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Multiple Jury Formats and Civil Litigation: Arnold v. Eastern Airlines

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NOTES

Multiple Jury Formats and Civil Litigation: *Arnold v. Eastern Airlines*

I. INTRODUCTION

The administrative burden on the federal judicial system has been a constant source of frustration and anxiety among litigants, judges, and practitioners alike.[1] Often, a single accident or tort results in several independent actions across the nation. Issues and facts common to all actions are adjudicated separately, creating unnecessary costs in time and money and heightening the risk of inconsistent outcomes. To help remedy the problem, Rule 42 of the Federal Rules of Civil Procedure allows courts to consolidate related cases into one proceeding.

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[2]

"The purpose of Rule 42(a) is to grant trial courts broad discretion to manage their dockets efficiently while providing justice to the parties."[3] Hence, whether consolidation is appropriate is left to the trial judge's discretion.[4] The consolidation

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1. *See* Chemerinsky & Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67; Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 1.

2. FED. R. CIV. P. 42(a).

3. Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250, 252 (S.D. Tex. 1985) (citing 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2381 (1971)).

4. Johnson v. Celotex Corp., 899 F.2d 1281, 1284-85 (2d. Cir. 1990); Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 906 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)

decision becomes a process of balancing the benefits of the procedure with the risk of undue prejudice to the litigants.[5]

Notwithstanding the broad discretion bestowed upon trial courts, such discretion must be tempered by the strict principle that considerations of convenience, efficiency, and economy must yield to the "paramount concern for a fair and impartial trial."[6] "[J]ustice, not judicial economy, is the first principle of our legal system."[7] Consolidation is not proper if it would result in unfairness or undue prejudice to the litigants. As a consequence, cases that share common issues and an overwhelming amount of evidence remain in their separated state because certain evidence admissible in one case may not be admissible in another. Where vast amounts of time, money, and energy could be saved through consolidation, fairness compels the adjudication of separate trials even when the cases share only minute portions of evidence.

This note focuses on one procedural tool which could remedy this problem. That tool is the multiple jury format, and by applying the procedure to the facts and circumstances of *Arnold v. Eastern Airlines Inc.*,[8] this note presents the multiple jury format as a viable method of facilitating the consolidation process in civil litigation while minimizing the possibility of prejudice and unfairness to the litigants.

Section II discusses the use of multiple jury format, relating its history and application in U.S. courtrooms. Section III presents the facts and procedural process of *Arnold v. Eastern Airlines*, from its trial stage to the Fourth Circuit, and finally to the Fourth Circuit's en banc decision. Finally, Section IV applies the multiple jury format to the *Arnold* case, addressing potential problems with the procedure and attempting to remedy those problems. This note concludes that the multiple jury format should be considered more carefully as a viable alternative to severance in complex litigation.

[hereinafter *Arnold II*].

5. Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985)(citing Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982) [hereinafter *Arnold I*], *cert. denied*, 460 U.S. 1102 (1983), *rev'd on rehearing*, *Arnold II*, 712 F.2d at 899.

6. Johnson v. Celotex Corp., 899 F.2d at 1285; *Arnold II*, 712 F.2d at 906; Baker v. Waterman, 11 F.R.D. 440, 441 (S.D.N.Y. 1951).

7. United States v. Crane, 499 F.2d 1385, 1388 (6th Cir), *cert. denied*, 419 U.S. 1002 (1974).

8. *Arnold II*, 712 F.2d at 899.

II. The Multiple Jury Format

The multiple jury format is designed to facilitate the consolidation of related cases while minimizing the possibility of prejudice and unfairness to the litigants.[9] The procedure involves placing two juries in the same courtroom. Each jury is assigned to hear evidence and determine verdicts for a specific case or set of cases. Certain procedural safeguards, unique to the multiple jury format, are implemented to reduce the risk of prejudice to the litigants (e.g., excusing a jury from the courtroom to protect it from exposure to evidence that is inadmissible in its assigned case).

The multiple jury format was first utilized in the criminal context in 1914,[10] and was introduced into the federal system in 1973.[11] The procedure has been used most often in criminal cases in lieu of severance.[12] However, it has been applied to complex civil litigation as well. In *Martin v. Bell Helicopter Co.*,[13] several plaintiffs brought multiple products liability actions against Bell Helicopter Company and others in connection with the crash of an Army helicopter. Because much of the evidence was similar in all of the cases, the district court consolidated the cases into one proceeding. Most of the plaintiffs sued under the California law of strict liability, but one plaintiff sued under the Colorado law of strict liability and negligence. Since the California law of strict liability was unique and differed significantly from the Colorado law, the court directed that two juries be empaneled; one to hear the evidence and be instructed in accordance with the California law of strict liability, and the other to hear the evidence and be instructed in accordance with the Colorado law of strict liability and negligence.[14]

The district court in *Martin* set forth certain limitations

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9. For an informative overview of the multiple jury format see Gaynes, *Two Juries/ One Trial: Panacea of Judicial Economy or Personification of Murphy's Law*, 5 Am. J. Trial Advoc. 285 (1981).

