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The Party Respectfully Requests A Jury Trial On All Issues So Triable: What issues are triable to a jury and what issues should be triable to a jury? A comment on the right to a jury trial, with a focus on civil trials, and when the right exists.

Michael Downing*

I. HISTORY AND BACKGROUND

A. Federal Law

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[1] But what about civil prosecutions? What about prosecutions under state law, not federal? What does the universally expected "right to a jury trial" really mean or afford the parties to a trial?

Under federal law and the United States Constitution, by the time the Bill of Rights was drafted, the ideal of an accused's right to a jury trial was already deeply rooted within society.[2] However, the right to a jury trial is only guaranteed by the United States Constitution for

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1. U.S. CONST. amend. VI.

2. *Sixth Amendment*, CONSTITUTION ANNOTATED (Oct. 24, 2021, 11:15 AM), https://constitution.congress.gov/browse/essay/amdt6_3_1_1/.

criminal prosecutions—in fact the right to a jury trial is arguably weaker than the average person thinks. The Sixth Amendment right to a jury trial, in federal prosecutions, does not apply to civil cases, may be waived by parties, and does not necessarily apply to prosecutions under state law.

By the time our constitution was written, the right to a jury trial in criminal cases existed in England and traced its roots to the Magna Carta.[3] The reverence for the inviolate right to a jury trial in criminal cases developed from the revolutionaries' distrust of the English king and their desire for fair trials.[4] The revolutionaries believed a trial by jury safeguards the rights of the accused.

Blackstone celebrated jury trials as a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion."[5] Jury trials are granted to criminally accused defendants to prevent inequitable oppression by the government. They are also guaranteed to limit judicial interference, sly prosecutors, and biased judges.[6]

While the "right of trial by jury under [Const. of U.S. Amend. 7], applies to Federal courts and not State courts,"[7] state constitutions of all the original states similarly guarantee the right to a jury trial in criminal convictions and each state to join the union thereafter followed suit.[8] Today, no state has dispensed of the right to a jury trial in serious criminal cases, nor made movements to do so.[9] The right to a jury trial in criminal prosecutions is firmly protected for all; however, a parties right to a jury trial in civil cases is not so protected. The remainder of this Comment will discuss the nuance, rules, and impact of the right, no-right dichotomy of civil jury trials and their benefits and detractions.

The Seventh Amendment of the United States Constitution provides the federal law on the right to a jury trial in civil cases. The Seventh Amendment provides

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3. Duncan v. State of La., 391 U.S. 145, 151 (1968).

4. *Id.* at 152–53.

5. JAMES DE WITT ANDREWS ET AL., COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, 349–50. The other of the two-fold barrier was, of course, indictment by grand jury.

6. *Sixth Amendment*, *supra* note 2.

7. Porter v. Watkins, 217 Ga. 73, 74, 121 S.E.2d 120, 121 (1961) (internal parenthetical omitted).

8. *Duncan*, 391 U.S. at 153.

9. *Id.* at 154.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[10]

The Seventh Amendment's coverage is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law."[11] Under the Seventh Amendment, "action[s] involv[ing] rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty" "require[d] trial by jury."[12] The lack of a right to a jury in civil suits has traditionally been upheld under the Seventh Amendment when the civil suit in question was not a suit traditionally at common law or the issues raised were not legal in nature.[13]

The use of the term "common law" in the Seventh Amendment reflects the traditional division of the English and United States legal system. The legal system is divided into separate—law and equity—jurisdictions. Actions cognizable in courts of law were generally triable to a jury by right, whereas actions in equity were afforded no right to a jury. Unlike the English court system, however, United States courts are unitary and have jurisdiction in both law and equity. Even though United States courts are unitary, the distinct law and procedures for both actions cognizable at equity and actions cognizable at law still, however, exist.

Traditionally, the Chancery Court, named for the Lord Chancellor of England and now known as the court of equity, served as a remedy for those unable to obtain an adequate common law remedy, or legal remedy. Those unable to obtain common law remedy could petition the King of England, who would refer the case to the Lord Chancellor. The Chancery grew into its own court with formal procedures and doctrines. Compared to the rigid common law court, the Chancery Court provided remedies based on the notion of fairness. While the common law court

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10. U.S. CONST. amend. VII.

11. Shields v. Thomas, 59 U.S. 253, 262 (1856).

12. Pernell v. Southall Realty Co., 416 U.S. 363, 375 (1974).

13. *See e.g.* McElrath v. United States, 102 U.S. 426, 439–40 (1880); Galloway v. United States, 319 U.S. 372, 388 (1943); Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534 (1899); United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 652–53 (1877); Luria v. United States, 231 U.S. 9, 27–8 (1913); Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), *cert. denied*, 277 U.S. 608 (1928); Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489, 492 (2d Cir. 1921), *cert. denied*, 256 U.S. 691 (1921); Crowell v. Benson, 285 U.S. 22, 45–46 (1932); Auffmordt v. Hedden, 137 U.S. 310, 329 (1890).

routinely provided monetary damages, the Chancery Court would order equitable relief. As a general rule, disputes in the Chancery Court were heard by the Chancellor without a jury.[14]

The United States' adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity claims which previously had to be brought as separate causes of action.[15] Accordingly, "mixed cases" or cases alleging issues both at equity and at law began to arise. Mixed cases, however, are still required to follow the traditional law and equity distinction as it pertains to a right to a jury—difficulty addressing this issue resulted as the frequency of mixed cases continued to grow.[16]

The issue of mixed cases, with separate issues having their own rules and procedures, has been resolved, within the federal law system, by stressing the known and expected fundamental nature of the United

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14. Cornell Law School, *Chancery*, LEGAL INFORMATION INSTITUTE, (Oct. 24, 2021, 11:15 AM), https://www.law.cornell.edu/wex/chancery.

15. 15 *Moore's Federal Practice*, §§ 38.01–38.03 (Matthew Bender 3d Ed.).

16. Under the old equity rules, it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109–10 (1891). If an action at law evoked an equitable counterclaim, the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, res judicata and collateral estoppel could operate to curtail the litigant's right to a jury finding on factual issues common to both claims. Schoenthal v. Irving Trust Co., 287 U.S. 92, 96–7 (1932).

State legislatures may abolish the distinction between actions at law and actions in equity, but the distinction between the two sorts of proceedings cannot be obliterated in the Federal courts. Thompson v. Railroad Companies, 73 U.S. 134, 137 (1868). So, if state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. However, the fact that the equity court had power to summon a jury on occasion did not afford an equivalent to the right of trial by jury secured by the Seventh Amendment. Whitehead v. Shattuck, 138 U.S. 146, 154–56 (1891). But where state law gave an equitable remedy, such as to quiet title to land, the federal courts enforced it, if it did not obstruct the rights of the parties as to trial by jury. Clark v. Smith, 38 U.S. 195, 203–04 (1839).

By the inclusion in the Law and Equity Act of 1915 of § 274(b) of the Judicial Code, 38 Stat. 956, the transfer of cases to the other side of the court was made possible. The new procedure permitted legal questions arising in an equity action to be determined therein without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The equitable issues were disposed of first, and if a legal issue remained, it was triable by a jury. Enelow v. New York Life Ins. Co., 293 U.S. 379, 382–83 (1935). *See* Liberty Oil Co. v. Condon Bank, 260 U.S. 235, 242 (1922).

States jury trial right. The federal system sought to protect against diminution of the right to a jury trial through parties repeatedly resorting to equitable principals. For example, in *Beacon Theatres v. Westover*,[17] the first landmark Seventh Amendment case, the Supreme Court of the United States held, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[18] In *Dairy Queen v Wood*,[19] the second landmark Seventh Amendment case, the plaintiff sought several types of relief, including legal and equitable relief. The Court held—even though the legal claim for relief was incidental to the equitable relief, the Seventh Amendment required the legal issues to be tried to a jury.[20] Accordingly, a rule emerged that legal claims must be tried over equitable ones and must be tried before a jury should the litigant wish.

