The National Agricultural Law Center

University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu • (479) 575-7646

An Agricultural Law Research Article

The Seventh Amendment and the CFTC Reparations Proceedings

by

Jerry W. Markham

Originally published in IOWA LAW REVIEW
68 IOWA L. REV. 87 (1982)

www.NationalAgLawCenter.org

The Seventh Amendment and CFTC Reparations Proceedings

*Jerry W. Markham**

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.[1]

The Commodity Futures Trading Commission (CFTC) Act of 1974[2] amended the Commodity Exchange Act[3] to create the Commodity Futures Trading Commission,[4] an independent federal regulatory agency with exclusive jurisdiction over all commodity futures transactions on exchanges such as the Chicago Board of Trade, all commodity options transactions, and all so-called leverage transactions.[5] The CFTC Act also created a "reparations" procedure, pursuant to which persons injured by violations of the Commodity Exchange Act can seek redress before the CFTC.[6] Since the creation of that reparations procedure, the number of complaints filed with the CFTC has increased from 6 complaints docketed in fiscal year 1976 to over 1200 in fiscal year 1981.[7]

The CFTC Act made the CFTC the adjudicative body for resolving

---

* Partner, Rogers & Wells, Washington, D.C. B.S. 1969, Western Kentucky University; J.D. 1971, University of Kentucky; LL.M. 1974, Georgetown University. The author was formerly Chief Counsel for the Division of Enforcement of the Commodity Futures Trading Commission. The author would like to thank Howard Sprow for the ideas and encouragement that lead to this Article.

1. U.S. CONST. amend. VII.

2. Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified in scattered sections of 5, 7 U.S.C. (1976)).

3. 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980).

4. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, sec. 101(a), § 2(a), 88 Stat. 1389, 1389-91 (codified at 7 U.S.C. §§ 2, 4a (1976)).

5. *See generally* S. REP. NO. 850, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087; S. REP. NO. 1194, 93d Cong., 2d Sess. (1974); S. REP. NO. 1131, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843; H.R. REP. NO. 975, 93d Cong., 2d Sess. (1974); Schief & Markham, *The Nation's "Commodity Cops"—Efforts by the Commodity Futures Trading Commission to Enforce the Commodity Exchange Act*, 34 BUS. LAW. 19 (1978); *Regulation of Commodity Futures Trading*, 27 EMORY L.J. 847 (1978); *Symposium on Commodity Futures Regulation*, 6 HOFSTRA L. REV. 1 (1977).

6. CFTC Act of 1974, Pub. L. No. 93-463, sec. 106, § 14, 88 Stat. 1389, 1393-95 (codified at 7 U.S.C. § 18 (1976)).

7. Letter from James M. Bruchs, Special Counsel for the Complaints Section of the CFTC, to Jerry W. Markham (Aug. 13, 1981) (on file with the *Iowa Law Review*). Approx-

both questions of law and fact in its reparations procedure.[8] Thus, while the CFTC's factual findings and holdings in reparations awards are subject to judicial review in courts of appeals,[9] the CFTC Act makes no provision for a jury trial. Nor is a jury trial available when reparations awards are sought to be enforced in a federal district court, because the order of the CFTC awarding reparations in those actions is by statute "final and conclusive."[10]

This Article will begin by reviewing the historical background of the commodity futures industry[11] and, more specifically, the legislative background of the CFTC reparations procedure.[12] Then, the precise nature of CFTC reparations proceedings will be examined.[13] Next, the jury trial guarantee of the seventh amendment will be analyzed,[14] followed by an application of seventh amendment principles to the CFTC's reparations procedure.[15] Finally, it will be concluded that the denial of the right to a jury trial in CFTC reparations proceedings violates the spirit and letter of the seventh amendment.

I. THE CFTC—BACKGROUND

The commodity futures industry dates back centuries,[16] but modern futures trading on organized exchanges developed in Chicago in the mid-1800's as the result of the grain trade in the Midwest.[17] At first, trading was conducted in "time contracts" for the sale of grain for deferred delivery.[18] By the 1860's, however, this trading gradually evolved into futures trading on the Chicago Board of Trade,[19] and in 1870 the New

---

imately 80% of the claims filed in fiscal year 1981 involved commodity futures transactions. *See id.*

8. *See* CFTC Act of 1974, Pub. L. No. 93-463, sec. 106, § 14(e), 88 Stat. 1389, 1393-94 (codified at 7 U.S.C. § 18(e) (1976)).

9. *See id.* sec. 106, § 14(g), 88 Stat. at 1394 (codified at 7 U.S.C. § 18(g) (1976)).

10. 7 U.S.C. § 18(f) (1976).

11. *See* text accompanying notes 16-71 *infra.*

12. *See* text accompanying notes 72-96 *infra.*

13. *See* text accompanying notes 97-141 *infra.*

14. *See* text accompanying notes 142-94 *infra.*

15. *See* text accompanying notes 195-294 *infra.*

16. CHICAGO BOARD OF TRADE, COMMODITY TRADING MANUAL 1-2 (1973); *see* H.R. REP. NO. 975, 93d Cong., 2d Sess. 33 (1974); T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 71-72 (1971).

17. *See* T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 72 (1971); G. HOFFMAN, HEDGING BY DEALING IN GRAIN FUTURES 13-15 (1925).

18. COMMODITY EXCHANGE ADMINISTRATION, TRADING IN COMMODITY FUTURES 2 (1938).

19. *See id.* at 2-3. "Speculation in futures contracts reached such vast proportions during the Civil War that the Chicago Board of Trade in 1865 adopted rules recognizing trading in grain futures as a distinct commercial practice." *Id.* at 3. *See also* S. REP. NO. 1131, 93d Cong., 2d Sess. 11-13 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5852-54; T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 72-74 (1971).

York Cotton Exchange began trading in cotton futures.[20]

As trading developed in futures, so did the problems. In 1868 it was reported that there was a "corner a month" on the Chicago Board of Trade.[21] Speculative operations were common,[22] and the Chicago Board of Trade was viewed by at least one congressman as a "gambling hell."[23] The growth of "bucket shops," which bet against their customers on changes in market prices on the grain exchanges,[24] also led to the condemnation of futures trading, and several states enacted statutes that prohibited some forms of futures trading as gambling.[25]

As a result of these and other abuses, Congress began in 1883 to consider legislation to regulate commodity trading. In the next 40 years, over 200 bills designed to regulate futures trading were introduced in Congress,[26] but the Future Trading Act of 1921[27] was the first such legisla-

---

20. COMMODITY EXCHANGE ADMINISTRATION, TRADING IN COMMODITY FUTURES 3 (1938).

21. T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 83 (1971).

22. G. HOFFMAN, HEDGING BY DEALING IN GRAIN FUTURES 17-18 (1925).

23. Rainbolt, *Regulating the Grain Gambler and His Successors*, 6 HOFSTRA L. REV. 1, 6 (1977).

24. T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 87-88 (1971). "Bucket shop" operations eventually were stopped by cutting off access to price quotes from the futures exchanges. *Id.* at 88; *see* Board of Trade v. Price, 213 F. 336, 337 (8th Cir. 1914). Bucket shops are now prohibited by the Commodity Exchange Act. *See* 7 U.S.C. §§ 6, 6b, 6h (1976).

25. *See* T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 88 (1971); H.R. REP. NO. 975, 93d Cong., 2d Sess. 34 (1974). For examples of state statutes that were enacted to restrict some forms of futures trading, see Act of Mar. 7, 1907, No. 342, 1907 Ala. Acts 448 (current version at ALA. CODE §§ 8-1-120 to -131 (1975)); Act of Apr. 5, 1928, No. 711, 1928 S.C. Acts 1321 (current version at S.C. CODE ANN. §§ 32-1-210 to -290 (Law. Co-op. 1976)).

26. H.R. REP. NO. 975, 93d Cong., 2d Sess. 34 (1974). A commodity futures contract is an agreement to "deliver or take delivery of a given quantity and quality of a commodity, at a price agreed upon when the contract is made, with delivery at the seller's option sometime during the specified future delivery month." CHICAGO BOARD OF TRADE, COMMODITY TRADING MANUAL 8 (1973). For similar definitions, see S. REP. NO. 850, 95th Cong., 2d Sess. 128 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087, 2216; COMMODITY FUTURES TRADING COMMISSION, GLOSSARY OF SOME TERMS COMMONLY USED IN THE FUTURES TRADING INDUSTRY 13 (1979). An agreement to *take* future delivery of a commodity at a certain price places a trader in a "long" position, while an agreement to *make* future delivery of a commodity at a certain price places a trader in a "short" position. *See* Cargill, Inc. v. Hardin, 452 F.2d 1154, 1156-57 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); COMMODITY FUTURES TRADING COMMISSION, 1976 ANNUAL REPORT 131, 135 (1976). However, trading in the commodity futures markets seldom results in delivery or receipt of a commodity. *See* Cargill, Inc. v. Hardin, 452 F.2d at 1156 n.2; Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 EMORY L.J. 1175, 1176-77 (1978). Rather, futures traders usually enter into offsetting transactions to liquidate their positions in the futures. Money is made or lost in the price differential between the original contract and the offsetting transaction. *See* Cargill, Inc. v. Hardin, 452 F.2d at 1157.

27. Chapter 86, 42 Stat. 187 (1921), *amended by* Grain Futures Act, ch. 369, 42 Stat. 998 (1922) (current version at 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980)).

tion to be enacted.[28] This statute established a regulatory scheme designed to restrict futures trading to bona fide commodity exchanges by imposing a prohibitive tax of twenty cents per bushel on grain futures contracts traded on exchanges that were not approved by the government and that did not meet specified requirements.[29] The Future Trading Act, however, was short lived. In 1922 the Supreme Court held in *Hill v. Wallace*[30] that the Future Trading Act of 1921 was an unconstitutional exercise of Congress' taxation powers.[31]

Congress quickly responded to the *Wallace* decision. In 1922 Congress enacted the Grain Futures Act,[32] which, while similar in scope to the Future Trading Act,[33] was based on the power of Congress to regulate interstate commerce.[34] The Grain Futures Act, like its predecessor, sought to regulate futures trading in grain and established only minimal regulation, including a licensing system pursuant to which commodity exchanges were required to be "designated" by the federal government as a "contract market" in each commodity on which futures contracts were traded.[35] One condition for such designation required exchanges to regulate their members' conduct to prevent price manipulation.[36] The Act also prohibited futures trading in grain unless the contracts were traded through a member of a contract market or unless the contracts were for deferred shipment or delivery by owners or growers.[37]

---

28. *See* H.R. REP. NO. 975, 93d Cong., 2d Sess. 34 (1974).