10. People v. Ho Kim You, 24 Cal. App. 451, 141 P. 950 (1914).

11. United States v. Sidman, 470 F.2d 1158, 1163 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973).

12. *E.g.*, United States v. Lewis, 716 F.2d 16, 19 (D.C. Cir.), *cert. denied*, 464 U.S. 996 (1983); United States v. Hayes, 676 F.2d 1359, 1366 (11th Cir.), *cert. denied*, 459 U.S. 1040 (1982); United States v. Rimar, 558 F.2d 1271, 1273 (6th Cir.1977), *cert. denied*, 435 U.S. 922 (1978); United States v. Rowan, 518 F.2d 685 (6th Cir.), *cert. denied*, 423 U.S. 949 (1975); United States v. Sidman, 470 F.2d at 1167-68.

13. 85 F.R.D. 654 (D. Colo. 1985).

14. *Id.* at 656.

and procedures to insure fairness and unprejudiced treatment for all the litigants and to "protect the integrity of each jury."[15] These safeguards were as follows:

> (1) Careful measures were to "be observed to prevent any contact between members of the two juries in court or during recess[]";
> (2) Appropriate jury instructions were to be given;
> (3) The two juries were to be "kept physically separated in the courtroom";
> (4) The two juries were to use separate jury rooms;
> (5) Although most of the evidence was to be admissible under both laws, the court ordered that each of the juries were to "be excused from the courtroom from time to time while the other jury hear[d] evidence admissible only under the law of one of the [s]tates";
> (6) Counsels' opening arguments were to "be general," and were to "avoid discussion of specific elements of theories of recovery," and no labels were "to be placed on theories of liability" (in this manner, "both juries [would] be able to hear opening arguments simultaneously");
> (7) The juries were to be empaneled separately, were to hear separate closing arguments, and were to be instructed separately.[16]

Unfortunately for our purposes, *Martin* was settled before trial and the practical success of applying the multiple jury format to complex civil litigation remained the topic of idle speculation. Much was written about the procedure in the late 1970s and early 1980s although the discussion centered around the use of the multiple jury format as a tool in criminal trials.[17] In recent years the topic has disappeared from the academic and professional journals. While it has frequently been used in criminal trials, *Martin v. Bell Helicopter Co.* is the only recorded implementation of the multiple jury format to the civil arena.

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15. *Id.*

16. *Id.*

17. *See, e.g.*, Ashman, *What's New in the Law: Trial Management . . . Jury Bifurcation*, 66 A.B.A. J. 787 (1980); Gaynes, *supra* note 9; Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 691 (1983); Morris & Savitt, Bruton *Revisited: One Trial/Two Juries*, 12 THE PROSECUTOR 92 (1976); Trangsrad, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 825 (1985); Note, *Criminal Law—Multiple Jury Joint Trials—On the Joint Trial of Two Defendants, The Empaneling of Two Juries Simultaneously is Permissible:* United States v. Sidman, 2 FORDHAM URB. L.J. 407 (1974).

III. *Arnold v. Eastern Airlines*

A. The Facts

To appreciate the specific benefits and problems a multiple jury approach would have created in *Arnold*, a review of the case's procedural history is necessary. The controversy arose from the crash of Eastern Airlines Flight 212 near Charlotte, North Carolina on September 11, 1974. The crash killed seventy-one people and seriously injured eleven others.

Following the crash of Flight 212, the majority of the ensuing claims were settled out of court by Eastern's insurers.[18] However, not all claims were settled. The following four actions were brought in 1976 and 1977:

> (1) In March of 1976, Richard Arnold commenced a diversity action against the airline in the United States District Court for the Western District of North Carolina. Under a theory of negligence, Arnold sought compensatory and punitive damages for personal injuries sustained in the crash.
> (2) In September of 1976, Francis Mihalek brought a similar action in the same court. In both the Arnold and Mihalek actions, Eastern impleaded the United States and sought contribution under the argument that the air traffic controllers on duty at the time of the crash were negligent.
> (3) In September of 1976, Helen Weston, as executrix of deceased passenger William Weston, brought a wrongful death action against Eastern under a theory of negligence. Weston also sought compensatory and punitive damages. The Weston case was commenced in the United States District Court for the District of South Carolina. Eastern did not implead the United States in this case.
> (4) In February of 1977, Aetna and Eastern's other insurers, commenced an action in the United States District Court for the Western District of North Carolina against the United States under the Federal Torts Claims Act.[19] Aetna also brought an action against four air traffic controllers individually. Aetna alleged negligence and sought contribution for the amounts Aetna and the other insurers had paid in out-of-court settlements.[20]

