trials, then it may meet the same fate as the *Disney* case.

#### A. Subprime Mortgage Crisis, Credit Crunch, and Stock Market Collapse

The compensation system for corporate executives contributed to the subprime mortgage crisis, credit crunch, and stock market collapse. Corporate executives often receive bonuses based not on their performance, “but on risky, short-term moves that look good on paper and pump up stock prices.”<sup>29</sup> Corporations created this bonus system to attract high quality officers and directors:

In theory, the chance at a fat bonus attracts top-flight financiers and motivates them to work hard. But by pegging bonuses to short-term returns, with no provisions for clawing back those bonuses if profits turn to losses, Wall Street devised a way to reward itself for taking great risk, exposing everyone else to danger. This is not only unfair to shareholders and taxpayers, it also undermined the economy.<sup>30</sup>

By rewarding directors and officers for short-term profits, the current executive compensation system has become a means by which corporate executives enrich themselves while swindling shareholders.

For instance, the scandals within the recent financial collapse originated with Wall Street investment banks bundling trillions of dollars worth of mortgages into various forms of mortgage-backed

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28. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d at 763; *see id.* at 697 (finding that the *Disney* directors did not comply with “best practices of ideal corporate governance”).

29. Editorial, *Scraping by on Half a Mil*, BOSTON GLOBE, Feb. 6, 2009, at A14; *see also* Andrew Ross Sorkin, *Putting a Value on a C.E.O.*, N.Y. TIMES, Dec. 2, 2008, at B1 (“What has caused the most outrage is the difference between pay and actual performance . . .”); David Greising, *Tide Seems to be Turning on Big Corporate Paydays*, CHI. TRIBUNE, Feb. 6, 2009, at C27 (“Never before has Wall Street’s star system seemed so tarnished. Merrill Lynch’s John Thain gets a package worth up to \$87 million in 2007, and what happens next? A shotgun merger with Bank of America late last year, arranged to avert an outright collapse. Goldman Sachs’ Lloyd Blankfein nabs \$69 million in 2007, and, before you know it, he needs Warren Buffett to bail out his firm with a \$5 billion rescue package.”).

30. Op-Ed., *With New Pay Rules, Bankers Get What They Deserve*, *supra* note 1, at 12A.

securities, mortgage-backed bonds, and collateralized debt obligations.<sup>31</sup> Wall Street investment banks then sold those products to investors,<sup>32</sup> which helped fuel the surge in housing sales.<sup>33</sup> In creating these mortgage-backed securities, however, Wall Street firms relied on mathematical risk models that falsely suggested such securities were safe.<sup>34</sup> They also failed to conduct due diligence on individual mortgages within such securities,<sup>35</sup> which would have revealed that subprime borrowers' mortgages were lumped together with the mortgages of prime borrowers who had good credit histories.<sup>36</sup>

The massive number of mortgage securitizations is viewed "as a key culprit of the housing mess because banks created and then sold billions of dollars of securities without conducting due diligence on individual loans within the pools."<sup>37</sup> While the financial markets soared, "the incentives on Wall Street were to keep chasing profits by trading more and more sophisticated securities, piling on more debt and making larger and larger bets."<sup>38</sup> But this scheme was unsustainable. When home prices began falling, widespread fears of mortgage defaults (particularly defaults on subprime mortgages) crushed the values of these mortgage-

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31. The securitizations of mortgages took several forms including mortgage-backed securities, mortgage-backed bonds, and collateralized debt obligations. See Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 2008 UTAH L. REV. 1109, 1111–13 (explaining the securitization process and the nomenclature of the mortgage-backed products); see also Jennifer E. Bethel et al., *Legal and Economic Issues in Litigation Arising from the 2007-2008 Credit Crisis* (Harv. Law & Econ. Discussion Paper No. 612, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1096582&rec=1&srcabs=956243](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096582&rec=1&srcabs=956243) (same); *Confessions of a Risk Manager*, THE ECONOMIST, Aug. 7, 2008, at 72 (noting that a collateralized debt obligation is a package of asset-backed securities). All of these products are included within this Article's interchangeable references to "mortgage-backed securities" and "mortgage securitizations."

32. Ruth Simon, *Investors Hit BofA Loan Modification*, WALL ST. J., Nov. 18, 2008, at C1.

33. Liz Rappaport & Carrick Mollenkamp, *Banks May Keep Skin in the Game*, WALL ST. J., Feb. 10, 2009, at C3.

34. See Schwarcz, *supra* note 31, at 1114–15; see also Kristopher Gerardi et al., Brookings Institute, *Making Sense of the Subprime Crisis* (Sept. 5, 2008) (draft Brookings Paper on Economic Activity), available at [http://www.brookings.edu/economics/bpea/~media/Files/Programs/ES/BPEA/2008\\_fall\\_bpea\\_papers/2008\\_fall\\_bpea\\_gerardi\\_sherlund\\_lehnert\\_willen.pdf](http://www.brookings.edu/economics/bpea/~media/Files/Programs/ES/BPEA/2008_fall_bpea_papers/2008_fall_bpea_gerardi_sherlund_lehnert_willen.pdf) (arguing that Wall Street correctly predicted the drop in the real estate prices but assigned too low of a probability to that risk); Uday Rajan et al., *The Failure of Models that Predict Failure: Distance, Incentives and Defaults* (Chi. Booth Sch. of Bus., Research Paper No. 08-19, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1296982](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296982) (arguing that the quantitative methods used by Wall Street underestimated defaults for subprime borrowers).

35. Rappaport & Mollenkamp, *supra* note 33, at C3; see also *Ruptured Credit*, THE ECONOMIST, May 17, 2008, at 6, 8 (explaining how the proliferation and complexity of these instruments "made it even harder to understand the composition and quality of underlying assets").

36. See Steven L. Schwarcz, *The Future of Securitization*, 41 CONN. L. REV. 1313, 1316–18 (2009).

37. Rappaport & Mollenkamp, *supra* note 33, at C3.

38. Steve Lohr, *Wall Street's Extreme Sport*, N.Y. TIMES, Nov. 5, 2008, at B1.

backed securities, which then collapsed the markets for such securities.<sup>39</sup> A *Wall Street Journal* article observed that “[t]he financial crisis has created losers across the spectrum—homeowners who can’t afford their subprime mortgages, banks that loaned to them, investors who bought mortgage-backed securities and, as financial markets eventually crumbled, just about everyone who owned shares.”<sup>40</sup> The steep decline of the financial markets alone impacted the approximately 6 in 10 Americans who have money invested in the stock market.<sup>41</sup> Hence, the actions of the officers and directors of the corporations in this mortgage securitization chain severely harmed the long-term interests of their corporations, shareholders, and employees, while they received record compensation for their short-term actions.

The consequences did not end there, however, because Wall Street investment banks’ actions led to the credit crunch. Banks “hobbled by these bad investments [in subprime mortgage-backed securities] reined in lending, spawning the wider credit crunch as a result.”<sup>42</sup> Even small banks have failed as result and regulators expect more bank failures as bad real-estate loans continue to damage bank balance sheets.<sup>43</sup> Some economists predict that “banks with huge holdings in subprime mortgages and related securities . . . may never recover much of their value.”<sup>44</sup> Economists also worry about the future of securitization, which is a pivotal instrument of modern banking that allows banks to bundle all sorts of loans into securities for sale to investors, and thus plays a significant role in the credit markets driving the American

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39. Alan S. Blinder, *Missing the Target with \$700 Billion*, N.Y. TIMES, Dec. 21, 2008, at BU4.

40. Tom Lauricella, *The Stock Picker’s Defeat*, WALL ST. J., Dec. 10, 2008, at A1; see also Susanne Craig et al., *The Weekend that Wall Street Died*, WALL ST. J., Dec. 29, 2008, at A1 (“For the U.S. Securities industry to unravel as spectacularly as it did in September, many parties had to pull on many threads. Mortgage bankers gave loans to Americans for homes they couldn’t afford. Investment houses packaged these loans into complex instruments whose risk they didn’t always understand. Ratings agencies often gave their seal of approval, investors borrowed heavily to buy, regulators missed the warning signs. But at the center of it all—and paid hundreds of millions of dollars during the boom to manage their firms’ risk—were the four bosses of Wall Street.”).

41. Public Agenda, <http://www.publicagenda.org/charts/six-10-americans-say-they-have-money-invested-stock-market-nearly-half-say-stock-market-has-no-affect> (last visited Jan. 14, 2010); see also INVESTMENT COMPANY INSTITUTE, 2008 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITY IN THE INVESTMENT COMPANY INDUSTRY 7 (2008), available at [http://www.icifactbook.org/pdf/2008\\_factbook.pdf](http://www.icifactbook.org/pdf/2008_factbook.pdf) (stating that about 90 million Americans are invested in the stock market).

42. Robin Sidel, *Massive Efforts to Save Mortgages*, WALL ST. J., Nov. 1, 2008, at A1.

43. Dan Fitzpatrick & Damian Paletta, *Three Banks Fail in a Single Day*, WALL ST. J., Nov. 24, 2008, at C2.

44. Ben White, *Goldman Sachs Reports a \$2.1 Billion Quarterly Loss*, N.Y. TIMES, Dec. 17, 2008, at B4.

economy.<sup>45</sup> Economists note that “[t]hree decades ago, banks supplied \$3 out of every \$4 worth of credit worldwide. Today, because of securitization, that share has dropped to about \$1 in \$3.”<sup>46</sup>

The mortgage-backed securities created by Wall Street investment banks also led to the creation of credit-default swaps, in which investors swapped contracts that insured pools of mortgage-backed securities.<sup>47</sup> Insurance companies, such as American International Group, Inc. (AIG), began selling insurance on debt securities backed by subprime mortgages; such insurance promised buyers “that if the debt securities defaulted, AIG would make good on them.”<sup>48</sup> Essentially, AIG insured security trading parties, including parties trading mortgage-backed securities, against any losses in their holdings of securities backed by pools of mortgages and other assets.<sup>49</sup> AIG’s financial-product unit operated more like “a Wall Street trading firm than a conservative insurer selling protection against defaults on seemingly low-risk securities.”<sup>50</sup> The face value of the entire credit-default swap market was an estimated \$55 trillion and, although intended to spread risk, these credit-default swaps actually magnified the financial collapse.<sup>51</sup> The federal government has twice bailed out AIG because of its enormous losses from the mortgage-backed securities and collateralized debt obligations that it insured.<sup>52</sup>

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45. See Schwarcz, *The Future of Securitization*, *supra* note 36, at 1313–15 (explaining the importance of securitization).

46. Eric Dash & Vikas Bajaj, *Parched for Credit*, N.Y. TIMES, Dec. 31, 2008, at B1 (“Securitization, which works like a shadow banking system, has radically changed banking and the credit markets in recent years.”); *see also* Rappaport & Mollenkamp, *supra* note 33, at C3 (“The \$8.7 trillion securitization market, which also helped fund credit cards and auto loans, is largely dead . . .”).

47. Lohr, *supra* note 38, at B1. A swap occurs between two investors (typically banks or hedge funds) and is not traded on an exchange. *Id.* Credit-default swaps were originally created to insure blue-chip bond investors against the risk of default. *Id.*

48. Carrick Mollenkamp et al., *Behind AIG’s Fall, Risk Models Failed to Pass Real-World Test*, WALL ST. J., Nov. 3, 2008, at A1.

49. Serena Ng et al., *AIG Faces \$10 Billion in Losses on Bad Bets*, WALL ST. J., Dec. 10, 2008, at C1; *see also* Matthew Karnitschnig et al., *U.S. to Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 17, 2008, at A1 (“AIG was a major seller of ‘credit-default swaps,’ essentially insurance against default on assets tied to corporate debt and mortgage securities.”).

50. Ng et al., *supra* note 49, at C1.

51. Lohr, *supra* note 38, at B1 (stating that credit-default swaps “magnified the financial crisis because the market is unregulated, obscure and brimming with counterparty risk”); *Heard on the Street / Financial Analysis and Commentary*, WALL ST. J., Sept. 15, 2008, at C8 (stating that AIG’s residential portfolio has a face value of at least \$88 billion).

52. See Michael J. de la Merced & Sharon Otterman, *A.I.G. Takes Its Session in Hot Seat*, N.Y. TIMES, Oct. 8, 2008, at B1; *see also* Matthew Karnitschnig et al., *AIG Faces Cash Crisis as Stock Dives 61%*, WALL ST. J., Sept. 16, 2008, at A1 (“AIG’s business selling credit protection against the possibility of default in a variety of assets, including subprime mortgages, set it apart from most other insurers and tied it more closely to the fate of the housing and credit markets.”); Annelena Lobb, *Few*

Numerous instances of mismanagement and looting by corporate executives were uncovered as the dominoes fell during the recent financial collapse, and they are already generating litigation.<sup>53</sup> Citigroup shareholders have filed a derivative action in federal court in the Southern District of New York, alleging that Citigroup executives recklessly purchased billions of dollars in subprime loans for securitization despite the apparent subprime mortgage crisis.<sup>54</sup> A similar action is pending against Citigroup in the Delaware Chancery Court.<sup>55</sup> AIG shareholders have also filed a similar derivative action in the Delaware Chancery Court.<sup>56</sup> Shareholders in Merrill Lynch have also filed a derivative action attempting to recoup the monetary losses suffered by the corporation from its aggressive investment in collateralized debt obligations and mortgage-backed securities, but their case was dismissed because the shareholders lacked standing following Bank of America's acquisition of Merrill Lynch.<sup>57</sup> Now virtually identical actions are pending against Bank of America in both the Delaware Chancery Court and the federal court in the Southern District of New York.<sup>58</sup> As the next section demonstrates, the plaintiffs in the derivative actions pending in federal court will possess a right to jury trial, but the other litigants will not because Delaware, like most states,

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*Bright Lights Amid the Gloom*, WALL ST. J., Jan. 2, 2009, at R2 (stating that AIG's billions of dollars in losses stemmed "mainly from problems in a unit that sold a form of insurance against credit defaults").

53. Numerous class actions alleging securities fraud have also been filed. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2008 A YEAR IN REVIEW 4 (2009), <http://securities.cornerstone.com/pdfs/YIR2008.pdf> (stating that 210 federal securities class actions were filed in 2008 and that 90% of the class actions filed against financial companies were related to the subprime mortgage crisis); Bethel et al., *supra* note 31, at 2. These actions possess a right to jury trial, and thus are not discussed in this article.

54. Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, Unjust Enrichment and Violations of the Securities Exchange Act of 1934, *Nathanson v. Prince*, No. 107CV10333, 2007 WL 5042954 (S.D.N.Y. Nov. 14, 2007).

55. Consolidated Second Amended Derivative Complaint, *In re Citigroup, Inc. S'holder Derivative Litig.*, No. 3338-CC, 2008 WL 3910741 (Del. Ch. Aug. 21, 2008).