29. Future Trading Act of 1821, ch. 86, §§ 3, 4, 42 Stat. 187, 187, *amended by* Grain Futures Act, ch. 369, 42 Stat. 998 (1922) (current version at 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980)).

30. 259 U.S. 44 (1922).

31. *Id.* at 68.

32. Chapter 369, 42 Stat. 998 (1922) (current version at 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980)).

33. 2 COMM. FUT. L. REP. (CCH) ¶ 20,772, at 23,168 n.25 (CFTC Mar. 12, 1979); Rainbolt, *Regulating the Grain Gambler and His Successors*, 6 HOFSTRA L. REV. 1, 7 (1977).

34. The Grain Futures Act was held to be a constitutionally valid exercise of the Commerce Power in Board of Trade v. Olsen, 262 U.S. 1, 43 (1923).

35. Grain Futures Act, ch. 369, § 5, 42 Stat. 998, 1000 (1922) (codified as amended at 7 U.S.C. § 7 (1976)); S. REP. NO. 1131, 93d Cong., 2d Sess. 13 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5855. Thus:

> A separate futures market is established for each regulated commodity trade[d] on a contract market. The contract markets have the authority, with certain limitations, to admit members and select officers; discipline offenders and expel members; determine delivery months and contract terms; fix price fluctuation limits (the amount of permissible price change during a trading day); and establish margin requirements, brokerage fees, and commissions.

H.R. REP. NO. 975, 93d Cong., 2d Sess. 35 (1974). *See also* S. REP. NO. 1131, 93d Cong., 2d Sess. 101 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5891 (defining "contract market"). Sections 4 and 4h of the Commodity Exchange Act prohibit commodity futures transactions except through a member of a contract market. 7 U.S.C. §§ 6, 6h (1976).

36. Grain Futures Act, ch. 369, § 5(d), 42 Stat. 998, 1000 (1922) (current version at 7 U.S.C. § 7(d) (1976)).

37. *Id.* § 4, 42 Stat. at 999-1000 (current version at 7 U.S.C. § 6 (1976)).

Regulation under the Grain Futures Act proved ineffective, however, and continued abuses and speculation in futures trading resulted in a presidential call for additional legislation.[38] After conducting extensive hearings,[39] Congress found regulation under the Grain Futures Act to be inadequate and, in its place, enacted the Commodity Exchange Act in 1936.[40] The Commodity Exchange Act applied to futures trading in wheat, corn, oats, barley, rye, flaxseed, grain sorghums, cotton, mill feeds, butter, eggs, potatoes, and rice.[41] The Commodity Exchange Act also created a Commodity Exchange Commission to administer its provisions. This Commission was composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General.[42] The Secretary of Agriculture was given day-to-day regulatory authority over the trading on regulated futures contracts. The Secretary, in turn, delegated much of his authority to the Commodity Exchange Authority, an agency established by the Secretary of Agriculture specifically to administer the Act.[43]

The Commodity Exchange Act made price manipulation a criminal offense[44] and sought to discourage "excessive speculation by the large market operator, and to expand regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and fictitious transactions in futures, which were seriously impairing the services of the market."[45] Among other things, commodity brokerage firms were required to register as futures commission merchants, and persons trading on exchange floors for the accounts of others were required to register as floor brokers.[46] In addition, customer funds held by futures commission merchants were required to be segregated from other funds.[47]

As a further protection, the Commodity Exchange Commission was authorized to establish limits on positions and trading by speculators. The

---

38. H.R. REP. NO. 421, 74th Cong., 1st Sess. 2 (1935).

39. *Regulation of Grain Exchanges: Hearings Before the House Committee on Agriculture on H.R. 8829*, 73d Cong., 2d Sess. (1934); *Regulation of Commodity Exchanges: Hearings Before the House Committee on Agriculture on H.R. 3009*, 74th Cong., 1st Sess. (1935).

40. Chapter 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980)).

41. *Id.* sec. 3(a), § 2, 49 Stat. 1491, 1491 (1936) (current version at 7 U.S.C. § 2 (1976)); H.R. REP. NO. 975, 93d Cong., 2d Sess. 34-35 (1974).

42. Commodity Exchange Act, ch. 545, sec. 3(b), § 2, 49 Stat. 1491, 1492 (1936) (current version at 7 U.S.C. § 2 (1976)); *see* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 295 (1973).

43. H.R. REP. NO. 975, 93d Cong., 2d Sess. 36 (1974).

44. *See* Commodity Exchange Act, ch. 545, sec. 11, § 9, 49 Stat. 1491, 1501 (1936) (current version at 7 U.S.C. § 13(b) (1976)).

45. S. REP. NO. 850, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087, 2096.

46. *See* Commodity Exchange Act, ch. 545, sec. 3(b), § 2, 49 Stat. 1491, 1491-92 (1936) (current version at 7 U.S.C. § 2 (1976)) (defining "futures commission merchants" and "floor brokers"); *id.* sec. 5, § 4f, 49 Stat. at 1495 (current version at 7 U.S.C. § 6f (1976)) (registration requirement).

47. *Id.* sec. 5, § 4d, 49 Stat. at 1494-95 (current version at 7 U.S.C. § 6d (1976)).

Act also prohibited trading in commodity options on regulated commodities, and it prohibited wash sales, fictitious transactions, bucketing of customer orders, and the cheating and defrauding of commodity futures customers.[48]

The Commodity Exchange Act of 1936 was subsequently amended several times to expand its coverage to include additional commodities.[49] The 1968 amendments to the Commodity Exchange Act also significantly expanded the regulatory safeguards under the Act, including the addition of a requirement that contract markets enforce certain rules and that the government review those rules.[50] Following the 1968 amendments, the number of commodities on which futures were traded continued to expand. For example, trading commenced in futures contracts on various international currencies, including Canadian dollars, pounds sterling, and Mexican pesos, as well as in other commodities, including silver, copper, platinum, industrial fuel oil, heating oil, palladium, and gold.[51] In addition, trading began in the early 1970's in commodity options contracts[52]

---

48. *Id.* sec. 5, §§ 4a, 4b, 4c, 49 Stat. at 1492-94 (current version at 7 U.S.C. §§ 6a, 6b, 6c (1976 & Supp. IV 1980)).

49. These amendments were, in summary, as follows:

> By the amendment of April 7, 1938, wool tops were added . . . and fats and oils, cottonseed, cottonseed meal, peanuts, soybeans, and soybean meal were added October 9, 1940. Wool (as distinguished from wool tops) was added on August 28, 1954, and the act was made applicable to onions on July 26, 1955. Public Law 85-839, approved August 28, 1958, prohibited futures trading in onions, effective September 27, 1958, but did not remove onions from the list of commodities covered by the Commodity Exchange Act. Effective June 18, 1968, the act was amended to include livestock and livestock products . . . . Public Law 90-418, approved July 23, 1968, extended coverage of the act to frozen concentrated orange juice.

H.R. REP. NO. 975, 93d Cong., 2d Sess. 35 (1974).

50. *See* Act of Feb. 19, 1968, Pub. L. No. 90-258, sec. 12(c), § 5a, 82 Stat. 26, 29 (current version at 7 U.S.C. § 7a(8)-(9) (1976)).

51. *See* S. REP. NO. 850, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087, 2097; H.R. REP. NO. 975, 93d Cong., 2d Sess. 41 (1974).

52. A commodity option is

> a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price, known as the "striking price." A contract entitling its owner to purchase the commodity is known as a "call," and a contract entitling its owner to sell is called a "put." In the plainest case, an option is created, or "written," by the owner of a commodity or commodity futures contract, who commits himself to sell his goods or contract. But an option can also be written by anyone else willing to take the chance that he will be able to cover his obligation in the futures market, if the option purchaser decides to exercise the option. Such an option is described as "naked."
>
> . . . .
>
> To profit from this purchase, the customer must exercise the option before it expires. Exercising the option means buying the underlying futures contract. Since the customer normally has no interest in actually receiving the commodity on the delivery date, the clearing member then sells a futures contract short for the customer. The difference between the price at which the option is exercised plus the cost of purchasing the option (premium and commission) and the price

and in leverage contracts.[53] Widespread fraud and insolvencies in commodity options, including the Goldstein, Samuelson debacle,[54] and the continuing expansion of futures trading in unregulated commodities, caused further concern in Congress.[55]

In 1973 Congress conducted a series of hearings on the need for additional regulation[56] and thereafter enacted the CFTC Act of 1974.[57] The CFTC Act was the first complete overhaul of the Commodity Exchange

---

at which the futures contract is sold is the customer's profit. If, however, the market price for the futures contract has dropped below the striking price, the customer allows the option to expire, in which case he loses his entire investment.

British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482, 484-85 (2d Cir.) (footnote omitted), *cert. denied*, 434 U.S. 938 (1977). For a discussion of the difference between options contracts and futures contracts, see CFTC v. United States Metals Depository Co., 468 F. Supp. 1149, 1154-55 (S.D.N.Y. 1979).

53. A leverage contract is

> an agreement for the purchase or sale of a contract for the delivery at a later date of a specified commodity in a standard unit and quality, or the close-out of the contract by an offsetting transaction. The principal characteristics of the contract include: (1) standard units, quality, and terms and conditions; (2) payment and maintenance of "margin"; (3) close-out by an offsetting transaction or by delivery, after payment in full; and (4) no right or interest in a specific lot of a commodity. The leverage dealer is the principal to every transaction and functions as a market maker. The leverage dealer, however, does not guarantee a repurchase market and further reserves the right to cease operating as a market maker or broker for the customer. Most customer commitments are covered or "hedged" in futures, forwards, or physical inventory; most physical inventory, however, is encumbered through bank loans. Leverage contract bid/ask prices are determined by dealer adjustments to spot and futures market quotations.