The Seventh Amendment, as treated by the Supreme Court, preserves the right to a jury trial in civil cases as it "existed under the English common law when the Amendment was adopted."[21] The amendment's primary purpose is to preserve

> the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.[22]

Therefore, the matters tried by a jury in England in 1787, the year the Seventh Amendment was adopted, are to be tried to a jury today, and the matters that were tired to a judge in England in 1787 are to be so tried today.[23] When new remedies are created, the right of action should be analogized to its historical counterpart or existing remedy, at

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17. 359 U.S. 500 (1959).

18. *Id.* at 510–511.

19. 369 U.S. 469 (1962).

20. *Id.* at 470.

21. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); *see* Parsons v. Bedford, 28 U.S. 433, 446–48 (1830).

22. *Baltimore*, 295 U.S. at 657; *see* Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 485–86 (1935).

23. *Parsons*, 28 U.S. at 446–48; Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1935).

law or in equity, for the purpose of determining whether there is a right of jury trial, unless the remedy prescribes a method.[24]

Accordingly, civil suits, unlike criminal prosecutions, do not benefit from a blanket guarantee of a right to a jury trial as guaranteed by the Sixth Amendment. The right of trial by jury, though essential in criminal cases, is not so much so in civil cases.[25] Generally, there is no guaranteed right to jury trial in equity cases, constitutionally or statutorily.[26]

B. State Law

State law on the right to a civil jury trial varies by constitution and statute promulgated by each state. Georgia's constitution for example states, "[t]he right to trial by jury shall remain inviolate . . .";[27] however, the constitutional guarantee only "guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798."[28] Georgia's constitution only protects claims tried to a jury at the time of the constitutions creation—it guarantees "the continuance of the right as it existed at common law or by statute at the time the constitution was originally adopted."[29] It does not afford a jury trial "in all cases."[30] Georgia's common law, however, has developed since the passage of the constitution in 1798 with the Civil Practice Act[31] to "guarantee the right of a jury trial to civil litigants in most cases."[32]

Another example, Colorado's constitution, contains no such guarantee of a right to a jury trial in a civil action. Nor does Colorado have a statute that guarantees the right to a jury trial in civil cases generally. In the Colorado Supreme Court case, *Kaitz v. District*

24. *See* Luria v. United States, 231 U.S. 9, 27–28 (1913).

25. Flint River Steamboat Co. v. Foster, 5 Ga. 194, 206 (1848).

26. Ellis v. Stanford, 256 Ga. App. 294, 297, 568 S.E.2d 157, 160 (2002). *See* Williams v. Overstreet, 230 Ga. 112, 115, 195 S.E.2d 906, 908 (1973); Cawthon v. Douglas Cty., 248 Ga. 760, 763, 286 S.E.2d 30, 33 (1982).

27. Ga. CONST. art. I, § 1, ¶ XI(a).

28. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 733, 691 S.E.2d 218, 221 (2010).

29. Liberty Mut. Ins. Co. v. Johnson, 244 Ga. App. 338, 340, 535 S.E.2d 511, 513 (2000); *see* Beasley v. Burt, 201 Ga. 144, 150, 39 S.E.2d 51, 57 (1946).

30. Swails v. State, 263 Ga. 276, 278, 431 S.E.2d 101, 103 (1993).

31. O.C.G.A. §§ 9-11-1–133 (2021).

32. Raintree Farms, Inc. v. Stripping Ctr., Ltd., 166 Ga. App. 848, 848, 305 S.E.2d 660, 661 (1983).

Court,[33] the court clearly stated: "In Colorado there is no constitutional right to a trial by jury in a civil action."[34] Moreover, the state's right to a jury trial is generally "not as broad as that afforded under the Federal Constitution."[35]

However, states with no such guarantee, like Colorado, almost universally contain a Rule of Civil Procedure, such as Colorado Rule of Civil Procedure 39(c)[36] which states: "In all actions not triable by a jury the court upon motion or on its own initiative . . . [or] with the consent of both parties, may order a trial with a jury."[37] The Colorado Rule, and the rules of other states, mimic Rule 39(c)(2) of the Federal Rules of Civil Procedure:

> In an action not triable of right by a jury, the court, on motion or on its own . . . may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.[38]

The crucial distinction in determining the right to a jury trial, is the distinction between "legal" and "equitable" remedies. Typically, where the remedy to the issue alleged authorizes awards of money damages or other forms of legal relief and not equitable remedies, such as injunctions—parties are commonly entitled under state and federal provisions to a jury trial by right.[39] The right to a jury trial is particularly strong when the party is seeking actual legal relief. However, when a plaintiff is seeking only equitable relief, courts typically do not afford the party the absolute right to a jury trial.

When a court's analysis into whether a party is seeking legal or equitable relief is unclear, courts generally look to the history of the action to determine if the action originated in the courts of law or the courts of equity. If the claim originated in the courts of law, then it is a

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33. 650 P.2d 553 (Colo. 1982).

34. *Id.* at 554. *See* Mountain States Tel. & Tel. Co. v. DiFede, 780 P.2d 533, 540 (Colo. 1989) ("Trial by jury in civil actions is not a matter of right in Colorado."). "Instead, the right to a jury trial in a civil case is derived from C.R.C.P. 38." Snow Basin Ltd. v. Boettcher & Co., 805 P.2d 1151, 1154 (Colo. App. 1990); *see also* People v. Shifrin, 342 P.3d 506, 512 (Colo. 2014).

35. Reheis v. Baxley Creosoting & Osmose Wood Preserving Co., 268 Ga. App. 256, 261, 601 S.E.2d 781, 786 (2004).

36. COLO. R. CIV. P. 39(c).

37. *Id.*

38. FED. R. CIV. P. 39(c)(2).

39. John E. Theuman, Annotation, *Right to jury trial in action under state civil rights law*, 12 A.L.R.5th 508 (1993).

legal remedy, and a party is entitled to a jury trial by right. If the claim originated in the courts of equity, then the party may only be permitted to empanel a jury based on the applicable rules of civil procedure. Typically, the relevant rules of civil procedure require the consent of both parties or a *sua sponte* action of the court. Below, the comment will examine the issues, along with the relevant sub issues of consent and timing with jury trials by consent and how courts determine if an issue is equitable or legal.

II. LEGAL BACKGROUND

A. Objection and Timing

The Federal Rules of Civil Procedure, Rule 39, provides "In an action not triable of right by a jury, the court, on motion or on its own . . . may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right."[40] Accordingly, parties bringing a suit at equity, which are "not triable of right by a jury," will often demand a jury trial with the hope that the other party will consent, or consent by failure to object. Most states contain a rule of civil procedure like Federal Rules of Civil Procedure, Rule 39. For example, Georgia's Civil Procedure Act, O.C.G.A.§ 9-11-39,[41] largely mimic the federal rule as does Michigan's Civil Procedure Act, Mich. Ct. R. 2.509.[42]

Objection to a trial by jury where the party does not have the right to a jury trial, and the timing of such objections often occurs with equitable issue jury trials because parties will demand a "trial by jury on all issues so triable." The issue with a demand for a jury trial on "all issues so triable" is judges and parties often are unable to determine what the demand encompasses. Does a demand for a jury trial on all issues so triable demand a jury trial only on the issues triable to a jury by right, or does it also encompass issues permissible to be tried by a jury, but not triable by right? What about mixed issues? The issue of jury demands, and objections also plays a large role given the strategy lawyers devise when planning for trial. A successful attorney's trial strategy changes when they are presenting a case to a jury versus when they are presenting a case to a judge.