56. Verified Double Derivative Complaint, *Fulco v. Cassano*, No. 4290, 2009 WL 111395 (Del. Ch. Jan. 15, 2009).

57. *In re Merrill Lynch & Co.*, 597 F.Supp. 2d 427, 429 (S.D.N.Y. 2009) (dismissing derivative actions on grounds that under Delaware law shareholders lacked standing to bring derivative suits on behalf of Merrill Lynch because they no longer owned stock in Merrill Lynch after its merger with Bank of America in a stock-for-stock transaction).

58. Verified Shareholder Derivative Complaint, *Siegel v. Lewis*, No. 09 CV 1331, 2009 WL 455225 (S.D.N.Y. Feb. 13, 2009); Verified Shareholder Derivative Complaint, *Hollywood Police Officers Ret. Sys. v. Lewis*, No. '09 CV 01174, 2009 WL 365121 (S.D.N.Y. Feb. 09, 2009); Verified Class and Derivative Action Complaint, *Houx v. Lewis*, No. 4389, 2009 WL 497059 (Del. Ch. Feb. 23, 2009); Verified Derivative Complaint, *Kovacs v. Lewis*, No. 4356-VCS, 2009 WL 357482 (Del. Ch. Feb. 10, 2009); Verified Derivative Complaint, *Se. Pa. Transp. Auth. v. Lewis*, No. 4310, 2009 WL 207904 (Del. Ch. Jan. 26, 2009); Derivative Complaint, *Rothbaum v. Lewis*, No. 4307, 2009 WL 166390 (Del. Ch. Jan. 22, 2009).

denies any right to a jury trial for shareholder derivative actions.

### *B. The Right to a Jury Trial in Shareholder Derivative Litigation*

Shareholders pursuing a derivative action have a number of considerations in choosing a forum in which to file their action. Shareholders can always bring a derivative action in the state in which the corporation is incorporated. They can also file in any state in which the defendants are subject to personal jurisdiction. Thus shareholders can file a derivative claim on behalf of many large public corporations in numerous states. Shareholders may also file derivative actions in federal court if the claim is based on a federal question<sup>59</sup> or if diversity jurisdiction exists,<sup>60</sup> which requires that all plaintiff-shareholders be citizens of states other than the home states of the defendants.<sup>61</sup> Each potential forum offers different perceived advantages and disadvantages. In some forums, one of the advantages is the right to a jury trial.

#### 1. The Law of the Forum Court Governs the Right to Jury Trial

The law of the forum where the shareholder derivative lawsuit is filed determines whether a right to a jury trial exists. When a lawsuit is filed in federal court under either federal question jurisdiction or diversity jurisdiction, the federal court applies its own rules of practice and procedure.<sup>62</sup> Thus, regardless of the substantive law that will govern the merits of the case, a federal court will apply federal provisions to decide whether a right to a jury trial exists in a lawsuit.<sup>63</sup> Similarly, in state courts, the law of the forum state governs the conduct of the court proceedings and the rules of practice.<sup>64</sup> The weight of judicial authority holds that the method of trying a case, including whether there is a right to a jury trial, is a matter of procedure.<sup>65</sup> Thus, regardless of which

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59. 28 U.S.C. § 1331 (2006).

60. *Id.* § 1332(a).

61. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005) (“The complete diversity requirement is not mandated by the Constitution, or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.”) (citation omitted).

62. *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460 (1965).

63. *Gatenby v. Altoona Aviation Corp.*, 259 F. Supp. 573 (W.D. Pa. 1966).

64. *See* 16 AM. JUR. 2D *Conflicts of Law* § 148 (1998); *Jaeger v. Jaeger*, 53 N.W.2d 740 (Wis. 1952).

65. ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 122, at 242 (3d ed. 1977).

state's substantive law applies<sup>66</sup> and whether a shareholder would be entitled to a jury trial in federal court, a state court may not recognize a right to a jury trial.<sup>67</sup>

This view is consistent with the *First* and *Second Restatements of Conflicts*. The *First Restatement of Conflicts* states that “[t]he law of the forum governs all matters of pleading and the conduct of proceedings in court”<sup>68</sup> and that “[t]he law of the forum determines whether an issue of fact shall be tried by the court or by a jury.”<sup>69</sup> Similarly, the *Second Restatement of Conflicts* states that “[t]he local law of the forum governs rules of pleading and the conduct of proceedings in court”<sup>70</sup> and specifically that “[t]he local law of the forum determines whether an issue shall be tried by the court or by a jury.”<sup>71</sup> Thus, the forum state may apply its own procedural rules to decide whether a shareholder derivative action has a right to a jury trial.

Other procedural rules of the forum court will also apply in shareholder derivative lawsuits. For instance, many states and the federal courts have enacted special pleading standards for derivative actions, which require the plaintiffs to plead either that they made a demand on the board of directors or the reasons why such a demand is excused.<sup>72</sup> Although the forum court's procedural rules apply, the substantive law of the corporation's state of incorporation applies to the merits pursuant to the internal affairs doctrine adopted by every state.<sup>73</sup>

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66. *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Vanier v. Ponsoldt*, 833 P.2d 949, 961 (Kan. 1992).

67. *Rankin v. Frebank Co.*, 47 Cal. App. 3d 75, 91 (Cal. Ct. App. 1975).

68. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 592 (1934).

69. *Id.* § 594.

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (1971).

71. *Id.* § 129.

72. *See, e.g.*, FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.

73. Shareholder derivative suits challenge the directors' decisions, and thus involve judicial review of the corporation's internal affairs. All states have recognized the "internal affairs doctrine," which provides that the law of the state where the corporation is incorporated governs the internal affairs of the corporation. *See VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (stating that under the internal affairs doctrine, state law governs those matters "that pertain to the relationships among or between the corporation and its officers, directors, and shareholders"); *see also First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. . . . Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue."); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").

## 2. The Right to Jury Trial in Federal Courts

The Supreme Court has interpreted the Seventh Amendment to the U.S. Constitution as protecting the jury trial rights that existed when that amendment was adopted in 1791. The Seventh Amendment states that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”<sup>74</sup> The colonial courts formed before the American Revolution were patterned on the English judicial system, which had two court systems: courts of common law and courts of chancery. In the common law courts, a jury trial was widely available for most of the legal claims commonly in use by the eighteenth century. In the chancery courts, the chancellor administered a variety of equitable remedies without a jury. The framers of the Seventh Amendment struck a compromise that preserved the right of trial by jury for those cases that were historically brought in the courts of common law.<sup>75</sup> The Seventh Amendment did not extend any right to jury trial to those cases that were historically relegated to the courts of chancery. In other words, a right of trial by jury exists for the legal claims historically pursued in the common law courts, but not for the equitable claims historically pursued in the chancery courts.

Consistent with the language of the Seventh Amendment, the Supreme Court has adopted a historical test for determining whether a right to a jury trial exists in a particular case that analyzes whether the particular claim would have been within the jurisdiction of the common law courts of 1791 when the Seventh Amendment was adopted.<sup>76</sup> For most claims, well-established historical patterns easily solve the question of the right to trial by jury. Claims created after 1791, such as those created by statute, are more complicated. For such claims, the Supreme Court requires federal courts to examine the nature of the claims and remedies sought: “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”<sup>77</sup> The Supreme

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74. U.S. CONST. amend. VII. The Seventh Amendment right to a jury trial was incorporated into the Federal Rules of Civil Procedure: “The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.” FED. R. CIV. P. 38(a).

75. See generally HEBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 18–19 (1981) (discussing the adoption of the Seventh Amendment); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 668–705 (1973) (same).

76. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990); see also *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 834 (9th Cir. 1963).

77. *Tull v. United States*, 481 U.S. 412, 417–18 (1987) (citations omitted).

Court has stated that the second inquiry is more important in determining whether a right to trial by jury exists.<sup>78</sup>

When the Seventh Amendment was adopted in 1791, the chancery courts heard the claims of plaintiffs seeking injunctive or other relief available only in equity.<sup>79</sup> The chancery courts also heard the claims of plaintiffs who wanted to use a procedural device available only in equity, such as a derivative or class action.<sup>80</sup> Because courts of common law in 1791 did not allow shareholders to sue on behalf of the corporation, shareholders were forced to turn to the chancery courts to pursue a derivative suit “to enforce a corporate cause of action against officers, directors, and third parties.”<sup>81</sup> Consequently, shareholder derivative actions were historically equitable, regardless of whether the claims asserted in the actions were legal or equitable.<sup>82</sup>

In the 1970 *Ross v. Bernhard* decision, the U. S. Supreme Court reversed a Second Circuit decision that had held that the Seventh Amendment’s right to a jury trial did not extend to shareholder derivative actions.<sup>83</sup> The Supreme Court interpreted the Seventh Amendment’s preservation of the right to a jury trial as including “not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined” and thus that the Seventh Amendment “embrace[d] all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”<sup>84</sup> The Supreme Court noted that despite the difficulty defining the line between actions in law and equity, some actions were clearly at law:

Whether the corporation was viewed as an entity separate from its stockholders or as a device permitting its stockholders to carry on their business and to sue and be sued, a corporation’s suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted.<sup>85</sup>

In 1791, shareholder derivative suits were required to show that the corporation had a valid claim but refused to sue after the shareholders

78. *Chauffeurs*, 494 U.S. at 565; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47–48 (1989).

79. See 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2302 (3d ed. 1998).

80. *Ross v. Bernhard*, 396 U.S. 531, 541 (1970) (noting that “the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law.”).

81. *Id.* at 534.

82. *Id.*

83. *Id.* at 532.

84. *Id.* at 533 (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830)).

85. *Id.* at 533–34 (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*475).

made a suitable demand.<sup>86</sup> The Supreme Court thus interpreted these two preconditions as forming the:

dual aspects [of the derivative suit]: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial.<sup>87</sup>

The Court then explained that:

[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit. The claim pressed by the stockholder against directors or third parties "is not his own but the corporation's." . . . The proceeds of the action belong to the corporation and it is bound by the result of the suit. The heart of the action is the corporate claim. If it presents a legal issue, one entitling the corporation to a jury trial under the Seventh Amendment, the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court.<sup>88</sup>

Thus, the Court held that the merger of law and equity meant that in a shareholder's derivative suit, the judge must preliminarily decide if the shareholders' derivative suit could proceed to trial, but a jury was required to hear any legal claims asserted on behalf of the corporation.

The Supreme Court stated that this holding was required by its prior decisions in *Beacon Theatres, Inc. v. Westover*<sup>89</sup> and *Dairy Queen, Inc. v. Wood*<sup>90</sup> in which it had held that the right to a jury trial is preserved even when legal and equitable claims are joined in the same case.<sup>91</sup> In such a case, "there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."<sup>92</sup> The Court thought the same principle determinative of the question in derivative actions, because "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."<sup>93</sup> Thus, if the shareholder has a right to sue on behalf of the corporation,<sup>94</sup> the court examines the claim as if the

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86. *Id.*

87. *Id.* at 538.

88. *Id.* at 538–39 (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947)).

89. 359 U.S. 500 (1959).

90. 369 U.S. 469 (1962).

91. *Ross*, 396 U.S. at 538.

92. *Id.*

93. *Id.*

94. *Id.*

corporation was the entity asserting it.<sup>95</sup> If the claim is one that historically entitled the corporation to a jury trial, the shareholder bringing the claim derivatively has a right to a jury trial.<sup>96</sup>

The adoption of the Federal Rules of Civil Procedure (FRCP) rejected the historical distinction between law and equity and merged the two such that one action may join all claims and remedies.<sup>97</sup> The FRCP thus destroyed “[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity.”<sup>98</sup> Because law and equity are combined under the FRCP, “nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court.”<sup>99</sup> Thus, “it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation’s spokesmen are its shareholders rather than its directors.”<sup>100</sup>

To support its conclusion that shareholder derivative actions presenting legal claims possess a right to jury trial, the Supreme Court noted that historically “the derivative suit and the class action were both ways of allowing parties to be heard in equity who could not speak at law,” but that a class action now may obtain a jury trial on any legal claims asserted by the class.<sup>101</sup> “After adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights.”<sup>102</sup> The Supreme Court concluded that:

[g]iven the availability in a derivative action of both legal and equitable remedies, we think the Seventh Amendment preserves to the parties in a stockholder’s suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.<sup>103</sup>

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95. *Id.*

96. *Id.* at 542.

97. *Id.* at 539. Under Federal Rules of Civil Procedure 1, 2, and 18, the same court may try both legal and equitable causes in the same action. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959). “As pointed out in *Beacon*, legal and equitable issues can be tried at the same time, the jury (if one has been demanded), rendering a verdict on the legal issues, and the court rendering a decision on the equitable issues.” *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 835 (9th Cir. 1963).

98. *Ross*, 396 U.S. at 539–40.

99. *Id.* at 540.

100. *Id.*

101. *Id.* at 541.

102. *Id.* at 542.

103. *Id.* *But see id.* at 550–51 (Stewart, J., dissenting) (arguing that the majority’s decision was not justified by the Federal Rules of Civil Procedure or the Constitution, but “can perhaps be explained

In sum, the right to a jury trial under the Seventh Amendment applies to the traditionally equitable shareholder's derivative suit when the underlying claims present legal issues. For derivative actions filed in federal court, the Supreme Court in *Ross v. Bernhard* held that "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."<sup>104</sup> The right to a jury trial does not depend on the character of the suit but on the nature of the issues involved within the "ancient distinction between law and equity."<sup>105</sup>

Courts look to the true basis of the action to distinguish between legal and equitable claims.<sup>106</sup> For example, federal courts allow a jury trial when the claim alleges tortious misappropriation of trade information,<sup>107</sup> conspiracy to defraud,<sup>108</sup> fraudulent transactions,<sup>109</sup> wrongful appropriation,<sup>110</sup> or where a claim for a breach of fiduciary duty is predicated on underlying conduct such as negligence which, in a direct suit, would allow a jury trial at common law.<sup>111</sup> Even a claim that is solely for breach of fiduciary duty carries a right to a jury trial when the remedy sought is monetary damages.<sup>112</sup> When a claim is equitable, however, such as one seeking an injunction, courts do not allow a jury trial. Thus, a plaintiff in a derivative action generally possesses a right to a jury trial if the principal relief sought is a monetary judgment rather than an equitable remedy.

Most circuit courts have concluded that the Supreme Court did not announce a new procedural rule in *Ross v. Bernhard*, but rather resolved a circuit conflict in articulating a rule consistent with the Supreme Court's prior interpretation of the procedure.<sup>113</sup> A few circuit and district courts, however, have ruled that highly complex cases such as shareholder derivative suits are an exception to the Seventh

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as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions.").

104. *Id.* at 532-33 (majority opinion). However, under the Federal Rules of Civil Procedure, the failure of a party to serve a demand for a jury trial constitutes a waiver of that right. FED. R. CIV. P. 38(b) & (d).

105. *Fabrikant v. Bache & Co. (In re U.S. Fin. Sec. Litig.)*, 609 F.2d 411, 422 (9th Cir. 1979).