S. REP. NO. 850, 95th Cong., 2d Sess. 26 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087, 2114. For further discussion of leverage contracts, see Matthews v. Monex Int'l, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,791 (CFTC Mar. 16, 1979).

54. *See* Schobel & Markham, *Commodity Options—A New Industry or Another Debacle?*, SEC. REG. & L. REP. (BNA) (Special Supp.) No. 347, at 3 (Apr. 7, 1976).

55. *Id.; see* H.R. REP. NO. 975, 93d Cong., 2d Sess. 36-39 (1974); Schief & Markham, *The Nation's "Commodity Cops"—Efforts by the Commodity Futures Trading Commission to Enforce the Commodity Exchange Act*, 34 BUS. LAW. 19, 20-21 (1978).

56. *See generally Commodity Futures Trading Commission Act of 1974: Hearings Before the Committee on Agriculture on H.R. 11955*, 93d Cong., 2d Sess. (1974); *Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113*, 93d Cong., 2d Sess. (1974); *Agriculture-Environmental and Consumer Protection Appropriations for 1974: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 1st Sess. pt. 4, at 386-529 (1973); *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. (1973); *Russian Grain Transactions: Hearings on Russian Grain Transactions Before the Permanent Subcommittee on Investigations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess. pt. 1 (1973); *Small Business Problems Involved in the Marketing of Grain and Other Commodities: Hearings Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. (1973); *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Committee on Agriculture*, 93d Cong., 1st Sess. (1973).

57. Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified in scattered sections of 5, 7 U.S.C. (1976)).

Act since its inception in 1936, and it was intended by Congress to establish a comprehensive regulatory structure to govern commodity futures trading.[58] Among other things, the CFTC Act removed regulatory authority over futures trading from the Commodity Exchange Commission and created the Commodity Futures Trading Commission, an independent five-member commission possessing the authority to administer the Commodity Exchange Act.[59] The CFTC Act also expanded the commodities regulated under the Commodity Exchange Act to include the previously regulated commodities and "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[60] The CFTC was given exclusive jurisdiction over all such transactions and over commodity options and leverage transactions.[61]

The CFTC Act established additional classes of persons required to register with the CFTC, including commodity trading advisors,[62] commodity pool operators,[63] and associated persons of futures commission merchants.[64] The CFTC assumed preexisting authority to suspend or revoke the registration of persons registered under the Act,[65] and the CFTC was granted enforcement powers, including the authority to seek injunctive relief in federal district courts to restrain violations,[66] to issue cease and desist orders,[67] and to prohibit persons from trading on, or subject to, the rules of any contract market.[68] The CFTC also was authorized to impose civil penalties of up to $100,000 for each violation of the Act.[69] In addition, the CFTC Act created a new claims procedure available to persons injured by violations of the Commodity Exchange Act.[70] The Act thus established an administrative procedure before the CFTC that allows individuals to be awarded reparations for damages sustained as the result of violations of the Act or regulations thereunder by a person registered with the CFTC.[71]

II. LEGISLATIVE BACKGROUND OF THE CFTC REPARATIONS PROCEDURE

Prior to the CFTC Act hearings, the case law on whether there was

58. H.R. REP. NO. 975, 93d Cong., 2d Sess. 1 (1974).
59. 7 U.S.C. §§ 2, 4a (1976).
60. *Id.* § 2.
61. *Id.* §§ 2, 6c(b).
62. *Id.* § 6n.
63. *Id.*
64. *Id.* § 6k.
65. *Id.* § 9.
66. *Id.* § 13a-1.
67. *Id.* § 13b.
68. *Id.* § 9.
69. *Id.* § 13a.
70. *Id.* § 18.
71. *Id.*

a private right of action under the Commodity Exchange Act was not widely developed. In *Chicago Mercantile Exchange v. Deaktor*[72] the Supreme Court reversed a Seventh Circuit decision that recognized a private right of action under the Commodity Exchange Act on the ground that the asserted violation "should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case."[73] Similarly, in other cases in which jurisdictional issues were raised, the courts did not always address whether Congress intended a private right of action under the statute.[74] For these reasons, litigation of issues arising in the context of commodity trading often were brought on the basis of state law or federal securities law, or in arbitration proceedings before the exchanges.

These differing actions led to much confusion concerning whether particular commodity transactions were securities transactions. For example, the issue whether options were securities, subject to state and federal securities laws, was a subject of controversy,[75] as was the issue whether discretionary commodity accounts were securities.[76] Exchange arbitration was also an uncertain forum. In one widely publicized case it was charged that the procedures of the largest of the commodity exchanges did not provide a fair forum for adjudication of disputes.[77] Indeed, it was stated in the Senate debates on the CFTC Act that the initial impetus for the legislation came from "a six-part series in the Des Moines Register . . . on a particular example of abuse arising from the lack of effective regulation—the Bernard Rosée case."[78] Rosee, a trader on the Chicago

---

72. 414 U.S. 113 (1973) (per curiam).

73. *Id.* at 115.

74. *See* Arnold v. Bache & Co., 377 F. Supp. 61, 65-66 (M.D. Pa. 1973); Gould v. Barnes Brokerage Co., 345 F. Supp. 294, 294-95 (N.D. Tex. 1972); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1343 (E.D. La. 1972); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968).

The Supreme Court recently held that Congress intended a private right of action under the Commodity Exchange Act. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825, 1844 (1982).

75. *See generally* Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. L. 217, 256-57 (1976) (discussing whether commodity options are securities).

76. *Id.* at 248. *Compare* Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 279 (7th Cir.) (discretionary commodity account is not a security), *cert. denied*, 409 U.S. 887 (1972), *with* SEC v. Continental Commodities Corp., 497 F.2d 516, 520-23 (5th Cir. 1974) (discretionary commodity account is a security), *and* Commercial Iron & Metal Co. v. Bache & Co., 478 F.2d 39, 42 (10th Cir. 1973) (discretionary commodity account is a security), *and* Marshall v. Lanson Bros. & Co., 368 F. Supp. 486, 490 (S.D.N.Y. 1974) (discretionary commodity account is a security), *and* Maheu v. Reynolds & Co., 282 F. Supp. 423, 426 (S.D.N.Y. 1967) (discretionary commodity account is a security).

77. *See In re* Petition of Bernhard Rosee, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,140, at 20,924 (CFTC Mar. 3, 1976).

78. 120 CONG. REC. 30,463 (1977) (remarks of Sen. Clark).

Board of Trade, was expelled from the board in 1960 after allegedly being defrauded of over $500,000 by a member firm.[79]

Concern over the inefficiency of remedies for participants in the commodity markets led to a proposal to create a specialized forum for the adjudication of disputes in commodity futures transactions.[80] The Administrator of the Commodity Exchange Authority proposed that each contract market should be required to provide a fair and equitable procedure for the settlement of customer claims against members or employees of an exchange.[81] The Administrator also proposed that decisions made by contract markets concerning customer claims be appealable to a federal agency.[82]

Both the Senate and House Committees considering this legislation adopted a proposal to require exchanges to establish an arbitration procedure for customer claims under $5000 that would result in the voluntary informal settlement of such claims.[83] Unless agreed to by the parties, the procedure was not to result in compulsory payment.[84] This arbitration process, however, did not provide for an appeal to the CFTC or any other regulatory body.[85] Instead, the Senate and House Committees proposed and adopted a reparations procedure before the CFTC to handle customer complaints.[86] This procedure permits persons injured by violations of the Act to institute proceedings before the CFTC to recover damages caused by persons registered with the CFTC.[87] The House Committee believed, however, that reparations proceedings would only involve complaints that had not been resolved through the informal arbitration procedures required of the contract markets.[88]

The House Agriculture Committee initially had proposed a repara-

---

79. *Id.*

80. H.R. REP. NO. 975, 93d Cong., 2d Sess. 52 (1974).

81. *Id.*

82. *Id.* at 53.

83. *Id.* at 3; S. REP. NO. 1131, 93d Cong., 2d Sess. 37 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5876.

84. S. REP. NO. 1131, 93d Cong., 2d Sess. 37 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5876.

85. *See id.*

86. H.R. REP. NO. 975, 93d Cong., 2d Sess. 57 (1974); S. REP. NO. 1131, 93d Cong., 2d Sess. 29-30 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5868-69. These provisions were adopted substantially in the form proposed. *Compare* H.R. REP. NO. 975, 93d Cong., 2d Sess. 57 (1974), *and* S. REP. NO. 1131, 93d Cong., 2d Sess. 29-30 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5868-69, *with* 7 U.S.C. § 18 (1976 & Supp. IV 1980). Subsequently, the CFTC proposed regulations to assure that customers submitting to the procedure did so voluntarily and that the procedure was "fair and equitable." 17 C.F.R. §§ 180.1-.3 (1981). *See generally* 40 Fed. Reg. 29,121 (1975) (CFTC interpretation of arbitration requirements); Schneider, *Commodities Law and Predispute Arbitration Clauses*, 6 HOFSTRA L. REV. 129 (1977) (analyzing CFTC regulation 180.3 on predispute arbitration clauses).

87. 7 U.S.C. § 18 (1976 & Supp. IV 1980).