A jury demand on "all issues so triable" is an unqualified jury demand. A demand on all issues so triable is a general jury demand,

40. FED. R. CIV. P. 39(c)(2).

41. O.C.G.A. § 9-11-39 (2021).

42. Mich. Ct. R. 2.509.

distinguishable from a jury demand on fewer than all the issues.[43] The Corpus Juris Secundum provides: "If a party's demand does not specify issues, the party is deemed to have demanded a jury trial of all issues so triable."[44] Moreover, Wright and Miller, the foremost authority on federal procedure provides—a general jury demand is one that does not specify any issues.[45] All issues so triable is a term of art recognized as a general jury demand. However, *Wright and Miller* also provide:

> [i]f a general demand for a jury is made without specifying any issues, it will be regarded as embracing all jury triable issues. If the demand includes issues on which there is no jury trial right, the demand will not be stricken, but the district court will limit jury trial to those issues on which there is a jury trial right.[46]

Courts routinely describe the colloquial phrase "all issues so triable" to be a general jury demand.[47] For example, in *Sprenger v. Sprenger*,[48] the "Plaintiff demand[ed] jury trial of the issues triable by jury."[49] Accordingly, the North Dakota Supreme Court concluded the demand encompassed all issues—including equitable claims—and the defendant had effectively consented to a trial by jury on such equitable claims by not objecting to such demand.[50] Therefore, some courts hold that a jury demand on all issues so triable encompasses equitable issues and a pleading containing such demand would require a party not wishing to have equitable issues tried to a jury to object. Failure to object to a pleading containing equitable claims demanding a jury on all issues may result in consent to a jury by implication.

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43. *See* Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1065 (9th Cir. 2005); United States v. Anderson, 584 F.2d 369, 371 (10th Cir. 1978).

44. *See* 50A C.J.S. *Effect of Demand for Jury Trial* § 160 (2020).

45. Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civil § 2318 (4th ed. 2020 update).

46. *Id.*

47. *See* United States v. Bd. of Cty. Comm'rs of the Cty. of Doña Ana, N.M., 730 F. Supp. 2d 1327, 1330 (D.N.M. 2010) (characterizing demands for a jury trial on "all issues so triable" and "all counts and issues so triable" as "general" jury demands); Visual Creations, Inc. v. IDL Worldwide, Inc., No. cv 17-405 WES, 2018 WL 344989 at *2 (D.R.I. Jan. 9, 2018) (holding that "a trial by jury on all issues so triable" is "a general jury demand."); R & S Auto Sales v. Owners Ins. Co., No. 4:13- CV-479-RAW, 2015 WL 12434459 at *3 (S.D. Iowa Jan. 5, 2015) (noting that a demand for "a jury trial on all issues so triable" is "a general jury trial demand.").

48. 146 N.W.2d 36 (N.D. 1966).

49. *Id.* at 40.

50. *Id.*

However, contradictory findings propounded by other jurisdictions exist. In *Starbucks Corp. v. Lundberg*,[51] the United States District Court for the District of Oregon held a jury demand for "all issues so triable" was not a jury demand for equitable claims not triable to a jury.[52] Moreover, in *Crescent Res. Litig. Trust v. Duke Energy Corp.*,[53] the United States District Court for the Western District of Texas similarly stated a demand on "all issues so triable" does not encompass equitable issues.[54] The United States District Court for the Southern District of New York found "all issues triable" is to be a limited request contrary to federal courts in other districts.[55]

However, a true unqualified jury demand, which states disagree if "all issues so triable," encompasses legal and equitable claims. Accordingly, states vary on the result of a demand for a jury trial on all issues so triable. Because all issues so triable is widely used by parties in pleadings, the variety of state-by-state holdings has created confusion. It is unclear if a demand on all issues so triable encompasses equitable issues and implicated jury trials by consent and the necessity for objection.

A court may be required to limit a jury demand of "all issues so triable" to only issues triable to a jury by right. For example, in *Damsky v. Zavatt*,[56] the court held "[i]f a jury demand includes issues as to which a party is not entitled to a jury trial, the court ought not to strike the demand altogether but should limit it to the issues on which a jury trial was properly sought[.]"[57] The potential that a court be required to limit parties demands further complicates the parties ability to seek a jury trial by right or by consent.

Traditionally, a party is only entitled to a jury trial on legal issues. In a mixed legal and equitable trial without parties' consent to a jury trial, the court should bifurcate the trial and present legal issues to the jury and equitable to the court. For example, in *Soneff v. Harlan*,[58] the court found the plaintiffs "were entitled to a jury trial on the legal issues, and the trial court properly exercised its powers as to the equitable

51. No. 02-948-HA, 2005 WL 6036699 (D. Or. May 25, 2005).

52. *Id.* at *8–10.

53. No. A-12-CA-009-SS, 2013 WL 1865450 (W.D. Tex. May 2, 2013).

54. *Id.* at *35.

55. Westminster Secs. Corp. v. Uranium Energy Corp., No. 15 CIV 4181 (VM), 2017 WL 3741337, at *2 (S.D.N.Y Aug. 9, 2017).

56. 289 F.2d 46 (2d Cir. 1961).

57. *Id.* at 48.

58. 712 P.2d 1084 (Colo. App. 1985).

claims."[59] "[W]here a plaintiff alleges a claim or claims upon which he is entitled to *both* legal and equitable relief, and prays accordingly, there is a right to a jury trial on the legal claim but not on the equitable claim."[60] Therefore, the general rule is, should there be no reflection of a demand for a jury trial on equitable issues nor reflection of the opposing party's consent or consent by implication, the court should not present equitable issues to a jury, but should decide the issue as the finder of fact.

A court may also consider the "basic thrust" of an action in determining the right to a jury trial if mixed legal and equitable claims are presented. Where a complaint "joins or commingles legal and equitable claims . . ." the right to a jury trial depends upon "the 'basic thrust' of the action . . . ."[61] Therefore, if the basic thrust of an action is legal, it may be proper for a court to grant a trial by jury on both the legal and equitable claims. For example, in *Setchell v Dellacroe*,[62] the plaintiff sought specific performance of an agreement, a traditionally equitable remedy. The plaintiff sought in the alternative money damages, a traditionally legal remedy. In *Setchell*, the court held the "basic thrust" of the action was equitable and therefore the parties did not have the right to a jury trial.[63] The court relied on the fact that if specific performance was granted, the party would be precluded from a legal remedy.[64]

Where legal and equitable claims are cumulative, the call can be much closer. In *Miller v. Carnation Co.*,[65] the plaintiff sought damages for trespass, a legal remedy, and injunctive relief for future abatement of the nuisance, an equitable relief. In *Miller*, the court held the basic thrust of the remedy sought to be legal and allowed a jury trial by right on all remedies sought.[66] By contrast, in *Zick v. Krob*,[67] the court held the plaintiff was not entitled to a jury trial when seeking malpractice claims, a traditionally legal claim, and unjust enrichment, a traditionally equitable claim.[68]

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59. *Id.* at 1088. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 423 (5th Cir. 1998) (general jury demand does not extend to equitable claims).

60. Miller v. Carnation Co., 516 P.2d 661, 664 (Colo. App. 1973) (internal emphasis omitted).

61. Nat'l Acceptance Co. of Am. v. Mars, 780 P.2d 59, 60 (Colo. App. 1989).

62. 454 P.2d 804 (Colo. 1969).

63. *Id.* at 807.

64. *Id.*

65. 516 P.2d 661 (Colo. App. 1973).

66. *Id.* at 664.

67. 872 P.2d 1290 (Colo. App. 1993).

68. *Id.* at 1293.

Today's trials are typically governed by Trial Management Orders, also known as Case Management Orders. These orders are often submitted jointly by the parties and pre-negotiated in a case or trial management conference. The Trial Management Order is then agreed upon, possibly with changes, by the judge and signed by the judge—making it an order. The order then governs the trial. Trial Management Orders establish a court issued schedule under Federal Rule of Civil Procedure, Rule 16(b).[69] Most states contain an analogous rule of civil procedure. These scheduling orders can typically only be issued once the parties have met, conferred, and agreed to a trial plan under Federal Rule of Civil Procedure, Rule 26(f).[70]

The agreed upon scheduling order covers possible issues such as amending pleadings, motions, discovery disputes, and would include the decision to present a trial to a jury or judge.[71] For example, the Colorado Rules of Civil Procedure, Rule 16, requires parties to ask the trial court to exclude claims from the jury's consideration or to identify any dispute about certain issues when setting a Trial Management Order.[72] Colorado Rules of Civil Procedure, Rule 16(f)(5), specifies that a trial management order "shall control the subsequent course of the trial" and no modification is permissible unless it "could not with reasonable diligence have been anticipated."[73] Accordingly, it is reasonable to assume that should parties not decide which issues are to be tried by a jury, or move for a bifurcated trial before entering a trial management order, the party demanding a trial by jury on all issues so triable likely can assume that "all issues" means all issues triable by right to a jury or permissively triable to a jury.