106. *Id.* at 423 (citing *Ross*, 396 U.S. 531); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

107. *Bruce v. Bohanon*, 436 F.2d 733, 736 (10th Cir. 1970).

108. *Nat'l Union Elec. Corp. v. Wilson*, 434 F.2d 986, 987-88 (6th Cir. 1970).

109. *Halladay v. Verschoor*, 381 F.2d 100, 109 (8th Cir. 1967).

110. *Robine v. Ryan*, 310 F.2d 797, 798 (2d Cir. 1962).

111. *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 836-37 (9th Cir. 1963).

112. *In re Evangelist*, 760 F.2d 27, 31 (1st Cir. 1985); *Moses v. Burgin*, 445 F.2d 369, 384 (1st Cir. 1971); *Tanzer v. Huffines*, 314 F. Supp. 189, 196 (D. Del. 1970).

113. *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th Cir. 1972); *see also DePinto*, 323 F.2d at 835-36 (creating a holding similar to *Ross v. Bernhard*).

Amendment.<sup>114</sup> These cases often argue that a footnote in *Ross v. Bernhard* allows for such an exception to the Seventh Amendment.<sup>115</sup> That footnote stated that “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.*”<sup>116</sup> Refusing to apply this rationale in rejecting a jury claim, the Ninth Circuit determined that “[a]fter employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote.”<sup>117</sup> Most circuit courts have rejected the complexity exception to the Seventh Amendment<sup>118</sup> and the Supreme Court, in considering Seventh Amendment questions since *Ross v. Bernhard*, has never considered juries’ abilities in determining whether a right to trial by jury exists.<sup>119</sup>

### 3. The Right to Jury Trial in State Courts

The Supreme Court has held that the Seventh Amendment does not apply to the states.<sup>120</sup> Therefore, *Ross v. Bernhard* does not bind state courts. Whether a shareholder derivative suit filed in state court has a right to a jury trial depends on each state’s law.

A few states have adopted the *Ross v. Bernhard* approach or reached the same approach based on interpretations of their own constitutions.<sup>121</sup> For instance, New Mexico and Wyoming have explicitly adopted the

114. *Cotton v. Witco Chem. Corp.*, 651 F.2d 274 (5th Cir. 1981); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp* (*In re Japanese Elec. Prods. Antitrust Litig.*), 631 F.2d 1069 (3d Cir. 1980); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 (E.D. Mich. 1980); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re Boise Cascade Secs. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976); *see also* George K. Chamberlin, *Complexity of Civil Actions as Affecting Seventh Amendment Right to Trial by Jury*, 54 A.L.R. FED. 733 (1981).

115. *See Fabrikant v. Bache & Co.* (*In re U.S. Fin. Sec. Litig.*), 609 F.2d 411, 425 (9th Cir. 1979); *see also* *Scott v. Woods*, 730 P.2d 480 (N.M. Ct. App. 1986).

116. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (emphasis added) (citing Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963)).

117. *Fabrikant*, 609 F.2d at 425.

118. *SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107 (Fed. Cir. 1985); *Fabrikant*, 609 F.2d 411.

119. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Lothether*, 415 U.S. 189 (1974); *Colgrove v. Battin*, 413 U.S. 149 (1973).

120. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220 (1916).

121. Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 616 n.130 (1994); Jean E. Maess, *Right to Jury Trial in Shareholder’s Derivative Action*, 32 A.L.R. 4th 1111 (2008); 13 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5990.10 (2009); DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 4:18 (2008).

*Ross v. Bernhard* approach and allow jury trials where shareholder derivative suits raise legal claims.<sup>122</sup> New York also follows *Ross v. Bernhard*, stating that if the claim is legal when brought by the corporation, then there is a right to a jury trial because “legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit.”<sup>123</sup> Similarly, Alabama and Maryland follow the *Ross v. Bernhard* approach in extending the right to jury trial in shareholder derivative actions, but do so based on interpretations of their own constitutions.<sup>124</sup>

By contrast, most states refuse to approach derivative suits like *Ross v. Bernhard* and hold that no right to a jury trial exists in shareholder derivative actions because such actions were historically filed in equity courts which did not have jury trials.<sup>125</sup> For instance, the South Carolina Supreme Court held that its state constitution mandates that the “right of jury trial shall be preserved only in those cases in which the parties were entitled to it under the law or practice existing at the time of the adoption of the Constitution” and thus no jury trial is allowed in shareholder derivative suits.<sup>126</sup> California courts have also rejected *Ross v. Bernhard* and held that no right to a jury trial exists in derivative actions, declining to depart from the “historically based approach” to interpreting their state constitution.<sup>127</sup> Although Florida courts have adopted a flexible approach for deciding whether to allow jury trials in most cases, they have declined to adopt *Ross v. Bernhard* and have relied on the historically equitable nature of derivative action to deny any right to a jury trial in shareholder derivative suits.<sup>128</sup>

Thus, even though these states have merged law and equity to allow one lawsuit to present both legal and equitable claims, they continue to deny any right to a jury trial for shareholder derivative actions. A few states, however, have not merged law and equity.<sup>129</sup> Delaware is the

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122. *Scott v. Woods*, 730 P.2d 480, 486 (N.M. Ct. App. 1986); *Hyatt Bros., Inc. ex rel. Hyatt v. Hyatt*, 769 P.2d 329, 335 (Wyo. 1989).

123. *Fedoryszyn v. Weiss*, 310 N.Y.S.2d 55, 57 (N.Y. App. Div. 1970).

124. *Fin., Inv. & Rediscount Co. v. Wells*, 409 So. 2d 1341, 1344 (Ala. 1982); *Hashem v. Taheri*, 571 A.2d 837, 840 (Md. Ct. Spec. App. 1990).

125. *Maess*, *supra* note 121; *DEMOTT*, *supra* note 121, § 4:18.

126. *Pelfrey v. Bank of Greer*, 244 S.E.2d 315, 316 (S.C. 1978).

127. *Rankin v. Frebank Co.*, 47 Cal. App. 3d 75, 92 (Cal. Ct. App. 1975).

128. *Lanman Lithotech, Inc. v. Gurwitz*, 478 So.2d 425, 427 (Fla. Dist. Ct. App. 1985).

129. Arkansas traditionally followed the historical analysis to deny a right to jury trial in shareholder derivative actions. *Hames v. Cravens*, 966 S.W.2d 244, 246–48 (Ark. 1998) (holding that the form of the action is dispositive and thus the equitable nature of a derivative suit excludes any right to a jury trial). But such actions may now possess a right to a jury trial after Arkansas voters agreed to merge the courts of law and equity in November 2000. See 2 DAVID NEWBERN & JOHN J. WATKINS, ARKANSAS CIVIL PRACTICE AND PROCEDURE § 29:3 (4th ed. 2009) (stating that law and equity are

most notable example because it is the state leader in corporate law.<sup>130</sup> In Delaware, all shareholder derivative suits must be filed in the Court of Chancery, which sits without juries.<sup>131</sup>

Iowa, on the other hand, denies jury trials in shareholder actions because it would create “quite a quandary for the lower courts” to decide which of the shareholders’ claims are legal or equitable under state law.<sup>132</sup> The Iowa Supreme Court also thought shareholder derivative litigation too complicated for a jury to properly decide because such cases typically involve multiple parties and require consideration of complex issues such as fiduciary duties, the business judgment rule, and the functioning of a large corporation.<sup>133</sup> Likewise, it expressed reservations about the fairness of a result in a jury trial due to the jury’s lack of specialized knowledge and ability to evaluate the testimony.<sup>134</sup> So to preserve the due process right to a fair trial, the Iowa Supreme Court deemed judges better equipped to decide these complex claims.<sup>135</sup>

In sum, a few states allow jury trial of legal claims in shareholder derivative actions consistent with the *Ross v. Bernhard* approach, but most do not. Most states deny any right to a jury trial in shareholder derivative actions because of the historically equitable nature of such actions. Criticism and mistrust of juries has also played a role in the decisions to prohibit any right to a jury trial in shareholder derivative suits.

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merged); *Walker v. First Commercial Bank*, 880 S.W.2d 316, 319 (Ark. 1994) (stating that procedural rules will not be applied to diminish the right to a trial by jury); Charles D. McDaniel, Jr., *First National Bank of Dewitt v. Cruthis: An Analysis of the Right to a Jury Trial in Arkansas after the Merger of Law and Equity*, 60 ARK. L. REV. 563, 563 (2007).

130. *See, e.g.*, *Mullen v. Acad. Life Ins. Co.*, 705 F.2d 971, 973 n.3 (8th Cir. 1983) (“[C]ourts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law.”); Arons, *supra* note 21, at 130 (“[M]ost states look towards Delaware’s corporate law decisions for guidance in their own holdings . . .”).

131. *See* *Heineman v. Datapoint Corp.*, 611 A.2d 950 (Del. 1992), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987); *Snyder v. Butcher & Co.*, C.A. No. 91C-04-0289, 1992 WL 240344 (Del. Super. Ct. Sept. 15, 1992).

132. *Weltzin v. Nail*, 618 N.W.2d 293, 300 (Iowa 2000); *see also* *Ross v. Bernhard*, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting) (“[T]here are, for the most part, no such things as inherently ‘legal issues’ or inherently ‘equitable issues.’ There are only factual issues, and, ‘like chameleons (they) take their color from surrounding circumstances.’ Thus the Court’s ‘nature of the issue’ approach is hardly meaningful.”).

133. *Weltzin*, 618 N.W.2d at 302.

134. *Id.*

135. *Id.* at 301.

### III. REFUTING THE CRITICISMS AGAINST CIVIL JURY TRIALS GENERALLY

Civil juries have long been criticized by lawyers, commentators, and even judges. Such criticisms, however, were not systematically tested until the past fifty years. Empirical research undermines much of the criticisms of civil juries and jury trials. Subpart A summarizes the typical criticisms directed toward civil juries and jury trials. Subpart B then explains the empirical research that challenges such criticisms.

#### A. Criticisms of Civil Juries and Jury Trials

Criticizing juries and jury trials is not a new phenomenon. A commentator in 1905 stated that the civil jury was a “clog upon justice.”<sup>136</sup> Noted American author Mark Twain once said: “The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago.”<sup>137</sup> Even judges have occasionally criticized juries. Chief Justice Warren Burger opined that “civil juries waste time and often are incapable of understanding issues presented to them.”<sup>138</sup> More recently, Judge Posner has questioned the ability of jurors, stating “I think it is romanticizing . . . to suppose that average people are deep wells of wisdom with a pumping station in every jury room.”<sup>139</sup> Criticisms of civil juries largely fall into two categories: (1) criticisms of civil juries’ performance and civil jury trials generally, and (2) criticisms of juries’ damage awards.

#### 1. Criticisms of Civil Juries’ Performance and Civil Jury Trials Generally

Critics often argue that jurors are ill-equipped for their decisionmaking responsibilities. They describe juries as incompetent, illogical, and irrational.<sup>140</sup> Further, critics claim that juries are

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136. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CINN. L. REV. 15, 17 (1990) (citing G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 9 (1905)).

137. 2 MARK TWAIN, *ROUGHING IT* 76 (1913).

138. Brodin, *supra* note 136, at 18 (citing *Suits Too Complex for a Jury*, BUS. WEEK, Sept. 22, 1980, at 118); *see also* Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210–11 (1985) (stating that juries are not comprised of peopled trained to decide complex litigation).

139. Richard A. Posner, *Juries on Trial*, 99 COMMENTARY 49, 51 (1995).

140. Brian H. Bornstein & Timothy R. Robicheaux, *Crisis, What Crisis? Perception and Reality in Civil Justice*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 1, 2 (Brian H. Bornstein et al. eds., 2008); Dennis J. Devine et al., *Jury Decision Making: 45 Years of*

“arbitrary, unpredictable, and subject to passion.”<sup>141</sup> Similarly, they argue that jurors are biased in favor of plaintiffs<sup>142</sup> and tend to make decisions based on experiences, stereotypes, and personal beliefs.<sup>143</sup>

Lawyers similarly criticize jury decisionmaking. When there is a choice, parties often decide between a judge or jury trial based on the lawyer’s attitude towards the jury. Stereotypical views may lead lawyers to act unwisely in choosing between judge and jury trials.<sup>144</sup> One corporate general counsel argued that a jury’s judgment is frequently not based on the law and facts: “Oh, a plaintiff’s lawyer can get [jurors] all riled up on emotion. It’s got nothing to do with law. It’s got nothing to do with real liability. It’s got nothing to do with real facts. It’s got to do with who’s the better actor.”<sup>145</sup> Another lawyer suggests that the “jury system is a bizarre lottery, lacking predictability and consistency in who wins.”<sup>146</sup> Other lawyers believe that jurors “focus on something that is more akin to ‘L.A. Law’ than is true in a courtroom context because that’s what they’ve been schooled in terms of what a courtroom is.”<sup>147</sup> However, “[d]espite the central importance of lawyers’ perceptions of the jury to the civil litigation system, there is little systematic information about their views.”<sup>148</sup>

Legal scholars have offered various arguments for reducing the role of juries in civil litigation and some even urge the complete abolition of

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*Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 699 (2001) (contending that jurors rarely pay complete attention and do not make decisions in the manner intended by courts, regardless of how they are instructed).

141. CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 70 (1962); see also James E. Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to Courts*, 29 UCC L.J. 419 (1997); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269, 269 (1989); Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248, 268–69 (Robert E. Litan ed., 1993); Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 593–94 (2001).

142. Daniels, *supra* note 141, at 269; Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 506 (1975) (stating that juror bias and incompetence are “very real problems”).

143. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 145 (2002) (“Lawyers entertain longstanding perceptions of juries as biased and incompetent, relative to judges.”); see also JEROME FRANK, LAW AND THE MODERN MIND 191 (Transaction Publishers 2009) (1930) (“Proclaiming that we have a government of laws, we have, in jury cases, created a government of often ignorant and prejudiced men.”).

144. Clermont & Eisenberg, *supra* note 143, at 144.

145. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 34 (1998) (alteration in original).

146. Daniels, *supra* note 141, at 280.

147. Lande, *supra* note 145, at 33.

148. Hans, *supra* note 141, at 274.

civil juries.<sup>149</sup> Scholars criticize jury trials as an inefficient use of judicial resources.<sup>150</sup> Some critics charge that jury trials cause court congestion because “it takes time to select a jury, because lawyers spend more time trying a case before a jury, and because it takes some time to instruct the jury and for the jury to deliberate.”<sup>151</sup> Commentators also argue that jury trials take more time than bench trials.<sup>152</sup> Some commentators have gone so far as to contend that the failings of the civil jury have created a crisis in the American legal system.<sup>153</sup>

Legal scholars and practicing attorneys highlight complex cases as the area of most concern with civil juries. Indeed, “[s]ome of the most vociferous criticisms of the jury relate to its performance in cases involving business and corporate wrongdoing.”<sup>154</sup> Some scholars contend that juries are “less sympathetic to large business interests”<sup>155</sup> and “less likely to understand complex issues.”<sup>156</sup> The American Bar Association, after observing alternate jurors in deliberations of complex cases, noted that “many jurors were confused, misunderstood the

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149. ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 14–15 (2001); *see also* JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 124–25 (1949); Peter Huber, *Junk Science and the Jury*, 1990 U. CHI. LEGAL F. 273, 302; Burger, *supra* note 138, 215–16; Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL’Y & L. 259, 259 (1997).