88. H.R. REP. NO. 975, 93d Cong., 2d Sess. 57 (1974).

tions procedure for inclusion in the CFTC Act that was modeled on the reparations procedure of the Stockyard and Shippers Act.[89] This proposal contained a provision stating that an action could be brought in a district court to enforce a reparations award and that the enforcement actions were to "proceed in all respects like other civil suits for damages except that the findings and orders of the CFTC would be '*prima facie* evidence of the facts therein stated.' "[90] The Senate Committee, however, adopted a different proposal that would have provided for enforcement proceedings in a district court that would

> proceed in all respects like other civil suits for damages except that the findings of fact and orders of the Commission would be prima facie evidence of the facts therein stated *and reviewable only for the purposes of determining if they are supported by substantial evidence.*[91]

The Senate revision established a stronger use of the Commission's findings. It viewed the words "prima facie" to mean something more than an evidentiary instruction, which was their intended meaning in the Packers and Stockyard Act. Nevertheless, the Senate Committee apparently intended that there be an opportunity for a jury trial, and a jury could still reject the CFTC's findings. The Senate report thus indicated that the matter was to proceed like any other "civil suit for damages."[92]

In considering the Senate and House proposals, the Conference Committee noted, however, that

> [j]udicial review of the Commission's findings and order would under the *House* bill be de novo, except that the findings of fact and orders of the Commission would be prima facie evidence of the facts therein stated. Under the *Senate* amendment, the findings would be reviewable only for purposes of determining if they are supported by substantial evidence.[93]

The Conference Committee rejected both proposals and decided that the CFTC's findings of fact would be reviewable only in the courts of appeals.[94] The Conference Committee further provided that, in enforcing the award in a district court, the findings of the Commission would be conclusive—no

---

89. *Compare* H.R. REP. NO. 975, 93d Cong., 2d Sess. 6-7 (1974), *and* H.R. 13,113, 93d Cong., 2d Sess. § 105, 120 CONG. REC. 10,754 (1974), *with* 7 U.S.C. § 210 (1976).

90. H.R. REP. NO. 975, 93d Cong., 2d Sess. 6-7 (1974); *see* H.R. 13,113, 93d Cong., 2d Sess. § 105, 120 CONG. REC. 10,754 (1974).

91. S. REP. NO. 1131, 93d Cong., 2d Sess. 30 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5869 (emphasis added in part); *see* H.R. 13,113, 93d Cong., 2d Sess. 120 CONG. REC. 30,410 (1974) (as amended by the Senate Committee on Agriculture and Forestry).

92. S. REP. NO. 1131, 93d Cong., 2d Sess. 30 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5869.

93. S. REP. NO. 1194, 93d Cong., 2d Sess. 34 (1974) (emphasis original).

94. *Id.*

jury trial or factual review would be available in the district court.[95]

The Conference Committee thus effectively eliminated jury trials on factual issues decided by the CFTC. In so doing, it made the CFTC reparations procedure substantially different from those of other federal agencies because, historically, Congress had constructed reparations procedures for federal agencies in a manner that allowed a jury trial in accordance with the standards of the seventh amendment.[96] Before discussing the constitutionality of the denial of seventh amendment protection to parties in

---

95. *Id.* at 35. Review of decisions in reparations proceedings under § 14 of the Commodity Exchange Act, 7 U.S.C. § 18(g) (1976), is governed by § 6(b) of the Commodity Exchange Act, *id.* § 9. Section 6(b) is the review provision for CFTC administrative disciplinary proceedings, which provides for review in the courts of appeals. That provision states that the findings of the Commission "as to the facts, is supported by the weight of evidence, shall . . . be conclusive." *Id.*

96. In 1887 the Interstate Commerce Commission (ICC) was authorized by Congress to allow reparations awards in favor of shippers and against carriers regulated by the ICC when such concerns charged excessive rates. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, 384. The ICC, however, refused to enter monetary reparations awards because of its belief that the failure to provide for a jury trial violated the requirements of the seventh amendment. *See, e.g.*, Macloon v. Chicago & N. Ry., 3 I.C. Rep. 711, 716 (1891), *noted in* Western N.Y. & P.R.R. v. Penn. Ref. Co., 137 F. 343, 349 (3d Cir. 1905), *aff'd*, 208 U.S. 208 (1908); Rawson v. Newport, N. & M.V. Co., 2 I.C. Rep. 626, 631 (1889); Riddle, Dean & Co. v. Baltimore & O.R.R., 1 I.C. Rep. 787, 792 (1889). In response to the ICC's concern, Congress amended the ICC statute in 1889 to provide for a jury trial in proceedings to enfore ICC reparations awards. Act of Mar. 2, 1889, ch. 387, 25 Stat. 855, 859. This amendment provided that the findings and orders of the ICC were to be prima facie evidence of the facts, *see* 49 U.S.C. § 16(2) (1976); Crooks, *Reparation Actions Before Regulatory Commissions*, 28 IOWA L. REV. 650, 651 (1943), thereby giving efficacy to the ICC award but also preserving the right to a jury trial. On that basis the statute was upheld as constitutional. *See, e.g.*, Lehigh Valley R.R. v. Clark, 207 F. 717, 720-21 (3d Cir. 1913), *rev'd on other grounds sub nom.* Mills v. Lehigh Valley R.R., 238 U.S. 473, 482 (1915); Western N.Y. & P.R.R. v. Penn. Ref. Co., 137 F. 343, 349-50 (3d Cir. 1905), *aff'd*, 208 U.S. 208 (1908).

Other statutes that contained reparations procedures modeled after those of the ICC were subsequently adopted by Congress for proceedings before the Federal Maritime Commission (previously the Federal Maritime Board) under the Shipping Act, ch. 451, § 22, 39 Stat. 728, 736 (1916) (codified as amended at 46 U.S.C. § 821 (1976)), and before the Secretary of Agriculture under the Packers and Stockyards Act, ch. 64, § 309, 42 Stat. 159, 165 (1921) (codified at 7 U.S.C. § 210 (1976)). *See* Bowman, *Reparation Claims Under the Packers and Stockyards Act*, 22 FED. B.J. 92, 93-95 (1962). Both of these statutes contained language designed, like that in the ICC statutes, to preserve the right to a jury trial by making the agency's findings only "prima facie" evidence. *Cf.* 7 U.S.C. § 18(f) (1976) (describing CFTC reparations procedures), *discussed at* text accompanying notes 112-41 *infra*.

In Southern Ry. v. Eichler, 56 F.2d 1010 (8th Cir. 1932), the Eighth Circuit affirmed an ICC reparations award, concluding that a carrier's right to a jury trial was not abridged because the reparations order was enforceable in a suit in the district court where there was a right to a de novo trial by jury. *Id.* at 1013. Similarly, the Seventh Circuit has held that an ICC reparations award sought to be enforced in a district court does not remove any question of fact from the jury. Cleveland C., C. & St. L. Ry. v. Blair, 59 F.2d 478, 479 (7th Cir. 1932).

CFTC reparations proceedings, the precise nature of the CFTC reparations procedure will be analyzed.

III. CFTC REPARATIONS AUTHORITY

Section 14 of the Commodity Exchange Act states that any person may complain to the CFTC and seek reparations for violations of the Commodity Exchange Act and the rules, regulations, and orders thereunder.[97] The complaint must be made within two years after the cause of action has accrued and may be made only against certain persons registered under specified provisions of the Act.[98] Those registered persons include floor brokers,[99] futures commission merchants,[100] associated persons of futures commission merchants,[101] commodity trading advisors,[102] and commodity pool operators.[103] Claims also may be made against persons engaging in activities that require them to be registered even if they are not in fact registered.[104]

Section 14 requires a complainant to file its complaint with the CFTC. The complaint must briefly state the facts upon which the complainant contends a violation has occurred. If the CFTC determines that a violation may be present, a copy of the complaint is forwarded by the CFTC

---

97. 7 U.S.C. § 18(a) (1976). For a thorough discussion of procedural requirements in CFTC reparations proceedings and a review of cases decided under that procedure, see Rosen, *Reparation Proceedings Under The Commodity Exchange Act*, 27 EMORY L.J. 1005 (1978).

98. 7 U.S.C. § 18(a) (1976).

99. *Id.* § 63. Floor brokers execute orders on the floors of commodity futures exchanges (contract markets) for their own account and for the accounts of customers. *See id.* § 2.

100. *Id.* § 6d. A futures commission merchant is simply a commodity brokerage firm. *See id.* § 2.

101. *Id.* § 6k. An associated person is an employee or other person associated with a futures commission merchant who solicits or accepts customer orders, or supervises persons so engaged. *See id.* § 2.

102. *Id.* § 6m. Commodity trading advisors include persons advising through publications or writings about the value of commodities or about the advisability of trading any commodity for future delivery. *Id.* § 2. *See generally* Mitchell, *The Regulation of Commodity Trading Advisors*, 27 EMORY L.J. 957 (1978).

103. 7 U.S.C. § 6m (1976). A commodity pool operator is defined to include:

> any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

Id. § 2.

104. This latter provision was added by the Futures Trading Act of 1978, Pub. L. No. 95-405, sec. 21(1), § 14(a), 92 Stat. 865, 875-76 (codified at 7 U.S.C. § 18(a) (Supp. IV 1980)).

to the respondent, who must either satisfy the complaint or answer it in writing.[105] The CFTC may, in its discretion, conclude that a complaint will be rejected without affording the complaining party an opportunity for a hearing.[106] The CFTC has also promulgated its own rules specifying similar procedures for reparations proceedings.[107]

When the CFTC has investigated a complaint and served the complaint on the respondent, the respondent is afforded the opportunity for a hearing before an administrative law judge designated by the Commission.[108] In cases in which a complaint is less than $5000, however, the statute provides that a hearing need not be held and that proof may be submitted in the form of depositions, verified statements of fact, or a complaint.[109] After a hearing on the papers, or, if the claim involves over $5000, after a hearing before an administrative law judge, the CFTC will determine whether a violation has occurred and the amount of damages, if any, to which the complainant is entitled as a result of the violation.[110] If damages are found, the CFTC will direct the respondent to pay the amount of the damages to the complainant.[111]

Section 14 of the Commodity Exchange Act also provides for review of the CFTC's findings and reparations awards before a United States Court of Appeals.[112] No provision is made for a jury trial at any point in this review process. Instead, section 14 incorporates another provision of the Commodity Exchange Act that allows judicial review of the CFTC's factual findings in administrative disciplinary proceedings in the courts of appeals.[113] The provision states, however, that the factual findings of the CFTC, "if supported by the weight of evidence, shall . . . be conclusive."[114] This may mean that, for the most part, the weight attributed to particular evidence and the inferences to be drawn from particular facts "are for the Commission to determine, not the courts."[115]

---

105. 7 U.S.C. § 18(a) (1976).