Essentially, should a suit contain legal and equitable issues, the trial management order—bargained for by the parties, ultimately agreed upon, and typically signed by the judge—should set out which issues are going to a jury or not. Should a party fail to set out issues not to be presented to a jury in the trial management order, it may likely constitute waiver.

Jury trial consent can be given by a party's actions, implication, or conduct, but the waiver must be indicative of the fact that the right is or is not asserted. For example, the Georgia Supreme Court in *Walker v. Walker*,[74] held a party's repetitive failure to appear or to enter

69. FED. R. CIV. P. 16(b).
70. FED. R. CIV. P. 26(f).
71. FED. R. CIV. P. 16(c)(2).
72. COLO. R. CIV. P. 16(f)(2)(c).
73. COLO. R. CIV. P. 16(f)(5).
74. 280 Ga. 696, 631 S.E.2d 697 (2006).

pleadings to have "impliedly waived his jury trial demand."[75] Minor failures, however, such as showing up late are not indicative of the fact that the right to a jury trial is waived.[76] Accordingly, actions of the parties may be interpreted by the court and may result in waiver of the right to be heard on a parties request, or decision not to request, a jury trial.

Another important issue compels courts to disallow an untimely request to remove a case from the jury. In *Hildebrand v. Bd. of Trs. Of Mich. State Univ.*,[77] the court held:

> We think that considerations of fundamental fairness and judicial economy militate against this view. Any good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge. To convert a trial from a jury trial to a bench trial (or vice-versa) in the middle of the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other. Further, it is a waste of the additional time and money which is inherent to a jury trial.[78]

Accordingly, parties must be ensured that when they prepare, analyze, and practice a pre-determined trial strategy, that preparation must not be made all for not by opposing parties' failure to timely object to a jury demand on a permissive issue—or by opposing parties tactful lawyering to disrupt the opposing counsel's trial strategy.

Trial judges should also not be afforded the opportunity to choose, after the fact, between the court's determination and the jury's. Giving a trial judge the authority to grant a party's motion to remove an issue at trial from a jury—especially once the jury has returned a verdict—would give the judiciary "veto" power over a decision the judge did not agree with.[79] Accordingly, once a jury trial embarks, the parties have consented to a trial by such jury and that consent is binding.

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75. *Id.* at 698, 631 S.E.2d at 699.

76. *Id.* at 698, 631 S.E.2d at 698.

77. 607 F.2d 705 (6th Cir. 1979).

78. *Id.* at 710. *See* Gloria v. Valley Grain Prods., Inc., 51 F.3d 1045, *10 (5th Cir. 1995); Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981).

79. Almog v. Israel Travel Advisory Serv., Inc., 689 A.2d 158, 165 (N.J. App. Div. 1997). *See* Thompson v. Parkes, 963 F.2d 885, 889 (6th Cir. 1992); Nizielski v. Tvinnereim, 453 N.W.2d 831, 834 (S.D. 1990) ("We cannot believe that it is fair to treat a jury's verdict as advisory only *after* the jury has returned its verdict.") (Internal emphasis omitted).

1. State Law

State case law generally supports the finding that a party must object to a jury trial on equitable issues before trial commences. "Trial by jury is a privilege which may be waived."[80] When a party has an opportunity to demand it, and omits to do so, he cannot complain that it is denied.[81] For example, In *Young v. Colorado National Bank of Denver*,[82] the defendant first argued that the jury should not consider the plaintiff's equitable claim at the close of the plaintiff's case-in-chief. On review, the Colorado Supreme Court held the jury's verdict binding stating: "[o]nce [the] court and counsel embark upon a non-jury statutory proceeding in such manner that it is treated as a jury case[.]"[83] The court went on to say "[w]here the plaintiff demands a jury trial of a non-jury case and neither the defendant nor the court objects, consent to such trial is deemed to have been given, and the jury's verdict has the same effect as if a jury trial had been a matter of right."[84] Accordingly, consent for a trial by jury on equitable issues—issues permitted to be tried by a jury, but not triable by right—is given once the court "embark[s]" on a jury trial.[85] Moreover, a jury trial by consent becomes a jury trial by right and that right cannot be taken away once the jury trial embarks.

Other courts of appeals have similarly applied the trial-by-consent rule propounded by the Colorado Supreme Court in *Young*. The Georgia Court of Appeal, in *Peacock v. Spivey*,[86] held that a party failed to make a timely jury trial demand and thus he "waived his right to demand a jury trial on the issue."[87] The party's request was untimely because the party failed to make a jury motion until after the trial court held a hearing to resolve any pre-trial motions.[88] Another Georgia appellate court case also found a party to have waived his right to make motions regarding a right to jury because the trial had already begun.[89]

In another jurisdiction, *Shuman v. Tuxhorn*,[90] details the same holding. The defendants, after the plaintiff's case-in-chief, moved to

80. *Flint River Steamboat Co.*, 5 Ga. at 208.
81. *Id.*
82. 365 P.2d 701 (Colo. 1961).
83. *Id.* at 708.
84. *Id.* (internal quotation marks omitted).
85. *Id.*
86. 278 Ga. App. 338, 629 S.E.2d 48 (2006).
87. *Id.* at 342, 629 S.E.2d at 53.
88. *Id.* at 342–43, 629 S.E.2d at 53.
89. Goss v. Bayer, 184 Ga. App. 730, 732, 362 S.E.2d 768, 769 (1987).
90. 481 P.2d 741 (Colo. App. 1971).

dismiss from the jury the plaintiff's equitable claims. The court of appeals held the jury verdict binding because the parties consented to a jury once the trial embarked under the pertinent rules of civil procedure.[91] The court reasoned the pre-trial order set the case for a jury trial, and the defendants did not object before trial.[92]

Several states have held that a defendant grants binding consent to a permissive jury trial on equitable issues when they fail to object before the beginning of trial. Some states are clear that the objection must be made before trial, however, there is no bright line rule. Typically, courts consider the equity of the decision and the impact on strategy. For example, the Kentucky Court of Appeals held in *Roberts v. Jiles' Ex'x*,[93] that although only equitable issues were being tried, because the parties embarked on a trial by jury and the defendant acquiesced to a trial by jury until after the trial commenced, consent had been implicitly given and could not now be rescinded.[94] In *First Am. Bank W. v. Michalenko*,[95] the North Dakota Supreme Court held:

> Consent for purposes of this rule need not be express. If one party demands a jury, the other parties do not object, and the court orders trial to a jury, this will be regarded as trial by consent. If there is trial to a jury by consent, the verdict has the same effect as if trial by jury had been a matter of right and cannot be treated as advisory only.[96]

The North Dakota Supreme Court also held that actions such as failing to object to a jury trial before the pretrial motion deadline, submitting jury instructions, and first objection on the eve of trial result in consent to a jury trial on equitable issue.[97] Therefore, there is no clear deadline for when consent by implication must be given. It is currently unclear when parties must object to equitable issues being sent to the jury; however, parties should be proactive and object as soon as possible.

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91. COLO. R. CIV. P. 39(c). "In all actions not triable by a jury the court upon motion or on its own initiative may try any issue with an advisory jury, or, except in actions against the State of Colorado when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury." *Shuman*, 481 P.2d at 742–43.

92. *Shuman*, 481 P.2d at 742–43. *See* First Nat'l Bank of Meeker v. Theos, 794 P.2d 1055, 1060 (Colo. App. 1990) (finding consent with no objection "prior to the trial"); *cf. Di Fede*, 780 P.2d at 541 (finding no consent based on "pretrial objections" and motions).

93. 307 S.W.2d 171 (Ky. 1957).

94. *Id.* at 174.

95. 501 N.W.2d 330 (N.D. 1993).

96. *Id.* at 333.