150. Moses, *supra* note 141, at 593–94; *see also* Jonathan D. Casper, *Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 414, 417 (Robert E. Litan ed., 1993).

151. JOINER, *supra* note 141, at 71.

152. *Id.*; Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 410 n.15 (“It has been suggested on occasion that use of the civil jury trial adds significant time-consuming burdens and expenses to the judicial process.”). In 1988, the National Center for State Courts conducted a study of nine courts in three states and found that “jury trials last considerably longer than nonjury trials.” DALE A. SIPES ET AL., NAT’L CTR FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 8–9 (1988) (reporting the median length for a civil jury was thirteen hours thirty minutes, as opposed to four hours fifty-five minutes for a civil non-jury trial).

153. *See* Daniels, *supra* note 141, at 270, 277; *see also* Bornstein & Robicheaux, *supra* note 140, at 1 (“There is clearly a perception that the civil justice system is, if not broken, in a serious state of disrepair . . . and although the jury is not painted as the sole culprit, it is portrayed as a leading one.”); Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 327 (1998) (“Claims that the jury engages in undeservedly negative treatment of the business corporation have been central to heated debate over the role of the jury and its place in an alleged litigation crisis.”).

154. Valerie P. Hans, *The Jury’s Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 177 (1989).

155. Moses, *supra* note 141, at 592; *see also* Sandra Schnitzer Stern, *Revised Article 5 Brings Uniformity, Predictability to Letters of Credit*, 143 N.J. J.L., Feb. 26, 1996, at 803.

156. Moses, *supra* note 141, at 592; *see also* Casper, *supra* note 150, at 416–19, Hans, *supra* note 141, at 177 (“Critics question the jury’s fact-finding ability in cases with business and corporate parties, and doubt whether lay jurors can understand the often complex and esoteric evidence of business wrongdoing.”).

instructions, failed to recall evidence, and suffered enormously from boredom and frustration.”<sup>157</sup>

Corporate executives also want to avoid juries because the issues are too complex for jurors to handle. One corporate executive stated: “Is it any surprise that many commercial contracts these days have a clause where each party waives its right to a trial by jury? Doesn’t that tell you something? That they are not willing to trust twelve peers off the street with the complexity of their business transaction.”<sup>158</sup> Even corporate attorneys avoid civil juries: “I started out as a plaintiff’s trial attorney with a strong belief in the jury system . . . I don’t believe that anymore. I think the system is broken. I think it behooves you to do anything possible to avoid it.”<sup>159</sup> In one study, 75% of business executives, 73% of inside counsel, and 60% of outside counsel believed that juries judge businesses more harshly than individuals.<sup>160</sup> In a 1992 *Business Week* survey of 400 senior executives, 83% reported that “their decisions are increasingly affected by the fear of lawsuits.”<sup>161</sup> In that same survey, 85% of those executives blamed the high cost of litigation on “[c]ontingency fees that enable people to sue without any financial risk” and 79% blamed “[j]uries that hand out awards that are too high.”<sup>162</sup> In that same survey, 62% of executives also stated that “the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies.”<sup>163</sup>

## 2. Criticisms of Juries’ Damage Awards

Lawyers frequently express discontent over juries’ damage awards.<sup>164</sup> Critics argue that juries are “overgenerous in their verdicts.”<sup>165</sup> Or, as

157. SPECIAL COMM. ON JURY COMPREHENSION, AMERICAN BAR ASS’N, JURY COMPREHENSION IN COMPLEX CASES 4 (1989).

158. Lande, *supra* note 145, at 34.

159. *Id.* at 32.

160. *Id.* at 34.

161. Mark N. Vamos, *The Verdict from the Corner Office*, BUS. WEEK, Apr. 13, 1992, at 66.

162. *Id.*; see also Archer W. Huneycutt & Elizabeth A. Wibker, *Liability Crisis: Small Businesses at Risk*, 26 J. SM. BUS. MGMT, Jan. 1988, at 25, 25–28. In a study of 288 small business owners in Louisiana, 68% “stated that they had made substantial changes in the way they operate their businesses as a result of the liability crisis,” 69% stated that jury awards had little relationship to the actual injury, and 58% stated that juries award damages based on sympathy rather than actual fault. *Id.* at 27.

163. Vamos, *supra* note 161, at 66.

164. JOHN GUINHER, THE JURY IN AMERICA 169 (1988) (“The thesis that juries are more generous than judges is one of such long standing that it seems almost an article of faith in the legal community and among the public. Documentation for it, however, is scant and ambiguous.”).

165. Daniels, *supra* note 141, at 269; Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267, 1268 (2005) (stating that in the alleged medical malpractice crisis, “the civil jury is often identified as the culprit” and accused of awarding “excessive

one critics put it, “[t]he size of the award [is where] the jury has gone nuts.”<sup>166</sup> Similarly, some critics believe that juries are “more likely to make awards based on the deep pocket of the defendant.”<sup>167</sup> Other critics contend that jury awards are more like lotteries. One lawyer called the civil jury system “a bizarre lottery, lacking predictability and consistency in who wins and how much winners are awarded.”<sup>168</sup> Another attorney directly blamed sizeable lottery jackpots for ever-increasing jury awards:

And I don’t know if anyone has done a statistical study, but I think that the sheer [number of] zeros that come up in lotteries make it no longer [unusual] for a jury to talk about \$5 million, \$10 million, \$100 million, maybe a billion dollars in some of their judgments. And [they] do it without any relationship to what the damage was.<sup>169</sup>

Today, the prospect of unsympathetic jurors convinces many corporations to settle<sup>170</sup> or prefer litigation abroad.<sup>171</sup> For instance, one lawyer recounted a discussion with a business executive: “Look, the odds we’re going to win this case are a toss-up. I mean we’re before a California jury. It should be a \$200,000 case, but it’s a California jury so it could be \$2 million. Or we can settle it for \$300,000.”<sup>172</sup> The business executive decided to settle.<sup>173</sup>

Legal historian Lawrence Friedman found that nineteenth-century juries were accustomed to living with calamity, accepted it as part of

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damages, particularly in frivolous lawsuits”); Dan Quayle, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 984 (1992) (criticizing juries for their punitive damages awards); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 849 (1998) (“Juries have been said, variously, to be . . . excessively generous in awarding compensatory damages, and out of control when awarding punitive damages.”).

166. Lande, *supra* note 145, at 33 (alteration in original).

167. Moses, *supra* note 141, at 592–93; *see also* Daniels, *supra* note 141, at 273; Lande, *supra* note 145, at 34–35.

168. Daniels, *supra* note 141, at 280.

169. Lande, *supra* note 145, at 33–34 (alteration in original).

170. Karen Orren, *Judicial Whipsaw: Interest Conflict, Corporate Business & the Seventh Amendment*, 18 POLITY 70, 85 (1985). The pressures and concerns forcing settlement in the shareholder derivative context also appear in the class action context. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Judge Posner stated that certification of a class action, even one lacking in merit, forced defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”); *see also* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973) (calling class action settlements induced by a small probability of an immense judgment “blackmail settlements”).

171. Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor’s Perspective*, 36 GEO. WASH. INT’L L. REV. 757, 780 (2004) (“Ironically, even U.S. manufacturers, who are supposedly more receptive to the U.S. judicial system, prefer to litigate abroad, partly because of their fear of generous jury awards of punitive damage at home.”).

172. Lande, *supra* note 145, at 21.

173. *Id.*

life, and awarded damages accordingly.<sup>174</sup> Contrastingly, he found that twentieth-century juries desired total justice and expected fair treatment and full compensation for undeserved suffering.<sup>175</sup> Such desires, as well as lawyers' negative views of juries' ability to rationally award damages, may help explain the development of technical rules of evidence governing damages issues.<sup>176</sup> These evidentiary rules keep juries from hearing evidence or argument regarding "information about parties' insurance coverage, treble damages in antitrust cases, attorneys' fees, taxability of awards, settlement offers, and actual settlements involving some of the parties."<sup>177</sup> These rules are "designed to blindfold jurors, keeping from them information for fear that it might adversely affect their decisionmaking process."<sup>178</sup>

### *B. The Criticisms of Juries Are Not Supported by Empirical Research*

Empirical research on juries undermines much of the criticism discussed in the prior subpart. This research uses four primary methodologies: (1) mock jury experiments involving simulated trials, (2) post-deliberation interviews or surveys with ex-jurors, (3) analysis of jury verdicts in archival sources, and (4) field studies or experiments involving real juries.<sup>179</sup> The mock jury methodology has been used most frequently.<sup>180</sup> While there are a few isolated studies on juries before World War II, systematic research on juries did not begin until 1953 with the Chicago Jury Project conducted by researchers at the University of Chicago.<sup>181</sup>

#### 1. Empirical Research Regarding Civil Juries Generally

The empirical research examining juries' performance reveals a different picture than the negative perceptions because it tends to show

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174. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 53 (1967).

175. *Id.*; cf. Stephan Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22, 43 (Robert E. Litan ed., 1993) (stating that the backlash against nineteenth century harsh tort doctrines "resulted in a renewed reliance on the [twentieth century] jury to humanize the law, a trend that has continued to the present day").

176. JOINER, *supra* note 141, at 75.

177. William W. Schwarzer & Alan Hirsh, *The Modern American Jury: Reflections on Veneration and Distrust*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 399, 402 (Robert E. Litan ed., 1993).

178. *Id.* at 402.

179. Devine et al., *supra* note 140, at 626.

180. *Id.*

181. *Id.* at 622.

that juries are competent decisionmakers.<sup>182</sup> “[R]esearchers concur that jurors on the whole are conscientious, that they collectively understand and recall the evidence as well as judges, and that they decide factual issues on the basis of the evidence presented.”<sup>183</sup> Moreover, “[s]erious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker.”<sup>184</sup> Additionally, surveys of judges—arguably the most significant and consistent jury observers—“show virtually unanimous support for the institution.”<sup>185</sup>

Though juries’ ability to rationally resolve disputes has been criticized, judges and juries frequently agree on the proper trial outcome.<sup>186</sup> According to the Chicago Jury Project, judges and juries agreed on the appropriate verdict in 78% of the jury trials examined.<sup>187</sup> This suggests that juries are not perplexed by complex cases and are generally able to reach rational results.<sup>188</sup> A 1981 study published by the Federal Judicial Center provided further evidence that juries are able to adjudicate complex legal issues when it found that “[a]lmost without exception, respondents who acknowledged the existence of difficult issues in their jury trials also mentioned explicitly that *the jury had made*

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182. Neil Vidmar, *The American Jury System for Ausländer (Foreigners)*, 13 DUKE J. COMP. & INT’L L. 95, 122 (2003).

183. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109 (1996).

184. *Id.*

185. Moses, *supra* note 141, at 596; *see also* Hans, *supra* note 141, at 261–65; *Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 746–47 (1989) (According to one survey, an overwhelming majority of judges believe that juries “usually make a serious effort to apply the law as they are instructed (99% federal, 98% state); [d]o not believe that the feelings jurors have about the parties often cause them to make inappropriate decisions (80% federal, 69% state). . . . Even in complex cases involving scientific or highly technical issues, there is a marked reluctance to abandon the jury system even though there is widespread recognition of the difficulties involved. . . . Majorities of judges reject the suggestion that there should be a limitation on the use of juries for complex civil cases involving highly technical and scientific issues (52% federal, 59% state), or for very complicated business cases (60% federal, 58% state).”).

186. *See* R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 101 (1991) (comparing the Chicago Jury Project finding that juries and judges agreed 79% of the time with a Georgia study finding that 71 of the 91 Georgia judges (78%) estimated they agreed with the jury’s verdict for the plaintiff); *see also* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 743 (2002) (reporting that a one-year study of forty-five of the nations’ largest counties yielded “no substantial evidence that judges and juries differ in the rate at which they award punitive damages or in the central relation between the size of punitive awards and compensatory awards”).

187. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63 (1966); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964) (stating that the Chicago Project studied jury verdicts in personal injury cases and compared the jury’s decision to what the judge stated he or she would have found).

188. Kalven, *supra* note 187, at 1055.

*the correct decision or that the jury had no difficulty applying the legal standard to the facts.*"<sup>189</sup> Moreover, contrary to the popular belief that judges are better able to weed out biased evidence because of their legal training, the evidence suggests that judges and jurors do not differ in their reactions to potentially biased information.<sup>190</sup>

In addition, a number of studies surveying a jury's handling of technical or complex issues show that that judges do not fare better in the face of complexity than jurors.<sup>191</sup> One study concluded that "[t]he jury does by and large understand the facts and get the case straight."<sup>192</sup> In 90% of disagreements between the jury and judge as to the proper trial outcome, the reason for disagreement was not the jury's misunderstanding of the facts.<sup>193</sup> In only 1 of the 3,576 cases studied by the Chicago Jury Project did the judge specifically state that he disagreed with the jury because of the jury's inability to understand the case.<sup>194</sup>

Furthermore, when a case is factually complex, juries will ask more questions and take longer to decide the case. According to the Chicago Jury Project, juries came back with questions in difficult cases about twice as often as in easy cases.<sup>195</sup> Two researchers analyzed deliberation times from real juries and found that the more complex the case, the longer the juries deliberated.<sup>196</sup> Juries that spend more time

189. GUNTHER, *supra* note 164, at 213 (emphasis in original).

190. See Moses, *supra* note 141, at 595; see also Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994).

191. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 234 (Robert E. Litan ed., 1993).

192. KALVEN & ZEISEL, *supra* note 187, at 149; Lempert, *supra* note 191, at 234 ("A close look at the number of cases, including several in which jury verdicts appear mistaken, does not show juries that are befuddled by complexity. Even when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally, and they usually reach defensible decisions.").

193. KALVEN & ZEISEL, *supra* note 187, at 152; Lempert, *supra* note 191, at 234-35 ("The empirical evidence also provides no reason to believe that judges will fare better in the face of complexity than juries . . . judges dealing with unfamiliar, technical information can be as confused as we fear similarly situated juries are. . . . [I]n complex cases we can expect that some judges will be more capable than the average jury, and we can expect that the average jury will be more capable than some judges.").

194. KALVEN & ZEISEL, *supra* note 187, at 153; Lempert, *supra* note 191, at 234 ("To the extent that juries make identifiable mistakes, their mistakes seem most often attributable not to conditions uniquely associated with complexity, but to the mistakes of judges and lawyers, to such systematic deficiencies of the trial process as battles of experts and the prevalence of hard-to-understand jury instructions, and to the kinds of human error that affect simple trials as well.").

195. KALVEN & ZEISEL, *supra* note 187, at 155 (reporting that juries returned with questions 14% of the time in easy cases and 27% of the time in difficult cases).