106. *Id.* § 18(b) (Supp. IV 1980).

107. 17 C.F.R. §§ 12.21-.27 (1981). CFTC rules provide for discovery, pretrial matters, and summary disposition before the administrative law judge. *See id.* §§ 12.61-.67.

108. 7 U.S.C. § 18(b) (Supp. IV 1980).

109. *Id.*

110. 17 C.F.R. § 12.84(b) (1981). In practice, the administrative law judge will decide whether there is a violation after making findings. *Id.* That decision may then be appealed to the CFTC. *Id.* § 12.101. If not appealed or reviewed by the CFTC sua sponte, the administrative law judge's decision becomes the order of the CFTC. *Id.* § 12.95(e). The order, however, may not bind the CFTC in future cases. Johnson v. Fahnestock & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,488, at 21,982 (CFTC Sept. 26, 1977).

111. 7 U.S.C. § 18(e) (1976).

112. *Id.* § 18(g). In the appeal the respondent must file a bond that is double the amount of the reparations award, plus interest, costs, and reasonable attorney fees. *Id.*

113. *Id.*

114. *Id.* § 9. The CFTC may decline to review a decision of its administrative law judge, in which case the findings and decision of the administrative law judge become an appealable order of the CFTC. *See generally* 17 C.F.R. § 12.101 (1981).

115. *See* Corn Prods. Ref. Co. v. FTC, 324 U.S. 728, 739 (1945).

Section 14 of the Commodity Exchange Act also provides that a complainant may enforce a reparations award by filing a certified copy of the CFTC order in an appropriate United States District Court.[116] In those cases, subject to the right of appeal to the court of appeals as discussed above, the CFTC order awarding reparations shall be final and conclusive.[117] The CFTC Office of General Counsel has expressed the view that this provision does not permit a trial de novo in district courts.[118] Rather, the Office of General Counsel stated that reparations awards were to be treated as local judgments and that a complainant need only file a certified copy of the Commission's order with the appropriate federal court as the means of obtaining enforcement of the CFTC order.[119]

The CFTC administrative law judge who conducts the factual hearing on the reparations complaint is crucial to the reparations procedure. The administrative law judge, a CFTC employee,[120] is given broad authority in conducting the hearing, including the authority to issue subpoenas,[121] rule on offers of proof,[122] receive evidence,[123] examine witnesses,[124] regulate the course of the hearing,[125] consider and rule on all motions,[126] and render an initial decision.[127] The initial decision must state whether a violation has occurred and set the amount of damages, if any, suffered by the complainant.[128]

In determining whether violations have occurred, the administrative law judge necessarily must make factual findings based on the evidence presented, and the CFTC is empowered to review these factual determinations. In *Kessenich v. Rosenthal & Co.*[129] the CFTC stated that findings of fact made by an administrative law judge in a reparations proceeding "must be supported by the preponderance of the evidence," which must be "substantial in nature."[130] The CFTC also stated, however, that findings of fact made by an administrative law judge based on credibility determinations should not be disturbed "unless error is clearly shown."[131]

---

116. 7 U.S.C. § 18(f) (1976).

117. *Id.*

118. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,875, at 23,566 (CFTC Aug. 2, 1979).

119. *Id. But cf.* United States v. Home Indem. Co., 549 F.2d 10, 13-14 (7th Cir. 1977) (district court in which registered judgment of another district court is being enforced has more than mere ministerial duty—district court may stay enforcement of judgment).

120. 7 U.S.C. § 18(b) (Supp. IV 1980).

121. 17 C.F.R. § 12.74 (1981).

122. *Id.* § 12.80(e).

123. *Id.* § 12.80.

124. *Id.* § 12.79(c).

125. *Id.* § 12.79.

126. *Id.* §§ 12.79-.80.

127. *Id.* § 12.84.

128. *Id.* § 12.84(b).

129. 2 COMM. FUT. L. REP. (CCH) ¶ 21,181 (CFTC Mar. 24, 1981).

130. *Id.* at 24,860.

131. *Id.* (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951)); *accord*

In *Ball v. Shearson Hayden Stone, Inc.*[132] the CFTC further stated that credibility findings of an administrative law judge that are based on conflicting testimony and evidence should be given the "highest degree of deference on review," which means that the administrative law judge's credibility resolutions will not be overturned unless they are "incredible or patently unreasonable," or "unless evidence to the contrary is overwhelmingly compelling."[133] These tests should be compared to the provisions of rule 52 of the Federal Rules of Civil Procedure, which states that findings of fact by a judge in a nonjury trial will not be set aside "unless clearly erroneous."[134] Under rule 52, findings on credibility are to be given "due regard."[135] In explaining that standard, the Supreme Court stated in *United States v. United States Gypsum Co.*[136] that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[137]

Therefore, it appears that more deference is given to factual determinations by the CFTC or an administrative law judge than is given to a federal district court's findings under rule 52. A "firm conviction" of error under rule 52 would appear to require less for reversal than the "incredible" or "overwhelmingly compelling" CFTC standard. In any event, parties to CFTC reparations proceedings find it very difficult to obtain a significant level of review of factual determinations made by the CFTC or the administrative law judge. If, however, a right to a jury trial

---

Walker v. Rosenthal & Co., 2 COMM. FUT. L. REP. (CCH) ¶ 21,168, at 24,774 (1981).

In *Kessenich* the CFTC relied on the Supreme Court's decision in Steadman v. SEC, 450 U.S. 91 (1981), to support its decision that findings by an administrative law judge in CFTC reparations proceedings need only be supported by a preponderance of the evidence. *Kessenich*, 2 COMM. FUT. L. REP. at 24,860. In a related context, the Court in *Steadman* had held that decisions by the SEC, although subject to a "substantial evidence" standard, 450 U.S. at 96 n.12, need only be supported by a preponderance of evidence. *Id.* at 102. In so holding, the *Steadman* Court relied on a provision of the Administrative Procedure Act, which states:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or a rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d) (1976), *construed in Steadman*, 450 U.S. at 98.

132. 2 COMM. FUT. L. REP. (CCH) ¶ 21,184 (CFTC Apr. 2, 1981).

133. *Id.* at 24,874 (citations omitted). The CFTC also noted, however, that all findings must be supported by "the weight, that is the preponderance of the evidence." *Id.* at 24,874 n.6 (citing Steadman v. SEC, 450 U.S. 91 (1981)).

134. FED. R. CIV. P. 52(a).

135. *Id.*

136. 333 U.S. 364 (1948).

137. *Id.* at 394-95.

were recognized for parties to CFTC proceedings, factual determinations, such as the credibility of the parties, would be judged by a group of their peers. Moreover, factual determinations made by the jury would be unlikely to be reversed because, if there is sufficient evidence to submit a matter to a jury,[138] appellate review of that matter is permitted only on questions of law.[139]

The effects of a CFTC decision may be far reaching. If the damage award is not paid, the registrant may have its registration suspended and be prohibited from trading futures contracts.[140] The CFTC also has stated that a reparations award, even if paid, may become the basis for collateral estoppel in an administrative proceeding to revoke the registrant's license or impose other remedial sanctions.[141] Thus, the right to a jury trial may be extremely important to parties involved in CFTC reparations proceedings.

IV. THE SEVENTH AMENDMENT

In *Parsons v. Bedford*[142] the Supreme Court held that the right to trial by jury is a "fundamental" constitutional principle and that any encroachment on that right must be guarded against jealously.[143] The Court also noted that the seventh amendment guarantees the rights and liberties of

---

138. *See* Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 25 (3d Cir.) (standard of review on motion for directed verdict requires sufficient evidence, viewed in light most favorable to, and allowing all reasonable inferences in behalf of, party opposing the motion), *cert. denied*, 439 U.S. 876 (1978).

139. 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.03[1], at 2614-15 (2d ed. 1982).

140. 7 U.S.C. § 18(h) (1976).

141. *See In re* Anthony Luizzi, No. 78-53, slip op. at 5-6 (CFTC Jan. 27, 1981). *See generally* Montana v. United States, 440 U.S. 147, 162-64 (1979) (collateral estoppel appropriate when plaintiff seeks to relitigate in a federal forum issues that plaintiff voluntarily chose to litigate in a state court); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335-36 (1979) (equitable determination can have collateral estoppel effect in subsequent legal action without violating seventh amendment); *In re* American Int'l Trading Co., 2 COMM. FUT. L. REP. (CCH) ¶ 21,127, at 24,567 (CFTC Nov. 26, 1980) (res judicata appropriate when person found by federal court to have violated Commodity Exchange Act attempts to deny violations in CFTC proceeding); *In re* Hunt, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,803, at 23,271 (CFTC Apr. 3, 1979) (court decision that party violated Commodity Exchange Act precludes that party from alleging innocence before CFTC, but does not preclude CFTC from imposing administrative sanctions).

142. 28 U.S. (3 Pet.) 432 (1830).

143. *Id.* at 445. *See also* Slocum v. New York Life Ins. Co., 228 U.S. 364, 387 (1913). In Dimick v. Schiedt, 293 U.S. 474 (1935), the Supreme Court stated:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" . . . and, as Justice Story said . . . [the] "Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

Id. at 485.

the people[144] and that the protection of the seventh amendment is preserved to the individual and cannot be deprived by action of the Congress or the courts.[145]

It has long been held that the seventh amendment applies only to actions at common law[146] and does not apply to proceedings in equity or admiralty.[147] However, the Supreme Court also has held that the common law embraced all suits in which legal rights were to be determined: "In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction . . . ."[148] In *Hipp v. Babin*[149] the Court further observed that defendants have a constitutional right to a trial by jury, and, therefore, plaintiffs must proceed at law if a court of law is competent to take cognizance of the right in question and has the power to grant a "plain, adequate and complete remedy, without the aid of a court of equity."[150]

Over one hundred years later, in *Beacon Theatres, Inc. v. Westover*,[151] the Supreme Court concluded that a jury trial on a legal cause of action could not be avoided or limited by a prior trial on equitable claims tried to the court without a jury.[152] Thereafter, in *Dairy Queen, Inc. v. Wood*,[153] the Court further held that the protection of the seventh amendment could not be eliminated by imaginative pleading.[154] The Court reasoned that because the claim before it was an action on a debt allegedly due under a contract, the case presented a claim that was unquestionably legal and subject to the right of a jury trial.[155] The Court held that merely by seeking an accounting, rather than damages, a party could not convert a legal action into an equitable action.[156]

---

144. 28 U.S. (3 Pet.) at 445. *See also* Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943); Jacob v. New York City, 315 U.S. 752, 752-53 (1942).