97. *Id.*

It is likely clear however, that consent is given once the trial embarks or begins and is certainly given once the parties present their cases. A ruling to the contrary would have negative impacts on trial strategy, judicial economies, and fairness. For example, a New Jersey court in *Almog v. Israel Travel Advisory Serv., Inc.*,[98] held that a party's challenge to the jury's propriety to hear the case could not be questioned for the first time after "the jury retired to deliberate, after summations and charge[.]"[99]

2. Federal Courts

Federal Courts, like state courts, have routinely held on appeal that a party consents, implicitly or expressly, to a jury trial on a permissive issue when it fails to object before the commencement of trial. Moreover, that consent is binding and cannot be rescinded. For example, in *RSACO, LLC v. Res. Support Assocs., Inc.*,[100] the court held the parties consented to a jury trial because the defendant first raised an objection to a trial by jury at the close of evidence.[101] The court held the parties had effectively consented by their delay and the consent was binding.[102] In *Gloria v. Valley Grain Prods., Inc.*,[103] the court refused to set aside a jury verdict as advisory when the first mention of an advisory jury came "in the middle of the trial."[104] In *Thompson v. Parkes*,[105] the complaint and pretrial order demanded a jury trial, and the trial was set as such. During trial, the defendant first argued that the issue was equitable and therefore a jury trial was inappropriate. The court held the defendant consented to the jury's verdict on the equitable claim by failing to raise the issue before trial.[106] Accordingly, federal courts align with state courts in that once a jury trial by consent embarks it becomes a jury trial by right even if the parties did not expressly consent. The federal courts similarly do not provide a bright line waiver deadline, but the fact that it must be before trial is clear.

98. 689 A.2d 158, 158 (N.J. App. Div. 1997).
99. *Id.* at 165.
100. 208 F. App'x 632 (10th Cir. 2006).
101. *Id.* at 642–43.
102. *Id*.
103. No. 94-10332, 1995 U.S. App. LEXIS 42958 (5th Cir. March 31, 1995).
104. *Id.* at *8.
105. 963 F.2d 885, 885 (6th Cir. 1992).
106. *Id.* at 889.

B. Equitable Versus Legal Claims

1. Money Damages

Parties have a right to a jury trial on all issues that are legal, not equitable. While this rule is not standard across all the states of the United States of America, it is the predominant rule and governs the vast majority of situations. To determine if a claim is legal or equitable, and therefore to determine if a party is entitled to a jury trial by right, courts typically utilize two methods: "Under the first method, courts examine the nature of the remedy sought . . . [u]nder the second method, courts look to the historical nature of the right that a plaintiff is seeking to enforce."[107] If the methods conflict, courts generally prefer to examine the historical nature of the right the plaintiff seeks to enforce.[108] A method of recovery being "based" in equitable principles does not, in itself, mean that a method of recovery is equitable. The court must conduct the two-part analysis to determine whether the remedy is legal or equitable as it pertains to a party's right to a jury trial.

Generally, actions for money damages are legal while actions invoking the coercive powers of the court are equitable.[109] The Supreme Court of the United States has stated "equitable relief . . . refer[s] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)[,]" while "[m]oney damages are, of course, the classic form of *legal* relief."[110] Moreover, the Restatement (Third) of Restitution and Unjust Enrichment provides if the plaintiff's remedy "is accomplished exclusively by a judgment for money," then the plaintiff's remedy "is presumptively legal."[111] The rule provided by the restatement is generally followed; however, money damages do not *per se* mean a party is seeking a legal remedy. Courts must still use the test detailed above.

Some courts have held that seeking a money judgement alone is not enough to firmly classify a claim as legal. The Colorado Court of Appeals held a party asking for a money judgement "is by no means decisive that the action was one at law."[112] Moreover, the same court also propounded that simply because the remedy sought is for money damages, does not, by itself, make it a legal claim, stating "not all forms

107. *See* Mason v. Farm Credit of S. Colo., ACA, 419 P.3d 975, 983 (Colo. 2018).

108. *Id.*

109. Mertens v. Hewitt Assocs., 508 U.S. 248, 255–56 (1993).

110. *Id.*

111. Restatement (Third) of Restitution and Unjust Enrichment § 4 (2011).

112. Johnson v. First Nat'l Bank of Denver, 131 P. 284, 286 (Colo. App. 1913).

of monetary relief need necessarily be characterized as legal relief for purpose[s] of the jury trial requirement."[113]

The importance of the two-part test comes into play when a party is seeking a claim that traditionally is considered equitable or legal, but does not fall within the traditional understanding after conducting the test. Unjust enrichment, for example, traditionally considered a claim at equity can be considered a legal remedy based on the remedy requested. The Supreme Court of the United States, in *Great-West Life & Annuity Ins. Co. v. Knudson*,[114] stated "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."[115] For example, in *Hottinger Excavating & Ready Mix, LLC v. R.E. Crawford Constr., LLC*,[116] the court applied the principles detailed above and found a plaintiff had the right to a jury trial on its unjust enrichment claim because it sought money damages.[117] The court further clarified that "for money damages to lie in equity, the money must be 'identified as belonging in good conscience to the plaintiff and can clearly be traced to particular funds in the defendant's possession and the action generally must seek not to impose personal liability on the defendant.'"[118]

2. The History of the Claim

Courts also look to the manner in which a claim "was historically enforced by a court of law" when determining whether a party has a right to a jury trial or is permitted to have a jury trial.[119] Historically, before the merger of law and equity courts, courts of law tried claims to a jury and courts of equity conducted bench trials without a jury.[120] For example, quantum meruit, an "action for the reasonable value of services rendered[,]"derived from the common law action of assumpsit.[121] Assumpsit was a common law count tried before juries in the court of law, not before a judge in the court of equities.[122]

113. *Shifrin*, 342 P.3d at 512.

114. 534 U.S. 204 (2002).

115. *Id.* at 214.

116. No. 14-CV-00994-KMT, 2016 WL 9735771 (D. Colo. May 26, 2016).

117. *Id.* at *5.

118. *Id.*; *see Knudson*, 534 U.S. at 213.

119. *Mason*, 419 P.3d at 983.

120. Am. Family Mut. Ins. Co. v. DeWitt, 218 P.3d 318, 322 (Colo. 2009).

121. *Quantum Meruit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

122. *See* 1 Dan B. Dobbs, Dobbs Law of Remedies § 4.2(1), at 385 (2d ed. 1993). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt. b; J.B. Ames, *The*

Accordingly, although quantum meruit is largely considered to be an equitable doctrine, it is a legal remedy because it derived from a claim presented to the court of law in Old England. Moreover, the Supreme Court of the United States has propounded the same analysis determining quantum meruit, traditionally assumpsit, to be a claim at law. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[123] the court stated the "quasi contract[124] was itself an action at law."[125] Georgia follows the same analysis when determining if a party is entitled to a jury trial. In *Strange v. Strange*,[126] the Georgia Supreme Court held "in civil actions the right of a jury trial exists only in those cases where the right existed prior to the first Georgia Constitution, and the Constitution guarantees the continuance of this right unchanged as it existed at common law."[127] Similarly, in Georgia, "there is no state constitutional right to a jury trial with respect to proceedings of statutory origin unknown at time Georgia Constitution was adopted."[128] In other words, "[a]ll cases triable without a jury prior to the adoption of the constitution may still be so tried."[129] Therefore, state law largely follows federal law which provides that claims arising out of the courts of law are permitted jury trials by right; however, claims arising out of the court of equity may only be brought before a jury with the consent of both parties.

History of Assumpsit, 2 Harv. L. Rev. 53, 57–8 (1888) (noting that the right to a jury trial is a principal reason that a plaintiff would prefer an action in assumpsit). *And see* Fischer Imaging Corp. v. Gen. Elec. Co., 187 F.3d 1165, 1172–73 (10th Cir. 1999); Austin v. Shalala, 994 F.2d 1170, 1176–77 (5th Cir. 1993); Jones v. Mackey Price Thompson & Ostler, 355 P.3d 1000, 1012–13. (Utah 2015); Scottsbluff v. Waste Connections of Nebraska, Inc., 809 N.W.2d 725, 738 (Neb. 2011); Jogani v. Superior Court, 81 Cal. Rptr. 3d 503, 506–07 (Cal. Ct. App. 2008); Nehi Beverage Co. of Indianapolis v. Petri, 537 N.E.2d 78, 85 (Ind. Ct. App. 1989); Roske v. Ilykanyics, 45 N.W.2d 769, 773–74 (Minn. 1951).