In its responsive pleadings to the Arnold, Mihalek, and Weston

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18. *Arnold I*, 681 F.2d at 186.
19. 28 U.S.C. § 1346 (1988).
20. *Arnold I*, 681 F.2d at 190-91.

cases, Eastern admitted liability for compensatory damages, but denied any liability for punitive damages.[21]

In November of 1977, the District Court for the Western District of North Carolina issued an order to consolidate all four cases for discovery and trial (subject to reconsideration after discovery as to the consolidated trial).[22] After discovery was completed, Eastern and Aetna moved to sever the Aetna action for trial. However, the district court determined that common issues of law and fact merited consolidation. The court identified the common issues as follows: (1) whether Eastern's negligence proximately caused the crash of the airliner and (2) whether the air traffic controllers' negligence concurred in causing the crash.[23] Eastern and Aetna argued that Aetna's presence at trial would inform the jury of Eastern's insurance coverage and therefore prejudice the jury against Eastern, creating an undue risk of inflated damages.[24]

To avoid possible prejudice, Eastern and Aetna suggested two alternative procedures. First, in return for severance of the Aetna claim, Eastern offered to drop its impleader claim against the United States.[25] Alternatively, Eastern and Aetna proposed certain procedural safeguards in the consolidated trial to screen the jury from any knowledge of Eastern's insurance coverage or of Aetna's out-of-court settlement amounts.[26] Aetna's counsel would be introduced as co-counsel for Eastern, "no mention of liability insurance would be allowed," and no mention of out-of-court settlements would be permitted.[27] The district court refused to implement either suggestion.

Eastern feared that the necessary revealing of the existence of their insurance coverage would result in inflated damages.[28] The district court responded that, given Eastern's position as a leading corporate entity, it was unrealistic to think that a jury would not assume the existence of liability insurance.[29] The court also doubted that such knowledge would inflate any dam-

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21. *Id.* at 190.
22. *Id.* at 191, 194.
23. *Id.* at 194.
24. *Id.* at 192.
25. *Id.*
26. *Id.* at 190.
27. *Id.* at 192-93.
28. *Id.* at 192.
29. *See infra* notes 39-41 and accompanying text.

age award made against a corporate defendant like Eastern.[30] As to Aetna's concern that it would be harmed by the revealing of Eastern's gross culpability, the court concluded that prejudice could be avoided with careful jury instructions.[31] Before presentation of the evidence, the district court had instructed the jury as to the relationships of the parties and to the jury's scope of scrutiny as to each party.[32]

A three-week trial followed. The jury awarded compensatory damages to Arnold for $3,027,500, to Mihalek for $1,137,500, and to Weston for $847,000.[33] The jury refused to award any punitive damages. In addition, the court found against Eastern and Aetna in their respective claims for contribution against the United States.[34]

B. *Admissibility of The Existence of Insurance Coverage in Liability Suits*

The focus of this note is to demonstrate how the multiple jury format could have prevented undue prejudice in *Arnold*. The prejudice there stemmed from the necessary revelation to the jury of Eastern's liability insurance. This section provides a brief overview of the admissibility of the existence of liability insurance in civil actions. Federal Rules of Evidence, rather than state rules, govern the admissibility of evidence in diversity actions, including the admissibility of the existence of a defendant's insurance coverage.[35]

Traditionally, admission of evidence pertaining to the existence or the extent of a defendant's insurance coverage has been ruled reversible error. This rule has been codified in Rule 411 of the Federal Rules of Evidence which reads,

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted neg-

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30. *Arnold I*, 681 F.2d at 193 (citing Tallant Transfer Co. v. Bingham, 216 F.2d 245, 247 (4th Cir. 1954)).

31. *Id.* at 193.

32. *Id.* at 193 n.7.

33. *Id.* at 191 (this award was reduced by the court to $797,000, which was accepted by the plaintiff).

34. *Id.* (The agreed trial format called for the court to decide the contribution issue through advisory verdicts from the jury. In the end the court refused to submit the claims to the jury for an advisory verdict.)

35. Reed v. General Motors Corp., 773 F.2d 660, 663 (5th Cir. 1985) (The court also pointed out that although the *Erie* doctrine requires the application of substantive state law, federal courts apply federal procedural rules).

> ligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.[36]

The rational behind the federal rule was ably set forth by the Ninth Circuit in *Geddes v. United Financial Group*.[37] That court explained that consideration of "the ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result."[38]

Exceptions to the general rule exist. Rule 411 expressly provides for the admission of insurance coverage when "offered for another purpose, such as proof of agency,[39] ownership[40] or control, or bias or prejudice of a witness."[41] To reflect modern society, federal courts have also determined that references to insurance coverage made inadvertently, casually, or incidentally amount to harmless error and, thus, are not prejudicial.[42] This last exception stems from Rule 61 of the Federal Rules of Civil Procedure which reads in part, "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[43] If inadvertent references to the defendant's insurance coverage have not affected the "substantial rights" of the parties, they are deemed harmless and do not constitute grounds for reversal. All rules of admissibility are tempered by Rule 403 of the Federal Rules of Evidence which allows the court to balance the relevance of the evidence with the risk of prejudice to the parties.[44] Finally, many federal courts will allow reference to insurance coverage if the existence of such coverage is deemed to be of common knowledge to the reasonable juror.[45] This last exception

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36. FED. R. EVID. 411.