145. 28 U.S. (3 Pet.) at 448. *See also* Raytheon Mfg. Co. v. Radio Corp. of Am., 76 F.2d 943, 947 (1st Cir. 1935), *aff'd*, 296 U.S. 459 (1935).

146. United States v. Louisiana, 339 U.S. 699, 706 (1950).

147. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 533 (1970); Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935); Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77, 80-81 (1st Cir. 1957).

148. Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 446 (1830). *See also* Ross v. Bernhard, 396 U.S. 531, 533 (1970) (right to a jury trial extends to stockholder's derivative suit with respect to those issues for which the corporation, had it brought the suit, would have been entitled to a jury trial).

149. 60 U.S. (19 How.) 271, 278 (1856).

150. *Id.*

151. 359 U.S. 500 (1959).

152. *Id.* at 504. The Court also noted that the right to a jury trial could not be impaired by blending a claim for equitable relief with a claim cognizable at law. *Id.* at 510 (quoting Scott v. Neely, 140 U.S. 106, 109-10 (1891)).

153. 369 U.S. 469 (1962).

154. *Id.* at 477-78.

155. *Id.* at 479.

156. *Id.* at 477-79. *See also* Cates v. Allen, 149 U.S. 451, 458-59 (1893) (court of equity will not take cognizance of a legal claim in jurisdiction in which law/equity distinction is one of substance).

Early in its history, the Supreme Court held that the blending of law and equity by the various states would not limit the scope of the seventh amendment. In other words, federal court jurisdiction would not be determined according to the practice of state courts, but rather according to the common law of England, "the grand reservoir of all our jurisprudence."[157] Consequently, in determining the scope of the seventh amendment, the courts will first look to the law in effect when the seventh amendment was adopted to determine the nature of the relief sought.[158]

The Supreme Court, however, has also held that the right to a jury trial extends beyond common-law forms of actions recognized at the time of the amendment's adoption in 1791.[159] For example, in *Ross v. Bernhard*[160] the Supreme Court considered whether plaintiffs in a stockholder derivative suit were entitled to a jury trial. It noted that under its decisions in *Dairy Queen* and *Beacon Theatres* a jury trial was required for legal issues, even if equitable and legal claims were intermingled.[161] The Court also stated that

> the "legal" nature of an issue is determined by considering, first, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[162]

In recent years, the Supreme Court has had occasion to reconsider, in a trilogy of cases, the scope of the seventh amendment, particularly in the context of statutory remedies unknown, as such, at common law. In the first of these cases, *Curtis v. Loether*,[163] the Supreme Court considered whether the seventh amendment required a jury trial in an action for damages under the Civil Rights Act of 1968. The plaintiff in this case had charged discrimination in the renting of an apartment, and the defendants had requested a jury trial on the issue whether actual and punitive damages should be imposed for violations.[164] The lower court refused the request and, after a trial, found no actual damages, but imposed punitive damages in the amount of $250.[165]

The court of appeals reversed on the jury trial issue, and the Supreme

---

157. Capital Traction Co. v. Hof, 174 U.S. 1, 8 (1899) (citation omitted). *See also* Scott v. Neely, 140 U.S. 106, 110-11 (1891).

158. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

159. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974). *But see* Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

160. 396 U.S. 531 (1970).

161. *Id.* at 537-39.

162. *Id.* at 538 n.10 (citation omitted).

163. 415 U.S. 189 (1974).

164. *Id.* at 190.

165. *Id.* at 191.

Court affirmed, holding that the seventh amendment entitled the defendants to a jury trial.[166] The Supreme Court recognized that while the seventh amendment was intended to preserve the right to a jury trial as it existed in 1791, it is well settled that the right extends beyond the common-law forms of actions recognized at that time.[167] The Court also rejected the argument that the seventh amendment is inapplicable to new causes of action created by congressional enactment.[168]

In *Loether* the Supreme Court also distinguished cases such as *NLRB v. Jones & Laughlin Steel Corp.*,[169] in which it was held that a jury trial was not mandated for back pay awards in an NLRB unfair labor practice proceeding because jury trials "would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."[170] The Supreme Court concluded in *Loether* that when Congress provides for the enforcement of statutory rights in an ordinary civil action in the district courts, and when the action involves rights or remedies typically enforced in an action at law, the parties must be afforded a jury trial—unless there is a functional justification for denying the jury trial right.[171] The Court noted that the damage action before it sounded basically in tort and that the statute merely defined a new *legal* duty and authorized the courts to compensate the plaintiff for the injury caused by the defendants' wrongful conduct.[172] The Court cautioned, however, that it was not holding that any award of monetary relief must necessarily be in the form of "legal" relief which requires an opportunity for jury trial.[173]

Subsequently, in *Pernell v. Southall Realty*[174] the Supreme Court held that the seventh amendment guaranteed the right to jury trial in an action brought to recover possession of real property under a District of Columbia statute.[175] In so holding, the Court noted that actions to recover land are like actions for damages to a person or property and, therefore, are actions at law that are triable to a jury.[176] The Court stressed that its decision in *Loether* was intended to make clear that the seventh amendment

166. *Id.* at 191-92.

167. *Id.* at 193.

168. *Id.* at 193-94. The Court held that the seventh amendment applies to actions enforcing statutory rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Id.*

169. 301 U.S. 1 (1937).

170. 415 U.S. at 194 (citation omitted).

171. *Id.* at 195.

172. *Id.*

173. *Id.* at 196-97.

174. 416 U.S. 363 (1974).

175. *Id.* at 376.

176. *Id.* at 370. The Court traced the path of the common law and concluded that traditionally a jury trial was permitted in ejectment actions, and that the procedure established by the District of Columbia statute was equivalent to common-law actions in which a jury trial was guaranteed. *Id.* at 375.

applies to actions beyond the common-law forms of actions recognized at the time of the adoption of the seventh amendment. Moreover, the Court emphasized that the seventh amendment applies to suits in which legal rights were to be ascertained and determined, including "actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."[177] The Court noted that in *Block v. Hirsh*[178] it had held that rent control commission proceedings were not subject to jury trial rights. The Court distinguished *Block*, however, and stated that *Block* stood for the proposition that when jury trials would be incompatible with the whole concept of administrative adjudication, the seventh amendment generally is inapplicable.[179] The Court assumed that the seventh amendment would not bar a congressional effort to entrust landlord and tenant disputes, including those over the right to possession, to an administrative agency. Nevertheless, because Congress had entrusted those determinations in the statute at issue to a federal court, the Court held that it would apply the seventh amendment.[180]

In *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*[181] the Supreme Court considered whether provisions of the Occupational Safety and Health Act of 1970 (OSHA)[182] violated the seventh amendment. These provisions authorized the federal government to order employers to correct unsafe working conditions and to impose civil penalties on any employer maintaining any unsafe working conditions; there was no provision for a jury trial.[183] In OSHA cases judicial review is obtainable in the courts of appeals, but findings of fact of the government agency are conclusive.[184] Also, if the employer fails to pay an assessed penalty, the Secretary of Labor may commence a collection action in a federal district court. In collection actions neither the fact of the violation nor the propriety of the penalty assessed may be retried.[185]

The petitioners in *Atlas Roofing* contended that allowing Congress to assign the adjudication of civil penalties to an administrative agency would permit Congress, by fiat, to deprive defendants of their seventh amendment jury right. The Supreme Court disagreed, stating that, at least in cases in which "public rights" are at issue, the seventh amendment does not prohibit Congress from assigning a fact-finding function to an administrative forum in which a jury would be incompatible. The Court de-

177. *Id.* at 375.
178. 256 U.S. 135 (1921).
179. 416 U.S. at 383.
180. *Id.*
181. 430 U.S. 442 (1977).
182. 29 U.S.C. §§ 651-678 (1976).
183. *Id.* §§ 658-659, 666. The penalties imposed may be as much as $10,000 for willfully repeated violations. *Id.* § 666(a).
184. *Id.* § 660(a).
185. *Id.* § 666(k).

fined "public rights" cases as "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[186] The Court distinguished those cases in which only "private rights" are involved and in which fact-finding by an administrative agency, without availability of a jury trial, is used only as an adjunct to a court's action.[187]

The Court in *Atlas Roofing* relied on cases in which the government was enforcing statutory rights.[188] The Court stated that those cases

> stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.[189]

The Court noted that it had been argued that the seventh amendment was not intended to turn on the identity of the forum to which Congress had chosen to submit a dispute. If seventh amendment rights turned solely on the forum, it was argued, Congress could "utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases."[190] The Court responded to the argument by stating that it had supported administrative fact-finding only in situations involving "public rights" and that private tort, contract, property, and other private causes of action that were typically believed to involve only legal claims were not implicated.[191] The Court also stated that fact-finding had long been conducted in equity proceedings and that the availability of a jury trial at common law turned to a considerable

---

186. 430 U.S. at 450.

187. *Id.* at 450 n.7.

188. *Id.* at 450-55.

189. *Id.* at 455 (footnote omitted). Previously, a federal district court held that Congress may enact a statute creating a right unknown at common law and may provide a remedy by trial without requiring a jury. The seventh amendment would not apply in those cases. Brotherhood of R.R. Trainmen v. Louisville & N.R.R., 211 F. Supp. 308, 310 (1962), *aff'd*, 334 F.2d 79 (5th Cir.), *cert. denied*, 379 U.S. 934 (1964). *See also* Katchen v. Landy, 382 U.S. 323, 336-37 (1966) (no jury trial right in bankruptcy proceedings); United States v. Yellow Cab Co., 340 U.S. 543, 555 (1951) (no jury trial right in Federal Tort Claims Act cases).