123. 526 U.S. 687 (1999).

124. Quasi contract is another term for *quantum meruit*. *Quantum meruit* is Latin for "as much as he has deserved." It is an equitable doctrine that provides restitution for unjust enrichment. Damages awarded in an amount considered reasonable to compensate a person who has provided services in a quasi-contractual relationship. *Quantum meruit* is not unjust enrichment.

125. *Monterey*, 526 U.S. at 717.

126. 222 Ga. 44, 148 S.E.2d 494 (1966).

127. *Id.* at 45, 148 S.E.2d at 495. Holding where a jury trial was required at common law it is now required by the law of Georgia, unless a change has been made by the Constitution.

128. Reheis v. Baxley Creosoting & Osmose Wood Preserving Co., 268 Ga. App. 256, 261–62, 601 S.E.2d 781, 787 (2004) (internal emphasis omitted).

129. Crowell v. Akin, 152 Ga. 126, 134–35, 108 S.E. 791, 794 (1921).

There are some instances of courts—even with a clear historical formation of the claim—classifying the claim in another manner. Colorado's highest court for example, which has endorsed and utilized the historical analysis method, stated "[q]uantum meruit is an equitable theory of recovery that arises out of the need to avoid unjust enrichment to a party in the absence of an actual agreement to pay for services rendered."[130] The court's classification is contrary to the development of quantum meruit from assumpsit, a claim that originated in the court of law.

Federal and state courts alike have consistently utilized the same historical analysis method and reached the same conclusion. The Washington Court of Appeals in *Auburn Mech., Inc. v. Lydig Const., Inc.*,[131] stated "[q]uasi contract developed out of the common-law writ of assumpsit . . . an action in a law court[.]"[132] The Connecticut Appellate Court in *Gagne v. Vaccaro*,[133] held "[m]uch of the relief we now think of as restitutionary was available in the English common law courts in an action of assumpsit."[134] The West Virginia Supreme Court of Appeals in *Realmark Devs., Inc. v. Ranson*,[135] held "the theory on which the plaintiff in this suit seeks money damages, unjust enrichment, sometimes referred to as restitution, a contract implied in law, quasi-contract, or an action in *assumpsit*, is the product of a long tradition in law, and is an action at law."[136]

Federal courts, like state courts, reach the same result. The United States Court of Appeals for the Eleventh Circuit, in *Hughes v. Priderock Capital Partners, LLC.*,[137] held "all implied contract actions were part of the action of assumpsit, which was an action at law under the common law."[138] The United States District Court for the Southern District of New York in *GSGSB, Inc. v. N.Y. Yankees*,[139] stated "since quantum meruit is an action at law, numerous federal courts have allowed actions for quantum meruit to be tried before a jury."[140] And, the United

130. Melat, Pressman & Higbie, LLP v. Hannon Law Firm, LLC, 287 P.3d 842, 847 (Colo. 2012).

131. 951 P.2d 311 (Wash. Ct. App. 1998).

132. *Id.* at 315.

133. 835 A.2d 491 (Conn. App. 2003).

134. *Id.* at 496.

135. 588 S.E.2d 150 (W. Va. 2003).

136. *Id.* at 153.

137. 812 F. App'x 828 (11th Cir. 2020).

138. *Id.* at 833.

139. No. 91 CIV. 1803 (SWK), 1995 WL 507246 (S.D.N.Y. Aug. 28, 1995).

140. *Id.* at *12.

States District Court for the Middle District of Florida in *United States ex. rel. S. Site & Underground, Inc. v. McCarthy Improvement Co.*,[141] found under federal law, quantum meruit is a legal claim subject to a right to jury trial.[142]

Accordingly, when trying to determine the right to a jury trial a court must determine if the claim being brought seeks a legal remedy or an equitable remedy. To make that determination, courts are often required to look to the historical formulation of the claim. Should the claim have originated in the courts of equity in Old England, today it benefits from no right to a jury, but should the claim have originated from the Old England courts of law—parties are entitled to a jury trial by right.

3. An Equitable Theory Is Not *Per Se* an Equitable Remedy

Just because a claim or theory may be classified as an equitable theory or is based in equitable principals, the classification or basis alone does not determine the right to a jury trial. The court must perform an analysis of the remedy and history. For example, in *Dudding v. Norton Frickey & Associates*,[143] the court defined quantum meruit was an "equitable doctrine;" however, the definition merely refers to quantum meruit's principles of fairness, or equity.[144] The Colorado Supreme Court similarly stated "[q]uantum meruit is an equitable theory of recovery that arises out of the need to avoid unjust enrichment to a party in the absence of an actual agreement to pay for services rendered."[145] "Although [the court's description] of quasi contract as 'equitable' has been repeated many times, this refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment."[146] The rule is clear, courts must perform the test to discern if a claim is legal or equitable and only then can a court determine if the parties are entitled to a jury trial by right or need both parties consent to present the issue to a jury.

A description of a theory as equitable only discusses the manner in which it is thought, not the manner in which it provides a remedy. In

141. No. 3:14-CV-919-J-PDB, 2017 WL 10434414 (M.D. Fla. Feb. 3, 2017).

142. *Id.* at *7 n.6.

143. 11 P.3d 441 (Colo. 2000).

144. *Id.* at 445.

145. *Melat*, 287 P.3d at 847.

146. 1 George E. Palmer, The Law of Restitution § 1.2 at 9 (1978); *see Jones*, 355 P.3d at 1016.

Jones v. Mackey Price Thompson & Ostler,[147] the Utah Supreme Court clarified:

> When [courts] described quantum meruit or unjust enrichment as 'equitable,' [courts] meant merely to describe the way in which the claim should be approached . . . . [P]rior opinions should not be read to impliedly hold that a claim for quantum meruit is 'equitable' for purposes of the right to a jury trial.[148]

Moreover, the Eleventh Circuit similarly stated in *Hughes*, "[quasi contract and quantum meruit] are legal fictions providing a remedy to prevent unjust enrichment, thereby promoting justice and equity. But, they are legal fictions created by courts of law. They were triable at law and not in equity, thus one is entitled to jury trial upon them."[149] Accordingly, the promotion or theory behind a claim bears no weight on whether or not the claim is legal or equitable. Courts must determine the remedy sought and consider its historical formulation regardless of the principals the claim is built upon.

III. ANALYSIS

To many if not most Americans, a jury trial seems to be the only way to decide a case—civil or criminal. This understanding is likely guided by popular culture, a limited understanding of the judiciary system, and the fundamental understanding that we are judged by a jury of our peers. Thanks to the Sixth Amendment, everyone is entitled to a jury trial in criminal cases. However, parties to civil suits are often not afforded the same right. Many laypeople are unaware of this distinction.

The reality of civil suits is much different than what people consume on television or social media. In reality, juries decide less than 1% of civil cases that are filed in court.[150] While the lack of jury trials may seem strange given the guarantee provided by the Seventh Amendment of the United States Constitution 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[,]"[151] the actual scope of the Seventh

147. 355 P.3d 1000, 1000 (Utah 2015).

148. *Id.* at 1016.

149. *Hughes*, 812 F. App'x at 833–34.

150. Renee Lettow Lerner & Suja A. Thomas, *The Seventh Amendment*, NATIONAL CONSTITUTION CENTER (Oct. 24, 2021, 11:15 AM), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125.

151. US CONST. amend. VII.

Amendment is quite narrow. The Seventh Amendment does not apply to state court systems. The Supreme Court of the United States has required states to protect almost every other right in the Bill of Rights; however, the Court has not required states to protect the right to a jury trial in civil trials.[152] Many states have protected the right to a jury trial on their own volition, but many have also decided not to protect the right.