37. 559 F.2d 557 (9th Cir. 1977).

38. *Id.* at 560.

39. *See* Hunziker v. Scheidemantle, 543 F.2d 489, 495 n.10 (3rd Cir. 1976).

40. *See* Dobbins v. Crain Brothers, Inc., 432 F. Supp. 1060, 1069 (W.D. Pa.), *aff'd in part, rev'd in part*, 567 F.2d 559 (3d Cir. 1977).

41. FED. R. EVID. 411.

42. Heuss v. Rockwell Standard Corp., 495 F.2d 1207, 1210 (6th Cir. 1974); Lenz v. Southern Pacific Co., 493 F.2d 471, 472 (5th Cir. 1974); Marks v. Mobil Oil Corp., 562 F. Supp. 759, 769 (E.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir. 1984).

43. FED. R. CIV. P. 61.

44. FED. R. EVID. 403.

45. Gleaton v. Green, 156 F.2d 459, 462 (4th Cir. 1946); Crockett v. Boysen, 26 F.R.D. 148, 149 (D. Minn. 1960); Schevling v. Johnson, 122 F. Supp. 87, 89 (D. Conn.

arises most often in personal injury actions involving commercial or corporate entities. In *Crockett v. Boysen*[46] the court explained that "most jurors know that an insurance company is involved in almost every personal injury action."[47]

C. Arnold *On Appeal*

Eastern and Aetna appealed the district court's judgment to the Fourth Circuit Court of Appeals. Although the appeal alleged error on several grounds, it rested primarily on the specific risks of prejudice caused by the consolidation of Aetna's action with the other three actions.[48] Eastern claimed that because of Aetna's presence as a party, Eastern had been subjected to an undue risk of prejudice by the revelation to the jury of Eastern's insurance coverage. Aetna argued that it had been unduly prejudiced by the exposure of Eastern's gross culpability at trial.

Affirming the district court's judgment, the Fourth Circuit concluded that the application of procedural matters at the trial level should be left to the trial court's discretion. The court determined that the trial court had acted within its discretion and that neither of the appellants had been unduly prejudiced thereby. Explaining their reasoning with regard to Eastern's complaint, the circuit court noted that the trial court had made a pragmatic decision and had properly exercised its discretion in allowing the jury to become aware of Eastern's insurance coverage. Since liability for compensatory damages was not an issue,[49] the circuit court agreed that the jury's knowledge of Eastern's insurance coverage added little to the risk of inflated damages.

With regard to Aetna's allegation of error, the circuit court again deferred to the discretion of the trial court. They determined that the trial court had recognized the possible risks and had properly "relied upon its ability to safeguard Aetna's interest by appropriate cautionary instructions."[50] In fact, the circuit

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1953).

46. 26 F.R.D. at 148.

47. *Id.* at 149.

48. Although not dealt with here, another ground for appeal revolved around the alleged outrageous conduct of the plaintiffs' counsel. *Arnold I*, 681 F.2d at 192. Judge Murnaghan, the author of the en banc opinion, dissented from the bench opinion arguing that counsel's outrageous conduct unduly prejudiced Eastern and Aetna. *Id.* at 208-11 (Murnaghan, J. concurring in part and dissenting in part).

49. *Id.* at 190. *See supra* text accompanying note 20.

50. *Id.* at 193. *See supra* text accompanying notes 26-27.

court commended the instruction, referring to it as "exemplary in its clarity and accuracy."[51]

D. En Banc Proceeding

Eastern requested and was granted a rehearing en banc. In the en banc proceeding, the Fourth Circuit retreated from its previous stance by reversing the personal injury judgment against Eastern and remanding the case for a new trial concerning the amount of compensatory damages. The court found that consolidation revealed the extent of the airline's insurance coverage and the approximate amount of recovery of other crash victims to the jury, creating an undue risk of jury prejudice against Eastern and possibility of inflated damage awards.[52] The court concluded that such prejudice could have been avoided had the cases not been consolidated at all or, after consolidation for discovery, had the cases been severed for trial.[53] The court explained, "Consolidation, or refusal to sever, where prejudice results under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error."[54] Although the court made reference to the general rule prohibiting the admissibility of insurance coverage in civil cases,[55] it refrained from making a "rule of universal applicability" which would require the separation of trials in every case if consolidation would result in making the jury aware of the defendant's insurance coverage.[56]

What caused the change in the circuit courts reasoning? Generally, courts are allowed to cure any prejudicial effect that consolidation may bring upon a party through the use of special instructions and other procedural devices.[57] Judge Murnaghan, the drafter of the en banc opinion, originally thought that "despite difficulties which customarily would dictate separate trials, consolidation of all the cases was, nevertheless at least theoretically proper, in view of the great dislocations that otherwise

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51. *Id.* at 193 n.7.