196. Thomas L. Brunell et al., *Time to Deliberate: Factors Influencing the Duration of Jury*

deliberating also appear less influenced by pretrial media coverage.<sup>197</sup>

The importance of the right to jury trial for litigants is bolstered by the relatively low percentage of jury waiver clauses in complex contracts. A study covering jury waiver clauses in large, commercial, and complex contracts showed that only 20% of more than 2,800 contracts examined had jury waiver clauses.<sup>198</sup> Although other factors undoubtedly influence parties' decisions to omit jury waiver clauses in complex contracts, the absence of such clauses may suggest that some parties do not want to eliminate the choice as to who decides their cases.<sup>199</sup>

Criticisms that juries favor plaintiffs in civil litigation have also been undermined by the empirical research. The Chicago Jury Project found that in 12% of civil cases, the jury favors the plaintiff and in 10% of cases the judge favors the plaintiff.<sup>200</sup> As odds would predict, studies also show that plaintiffs tend to win about 50% of the time in civil cases.<sup>201</sup>

## 2. Empirical Research Regarding Civil Juries' Damage Awards

Criticisms about juries awarding excessive damages in civil litigation have also been undermined by empirical research. The research shows that juries attempt to use a systematic process to determine damage awards.<sup>202</sup> It also demonstrates that compensatory awards are moderately related to the seriousness of plaintiffs' injuries and punitive damage awards are strongly related to the compensatory damages awarded.<sup>203</sup> The typical civil jury award is not extraordinary large,

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Deliberation (2nd Annual Conference on Empirical Legal Studies Paper, June 24, 2007), available at <http://ssrn.com/abstract=996426> (including appendix with various data tables in multiple areas); see also KALVEN & ZEISEL, *supra* note 187, at 157 (reporting that the average deliberation time was 2.1 hours in clear and easy cases, it was 3.3 hours in close and easy cases, and it was 4.5 hours in difficult cases).

197. Emily G. Owens, Justice for Hire: Financial Incentives in Jury Deliberation (3d Annual Conference on Empirical Legal Studies, Apr. 14, 2008), available at <http://ssrn.com/abstract=1120336>.

198. Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 541 (2007).

199. Moses, *supra* note 141, at 595.

200. KALVEN & ZEISEL, *supra* note 187, at 64.

201. Vidmar, *supra* note 165, at 851; George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 55 (1984) (predicting that plaintiff success rates in civil jury trials should generally fall around 50% and that plaintiffs are not overly favored in civil jury trials); see also Devine et al., *supra* note 140, at 702 (stating that almost every major study on the topic has found that plaintiff success rates vary according to certain factors, particularly case type).

202. Devine et al., *supra* note 140, at 706.

203. Devine et al., *supra* note 140, at 702; see also Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989); FRANK A. SLOAN ET

especially considering attorneys' fees and court costs, and the amount has not drastically changed over the years when adjusted for inflation.<sup>204</sup> The public perception that juries are overly sympathetic to plaintiffs, regularly award excessive sums of money, and are biased against defendants with "deep pockets" has likely been "unduly influenced by a selection bias in the media that focuses attention on atypical high-stakes cases and their outcomes."<sup>205</sup> It is true, however, that juries tend to award larger damages against corporate defendants than individual defendants.<sup>206</sup>

Neither juries nor judges are perfect dispute resolution mechanisms because both involve the potential for human error. The empirical evidence, however, suggests that corporate executives possess either an irrational fear of juries or at least a fear based on inflated criticisms of juries. Civil juries should not be categorically excluded as decisionmakers on the basis of such criticisms. Moreover, as the next Part discusses, civil juries fulfill important roles beyond simply resolving disputes and these roles support giving civil juries a significant role in shareholder derivative litigation.

#### IV. THE HISTORICAL AND CONTINUING VALUE OF THE CIVIL JURY

Despite frequent criticism, the jury system is an integral part of the United States' justice system. "The jury is almost by definition an exciting and gallant experiment in the conduct of serious human affairs; it is not surprising that virtually since its inception it has been embroiled

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AL., *SUING FOR MEDICAL MALPRACTICE* (1993); Sentell, *supra* note 186, at 104 (reporting a Georgia study that found 71 of the 91 Georgia judges (78%) estimated they agreed with the jury's verdict for the plaintiff and that of the judges that did not agree with juries' awards for plaintiffs, "[a] slight majority of those judges (14) manifested a definite preference for higher damage awards than their juries were returning"); *see also* Eisenberg et al., *supra* note 186, at 779 ("Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards. Jury punitive awards have a bit more spread than judge awards, but the effect is not robust and leads to few jury punitive awards outside the range of what judges are expected to award.").

204. Devine et al., *supra* note 140, at 703; *see also* GUNTHER, *supra* note 164, at 175 (noting that the Rand study found that most jury awards did not vary in terms of constant dollars and that, in major-injury cases, some studies have shown that juries more frequently err on the conservative side); Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1287 (1952) ("[W]hen it comes to a calculation of damages under the flexible rules of tort law the estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society.").

205. Devine et al., *supra* note 140, at 702.

206. *Id.* at 706; *see also* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUDIES 623, 640 (1997); Brian J. Ostrom, *A Step above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 238 (1996).

in controversy . . . .”<sup>207</sup> Beginning with early legal journals, commentators have argued for the abolition of the jury or, at least, for keeping complex issues away from the jury.<sup>208</sup> The jury, however, has proved an amazingly resilient institution.<sup>209</sup> Critics of the civil jury too often focus on its dispute resolution task, while ignoring the other important roles fulfilled by the American jury as embodied in the Seventh Amendment.<sup>210</sup>

*A. The Civil Jury Has a Long History in the United States*

The concept of the civil jury stretches back thousands of years. Its roots trace back 2,500 years to ancient Greece, where juries decided the outcome of trials and determined penalties.<sup>211</sup> Later, the Magna Charta declared that no man should be condemned without the lawful judgment of his peers.<sup>212</sup> Americans have relied on the civil jury to resolve legal disputes since the beginning of the colonial period.<sup>213</sup>

English colonists brought the civil jury system to America.<sup>214</sup> The 1641 Massachusetts Body of Liberties specifically provided for civil juries, and jury trials were available in virtually all civil, as well as criminal, cases in Virginia as early as 1642.<sup>215</sup> Later, during the American Revolution, the jury’s value was “enhanced because juries regularly thwarted British objectives and provided a bulwark against royal tyranny.”<sup>216</sup> After the United States gained its independence from Britain in 1776, every former colony embraced the right to trial by jury

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207. Kalven, *supra* note 187, at 1055–56; *see also* Landsman, *supra* note 175, at 37 (noting that the drafters only mentioned the civil jury twice during the constitutional debates by the delegates and “[t]hese two brief discussions resulted in the decision to refrain from mentioning the civil jury in the Constitution’s text, because, the delegates said, ‘the Representatives of the people may be safely trusted in this matter.’” (quoting Mr. Gorham on September 12, 1787, originally reported in JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, available at [http://www.constitution.org/dfc/dfc\\_0912.htm](http://www.constitution.org/dfc/dfc_0912.htm))).

208. Oliver P. Shiras, *The Jury System*, 1 YALE L. J. 45, 47 (1891); Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 292 (1901) (“I believe it is a mistake to think that there would be any general regret were jury trials abolished in the class of civil cases to which I have alluded [civil matters with complex factual situations].”).

209. Devine et al., *supra* note 140, at 622.

210. *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1419–20 (1997) [hereinafter *The Civil Jury*].

211. *See id.* at 1414–17.

212. *Id.* at 1418.

213. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999).

214. SWARD, *supra* note 149, at 90.

215. Landsman, *supra* note 213, at 285.

216. *Id.* at 288; *see also* SWARD, *supra* note 149, at 90–91.

and it was probably the only right “universally secured by the first American state constitutions.”<sup>217</sup> In fact, many of the early states granted a right to jury trial even in equitable actions.<sup>218</sup>

In drafting the U.S. Constitution, the Federalists and Anti-Federalists disagreed as to when a right to a jury trial existed.<sup>219</sup> However, as Alexander Hamilton stated:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.<sup>220</sup>

After much debate, the Federalists and Anti-Federalists compromised on the right to a jury trial.<sup>221</sup> The right to a civil jury trial did not appear in the Constitution as originally approved by the states in 1788, but it was incorporated into the Seventh Amendment when the Bill of Rights was adopted in 1791.<sup>222</sup> As previously explained, the Seventh Amendment preserves the right to a jury trial for all legal claims.<sup>223</sup>

The history of the civil jury demonstrates that early Americans believed juries of ordinary people, exempt from corruption, could resolve society’s disputes.<sup>224</sup> Though the civil jury is arguably less valued than the criminal jury,<sup>225</sup> the civil jury continues to play the important role originally envisioned by the Seventh Amendment.<sup>226</sup> And, while the jury has undergone changes, especially in the nineteenth century,<sup>227</sup> it remains a prized institution that plays an important role in

217. Landsman, *supra* note 213, at 288 (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960)).

218. Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 836–38, 848 (1980).

219. SWARD, *supra* note 149, at 91–93.

220. THE FEDERALIST NO. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

221. Wolfram, *supra* note 75, at 672–73 (“While many of their [anti-Federalists] arguments concerning the form of the national government and the extent of its powers were ultimately rejected, the antifederalist arguments concerning civil jury trial (and other guarantees that were enacted into the Bill of Rights) ultimately prevailed. . . . [T]here is no surviving evidence that the shape of the seventh amendment enacted by a federalist Congress and approved by federalist state legislatures varied significantly from what the antifederalists had been arguing for during the ratification process.”).

222. Landsman, *supra* note 213, at 289.

223. See *supra* Part II.B.

224. Arnold, *supra* note 218, at 835.

225. *The Civil Jury*, *supra* note 210, at 1412 (noting the Seventh Amendment right to civil jury has not been applied to the states while the Sixth Amendment right to criminal jury has).

226. Landsman, *supra* note 213, at 304.

227. See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964). Modifications of the civil jury mechanism over the past several decades include relaxing the unanimity rule and allowing smaller juries. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding a state

American democracy.<sup>228</sup> As the Supreme Court has noted: “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>229</sup>

### *B. The Civil Jury’s Role in American Democracy*

The civil jury is not only a dispute resolution mechanism; it is also a check against the power of judges and legislatures, a legitimator of legal decisions, and a forum for democracy. Juries are also “equalizers, capable of bridging the power gap between a big company and an injured person and thereby reflecting our distinctively American respect for the individual.”<sup>230</sup> The civil jury system, however, does cost jurors and the judicial system both time and money. Yet, such costs have long been viewed as outweighed by the values of liberty, democracy, and political community associated with the civil jury.<sup>231</sup>

The civil jury is a check against judges.<sup>232</sup> In the colonial period, Americans preferred the decentralized jury trial over a decision by a single judge, because the judge was viewed as the executive’s agent.<sup>233</sup> For this reason, Americans politically opposed courts of equity and

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court conviction of a criminal defendant by less than a unanimous jury); *Colgrove v. Battin*, 413 U.S. 149 (1973) (upholding a civil court verdict of a six-person jury).

228. See *The Civil Jury*, *supra* note 210, at 1436; STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 215 (1994) (“We are still, through the jury, a government of and by the ordinary people.”); Landsman, *supra* note 175, at 54–55 (“History teaches that the jury has been protean, repeatedly adapting to the needs of changing times. . . . Our loss [of the civil jury] could not be measured in terms of the jury’s past service alone. We would also be deprived of the adaptations yet to be fashioned in response to the ever changing needs of society.”).

229. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959).

230. ADLER, *supra* note 228, at 215–16.

231. *The Civil Jury*, *supra* note 210, at 1413.

232. Orren, *supra* note 170, at 85; Wolfram, *supra* note 75, at 653 (stating that one of the purposes behind the Seventh Amendment is to protect a civil litigant “against an oppressive and corrupt federal judge”); see also JAMES MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787*, available at [http://www.constitution.org/dfc/dfc\\_0912.htm](http://www.constitution.org/dfc/dfc_0912.htm) (stating that in the 1787 constitutional debates, Mr. Gerry “urged the necessity of Juries to guard [against] corrupt judges”).

233. See Arnold, *supra* note 218, at 830, 835; JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 22–23 (1994) (noting that in early America, the British forced Americans to be tried in England by British juries in an effort to quash American independence and democracy); Landsman, *supra* note 175, at 35 (“From the 1760s until the Revolution, the jury came, in the colonial mind, to represent the most effective means available to secure the independence and integrity of the judicial branch of government. It was precisely for this reason that the British authorities increasingly sought either to control or to avoid jury adjudications. The fight over jury rights was, in reality, the fight for American independence and served to help unite the colonies.”).

associated them with exercises of arbitrary power.<sup>234</sup> Thus early Americans valued juries as a check on judges, who could otherwise exercise their power oppressively, arbitrarily, or corruptly.<sup>235</sup> As Alexander Hamilton argued:

[T]rial by jury must still be a valuable check upon corruption. . . . As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practise upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer, while the [cooperation] of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes."<sup>236</sup>

The jury thus fulfills a significant countervailing function against the judge.

The civil jury is also important as a legitimator of trials. The jury helps guarantee the integrity of trials because it is more difficult to corrupt twelve jurors than one judge.<sup>237</sup> It also generates public confidence in its verdicts because it is composed of laypersons and, therefore, instills a sense of inclusion and participation.<sup>238</sup> Furthermore, that each jury is composed of different individuals helps diffuse dissatisfaction with verdicts.<sup>239</sup> Juries also play a regulating role by

234. Arnold, *supra* note 218, at 830.

235. Wolfram, *supra* note 75, at 670–71; *see also* Arnold, *supra* note 218, at 834; *The Civil Jury*, *supra* note 210, at 1429 (noting that an important aspect of the jury system is its check on “oppressive officialdom” or “security against corruption”).

236. THE FEDERALIST NO. 83, at 523 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

237. Kalven, *supra* note 187, at 1062; *see also* ADLER, *supra* note 228, at 6 (“It seems wonderfully in keeping with our democratic ideal that we allow juries of ordinary people to have this power [to give verdicts]. By doing so, we deny powerful judicial officials who may have political agendas from shaping . . . history for us. . . . It’s no accident that the Communist-era Soviet Union did without a jury system and, as it fought in 1993 to develop as a democracy, Russia was working to establish one.”).

238. *The Civil Jury*, *supra* note 210, at 1433; *see also* WILLIAM ORVILLE DOUGLAS, WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA 389 (1956) (“A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights . . . it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.”).