The United States is one of the few countries to require a jury trial in federal civil cases. Jury trials were historically not permitted by developed countries. Today civil jury trials have largely been abolished.[153] However, many people still believe that they are always afforded the right to a jury. The American belief that you are always able to go before a jury has its upsides. People generally believe in the fairness juries provide, but civil suits are often more capably handled by judges. Bench trials are often cheaper, faster, and more effective. Attorneys also prepare for jury trials and develop strategy much different than if they were going before a judge. The right to a civil jury trial exists federally, but not all states provide the same right. Maybe the right should be abolished or limited? Considerations of judicial economies certainly favor bench trials. Moreover, the issues that arise out of timing, waiver, and consent when seeking a jury trial by consent raise problems that can negatively impact parties. Civil jury trials are already largely extinct abroad. Maybe it is time that they no longer exist in the United States.

A. Jury Trials Versus Bench Trials

The civil jury trial is almost extinct. Civil jury trials are long, expensive, and unpredictable. Even when they are available, almost no party wants to use them. Often, parties much prefer a bench trial and the resulting decision by a judge. In fact, more often than not, parties reach an agreement before trial and settle the case in a manner beneficial to both parties. The shortcomings of the civil jury trial have led to countries all over the world abolishing the right to a jury trial in civil disputes; however, this right is protected in the United States in federal courts by the Seventh Amendment.

152. Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 221–23 (1916).

153. Lerner & Thomas, *supra* note 150.

1. Is the Seventh Amendment Still Needed?

The Seventh Amendment was passed by the Founding Fathers due to political pressures. [154] At the time of the Seventh Amendment's passage, America's desire for independence from the Old England institution was at an all-time high. The civil jury was an Old England institution used in the court of law. In the eighteenth century, when American colonists began to serve on juries, the jury became a way for Americans to rebel against hated English laws. American juries would refuse to follow English law and therefore nullify such law. Accordingly, when the Americans drafted the Constitution, they saw juries as a powerful means of rebellion from English law and a tool to protect American law. The right to a jury in both civil and criminal trials was therefore preserved.[155]

After Americans gained their independence, the people were able to form their own federal and state republics and govern themselves as they saw fit. With the development of their own laws and governance system, the civil jury trial became much less important to the American people. It was no longer needed as a tool to rebel from Old England. Moreover, jury nullification, or the act of a jury refusing to follow a law, became problematic when juries were nullifying laws created by democratically elected officials and not created by what colonists saw as tyrants across the pond.[156]

Civil jury trials also have many intrinsic shortcomings. Juries often have difficulty understanding issues involving complex facts and law. Issues of complex fact and law are often better decided by judges. Judges benefit from a legal education, legal experience, and judicial experience. Jurors also must hear all the evidence at once and decide the case. It is impractical to require a jury to continue to return to the courthouse. A judge, however, may take the evidence and facts under consideration and deliberate before returning a decision. The

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154. I write this section with the caveat I do not think the Seventh Amendment would, or could, be abolished given the: (1) constitutional requirements for amendment abolition; and (2) current political landscape. However, I write the section to discuss its effectiveness and use. I do feel that action could be taken at the state level to abolish the right to civil jury trials. A zealous state legislature could enact law—given that state law typically covers the right to civil jury trials for state law issues—and state constitutions are much easier to alter than the United States Constitution.

155. Renee Lettow Lerner, *The Problem of the Seventh Amendment and Civil Jury Trial*, NATIONAL CONSTITUTION CENTER (Oct. 24, 2021, 11:15 AM), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125#the-problem-of-the-seventh-amendment-and-civil-jury-trial-renee-lettow-lern.

156. Lerner & Thomas, *supra* note 150.

shortcoming of civil juries was address by Old England with rules called "pleading rules;" however, the civil jury system in the United States is not burdened by the same rules. In Old England, civil jury trials were limited in the number of parties that could appear, the number of claims a party could make, and the remedy that could be sought. In fact, the court of equity, where no jury is utilized, was a result of the need for more complicated issues to be resolved in Old England.

Civil juries are even less suited to decide modern civil disputes. There is no limit to the complexity of issues that juries can hear in modern civil suits. The issues may, and often do, involve elaborate rules of evidence, expert testimony, and complicated jury instructions. Moreover, pre-trial discovery now allows parties to better understand the situation before trial and judges are now permitted to dismiss a case on summary judgement if a claim does not meet the requirements. Most importantly, the fact that many states have decided against protecting the right to a civil jury trial speaks volumes.

However, it should be pointed out that one stalwart of the modern civil litigation bar and the legal community in general—personal injury attorneys and the lobbyist behind them—would almost certainly go to great lengths to protect the right to a civil jury trial as it is critical to their profession.

The Seventh Amendment was passed under tremendous political pressure. Colonists wanted, above all, to escape the tyrannical rule of Old England and saw the civil jury as a means to achieve that goal. Today; however, juries don't wield the same power. They are ill-suited to hear complex civil issues. Moreover, most civil suits, if they make it to trial, are presented to a judge without parties ever considering enlisting a jury.

2. The Effectiveness of Civil Jury Trials

That is not to say; however, that civil jury trials and the option to seek a civil jury trial does not have its pros. Jurors often have more compassion than judges. They are susceptible to being influenced by personal appeal or testimony. Jurors are also typically an easier audience than the judge. Judges sitting as the finder of fact are much more in tune with technical rules, requirements, and details. Judges are trained, as lawyers, to analyze the facts and law and make a decision unlike jurors. However, the same considerations can work against a party. Jurors can become too emotional and are highly unpredictable compared to a judge sitting for a bench trial. Parties may; however, often hold solace in the fact that a jury trial is decided by many, not one. In fact, one issue with bench trials is that there is only one voice. It is possible for judges to be too predictable. The voice of

many can protect a party against a "bad" judge, or a judge having a bad day. Moreover, sometimes a fresh set of eyes on an issue is more effective than the judge who has been involved since the outset.

The importance of jury trials to a democratic society is engrained in American ideals. Thomas Jefferson said himself, "I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution[.]"[157] The jury trial effectively maintains checks and balances and prevents tyrannical judges from developing. Moreover, in a civil case, jurors—being a jury of your peers—are often best suited to determine community standards and expectations in accordance with the law.

There may also be strategic reasons to choose a civil jury trial as opposed to a bench trial. The standard of proof is lower in civil trials than criminal trials. Jurors, in comparison to judges, have a limited understanding of the burden of proof, how that burden can be shifted, and how that burden may be met. Juries often find for the plaintiff given their limited understanding of the burden of proof that must be met. A jury trial allows parties to focus on maximizing recovery and focus less on meeting the exact technical requirements and legal intricacies. Juries also tend to award much more than judges, especially when the party can put on a compelling story.[158] Accordingly, just because the use of civil jury trials is rare, there is still major strategic advantages to seeking a jury trial by consent on equitable issues.

B. Strategic Implications at Play When Seeking a Jury Trial by Consent

The difficulty in determining if parties have the right to jury trial raises strategic issues when attorneys and their parties develop a strategy and trial plan. Judges are required to examine the history of a claim and the remedy it is seeking to determine if a party is entitled to a jury trial. Parties may also seek to get the consent of the opposing party, raising issues of waiver, consent, and timing. With some remedies, the right to a jury trial is not clear at the outset of a dispute. Take for example the issue discussed in the above section, quantum meruit. Quantum meruit is considered an equitable theory; however, it is a remedy that derived from the common law claim of assumpsit. Assumpsit originated in the Old English courts of law. Therefore,

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157. *From Thomas Jefferson to Thomas Paine, 11 July 1789*, FOUNDERS ONLINE https://founders.archives.gov/documents/Jefferson/01-15-02-0259 (last visited Mar. 25, 2022).

158. *Trial by Jury May Be a Better Choice Than a Bench Trial*, HG.ORG LEGAL RESOURCES (Oct. 24, 2021, 11:15 AM), https://www.hg.org/legal-articles/trial-by-jury-may-be-a-better-choice-than-a-bench-trial-6613.

parties seeking a remedy under quantum meruit are entitled to a jury by right. The right to a jury trial under quantum meruit, for example, is not abundantly clear. Because of this, parties can fall into the trap of consenting to a jury trial when they believe there is no right by failing to object to the opposing parties jury demand.