52. *Arnold II*, 712 F.2d at 907.

53. *Id.*

54. *Id.* at 906 (citing Dupont v. Southern Pacific Co., 366 P.2d 193, 196 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967)).

55. *Id.* at 907 n.14.

56. *Id.* at 906-07.

57. *Id.* at 907. *See also* Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990) (quoting Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985)).

were in store for the [trial court]."[58] However, Murnaghan recognized that the necessary exposure to the jury of Eastern's insurance coverage presented a risk of prejudice and thus required a "heightened need to insist on scrupulous fairness in all other aspects of the trial."[59] Later, in the en banc opinion, Murnaghan realized that no special instruction or procedural safeguards were sufficient to guard against the risk of prejudice the insurance issue presented. Even with "scrupulous fairness" being applied to other aspects of the trial, procedural safeguards were not sufficient to remedy a situation that seemed to him to be inherently and irreversibly unfair. "In the actual proof of the pudding, it has now become clear to me that the fairness required was not possible to attain."[60]

This note now wrestles with the issue of whether Judge Murnaghan was correct. Is fairness unattainable in such a consolidated trial? Would the same unfairness have been an issue if the district court had implemented a multiple jury format at the trial level? Could the extra cost in time, money, and energy wasted on the reversed trial proceeding have been spared?

IV. Application of Multiple Jury Format to *Arnold*

A. *Introduction of Format*

Attempting to implement a multiple jury format into the *Arnold* scenario may be nothing more than an intellectual exercise. However, if it can be shown that a multiple jury format could have changed the "proof" of Judge Murnaghan's "pudding" and saved the consolidation stage of the *Arnold* trial, then its value as a procedural tool to aid consolidation may be reintroduced into the minds and hopefully the practices of litigators and the federal judiciary.

In the hypothetical *Arnold* consolidation, two juries would be used; Jury A would hear evidence and determine the extent of damages in the three consolidated actions against Eastern and Jury B would hear evidence and determine the outcome of East-

58. *Arnold I*, 681 F.2d at 207 (Murnaghan J., concurring in part and dissenting in part). Judge Murnaghan argued that the outrageous conduct of the plaintiffs violated the "heightened need to insist on scrupulous fairness in all other aspects of the [consolidated trial]." *Id.* at 208. While he agreed that in theory consolidation was proper, he determined that improper conduct by counsel left the consolidated action powerless to protect the interests of fairness to the litigants. *Id.* at 207-12.

59. *Id.* at 207-08.

60. *Arnold II*, 712 F.2d at 907.

ern's and Aetna's actions against the United States. Following the guidelines of *Martin v. Bell Helicopter Co.*,[61] the two juries would be separated in the courtroom, use two separate jury rooms, be separated during recess, and be prohibited from communicating with each other. Each jury would be empaneled separately, be instructed separately, and hear closing arguments separately. Although most of the evidence would be admissible to both actions, the court would dismiss one jury or the other before evidence was presented which would be inadmissible in that particular action. For example, Jury A would be dismissed from the courtroom before evidence was presented concerning the existence or extent of Eastern's insurance coverage or the amount of its settlement claims. Similarly, Jury B would be dismissed when evidence was presented which would be inadmissible in Eastern and Aetnas' action against the United States.

B. Criticisms of the Multiple Jury Format and Such Criticism's Relevance to the Arnold *Hypothetical*

Uniformly, courts have commended and encouraged creativity and initiative in aiding judicial economy. The Third Circuit explained in *Byrne v. Matczak*,[62] "[F]air new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional."[63] However, concomitant with the mission of the Rules Enabling Act[64] is the mandate that new rules and procedures must "really regulate procedure" and not alter the "substantial rights" of the parties.[65] Hence, because of potential for affecting the substantial rights of the parties, courts have hesitated in giving a "blanket endorsement" to the practice of using multiple juries until trial courts have established guidelines to protect criminal defendants from prejudice.[66] The call for guide-

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61. 85 F.R.D. 654, 656 (D. Colo. 1980). *See supra* notes 14-17 and accompanying text.

62. 254 F.2d 525 (3d Cir.), *cert. denied*, 358 U.S. 816 (1958).

63. *Id.* at 529, *quoted in* United States v. Sidman, 470 F.2d 1158, 1168 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973). *See also* United States v. Crane, 499 F.2d 1385, 1388 (6th Cir.) ("efforts by trial judges to keep their dockets current are to be commended"), *cert. denied*, 419 U.S. 1002 (1974).