239. *See* Kalven, *supra* note 187, at 1062 (stating that the civil jury legitimates legal judgments by acting as “a lightning rod for animosity and suspicion which might otherwise center on the more exposed judge”); *see also* 1 THE COMPLETE ANTI-FEDERALIST, at 19 (Herbert J. Storing ed., 1981) (Anti-federalists believed that, “[j]uries are constantly and frequently drawn from the body of the

establishing a pattern of trial outcomes; the predictability of a trial outcome is an important factor in settlement negotiations.<sup>240</sup> A jury's decision not only affects the rights and duties of the parties at bar, but it also establishes a "pattern of trial outcomes that serves as a backdrop to private settlement negotiations. Juries thus exert a regulating influence in the legal system by disseminating information about the probabilities of trial outcomes."<sup>241</sup> Because the legal system remains connected to public sentiment through the jury system, the jury is also essential to the continued popular acceptance of judicial authority.<sup>242</sup>

The civil jury is also important to American democratic government. Service on a civil jury is a form of political participation by citizens.<sup>243</sup> Before the Constitution was ratified, even the Anti-Federalists acknowledged the parallel between jury service and the right to vote.<sup>244</sup> Alexis de Tocqueville, who wrote the seminal *Democracy in America*, found that:

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people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul of the judicial department.").

240. *The Civil Jury*, *supra* note 210, at 1423; Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 307 (Robert E. Litan ed., 1993) ("[T]he most significant function of juries is to shape the parties' predictions about what will happen if the case goes to trial.").

241. *The Civil Jury*, *supra* note 210, at 1423 (footnote omitted); Schuck, *supra* note 240, at 307 (Parties use these outcomes to create a "complex screening process that determines the mix of the cases that are initiated, the pattern of pre-trial settlements, and the mix of the cases that go to trial."). For empirical studies on jury decisions and case settlement patterns, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) and Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990).

242. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 59 (1977).

243. *The Civil Jury*, *supra* note 210, at 1437; PATRICK DEVLIN, *THE JUDGE* 127 (1979) ("In a democracy, law is made by the will of the people and obedience is given to it not primarily out of fear but from goodwill. . . . The jury is the means by which the people play a direct part in the application of the law."); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (*In re Japanese Elec. Prods. Antitrust Litig.*), 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J. dissenting) ("In the process of gaining public acceptance for the imposition of sanctions, the role of the jury is highly significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process. . . . Any erosion of citizen participation in the sanctioning system is in the long run likely, in my view, to result in a reduction in the moral authority that supports the process."); *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1986) (Judge Learned Hand commenting that a jury's verdict is "really a small bit of legislation ad hoc").

244. *The Civil Jury*, *supra* note 210, at 1437; 5 THE COMPLETE ANTI-FEDERALIST, at 38 (Herbert J. Storing ed., 1981) ("The trial by jury is—the democratic bench of the judiciary power—more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks; in the one case the treason is never discovered until liberty, and with it the power of defence is lost; the other is an open summons to arms, and then if the people will not defend their rights, they do not deserve to enjoy them.").

The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. These institutions are two instruments of equal power, which contribute to the supremacy of the majority. All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.<sup>245</sup>

Further, he found juries useful for American democracy: “I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.”<sup>246</sup> Political scientists find that the American participatory model of democracy depends upon high levels of civic activity. Ideally, as part of their duties and rights, citizens participate in periodic elections and regularly take part in local community activities such as jury service.<sup>247</sup> Political scientists have argued that citizen involvement in even minor aspects of public life promotes widespread public involvement.<sup>248</sup> Some researchers have even found that participating on a jury may increase the likelihood of voting in the future.<sup>249</sup>

In addition, the civil jury is one of society’s most effective means of popular education<sup>250</sup> and gives those who serve a sense of community responsibility.<sup>251</sup> The jury has an impact on the jurors, because “it invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government.”<sup>252</sup> As Judge Irving Kaufman

245. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (Henry Reeve trans., Colonial Press rev. ed. 1900) (1835).

246. *Id.* at 290.

247. John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 J. POLITICS 585, 585 (2002); ABRAMSON, *supra* note 233, at 2 (“Elections for president, governor, senator, or other office give power of a sort to the people by making those who are elected accountable to their constituents through the ballot box. But this is a far cry from empowering the people themselves with the daily responsibility for governing. . . . By contrast, the jury version of democracy stands almost alone today in entrusting the people at large with the power of government . . .”).

248. Gastil et al., *supra* note 247, at 586; 1 THE COMPLETE ANTI-FEDERALIST, at 19 (Herbert J. Storing ed., 1981) (An Anti-federalist writer found that jury trials “are the means by which the people are let into the knowledge of public affairs—are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.”).

249. Gastil et al., *supra* note 247, at 592 (“Registered voters who actively participated in criminal juries that successfully reached verdicts were more likely to vote in future elections than those empanelled jurors who simply played the role of alternate, had no chance to deliberate, or failed to reach a verdict after deliberating.”).

250. See *The Civil Jury*, *supra* note 210, at 1408.

251. Dale W. Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. CHI. L. REV. 386, 419 (1954).

252. 1 TOCQUEVILLE, *supra* note 245, at 289.

observed, “there can be no universal respect for law unless all Americans feel that it is *their* law—that they have a stake in making it work.”<sup>253</sup>

The jury system also allows the community to identify with a governmental process and brings the community’s values into that process.<sup>254</sup> The “civil jury is a democratic institution composed of laypersons [that] fosters a sense of inclusion and participation that reflects and generates popular endorsement of the judicial system.”<sup>255</sup> The jury thus is intrinsically valuable as a means for society to actively participate in the administration of government and to keep the legal system in touch with public sentiment.

Similar to its check against judges, the civil jury also serves as a check against legislatures’ unjust laws.<sup>256</sup> Unlike modern juries, early juries decided both issues of fact and law, which allowed juries to have direct control over the substantive law of the community and to protect citizens against a tyrannical government.<sup>257</sup> Juries in today’s courtrooms, however, do not enjoy this broad power. Now, because juries primarily render judgments on the facts, their policymaking role has significantly decreased.<sup>258</sup> But even today, the jury can frustrate the application of unjust laws by refusing to apply such laws.<sup>259</sup> Although

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253. Judge Irving Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

254. Alvin B. Rubin, *Trial by Jury in Complex Civil Cases: Voice of Liberty or Verdict by Confusion?* 462 ANNALS AM. ACADEMY POL. & SOC. SCIENCE, Jul. 1982, at 87, 96; see also ADLER, *supra* note 228, at 216 (stating that when a jury makes a decision, it reflects community values because “[t]he people who made that choice sprang from, and then would return to, the community that had to live with the decision—a satisfying prospect in a nation that takes democracy seriously.”); GUNTHER, *supra* note 164, at 174–75 (stating that juries’ verdicts can represent community values; for example, “jurors—without making a separate punitive damage finding—sometimes add to an award against a defendant, their purpose to chastise or warn about improper conduct, not to promiscuously pick some insurance company’s pocket.”).

255. *The Civil Jury*, *supra* note 210, at 1433.

256. Orren, *supra* note 170, at 85; see also ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 3 (1984) (“In channeling community values into the legal system, the jury also serves as a check on the possible excesses of the legislative branch.”); GUNTHER, *supra* note 164, at xiii (“Jury decisions, at times, have changed the course of history, have caused laws to be discarded or rewritten, have wrought guarantees of our freedoms.”); *id.* (“Thomas Jefferson and others have seen them [juries] as the public’s line of defense against the state when it acts oppressively, and Jefferson, for that reason, once declared that the right to trial by jury was more precious to the maintenance of a democracy than even the vote.”).

257. Arnold, *supra* note 218, at 835; Gary J. Jacobsohn, *Citizen Participation in Policy-Making: The Role of the Jury*, 39 J. POLITICS 73, 78 (1977) (noting that, until the first half of the nineteenth century, the prevailing practice in jury trials was to allow the jury to consider the law and the facts in carrying out its duty).

258. Jacobsohn, *supra* note 257, at 78; see also *The Civil Jury*, *supra* note 210, at 1421 (stating that, once the jury’s power to resolve issues of law disappeared, its value as a forum for deliberative democracy diminished).

259. *The Civil Jury*, *supra* note 210, at 1430; Wolfram, *supra* note 75, at 705 (“It has been

this power is restricted by the judge's power to grant motions such as directed verdicts, judgments notwithstanding the verdict, and new trials,<sup>260</sup> the secrecy surrounding the jury's deliberative process gives it the power to essentially dispense with the operation of law if it sees fits.<sup>261</sup> The jury thus may mitigate otherwise harsh legal rules and create exceptions to laws.<sup>262</sup> The jury also uses community judgment to affect policy where the law establishes criterion such as a reasonable standard of care or a reasonable person standard.<sup>263</sup> In such cases, juries do not directly make policy, but implement policy in deciding how to apply the law to particular cases.<sup>264</sup> Juries therefore bring community values into the judicial process<sup>265</sup> and affect policy in terms of "what is actually being carried out, or enforced, in the real world."<sup>266</sup>

#### V. EXTENDING A JURY TRIAL RIGHT TO SHAREHOLDER DERIVATIVE LITIGATION

The civil jury is by no means a perfect institution. The civil jury has often been criticized by scholars, lawyers, and even judges. Empirical research, however, undermines much of this criticism and reveals that the civil jury is not as inept as its critics suggest. In addition, though the criticisms of the civil jury are directed at its dispute resolution function—the jury's ability to competently handle its decisionmaking tasks, reach rational and unbiased decisions, award fair damages, and

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observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed." (citing THE FEDERALIST NO. 83, at 563 (Alexander Hamilton) (J. Cooke ed., 1961)).

260. *The Civil Jury*, *supra* note 210, at 1430; *see* FED. R. CIV. P. 50(a)(1) (stating a judge may grant judgment as a matter of law once "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"); FED. R. CIV. P. 50(b)(2) & (3) (stating that if the judge denies the motion, the judge may grant a renewed motion for judgment as a matter of law after the jury trial or order a new trial); FED. R. CIV. P. 59(a)(1)(A) (stating a judge may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court").

261. Broeder, *supra* note 251, at 411.

262. *Id.*; Bernard D. Meltzer, *A Projected Study of the Jury as a Working Institution*, 287 ANNALS AM. ACADEMY POL. & SOC. SCIENCE, May 1953, at 97, 98 (stating that the jury is able to mitigate a general law it views as too harsh); *see also* Jacobsohn, *supra* note 257, at 76.

263. Jacobsohn, *supra* note 257, at 80; *see also* Broeder, *supra* note 251, at 389; Meltzer, *supra* note 262, at 98.

264. Jacobsohn, *supra* note 257, at 76.

265. Higginbotham, *supra* note 242, at 59–60; *see also* Arnold, *supra* note 218, at 833–34 (noting that juries were historically regarded as instruments of local government); ADLER, *supra* note 228, at 216 (Juries "apply community values to complex matters of commerce, a democratization of business rules attempted in few other nations.").

266. Jacobsohn, *supra* note 257, at 76 (citing WILLIAM A. WELSH, *STUDYING POLITICS* 105 (1973)).

understand complex cases—the civil jury is not merely a dispute resolution instrument. The civil jury also serves other vital purposes, including purposes that could significantly benefit shareholder derivative litigation.

*A. Expanding a Right to Jury Trial for all Shareholder Derivative Litigation*

If a normative decision allows jury trials for legal claims in shareholder derivative litigation in all courts, the next question is how to implement such a change. The easiest and quickest way would be for the Supreme Court to hold that the Seventh Amendment applies to the states.<sup>267</sup> Then all states would have to follow *Ross v. Bernhard* and a right to a jury trial would exist for legal claims asserted in shareholder derivative actions. Otherwise, implementing such a change would be more complicated. For those states that currently do not permit any right to a jury trial in shareholder derivative litigation, the state legislatures could enact statutes extending a right to jury trial to legal claims asserted in shareholder derivative litigation. Alternatively, the highest court in those states could adopt the reasoning of *Ross v. Bernhard* through common law development or possibly an interpretation of the state constitution. As discussed in the following subparts, the advantages of expanding the right to jury trial for legal claims in shareholder derivative actions outweigh the disadvantages.

1. Equality Among Cases

Shareholder derivative lawsuits are no more complicated than other lawsuits, and therefore courts cannot rationally treat them differently. Though judges and scholars argue that shareholder derivative actions are too complex for juries, denying any right to a jury trial in shareholder derivative actions is inconsistent with the use of juries in other complex cases. For instance, complicated medical and legal malpractice cases are entrusted to juries. Similarly, juries resolve complex and highly technical issues in intellectual property and antitrust cases, as well as in cases involving engineering, architectural, and construction disputes. Like shareholder derivative litigation, these cases often involve multiple parties, vague standards of liability, and complex transactions.

Although these cases present complex issues in areas in which jurors typically have no specialized knowledge, courts allow the jury to

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267. Future work by the author will explore this issue, but to do so in the Article is unnecessary.

evaluate the evidence and weigh the testimony to determine if a certain legal standard of conduct was violated. The modern trend demonstrates that courts increasingly trust jurors, aided by expert testimony when necessary, to make rational decisions in these complex cases. For example, physicians traditionally were not liable for malpractice unless their conduct was not considered customary in the medical field.<sup>268</sup> If an expert gave undisputed testimony that a physician's actions corresponded with customary practice, the physician was not liable for malpractice.<sup>269</sup> Today, however, courts permit juries to consider expert testimony and determine the reasonable standard of care under the circumstances.<sup>270</sup> Thus, this modern trend supports expanding the right to a jury trial in shareholder derivative actions.

Most importantly, juries are entrusted with resolving actions that are virtually identical to shareholder derivative litigation. When a corporation, rather than its shareholders, litigates a matter, the corporation is entitled to a jury trial on any legal claims;<sup>271</sup> thus the jury is trusted with the power to hear such claims. The action is derivative only because the board of directors is disabled in some way from bringing the claim; if the board is not disabled, the shareholder cannot pursue a derivative action. It is irrational to deny shareholder derivative actions equal footing with the same actions pursued directly by corporations.

Similarly, the Department of Justice, when it criminally prosecutes corporate wrongdoers, and the SEC, when it brings enforcement proceedings, have a right to jury trial. Shareholders who file shareholder derivative litigation based on the same conduct, however, may not.<sup>272</sup> It is nonsensical to argue that a jury can understand the corporate conduct involved in criminal and enforcement cases, but cannot comprehend that same conduct in the context of a derivative action. These cases are no more complicated than shareholder derivative actions and therefore deserve equal treatment in the right to jury trial.

Finally, to the extent that the laws commonly implicated in shareholder derivative actions are too complicated, then the civil jury also acts as a check on the legal system. As a potential juror, the

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268. Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909, 913 (2002).

269. *Id.* at 911–12.

270. *Id.* at 911–14.

271. *See* *Ross v. Bernhard*, 396 U.S. 531, 533–34 (1970).