In the United States, if a civil case goes to trial, which is unlikely to begin with, it is likely to be tried from the bench. Lawyers develop and utilize different strategies when presenting a case to a jury versus a judge. In jury trials, the jury is the ultimate fact finder, but has no knowledge of any pre-trial motions, theories, or actions. Conversely, in a bench trial, the judge is the ultimate fact finder and is typically very familiar with the case. Because judges are engaged with a case from the outset, should the party plan for a bench trial, the attorney has the unique ability to influence the judge's opinion on the case prior to the trial with carefully crafted pre-trial motions and briefs. For example, parties may present creative arguments in the form of a motion to dismiss. Even if the motion is not granted, the party has still shaped the judge's opinion. Attorneys are also able to use a judge's previously published opinions to roadmap their arguments and better predict the possibility of a successful outcome. Unlike with juries, where there is no historical basis for a party to work with, attorneys that know they will be presenting an issue to a judge can craft their arguments based on the judges past published opinions. Finally, attorneys, when planning for a bench trial or jury trial, plan according to a much different audience. All these decisions are made necessarily at the outset of the representation, not on the eve of trial. Although attorneys must remain flexible, the manner in which a case is to be tried colors the entire strategy.[159]

Although there is no bright line rule promulgated by the federal government or states about when a party must seek or object to a permissive civil jury trial, case law indicates that once a trial embarks the parties are stuck with the method upon which they embarked. The eve of trial; however, is not when the parties need to begin crafting their trial strategy. As detailed above, should the party be expecting a bench trial, the party must begin impacting the judge's opinion from the initial motions and briefs. Conversely, should the attorney expect a jury trial they must focus on presenting the issue to the jury to invoke the jury's compassion or other human elements. Moreover, the way legal

159. Ariel E. Harris, *The Ins and Outs of a Bench Trial: Tips for Success*, AMERICAN BAR ASSOCIATION (Oct. 24, 2021 11:15 AM), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/bench-trial-tips/.

theory is presented to judges is much different than jurors. Judges, unlike lay-jurors, are familiar with the law and do not need to be taught throughout the trial. The acts of preparing and presenting a trial to a judge versus a jury are distinct.

Accordingly, because the issue of consent and waiver have such an impact on attorney's and party's trial strategy and preparation, and because if the type of remedy sought affords a party a jury trial by right or not is sometimes unclear, the federal government and the states should legislatively clarify the issue. Common law clarification is inadequate because a case-by-case basis to determine if an issue or remedy is subject to a jury trial by right is too slow and burdensome on the court. Moreover, judicial remedies can be utilized in different manners and result in different decisions as it pertains to the right to a jury trial. For example, should a party seek to utilize a traditionally equitable remedy, but is seeking money damages to compensate the harm, the party may be entitled to a jury by right in that instance. However, should the next party seek to use the same remedy and only want an injunction, no such right to a jury trial would exist.

Moreover, the process of determining how and where a claim originated—and using that origination to decide a party's right to a jury—is difficult and an inexact science. Records are not abundant and political pressures guided the actions of the Framers and Founding Fathers that developed the Seventh Amendment.

Finally, the variety of means in which states permit and deny civil jury trials only complicates the issue. Because it is unlikely that the Supreme Court of the United States will apply the Seventh Amendment to the states given that they skipped over the Seventh Amendment and applied the other rules of the Bill of Rights, legislative change is likely the most effective means to solve the issue.

C. Judicial Economies and Fairness

Judges, legislatures, and attorneys alike consider judicial economies in making decisions, rules, and legislation. Judicial economy is the "[e]fficiency in the operation of the courts and the judicial system; [especially] the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources."[160] For example, a court may consolidate two cases for trial to save the court and parties from having two trials—therefore preserving time and money—or may order separate trials should the judge decide that doing such would avoid a more complex and time-consuming trial.

160. *Judicial Economy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Preserving the courts resources is an important consideration of judges and parties alike when setting out on an issue.

Bench trials often are easier and more efficient than jury trials largely because the judge acts as the fact finder and rules on the matters of law and procedure at play. Jury trials also require lengthy breaks and a more structured daily schedule. Bench trials are typically more flexible on the start and end times and can be conducted with minimal breaks. The court may also allow the parties to forgo opening and closing arguments and allow the parties to provide the court with written submissions—for which the parties may be able to more carefully craft and refine arguments and theories. Parties are also permitted to argue evidentiary issues and trial-related motions openly without the requirement of jury sequestration or sidebars. Procedurally, parties can avoid timely voir dire question-drafting and the jury selection process as a whole. Parties can also save trial expenses such as jury fees and jury consultant fees.[161]

The average federal civil jury trial may last 4.48 days, compared to the 2.21 days for the average bench trial.[162] The available data generally shows that jury trials take about twice as long as bench trials.[163] However, the research also provides that "it is hard to imagine that these marginal administrative costs of the jury system are large enough to affect significantly the debate over jury reform."[164] The research does; however, demonstrate that jury-tried cases queue on the docket for longer than judge-tried cases. This waiting period not only has a monetary impact on the parties and attorneys, but also has psychological costs to the parties because of the uncertainty it creates.[165]

Updated research; however, points to the contrary finding that judge-tried cases have a longer duration and remain on the docket longer.[166] The data seems to return an unexpected result; however, when examining the data closer the answer becomes clearer.

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161. Harold P. Weinberger et al., *Bench Trials (Federal)*, AMERICAN BAR ASSOCIATION (Oct. 24, 2021, 11:15 AM), https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/litigation-and-trial-practice/bench-trials-federal/.

162. Posner, The Federal Courts: Crisis and Reform 130 n.1 (1985).

163. Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which is Speedier?* (1996), CORNELL LAW FACULTY PUBLICATIONS https://scholarship.law.cornell.edu/facpub/228.

164. Robert E. Litan, VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 318 (1993).

165. Theodore Eisenberg & Kevin M. Clermont, *supra* note 163.

166. *Id.*

As stated earlier, the civil jury trial is dying. Judges are more adept at handling civil issues that are complex, and parties generally believe that judge-heard cases are more efficient and cheaper. As more and more parties begin to utilize bench trials to solve civil issues, the understanding that jury trials are longer and more expensive flips. Bench trial dockets begin to fill, and the complexity of issues drives the duration of trials longer.[167]

Other explanations for the flip exist as well. Judge-tried cases are more flexible and because of that are more often interrupted or continued to meet the convenience of the lawyers. With jury trials, this same convenience cannot be afforded since the jurors have been hauled in to serve. Moreover, in bench trials, judges are prone to take all the information, record, and evidence under advisement and prolong the decision making for months. With jury trials, the jurors have an incentive to reach a conclusion so that they may be excused from service.[168]

Ultimately the efficiency and monetary burden of jury-tried cases versus judge-tried cases is not as different as many attorneys would think. Still the benefits of judge-tried cases likely outweigh the benefits of jury-tried cases. Attorneys can mold the judge's opinion throughout the entire process when preparing for a bench trial. The attorney can forego many procedural requirements of jury trials including the time consuming and expensive jury selection, and the attorney can base a trial strategy off past published decisions.

The civil jury trial is dying. Only 1% of civil trials go to a jury. While a jury has its benefits, the cons often outweigh those benefits. There is a reason why parties do not choose to send their civil disputes to a jury. Ultimately the need for civil jury trials is minimal and arguably should be abolished.

IV. CONCLUSION

Many individuals assume—be it from TV or an incorrect understanding of the judicial system—that parties are guaranteed the right to a jury trial when involved in litigation. However, with equitable issues, the right to a jury trial typically does not exist. The distinction between if a party has a right to a jury trial or not, and the difficulty courts and parties have with discerning if the right exists, creates issues. Bench trials and jury trials are prepared for differently by attorneys. They involve different trial strategies, a different audience,

167. *Id.*

168. *Id.*

and a different means of explaining the law. Judicial economies are heavily at play when deciding between a jury trial and a bench trial. Because of all these issues, it is arguably unclear if judges and parties should even have the opportunity to empanel a civil jury. Given that only a small amount civil cases go to a jury and that many states do not even offer the right, maybe it is time for the civil jury trial to abolished.