64. 28 U.S.C. § 2072 (1988).

65. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

66. United States v. Sidman, 470 F.2d at 1170; *See also* United States v. Lewis, 716 F.2d 16, 19 (D.C. Cir.) ("acknowledging warnings voiced by various courts"), *cert. denied*, 464 U.S. 996 (1983); State v. Corsi, 86 N.J. 172, 178, 430 A.2d 210, 213 (1981) ("We do not recommend it").

lines stems from judicial wariness of the possible "aberrations" that may take place with two juries in the same courtroom.[67] "[I]nherent in such a complicated procedure is the greatly enhanced possibility of error."[68] "[T]here are too many opportunities for reversible error to take place."[69]

Notwithstanding the reluctance of the courts to openly endorse the procedure, courts have not found that the multiple jury format violates the rights of the defendant to a fair trial.[70] When a conviction has been reversed, it has usually been as a result of an evidentiary mistake which could have been avoided with greater care.[71] Rarely has it arisen from a "basic flaw in the concept of multiple juries."[72] Circuit courts have followed the practice of affirming district court rulings in the absence of incidents of "specific prejudice."[73] As of yet, no "specific prejudice" has been found as a result of the procedure. This fact may suggest that the problem of potential prejudice may be overestimated, and may raise the question whether the problem is "one of injustice or . . . only the failure to *appear* just."[74]

1. Arnold*: prejudice and jury speculation*

Several problems may arise from the application of the multiple jury to a scenario similar to that of *Arnold*. First, how does the court limit the risk of prejudice to defendant Eastern resulting from Jury A's speculation of Jury B's presence and purpose?[75] Wouldn't the physical presence of Jury B, coupled with precautionary instructions from the bench, speak as loudly as if plaintiff's counsel rose up and revealed the existence and extent

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67. Gaynes, *supra* note 9, at 292.

68. State v. Corsi, 86 N.J. at 178, 430 A.2d at 213.

69. *Id.*

70. *See* Meyer, *supra* note 17, at 691; Morris & Savitt, *supra* note 17, at 94. *See also* cases cited *supra* note 12. Interestingly, even after the *Corsi* court's aggressive attack on the multiple jury format the court affirmed the conviction adding, "neither defendant can point to any specific prejudice or error." State v. Corsi, 86 N.J. at 178, 430 A.2d at 213.

71. Note, *supra* note 17, at 415.

72. *Id.*

73. United States v. Lewis, 716 F.2d 16, 19 (D.C. Cir.), *cert. denied*, 464 U.S. 996 (1983). *See also* United States v. Hayes, 676 F.2d 1359, 1366-67 (11th Cir.), *cert. denied*, 459 U.S. 1040 (1982); United States v. Sidman, 470 F.2d 1158, 1170 (9th Cir.), *cert. denied*, 409 U.S. 1127 (1973).

74. Gaynes, *supra* note 9, at 292 (emphasis added).

75. *See generally Id.* at 291 (raising the issue of one jury speculating about the other jury's deliberations).

of Eastern's insurance coverage? Is not this similar to instructing a jury not to think about pink elephants? As the court in *Gleaton v. Green*,[76] pointed out, "[I]t is a matter of common knowledge that cautioning jurors to disregard certain testimony frequently only serves to attract their attention to it."[77]

However disruptive this problem may initially appear, it is probably not fatal in this case. First, the procedural safeguards set up in *Martin v. Bell Helicopter Co.*[78] limit Jury A's knowledge of Eastern's insurance coverage to a minimum level.[79] Second, because of Eastern's prominent corporate status, the reasonable person most likely assumes the existence of liability insurance.[80] Third, jury speculation is not unheard of in single jury trials.[81] "[I]n all trials individual jurors are able to observe the other jurors with whom they sit."[82] As in any trial, the trial judge should simply instruct the jury not to speculate.[83] Not all instances of prejudice are curable through instructions. However, "[i]t is not unreasonable to conclude that in many cases the jury can and will follow the trial judges' instructions to disregard such . . . information."[84] There is a good chance that in *Arnold*, the procedural safeguards set forth in *Martin v. Bell Helicopter Co.* could have prevented any harmful reference to insurance coverage. One should remeber that, "litigants are entitled to a fair trial, not a perfect one."[85]

2. *Logistics*

A second problem deals with simple logistics. How does the court administer the trial to prevent the proceedings from becoming a three-ring circus? What about jury confusion (to say nothing about confusion amongst the members of the bar). Won't it be distracting for counsel to address two juries at the

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76. 156 F.2d 459 (4th Cir. 1946).

77. *Id.* at 462.

78. *See also supra* text accompanying note 16.

79. *See* FED. R. CIV. P. 61.

80. *See* sources cited *supra* notes 38-40 and accompanying text.