272. An example is the federal criminal prosecution of Enron's former CEOs, Kenneth Lay and Jeffrey Skilling, which was followed by shareholder derivative litigation. *See* Russell Powell, *The Enron Trial Drama: A New Case for Stakeholder Theory*, 38 U. TOL. L. REV. 1087, 1088 (2007).

average citizen must comprehend the law to apply the law (as well as to obey the law).<sup>273</sup> The civil jury thus serves as a constraint on an increasingly complex legal system<sup>274</sup> by influencing legislators to create laws that are understandable and acceptable to average citizens who serve as jurors.<sup>275</sup> Juries also influence attorneys by requiring them to understand a case well enough to organize and comprehensibly communicate it to jurors lacking legal experience.<sup>276</sup>

## 2. Minimize Distorting Influences

Extending the right to jury trial in shareholder derivative litigation also minimizes the incentive for forum shopping presented by the current legal landscape. For derivative actions filed in federal court, the Supreme Court in *Ross v. Bernhard* held “that the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.”<sup>277</sup> Thus, for shareholder derivative actions filed in federal court or in state courts that follow *Ross v. Bernhard*, the shareholders are entitled to a jury trial on any legal claims asserted. Because most states have declined to extend any jury trial right to shareholder derivative actions—based on negative views of civil juries and the historically equitable nature of such actions—differing jury trial rights can produce a strong incentive for plaintiffs to forum shop when filing a shareholder derivative action.

Admittedly, the right to a jury trial is not the only basis on which plaintiffs forum shop when filing shareholder derivative lawsuits. Most courts have special pleading standards for shareholder derivative actions, which require the plaintiffs to plead either that they made a demand on the board of directors or the reasons such a demand is excused. This pleading standard is rarely a basis for forum shopping, however, because it is very common.<sup>278</sup> Some forums try to prevent strike suits and other frivolous lawsuits by restricting which shareholders may bring derivative actions, such as requiring that the plaintiff-shareholders represent a specified percentage or dollar

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273. *The Civil Jury*, *supra* note 210, at 1439.

274. Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693, 703 (1986); *see also The Civil Jury*, *supra* note 210, at 1437.

275. Jacobsohn, *supra* note 257, at 81.

276. *The Civil Jury*, *supra* note 210, at 1439.

277. *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970).

278. *See, e.g.*, FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.

investment in the corporation.<sup>279</sup> Such filing restrictions may lead shareholder-plaintiffs to choose an alternative forum.

“There is nothing inherently evil about forum-shopping,”<sup>280</sup> and all lawsuits likely involve some degree of forum shopping.<sup>281</sup> Forum shopping is not one act or course of conduct, but rather encompasses various factors and choices.<sup>282</sup> Forum shopping “is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.”<sup>283</sup> Nevertheless, different rules governing the right to a jury trial in shareholder derivative litigation present some negative consequences.

Procedure is a powerful litigation tool, and procedural differences can impact forum selection. As Representative John Dingell stated: “I’ll let you write the substance . . . and you let me write the procedure, and I’ll screw you every time.”<sup>284</sup> Procedural differences can lead to differences in the ultimate outcome of the case.<sup>285</sup> These incentives distort

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279. *See, e.g.*, COLO. REV. STAT. § 7-107-402(3) (2009) (allowing a court to compel a shareholder who owns less than a prescribed amount of stock to post a bond); N.Y. BUS. CORP. LAW § 627 (McKinney 2003) (same); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1835 n.1 (3d ed. 2007) (listing Arizona, California, Colorado, Florida, Nebraska, New Jersey, New York, Pennsylvania, and Wisconsin as states adopting bond requirements). Delaware also requires:

an affidavit stating that the [plaintiff] has not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in the derivative action in which the person or entity is a named part except (i) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of such person, or (ii) reimbursement, paid by such person’s attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of the action.

DEL. CH. CT. R. 23.1(b).

280. *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987).

281. *See* Clermont & Eisenberg, *supra* note 143, at 121; Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 555 (1989); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 n.1 (1995) (calling forum shopping a “national legal pastime”).

282. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 345–46 (2006). There are “five basic, and overlapping, types of decisionmaking considerations inherent in forum selection: (1) choices involving federal courts versus state courts; (2) choices involving courts in different states; (3) choices involving different substantive laws; (4) choices involving different procedural provisions; and (5) choices involving subjective and personal factors.” *Id.*

283. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 571 (1989).

284. *Regulatory Reform Act, Hearing before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce).

285. Kimberly A. Morre & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI-KENT L. REV. 1325, 1331 (2002).

shareholder derivative litigation, and may lead to such actions being filed in states which are unfamiliar with the substantive law applied to the merits of the challenged directors' decisions. At a minimum, inequality in the treatment of shareholders results when similar derivative actions possess differing rights to jury trial based solely on the courts in which such actions are filed.

Different rules for the right to a jury trial also incentivize plaintiff-shareholders to creatively plead their cases. For instance, when a plaintiff cannot file a shareholder derivative action in a court that would permit a jury trial, that plaintiff has an incentive to creatively plead that their claims are not derivative but rather direct, which will provide the right to jury trial of any legal issues. In a shareholder derivative lawsuit, the injury was to the corporation and thus the cause of action and any recovery belongs to the corporation. By contrast, in a direct shareholder lawsuit, the injury is to the shareholder and the recovery belongs to the shareholder. For example, if the corporation breaches a contractual right of one class of shareholders, those shareholders have a direct cause of action. By creatively pleading their case as a direct shareholder action, a right to a jury trial exists for those claims even though the state would deny a right to a jury trial if it were a derivative suit. Nevertheless, there is no difference between direct and derivative action trials.

### 3. Avoid Excessive Deference to Directors and Officers

Entrusting enforcement to civil juries in shareholder derivative actions is also wise based on judges' past performance. Accepting the argument advanced by judges and scholars that civil juries are incapable of resolving complex business cases is troubling. Judges have historically shown great deference to the decisions of corporate executives on the rationale that "judges are not business experts."<sup>286</sup> Scholars also believe that "courts are ill-equipped to review business decisions" because they "often involve intangibles, intuitive insights or surmises as to business matters such as competitive outlook, cost structure, and economic and industry trends" and are "not susceptible to systematic analysis."<sup>287</sup> Yet, the judiciary has not created a "medical judgment rule" or a "design judgment rule" that precludes judicial

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286. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); see also Douglas M. Branson, *The Rule that Isn't a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 637 (2002) (stating "courts are ill-equipped to review business decisions" because they "often involve intangibles, intuitive insights or surmises as to business matters such as competitive outlook, cost structure, and economic and industry trends" and are "not susceptible to systematic analysis").

287. Branson, *supra* note 286, at 637.

review in medical malpractice or product liability cases.<sup>288</sup> No other profession or issue is deemed too complicated for judges to review.<sup>289</sup>

As noted in Part II, the business judgment rule defense operates as a presumption that directors have acted consistent with their fiduciary duties in making corporate decisions.<sup>290</sup> This presumption alone demonstrates judicial deference to defendants in derivative litigation. Further, because defendants can assert the business judgment rule defense in motions to dismiss, motions for summary judgment, and motions for directed verdicts at trial, defendants have continuous opportunities to argue essentially the same defense to the judge.<sup>291</sup> Consequently, the judge possesses a great deal of power to end shareholder derivative litigation in favor of defendants and may be more likely to do so after repeated argument. Judges' deference to directors is well documented by the vast number of cases in which judges have protected directors from legal liability based on the business judgment rule defense.<sup>292</sup> For instance, the Delaware Chancery Court, which sits without juries, rarely imposes liability on corporate executives for breaching their fiduciary duties. That perhaps explains why many Fortune 500 companies choose to incorporate in Delaware.<sup>293</sup> Because judges give inordinate deference to directors' decisions compared to the deference accorded other defendants, civil juries can act as a counterbalance to judges at least in those shareholder derivative actions that reach trial.<sup>294</sup> Empowering the jury to decide whether directors

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288. See Bainbridge, *supra* note 11, at 120 (noting that "no 'medical judgment' or 'design judgment' rule precludes judicial review of malpractice or product liability cases").

289. See *id.*; see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 94 (1991) (asking why "the same judges who decide whether engineers have designed the compressors on jet engines properly . . . cannot decide whether a manager negligently failed to sack a subordinate who made improvident loans"); Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 613-17 (1994) (discussing the differences between courts' review of business and medical decisions); Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 581 (opining that "judges should find it far easier to overcome the barrier of expertise and stand in the shoes of outside directors than in those of almost any of the other professionals whose actions courts are routinely called upon to review").

290. See, e.g., *Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.)*, 906 A.2d 27, 52 (Del. 2006); *McMullin v. Beran*, 765 A.2d 910, 916-17 (Del. 2000).

291. See *supra* Part II.

292. See *Fairfax*, *supra* note 17, at 409 ("[T]he tremendous deference courts grant to board decisions means that courts hold directors liable for only the most egregious examples of director misconduct."); see also TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* 183-84 (2006) (noting "the historical strong protection of corporate boards").

293. See, e.g., ANNUAL REPORT OF THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY, JANUARY 1995, at 8 ("The Delaware Chancery Court is one reason many Fortune 500 companies choose to incorporate in that state.").

294. See *supra* Part III.B.

have breached their fiduciary duties is a better mechanism for providing just resolution of shareholder derivative actions.

#### 4. Superior Group Decisionmaking

Twelve jurors participating in open-minded discussions will reach better results than one judge acting alone.<sup>295</sup> “The distinctive strength and safeguard of the jury system is that the jury operates as a group” and “twelve lay heads are very probably better than one.”<sup>296</sup>

Judges cannot test their unconscious mental and emotional prejudices against the reactions of others, as can members of a jury while deliberating.<sup>297</sup> As such, a jury may prove more impartial than the judge in relation to a particular case being tried. The American justice system relies on an adversarial form of justice, in which adversaries present proof in a highly structured setting and then the decisionmaker renders a decision.<sup>298</sup> “The jury is the most neutral and passive decisionmaker available . . .” because, unlike a judge, it does not rule on any pretrial motions and is not involved in the lawsuit’s administration.<sup>299</sup> Also unlike a judge, the jury does not hear pretrial disputes and only considers evidence deemed not greatly prejudicial according to the rules of evidence.<sup>300</sup> The jury will also not have certain prejudices that judges may develop towards certain types of claims, parties, or lawyers.<sup>301</sup>

Moreover, a group with a variety of perspectives represents the community in the legal decisionmaking process and lessens the possibility that one individual’s idiosyncratic views will control the outcome. The individuals comprising a jury possess diverse views and their role on the jury brings them together to deliberate until they reach a desirable communal solution to both moral and social issues.<sup>302</sup> Although individual jurors likely have prejudices, the combination of individual jurors is intended to represent the community.<sup>303</sup> In a democracy, this is the ideal means of addressing dissension and conflict:

[L]ong ago, Aristotle suggested that democracy’s chief virtue was the way it permitted ordinary persons drawn from different walks of life to achieve a “collective wisdom” that none could achieve alone. At its best,

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295. See Broeder, *supra* note 251, at 388.

296. Kalven, *supra* note 187, at 1067.

297. Meltzer, *supra* note 262, at 98.

298. Landsman, *supra* note 213, at 288.

299. *Id.*

300. *Id.*

301. *Id.*

302. *The Civil Jury*, *supra* note 210, at 1441.

303. Orren, *supra* note 170, at 97.

the jury is the last, best refuge of this connection among democracy, deliberation, and the achievement of wisdom by ordinary persons.<sup>304</sup>

Therefore, the jury is the best judicial and political institution to try cases and resolve society's issues.<sup>305</sup>

Civil juries' ability to bring community values to the judicial process and keep the judicial system in touch with public sentiment is vital today when shareholders have ample reason to distrust corporate executives, judges, and the government generally. Through their verdicts, civil juries can instill meaning into the laws governing directors' fiduciary duties.

### 5. Undesirability of Specialized Knowledge

Judges are not inherently more qualified than jurors to make factual conclusions on complicated issues. Judges have legal backgrounds, but this does not give them specialized knowledge of complex areas such as the inner workings of a corporation, medicine, or computer technology.<sup>306</sup> A judge likely has no more training in such areas than the average juror.<sup>307</sup> In fact, in a group of twelve jurors it is likely that one or more jurors will possess worldly experiences touching on a question similar to the one in dispute.<sup>308</sup>

Likely the biggest objection to expanding the right to jury trial to shareholder derivative actions is the development of business courts during the past decade.<sup>309</sup> As of 2008, some form of business court existed in twelve states as well as in several cities.<sup>310</sup> "The phrase 'business courts' is used as a generic term for the variety of courts and programs that have been created which are not separate courts at all, but divisions or programs within an existing court."<sup>311</sup> Some commentators consider the Delaware Court of Chancery the "most well known of the

304. *The Civil Jury*, *supra* note 210, at 1441 n.145.

305. *See id.* at 1441; Meltzer, *supra* note 262, at 98.

306. *See* Fabrikant v. Bache & Co. (*In re* U.S. Fin. Securities Litig.), 609 F.2d 411, 431 (9th Cir. 1979).

307. *Id.*

308. Broeder, *supra* note 251, at 388. *But see* Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 497 (2002) (arguing juror with specialized background knowledge that overlaps with the case's central issue should be subject to a strike for cause to avoid potential bias).

309. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 151 n.1 (2004).

310. Lee Applebaum, *The "New" Business Courts: Responding to Modern Business and Commercial Disputes*, 17 BUS. LAW TODAY, Mar./Apr. 2008, at 13, 14 (also noting that Colorado, Michigan, Ohio, Wisconsin, and Oklahoma are considering business courts).

311. Bach & Applebaum, *supra* note 309, at 151 n.1.

courts that are considered business courts.”<sup>312</sup> The Delaware Chancery Court, however, is actually a traditional court of equity separate from the Delaware common law courts.<sup>313</sup>

Some states have created business courts to attract businesses,<sup>314</sup> but the more typical justification is efficiency.<sup>315</sup> Business courts often have expedited schedules that enable businesses to quickly resolve differences,<sup>316</sup> and their dockets are generally separate from general litigation and criminal dockets that can slow resolution of business cases.<sup>317</sup> The Delaware Chancery Court in particular has been praised for its ability to provide quick and effective action and for its refined body of law that provides businesses predictability.<sup>318</sup> Contrarily, some supporters argue that business courts may benefit the justice system by improving case flow for other litigation areas<sup>319</sup> because “business cases are known to move at a glacial pace, making it difficult for the businesses involved, and tying up the court system for other litigants.”<sup>320</sup> Supporters also believe that “general courts are ill-

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312. *See id.* at 216; Applebaum, *supra* note 310, at 13 (calling the Delaware Court of Chancery the “bright star” within specialized business courts).

313. DEL. CODE ANN. tit. 10, §§ 341, 342 (2009).

314. Kimberly A. Ward, *Getting Down to Business—Pennsylvania Must Create a Business Court, or Face the Consequences*, 18 J.L. & COM. 415, 415, 421 (1999) (finding that Pennsylvania’s business community and state government view business courts as an economic tool); Chad Kile, *Oklahoma Lawmaker Proposes Specialized Businesses Court*, DAILY OKLAHOMAN, Oct. 4, 2003 (“If Oklahoma could get on the leading edge of this business court, we would look progressive—pro business.”); Jill Krueger, *Roche Takes Reins of First Business Court*, ORLANDO BUS. J., Oct. 31, 2003 (stating that the business court “represents an . . . opportunity for Orlando, and Florida for that matter, to demonstrate its commitment to achieving an efficient and meaningful resolution of business disputes.”).