190. 430 U.S. at 457.

191. *Id.* at 458.

degree on the nature of the proceeding.[192] The Court stated that equity jurisdiction as it existed in 1789 was not frozen by the seventh amendment, that the seventh amendment did not preclude the creation of new rights or their enforcement in forums other than regular courts of law,[193] and that

> [w]e cannot conclude that the Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.[194]

V. THE CFTC REPARATIONS PROCEDURE AND THE SEVENTH AMENDMENT

A. Actions Involving the CFTC

The issue whether the CFTC reparations procedure violates the seventh amendment is not an entirely academic one. In *Rosenthal & Co. v. Bagley*[195] the plaintiff sought to enjoin CFTC administrative proceedings on the ground that the statutory scheme abridged the right to a jury trial under the seventh amendment.[196] The plaintiff contended that CFTC reparations claims were suits at common law within the seventh amendment and, therefore, were subject to the guarantee of trial by jury.[197] The Court of Appeals for the Seventh Circuit held, however, that because the plaintiff had failed to exhaust its administrative remedies by appealing from an adverse order of the CFTC in the reparations proceedings under challenge, it would be premature to pass on the seventh amendment issue.[198] The court noted that while an exception to the exhaustion requirement exists when an agency's action would violate a clear right of the plaintiff, this case did not fall within that exception.[199] The court stated that in light of the Supreme Court's decision in *Atlas Roofing*, the seventh amendment issue was "far from clear" and that

> [a]t least when only "public rights" are involved, Congress may provide for administrative fact finding . . . with which a jury trial would be incompatible. . . . *And the fact that new statutory "public rights" are enforceable in favor of a private party does not mean*

192. *Id.* at 458-59.
193. *Id.* at 459.
194. *Id.* at 460.
195. 581 F.2d 1258 (7th Cir. 1978).
196. *Id.* at 1259.
197. *Id.*
198. *Id.* at 1259, 1261.
199. *Id.* at 1261.

> *they cannot be committed to an administrative agency for determination.* . . . Moreover, "the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved."[200]

The court also rejected a claim that article III of the Constitution required reparations claims to be tried in a judicial forum rather than before an agency.[201]

The court in *Rosenthal* noted that in *Atlas Roofing* the Supreme Court had held that the right to a jury trial does not depend solely on the nature of the issue.[202] The Supreme Court in *Atlas Roofing* concluded that Congress had acted because remedies available in courts of law were inadequate,[203] which is the same standard for determining whether equity jurisdiction would apply and obviate the jury trial requirement.[204] It appears, however, that *Atlas Roofing*, on its facts, went only so far as to adopt a two-pronged test to determine whether an agency may adjudicate a claim without the use of a jury. In deciding whether a jury trial should be required in an administrative context, the courts must determine (1) whether the claim is a type of claim that was cognizable at common law and, if so, (2) whether legal remedies are inadequate, thereby permitting Congress to create a new public right with new remedies.

Rosenthal did not let the matter rest with the Seventh Circuit's decision. In *Myron v. Hauser*,[205] a subsequent appeal to the Eighth Circuit from a CFTC reparations award, the company again challenged the reparations procedure under the seventh amendment.[206] In its brief, Rosenthal argued that a CFTC reparations proceeding is in reality a common-law action and that it "is nothing more (or less) than A suing B for money, most likely as a result of B's having acted as a broker for A."[207] The CFTC argued in the appeal that reparations involve public rights and that the CFTC may adopt rules imposing duties on a registrant far different from those at common law.[208] In other words, the CFTC argued that reparations have an overall public benefit that transcends the mere monetary claim cited by Rosenthal.

The court of appeals held that the CFTC reparations proceedings did not violate the requirements of the seventh amendment.[209] Agreeing

---

200. *Id* (citations omitted) (quoting *Atlas Roofing*, 430 U.S. at 460-61) (emphasis added).
201. *Id.* at 1261-62.
202. *Id.* at 1261 (citing *Atlas Roofing*, 430 U.S. at 460-61).
203. 430 U.S. at 460-61.
204. *Id.* at 458-59.
205. 673 F.2d 994 (8th Cir. 1982).
206. *Id.* at 1002.
207. Brief for Petitioner at 12, Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982).
208. Brief for the CFTC at 21-22, Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982). *See generally* Shipe, *Private Litigation Before the Commodity Futures Trading Commission*, 33 AD. L. REV. 153, 163-64 (1981).
209. 673 F.2d at 1004.

with the Seventh Circuit's decision in *Rosenthal*, the court concluded that, under *Atlas Roofing*, Congress could create, consistent with the seventh amendment, a new cause of action enforceable in an administrative agency without any provision for jury trial.[210] The court further stated that it would not engage in a "difficult (and often inconclusive) historical analysis in order to determine whether the reparations procedure is an action to enforce legal or equitable rights."[211] Even if the reparations claim could be characterized historically as a legal issue, the right to jury trial did not turn solely on the nature of the issue to be resolved. Accordingly, the court concluded that because the seventh amendment was generally inapplicable to administrative and statutory proceedings, it was not abridged under the CFTC reparations procedure. Rosenthal's argument that the right to jury trial should not depend on the forum was rejected.[212]

The *Myron* court also rejected a claim by Rosenthal that the reparations proceeding was really a private dispute and that it did not involve public rights. The court noted that purely private rights were not at issue because the government was involved in a sovereign capacity.[213] The court stated that

> Congress, acting under the commerce clause, has regulated commodity options transactions. The case is in a functional sense one between the government and the commodity options broker, the party subject to government regulation. The customer does receive a benefit in the form of a reparations award. However, the fact that the statute and regulations are enforceable in favor of a private party does not preclude administrative adjudication.[214]

---

210. *See id.* at 1002-03.

211. *Id.* at 1004.

212. *Id.*

213. *Id.* at 1004-05.

214. *Id.* at 1005. A recent federal district court case suggests that perhaps not all courts will adopt the *Myron* court's determination that CFTC reparations proceedings involve "public rights." In Board of Trade v. CFTC, No. 81 C 717, slip op. (N.D. Ill. Apr. 23, 1982), the Board of Trade sought a permanent injunction restraining the CFTC from enforcing a rule requiring all contract markets and their employees to submit to arbitration of customers' complaints; the Board of Trade also sought a declaration that the rule in question violated the seventh amendment. *Id.* at 1-2. The court granted a permanent injunction and declaratory relief. *Id.* at 6.

Under § 5a(11) of the Commodity Exchange Act, 7 U.S.C. § 7a(11) (1976 & Supp. IV 1980), and part 180 of the CFTC's regulations, 17 C.F.R. pt. 180 (1981), each contract market must provide a "fair and equitable procedure through arbitration or otherwise . . . for the settlement of customers' claims and grievances against any member or employee thereof." 7 U.S.C. § 7a(11) (1976 & Supp. IV 1980); 17 C.F.R. § 180.2 (1981). The arbitration procedures are more widely available to customers than the reparations procedures, which are available only against persons registered under the Commodity Exchange Act, 7 U.S.C. § 18a (1976 & Supp. IV 1980), and only if a violation of the Commodity Exchange Act or rules promulgated thereunder is alleged. *Id.* The arbitration procedures, on the other hand, are available for the resolution of any customer claim

B. *The Nature of the Claim: Legal or Equitable*

Claims under the Commodity Exchange Act may arise in a number of contexts, but most claims—sixty-five percent of CFTC reparations proceedings in fiscal year 1981[215]—involve fraud claims under section 4b of the Act.[216] Section 4b makes it unlawful for anyone "to cheat or defraud or attempt to cheat or defraud such other person [e.g., a customer] . . . willfully to make . . . any false report . . . or . . . to bucket such order, or to fill such order by offset."[217] Another section of the Act, section 4c, prohibits wash sales, cross trades, accumulation trades, and fictitious trading.[218] Reparations claims under section 4c constituted five percent of the CFTC reparations claims filed in fiscal year 1981.[219] Congress has viewed section 4c transactions as "pure, unadulterated fraud,"[220] and in *CFTC v. Savage*[221] the Ninth Circuit noted that section 4c was intended by Congress to prevent fraud.[222] Section 4*o* of the Commodity Exchange

---

or grievance, whether or not it concerns a violation of the Commodity Exchange Act. *See generally* 17 C.F.R. pt. 180 (1981); 2 COMM. FUT. L. REP. (CCH) ¶ 21,286, at 25,466 (CFTC Dec. 14, 1981). The requirement that contract markets provide for arbitration of customers' claims was intended by Congress to ensure that customers had an "expeditious and inexpensive forum" in which to settle their claims. *Contract Market Rules; Disapproval and Alteration*, 46 Fed. Reg. 57,457, 57,461 (1981). *See generally* Schneider, *Commodities Law and Predispute Arbitration Clauses*, 6 HOFSTRA L. REV. 129 (1977).

In *Board of Trade* the Board of Trade of the City of Chicago alleged that the CFTC's arbitration rules, which required contract markets and their employees to submit to arbitration of customer disputes at the election of the customer, *see Contract Market Rules Altered or Supplemented by the Commission*, 46 Fed. Reg. 57,464 (1981) (to be codified at 17 C.F.R. § 7.201), violated their seventh amendment rights and those of their employees. *Board of Trade*, slip op. at 2. The court agreed with the Board of Trade and concluded that the CFTC arbitration rules violated the seventh amendment by "compelling the Board of Trade and its members to arbitrate common law legal claims," *id.* at 5, and granted the permanent injunction prohibiting the CFTC from enforcing the rule. The court specifically concluded that the "public rights" exception to the seventh amendment, as expressed in *Atlas Roofing*, *see* text accompanying notes 181-94 *supra*, did not apply to the case before it. *Board of Trade*, slip op. at 6. Whereas the customer may choose in some instances to settle claims or grievances in either CFTC reparations or arbitration proceedings, the determination by the court in *Board of Trade* that the public rights exception did not apply may signify that not all courts will adopt the *Myron* court's determination that CFTC reparations claims involve only public rights.