81. Morris & Savitt, *supra* note 17, at 93.

82. People v. Brooks, 92 Mich. App. 393, 397, 285 N.W.2d 307, 308-09 (1979).

83. Morris & Savitt, *supra* note 17, at 93.

84. United States v. Bruton, 391 U.S. 123, 135 (1968) *quoted in* United States v. Rimar, 558 F.2d 1271, 1273 (6th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978). Note also that in *Rimar*, jury instructions were deemed to cure possible prejudice or confusion which may have arisen from inadvertent comments or mistakes. 558 F.2d at 1273.

85. Marks v. Mobil Oil Corp., 562 F. Supp. 759, 769 (E.D. Pa. 1983).

same time? How are the juries to be situated in relation to the witness stand? What about exhibits? Does everything need to be done in duplicate?

These are all valid concerns. Generally, the court handles the proceedings the same as any other trial.[86] However, much of the success of the multiple jury format turns on the competence of the judiciary and the cooperation of counsel. Definitely, a high level of concentration and sensitivity aids in the successful application of such an ambitious endeavor.[87] Counsel have to watch their words carefully to prevent "slip-ups" and the trial judge must carefully guard the integrity of the proceedings.[88] Guidelines should be created and followed strictly, as was done in *Martin v. Bell Helicopter Co.*[89] To aid the juries, the trial judge should give "meticulous instructions" as to the guidelines set forth, and the purpose of the multiple jury procedure[90] and, if possible, copies should be made of physical evidence so that each jury may have access to it during deliberations.[91] To avoid confusion in leaving the courtroom, single jury presentations could be made just before or just after meal breaks[92] and jurors could be dismissed at different intervals.[93] In the courtroom the juries need to be physically separated with each juror having a "proper and equal view of the witness stand."[94] To accomplish this, "inexpensive modifications" can be made in the courtroom;[95] constructing another jury box is not necessary.[96] "Certainly there is nothing sacrosanct in the placement of the jury in the jury box. . . ."[97] Separation has usually been accomplished

86. *See* Morris & Savitt, *supra* note 17, at 93-94.

87. Gaynes, *supra* note 9, at 285.

88. *Id.*

89. 5 F.R.D. 654, 656 (D. Colo. 1980).

90. United States v. Hayes, 676 F.2d 1359, 1367 (11th Cir.), *cert. denied*, 459 U.S. 1040 (1982); United States v. Sidman, 470 F.2d 1158, 1168 (9th Cir.), *cert. denied*, 409 U.S. 1127 (1973).

91. Gaynes, *supra* note 9, at 291; Morris & Savitt, *supra* note 17, at 94.

92. Gaynes, *supra* note 9, at 291 (reviewing the trial court's practices in *United States v. Hanigan*, 681 F.2d 1127 (9th Cir. 1982)).

93. Morris & Savitt, *supra* note 17, at 94.

94. *Id.*

95. *Id.*

96. People v. Brooks, 92 Mich. App. 393, 397, 285 N.W.2d 307, 308 (1979). A federal courthouse in California has a courtroom equipped with two jury boxes. Gaynes, *supra* note 9, at 285.

97. People v. Brooks, 92 Mich. App. at 397, 285 N.W.2d at 308-09.

by placing one jury in the jury box and the second jury in chairs in front of the jury box.[98]

Fortunately, the multiple jury format is not without an available laboratory. For several years, courts have experimented with and refined the logistics of such a proceeding in the criminal trial arena. Generally, multiple jury criminal trials have gone smoothly.[99] "[C]oncerns about an overcrowded courtroom with jurors who could not view the action were unfounded and overblown."[100] One Michigan appellate court commented,

> Things have gone quite smoothly. This is sort of a new procedure that we have followed here. It has helped the Court, assisted the Court in that where it has taken us four days, we have been able to handle it in a little over two days. It is because of the cooperation of Counsel, parties in the case, and, of course the Juries.[101]

The Sixth Circuit in *United States v. Rimar*[102] observed that when confusion or misstatements did take place at the trial level the "[trial] judge promptly corrected himself or the attorney involved and instructed the jury accordingly."[103]Complex civil litigation has a model to work with, and as litigators and judges refine their skills, logistical hurdles will become less and less of an obstacle. Remember, logistical hurdles for litigants and witnesses that come with the adjudication of multiple trials stemming from the same accident or tort is no "walk in the park" either.

3. *Efficiency*

The multiple jury format has been criticized as being inefficient in that "the empanelment of two juries would be cumbersome at minimum and would create unnecessary logistical problems. The judicial economy argument thus collapses."[104]

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98. *See, e.g.*, Gaynes, *supra* note 9, at 290 (explaining the court's practices during the trial of Patrick and Thomas Hanigan. United States v. Hanigan, 681 F.2d 1127 (9th Cir.), *cert. denied*, 459 U.S. 1203 (1983)).