315. Sheri Qualters, *Verdict: Business Court Has Made Strong Case for Itself*, BOSTON BUSINESS J., Aug. 2, 2002 (“Arguing before judges well-versed in business matters also speeds the process.”).

316. *Id.*

317. *See* Sally Apgar, *Proponents Say Separate Business Court Needed*, STAR TRIB., Nov. 7, 1990, at 1D. (“Both state and federal courts are so inundated with criminal cases that carry the right to a speedy trial, that business litigation gets put on a back burner.”); Dan Crawford, *Ohio Bar Considers Push for Separate Business Court*, BUS. FIRST OF COLUMBUS, Jan. 3, 1997 (stating that business cases “are being held hostage to the criminal docket”); *see also* Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 318 (1998) (arguing that the speed of business courts purportedly will aid “small and mid-size businesses which do not have resources to hire private . . . arbitrators” and “suffer most from the high costs and long delays of civil litigation”); National Center for State Courts, *Complex Litigation: Key Findings from the California Pilot Program*, 3 CIVIL ACTION, Winter 2004, at 2 (reporting an empirical study based on the California pilot program for complex civil litigation showed that caseloads “were sufficiently reduced to give judges the relative luxury to engage in substantial supervision” and the cases moved faster through litigation than non-pilot program cases).

318. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351 (1992).

319. Applebaum, *supra* note 310, at 17.

320. Junge, *supra* note 317, at 316–17 (also arguing that business courts would allow business cases to be resolved more quickly, free up resources for other cases, and decrease costs overall); *see also*

equipped to efficiently resolve sophisticated commercial disputes<sup>321</sup> and theorize that “a judge who is consistently hearing a limited—though not small—universe of case types will develop a greater knowledge and expertise in both the subject matter of these cases and in their procedural management.”<sup>322</sup> In addition, business courts were partly created because business litigants and litigators wanted to avoid state trial courts in which multiple judges sometimes handled different aspects of the same case, leading to an allegedly “unpredictable, uninformed, and unreliable process.”<sup>323</sup>

These justifications for business courts, however, are not entirely incompatible with jury trials. A judge in a business court could oversee the entire pretrial process in a given case, but a civil jury could still serve as the factfinder at trial. More importantly, business courts create other systemic problems. Judicial specialization creates “risks of myopia, lack of cross-pollinating ideas from learning other fields of the law, having the same judge hearing all cases in the same subjects for too long, and so on.”<sup>324</sup> In addition, such business courts “may function with a bias toward commercial parties as opposed to individual nonbusiness litigants involved in commercial litigation.”<sup>325</sup> Even the state’s involvement in creating business courts may create bias, because “[a] court whose very function is to facilitate the state’s commercial enterprise could easily develop a bias in favor of commercial parties or a bias against non-business litigants involved in commercial litigation.”<sup>326</sup> Similarly, states’ creation of business courts to benefit or attract businesses may harm consumers and individual litigants.<sup>327</sup>

Notably, the vast majority of states have not rushed to create business courts. “After years of study and analysis, California decided against

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Applebaum, *supra* note 310, at 17 (arguing that business courts “may become laboratories for innovations that can be used systemwide”).

321. Junge, *supra* note 317, at 315.

322. Applebaum, *supra* note 310, at 16 (“This will permit these specialist judges to make more reliable and informed decisions, and to do so with greater efficiency.”); Bach & Applebaum, *supra* note 309, at 228 (“Judges presented daily with a field of law in which to cultivate their understanding, knowledge, and ability are more likely to come to deeper understandings about the inner workings of the legal principles they face; the patterns that may reveal themselves in the conduct of business cases; and the patterns of thinking and behavior that may appear in parties and counsel.”).

323. Applebaum, *supra* note 310, at 14.

324. *Id.* at 16.

325. Junge, *supra* note 317, at 318.

326. Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 913 (2008) (“The justice rendered by business courts has the potential to become questionable when these business courts decide claims brought against businesses by individuals, as they are increasingly doing in some states.”).

327. *Id.*

the creation of business courts.”<sup>328</sup> The chair of California’s task force that studied such courts, Justice Richard Aldrich, stated that “the only place we found support [for business courts] was within the business community.”<sup>329</sup> Perhaps one reason states are leery of business courts is their detrimental effect on the judicial system as a whole.<sup>330</sup> “A specialized business court runs contrary to the goal of court unification and simplification.”<sup>331</sup> Critics further worry about “a proliferation of courts where every interest has a court”<sup>332</sup> and triggering more litigation with the streamlined process offered by business courts.<sup>333</sup> Opponents also question how proposed business courts would be funded<sup>334</sup> and the potentially limited number of cases that such courts would handle.<sup>335</sup> Additionally, business courts could lead to “turf battles between regular trial division courts—many of whose judges feel capable of dealing with complex business disputes—and the specially created business courts.”<sup>336</sup> Finally, business courts are unnecessary because judges “already ha[ve] the inherent power to use special case management techniques to address the goals of the business court.”<sup>337</sup>

### *B. Improving and Checking Civil Juries’ Performance*

Expanding the right to a jury trial in shareholder derivative actions is unlikely to flood the judicial system with substantially more jury trials. Although statistics are not available for derivative and direct shareholder actions ending in jury verdicts, only about 1% of cases in the state court systems and 2% in the federal system end with a verdict by a civil

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328. *Id.*

329. *Id.* at 914; *see also* Qualters, *supra* note 315 (reporting that a survey of the Suffolk Superior Court found 52% of attorneys were “extremely satisfied” with the court’s overall performance, 70% were extremely satisfied with the promptness of the court’s decisions, and 58% were extremely satisfied with the firmness of the schedule).

330. *See* Junge, *supra* note 317, at 318.

331. *Id.*

332. Crawford, *supra* note 317.

333. *Id.*

334. *Id.*; Sheri Qualters, *Business Court to Expand to Other Counties*, BOSTON BUSINESS J., Feb. 14, 2003 (noting that “business-session litigants have had to hire their own court reporters at various times during the past couple of years” at the business-session of Suffolk Superior Court based in Boston).

335. *See* Todd Bishop, *Business Court Looking for a Bit More Business*, PHILADELPHIA BUS. J., May 19, 2000; Press Millen, *Why Do We Have a Business Court?* at VI-B-7, <http://www.wcsr.com/resources/pdfs/bl051208.pdf> (last visited Jan. 23, 2010) (noting that the North Carolina business court has more technology available to it than other courts and its judges receive law clerks unlike other judges).

336. Millen, *supra* note 335, at VI-B-6.

337. Junge, *supra* note 317, at 318.

jury.<sup>338</sup> Moreover, of the more than 150,000 jury trials that take place each year in the United States, most involve torts such as automobile accidents and premises liability.<sup>339</sup>

Improving and monitoring the performance of civil juries may alleviate any lingering concerns about expanding the right to jury trial in shareholder derivative actions. The opportunity to determine the “correct” verdict in actual jury trials is rare,<sup>340</sup> so it is instead more useful to focus on procedural criteria that theoretically relate to the accuracy of jury verdicts including: (1) jurors’ thorough review of the facts in evidence, (2) jurors’ accurate comprehension of the judge’s instructions, (3) all jurors’ active participation, (4) resolution of differences through discussion by jurors rather than pressuring tactics, and (5) systematic matching of case facts to the requirements for the various verdict options.<sup>341</sup>

Published empirical research on jury decisionmaking identifies very similar factors as positively and consistently influencing juries’ decisions. The research includes factors such as: definitions of key legal terms, verdict options, trial structure, jury–defendant demographic similarity, jury attitude composition, evidence strength, pretrial publicity, inadmissible evidence, case type, and the initial distribution of juror verdict preferences during deliberations.<sup>342</sup>

For example, in an extensive study of jurors in post-deliberation interviews from 225 trials, researchers found that the verdict preferred by the majority of jurors on the first ballot was the jury’s final verdict more than 90% of the time.<sup>343</sup> The empirical data on non-unanimous juries suggest that they do not function as well as their unanimous counterparts and that non-unanimous rule juries virtually always cease serious deliberations once they have reached the majority required for a decision.<sup>344</sup> Further, the smaller the required majority, the faster the

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338. See Landsman, *supra* note 213, at 289; see also Bureau of Justice Statistics, *General Civil (Tort, Contract, and Real Property) Trials*, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=2231> (last visited Jan. 16, 2010) (stating that of the 98,786 tort cases that were terminated in U.S. district courts during fiscal years 2002 and 2003, 1,647 or 2% were decided by a bench or jury trial).

339. Devine et al., *supra* note 140, at 622; see also Ostrom, *supra* note 206, at 233–41 (stating that about 75% of the cases that go to civil juries are tort cases, and about two thirds of those involve automobile accidents or premises liability).

340. Devine et al., *supra* note 140, at 707.

341. *Id.*

342. *Id.* at 622.

343. *Id.* at 623; see Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes: Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175, 175–95 (1995) (indicating that one in ten trials results in a reversal of the verdict preference initially favored by the majority).

344. See REID HASTIE ET AL., *INSIDE THE JURY* (1983).

jury's deliberations.<sup>345</sup> For example, juries that needed only to reach an eight-to-four verdict in a particular mock case deliberated 75 minutes on average, the ten-to-two juries took 103 minutes, and their unanimous jury counterparts needed 138 minutes. Majority rule juries felt significantly less certain about the correctness of their decisions and the winning majority tended to "adopt a more forceful, bullying, persuasive style" of deliberating.<sup>346</sup> The judicial system thus should require that civil juries in shareholder derivative actions reach unanimous verdicts. Further, research indicates that increased juror pay increases deliberation time,<sup>347</sup> so jurors should receive higher pay to facilitate longer deliberation time and potentially improve trial outcomes.

Importantly, juries are not completely unrestrained in rendering verdicts. Trial and appellate courts operate as a "final check" upon juries' deliberations and verdicts. Trial courts are generally required to respect jury decisions, as juries are afforded broad latitude in assessing witness credibility and weight of the evidence.<sup>348</sup> In limited circumstances, however, if juries reach the "wrong" decision, a trial judge may order a new trial. For example, a trial judge may order a new trial if the judge believes errors occurred during the trial, such as erroneous jury instructions or erroneous admission of evidence.<sup>349</sup> A trial judge also may order a new trial if the jury's verdict is against the clear weight of the evidence (sometimes phrased as a manifestly unjust verdict), but not simply because the judge disagrees with the verdict.<sup>350</sup> The reviewing judge also has several other options in response to a perceived incorrect verdict. A judge may grant judgment notwithstanding the verdict (now called judgment as a matter of law in federal courts), which grants judgment to the losing party upon a showing that it is the only rational result.<sup>351</sup> Alternatively, the judge may require the plaintiff to choose between accepting a remittitur, which is a lower amount of damages than awarded by the jury, and a new

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345. *Id.* at 60, 95.

346. *Id.* at 112.

347. Owens, *supra* note 197 (proposing jurors receive about fifty dollars per day based on a 2001 study of the 1990 Offender Based Transaction Statistics).

348. Landsman, *supra* note 213, at 304.

349. *See, e.g.*, Lind v. Schenley Indus., Inc., 278 F.2d 79, 87-88 (3d Cir. 1960).

350. *See id.*

351. *See, e.g.*, Pa. R.R. Co. v. Chamberlain, 288 U.S. 333, 395 (1933); FED. R. CIV. P. 50(a) ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.").

trial.<sup>352</sup> In some states, a judge may even require the defendant to choose between additur, a judge-ordered increase in the amount of damages awarded, and a new trial.<sup>353</sup> Similarly, the appellate courts possess limited authority to review jury verdicts.

#### VI. CONCLUSION

The corporate conduct exposed in the recent financial collapse demonstrated the failure of prior legislative and regulatory responses intended to prevent future corporate governance crises. Legislation alone will not end the greed of corporate directors and officers, nor will it force corporate executives to properly oversee corporate activity. Enforcement is crucial. The SEC sometimes prosecutes enforcement proceedings under the federal securities laws and the Department of Justice occasionally initiates criminal charges under those laws. But breaches of fiduciary duties are left for shareholders to pursue through derivative actions. Unfortunately, most states assign the adjudication of such actions to judges, who have historically accorded great deference to corporate directors and officers. For instance, the Delaware Chancery Court, which sits without juries, rarely imposes liability on corporate executives for breaching their fiduciary duties. Thus, judges may not be the best enforcers of the legal obligations imposed on corporate directors and officers.

To prevent the next crisis in corporate governance, the answer is not to enact more laws, but rather to change the enforcer of the existing laws. Such an enforcer already exists—the civil jury. Civil juries are widely utilized in complex cases touching other areas of the law. They are already entrusted to decide virtually identical legal claims pursued by the corporation itself and shareholder derivative actions filed in federal court, without any apparent negative consequences. Civil juries are composed of average American citizens who can exercise the oversight currently lacking. Corporate executives' incentives to act in the best interests of shareholders and to fulfill their fiduciary duties are increased by the knowledge that jurors similar to their shareholders will judge their conduct. This simple change may produce better decisionmaking by corporate executives and may restore shareholders' trust in corporate management.

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352. *See* *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (authorizing remittitur); *see also* *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (limiting plaintiff to choosing between accepting the remittitur and facing a new trial).

353. *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935) (stating that additur violates the Seventh Amendment); *Jehl v. S. Pac. Co.*, 427 P.2d 988, 992–93 (Cal. 1967) (permitting additur).

Opponents of this proposal will likely recite the typical criticisms of civil juries' performance in resolving disputes, but empirical research undermines the force of those criticisms. Moreover, important historical and policy arguments favor the use of jury trials in civil litigation, and those arguments are particularly relevant for shareholder derivative litigation. Corporate executives will undoubtedly argue that juries judge them more harshly than individual judges, but that is precisely the point. Because judges have traditionally deferred to the decisions of corporate executives, judges are perceived as judging corporate executives too leniently and thus are not the ideal decisionmakers in shareholder derivative litigation—especially in light of recent corporate governance failures. At the same time, for juries to effectively operate as the enforcer, the judicial system must restrain judges from improperly using pretrial motions to keep cases from reaching trial. To the extent corporate executives continue to irrationally fear juries, they can always settle asserted claims. An incentive to settle exists in all civil litigation and settlement has long been encouraged by the American judicial system.

The civil jury plays an important populist role in our democracy. Civil juries give a voice to the public when directors and officers, and even judges, are out of touch with fiduciary duties and the interests of shareholders. States that deny any right to jury trial in shareholder derivative actions, such as Delaware, are anti-populist and widen the chasm between management and shareholders. Extending a jury trial right to shareholder derivative actions filed in all courts, would reinvigorate shareholder derivative litigation by trusting civil juries to decide whether directors and officers have breached their fiduciary duties. In light of continuing egregious conduct by corporate directors and officers, empowering civil juries would fill the existing void in corporate oversight and help restore the public's trust in corporate management and the stock markets.