99. People v. Brooks, 92 Mich. App. at 395, 285 N.W.2d at 308-09. *See also* Gaynes, *supra* note 9, at 290.

100. Gaynes, *supra* note 9, at 290 (reviewing the success of the multiple jury format in the trial of Patrick and Thomas Hanigan. United States v. Hanigan, 681 F.2d at 1127).

101. People v. Brooks, 92 Mich. App. at 395, 285 N.W.2d at 308 (quoting the trial judge).

102. 558 F.2d 1271, 1273 (6th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

103. *Id.* at 1273.

104. United States v. Teicher, No. 88 Cr. 796 (CSH) (S.D.N.Y. Jan. 8, 1990)

Even in cases where the practice is approved, courts have observed that the proceedings took "somewhat longer than the nature of the charges might suggest was necessary."[105] However, this result has been the exception rather than the rule. Commentors argue that the procedure has resulted in substantial savings of time, money, and judicial resources.[106]

Undoubtedly, for the administering trial court, a consolidated trial under a multiple jury format would be more expensive in time and money than a separate trial inside a more traditional framework. However, consolidated trials are *always* more expensive for the adjudicating trial court. The savings derived from the system are the result of the elimination of one or perhaps several other trials. When the judicial system is analyzed in the aggregate, the overall savings to the system in time and money is substantial and should outweigh the extra cost and inconvenience placed upon the administering trial court. Moreover, efficiency of money and time will increase once the judicial system becomes comfortable with multiple juries. As efficiency increases, so will the ability of the judiciary to attack its docket load and more effectively administer justice to the litigants before it.

4. *Of limited use, or a panacea?*

It has been stated that the multiple jury format is "not a panacea and to treat it as such will undoubtably [sic] pervert its usefulness."[107] The multiple jury format has been used only in the criminal context because of its usefulness in circumventing the *Bruton* problem.[108] However, its past narrow application to only criminal cases does not render the procedure useless in civil litigation. The multiple jury format is not a panacea; it is a device that, if used under the proper circumstances, could save sig-

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(LEXIS, Genfed library, Dist. file).

105. United States v. Rimar, 558 F.2d at 1273.

106. Courts have recognized the benefits of judicial economy under a multiple jury format. *See* cases cited *supra* note 12. *See also* Meyer, *supra* note 17, at 692 ("simplifying mechanism"); Gaynes, *supra* note 9, at 285 ("resulting in substantial savings of time, without prejudicing any party involved"); Morris & Savitt, *supra* note 17, at 92; Note, *supra* note 17 at 417 ("[G]iven particular circumstances, it can be a smooth alternative to an unnecessary expenditure of time").

107. Note, *supra* note 17, at 417.

108. A *Bruton* problem arises when one of two co-defendants in a joint trial makes a confession which implicates the other defendant. Such circumstances normally require severance. Bruton v. United States, 391 U.S. 123 (1968).

nificant amounts of time, money, and energy.[109] The *Arnold* case provided the necessary circumstances. The majority of the evidence in the Eastern case overlapped with evidence in the Aetna case. Few instances would call for the removal of one of the juries, and careful administration would prevent this from being too disruptive. Although the large majority of the evidence was common to both cases, the cases did not share too many issues of fact, thus avoiding serious difficulties with collateral estoppel.[110]

V. Conclusion

The purpose of this note has been to demonstrate that the multiple jury format can be a useful and efficient tool in administering complex litigation. The difficulty in applying a multiple jury format to the *Arnold* case stems from the fact that the procedure has never been actually implemented in a civil case. Lack of experience, however, is no reason for the federal courts to ignore its potential benefits.[111] Consolidation in *Arnold* failed because the traditional structure of consolidation did not protect its litigants from prejudice and unfairness. As a result, an expensive and time-consuming trial was administered only to be reversed and remanded on appeal. If the multiple jury format had been implemented successfully in *Arnold*, the time, money, and effort invested at the trial level and through the appellate process would not have been wasted. Unfortunately, whether a multiple jury format would have been successful in *Arnold* will never be known. Although potential difficulties with the procedure make it unsuitable in certain circumstances, experienced judges will be able to cope with these difficulties or decide not to apply the format when the difficulties are insurmountable. The procedure has been successful in criminal trials and overloaded judicial dockets are an ever growing concern. With this in mind,

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109. Note, *supra* note 17, at 417. *See also* People v. Brooks, 92 Mich. App. 393, 395, 285 N.W.2d 307, 308 (1979).

110. If a collateral estoppel problem were to arise, the court could simply apply collateral estoppel within the confines of the courtroom in the same way it would be applied under a more traditional framework.

111. See United States v. Hayes, 676 F.2d 1359 (11th Cir.) ("while we do not endorse the use of the multiple jury procedure in every case . . . neither do we condemn it on the basis of its novelty alone"), *cert. denied*, 459 U.S. 1040 (1982).

a procedure with the potential exhibited by the multiple jury format deserves a closer look.

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