215. Letter, *supra* note 7.

216. 7 U.S.C. § 6b (1976).

217. *Id.* A significant amount of commodity option cases also were the subject of reparations proceedings before a trading suspension was ordered by the CFTC on June 1, 1978. 17 C.F.R. § 32.11 (1981). A CFTC antifraud rule for commodity options, 17 C.F.R. § 32.9 (1981), was generally the basis for such suits. *See* Letter, *supra* note 7. Section 32.9 is modeled upon § 4b, except that it omits the word "willfully" from its provisions. *See generally* 40 Fed. Reg. 26,504 (1975).

218. 7 U.S.C. § 6c (1976 & Supp. IV 1980).

219. Letter, *supra* note 7.

220. 80 CONG. REC. 7905 (1936) (remarks of Sen. Smith).

221. 611 F.2d 270 (9th Cir. 1979).

222. *Id.* at 284.

Act,[223] an antifraud provision modeled after section 10b of the Securities Exchange Act,[224] also prohibits fraud by commodity trading advisors and commodity pool operators.[225] It accounted for five percent of CFTC reparations awards in fiscal year 1981.[226] In sum, at least seventy-five percent of all CFTC reparations claims for futures contracts involve claims of fraud.

Fraud has been recognized as an actionable wrong in English law since at least the Star Chamber, which handled both civil and criminal cases of fraud until it was abolished in 1641.[227] The common-law tort for fraud and deceit did not become fully recognized in England, however, until 1789 in the celebrated decision of *Pasley v. Freeman*.[228] In *Pasley*, Freeman persuaded Pasley to sell and deliver goods on credit to a third party, Falch. Freeman falsely asserted to Pasley that Falch was a person to be trusted for credit.[229] Falch later defaulted,[230] and it was held that Pasley could bring an action at law for deceit against Freeman.[231]

Courts of equity also exercised concurrent jurisdiction with law courts in granting relief from fraud,[232] but equity did not generally take jurisdiction of damage claims. Damage actions were actions at law, while actions for an accounting or rescission were equitable claims.[233] In other words,

---

223. 7 U.S.C. § 6*o* (1976 & Supp. IV 1980).

224. 15 U.S.C. § 78j(b) (1976). *But see* CFTC v. Savage, 611 F.2d 270, 285 (9th Cir. 1979) (§ 4*o* is broader than § 10b in that § 4*o* does not contain a scienter requirement).

225. 7 U.S.C. § 6*o* (1976 & Supp. IV 1980).

226. Letter, *supra* note 7. At least two courts have concluded that jury trials are appropriate for damage actions under § 10b of the Securities Exchange Act. Dasho v. Susquehanna Corp., 461 F.2d 11, 24 (7th Cir. 1972); Richland v. Crandall, 259 F. Supp. 274, 279 (S.D.N.Y. 1966).

227. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 406 (2d ed. 1936).

228. 100 Eng. Rep. 450 (1789).

229. *Id.* at 450.

230. *Id.* at 450-51.

231. *Id.* at 450, 458. *See generally* 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 69-70 (2d ed. 1937); E. JENKS, THE BOOK OF ENGLISH LAW 433 (3d ed. 1932); F. PIGGOTT, PRINCIPLES OF THE LAW OF TORTS 259 (1885); J. SALMOND, SALMOND ON THE LAW OF TORTS 14 (R. Heuston 14th ed. 1965); A. UNDERHILL, PRINCIPLES OF THE LAW OF TORTS OR, WRONGS INDEPENDENT OF CONTRACT 529 (N. Moak 3d ed. 1881); P. WINFIELD & J. JOLOWICZ, WINFIELD & JOLOWICZ ON TORT 212 (W. Rogers 10th ed. 1975); Note, *600 Years in the Development of an Action for Fraud*, 22 B.U.L. REV. 295 (1942).

232. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 406 (2d ed. 1936); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 200 (13th ed. 1886); J. WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 169 (P. Potter ed. 1875).

233. *See* G. CHESHIRE & C. FIFOOT, CHESHIRE AND FIFOOT'S LAW OF CONTRACT 283 (M. Furmston 9th ed. 1976); E. JENKS, THE BOOK OF ENGLISH LAW 401 (3d ed. 1932). It should be noted that there were equity decisions as early as 1860 that granted monetary relief. *See* L. SHERIDAN, FRAUD IN EQUITY 29 (1957); Note, *The Theory of Equitable Jurisdiction Over Fraud*, 4 MERCER BEASLEY L. REV. 74, 75 (1935). Sheridan notes that money bills were brought in equity before *Pasley* and that after *Pasley* the idea "took root" that an action could also be brought for deceit in Chancery. But fraud actions were still classified according to the remedy (damages or rescission), and suits for damages were a rare occurrence in equity. L. SHERIDAN, FRAUD IN EQUITY 34-35 (1957).

in England fraud was "a pure common-law action, but the Court of Chancery awarded restitution in place of damages on the same principles."[234]

These concepts were adopted in the United States, and it generally was recognized early in this country that an action to recover damages for fraud or deceit was an action at law triable to a jury.[235] It also was held that no remedy for damages could be had in equity because the remedy at law was adequate,[236] and it was stated that this doctrine was strengthened by the desire to preserve the right to jury trial.[237] Factual issues of fraud thus were considered to be jury questions.[238] The elements required to prove a common-law fraud in America were also recognized by the Supreme Court at an early point to be the same as those settled in English law as early as 1801—a fraud action at law required scienter or knowing misconduct on the part of the defendant.[239]

As in England, equity exercised concurrent jurisdiction over fraud in the United States.[240] As noted in an 1826 decision in Kentucky, however, the province of a court of equity in a fraud action "is not to take cognizance of questions of fraud for the purpose of estimating the injury done, and decreeing a compensation, but for the purpose of canceling the contract, and placing the parties in *statu quo*."[241] A fraud action for damages required the plaintiff to plead and prove scienter as an essential element of the

---

234. 6 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 259 (2d ed. 1907) (citation omitted).

235. *See, e.g.*, Cooper v. Schlesinger, 111 U.S. 148, 155 (1884); Butler v. Watkins, 80 U.S. (13 Wall.) 456, 457, 459 (1872); Lord v. Goddard, 54 U.S. (13 How.) 198, 198-99 (1851); Rhodes v. Dickerson, 95 Mo. App. 395, 400-01, 69 S.W. 47, 48 (1902); Montoya v. Moore, 77 N.M. 326, 329, 422 P.2d 363, 365 (1967); Jewell v. Allen, 188 Okla. 374, 375, 109 P.2d 235, 236-37 (1941).

236. *See generally* W. WALSH, A TREATISE ON EQUITY 491 n.5 (1930) (citing Kilgour v. Parker, 26 Ky. (3 J. J. Marsh.) 577 (1830)); Note, *Misrepresentation—Basis of Liability—Damages at Law and Equitable Rescission in Kentucky*, 44 KY. L.J. 112 (1955).

237. Note, *The Theory of Equitable Jurisdiction Over Fraud*, 4 MERCER BEASLEY L. REV. 74, 77 (1935).

238. *See* Hodges v. Easton, 106 U.S. 408, 408, 412 (1882) (conversion of wheat); Castle v. Bulhard, 64 U.S. (23 How.) 172, 184 (1860) (fraud and deceit); Southwestern Packing Co. v. Cincinnati Butchers Supply Co., 139 F.2d 201, 203 (5th Cir. 1944) (fraudulent misrepresentation in procurement of contract). But a preemptory instruction could be given to the jury when the evidence of fraud was insufficient to sustain a jury verdict. Marshall v. Hubbard, 117 U.S. 415, 419 (1886).

239. *See* Lord v. Goddard, 54 U.S. (13 How.) 198, 211 (1851). In fact, the scienter question was not actually settled in England until the later case of Derry v. Peek, 14 App. Cas. 337 (1889). *Derry* and *Pasley v. Freeman* were subsequently determined to set forth the United States doctrine on this subject. Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co., 148 F. 674, 675 (3d Cir. 1906); *see* Ming v. Woolfolk, 116 U.S. 599, 603 (1886).

240. For example, a fraud action could be brought in equity for rescission. *See* Smith v. Richards, 38 U.S. (13 Pet.) 26, 29 (1839); Wade v. Thurman, 5 Ky. (2 Bibb) 583, 583 (1812); Ginn v. Almy, 212 Mass. 486, 493, 99 N.E. 276, 279 (1912).

241. Stone v. Ramsey, 20 Ky. (4 T. B. Mon.) 236, 237-38 (1827). *Accord* Ryan v. Miller, 236 Mo. 496, 509-10, 139 S.W. 128, 131 (1911).

action.[242] But the doctrine of constructive fraud was developed at equity, which did not require an intent to deceive.[243] This equitable doctrine was engrafted onto American law,[244] and under this doctrine a breach of a legal or equitable duty was sufficient for equity to act; moral guilt, actual dishonesty, or an intent to deceive were not required to be shown.[245] The presence or absence of an intent to deceive thus distinguishes actual fraud from constructive fraud.[246]

If the fraud provisions of the Commodity Exchange Act were interpreted to include constructive fraud, and if it were ignored for the moment that damages are being sought, actions pursuant to those provisions arguably could be considered equitable claims. The resolution of these claims thus would not require a jury trial under the seventh amendment. In *Gordon v. Shearson Hayden Stone, Inc.*,[247] a CFTC reparations proceeding, the CFTC noted that the common-law concept of fraud included both actual fraud and constructive fraud when Congress enacted section 4b of the Commodity Exchange Act and that the flexible rules of constructive fraud were incorporated by Congress into section 4b.[248] On that premise the CFTC held that even unintentional or negligent violations of the antifraud provisions of the Commodity Exchange Act would sustain a damage award in reparations.[249] Subsequently, in an unpublished

---

242. *E.g.*, Cooper v. Schlesinger, 111 U.S. 148, 155 (1884); Butler v. Watkins, 80 U.S. (13 Wall.) 456, 464 (1872); Lord v. Goddard, 54 U.S. (13 How.) 198, 211 (1851).

243. G. CHESHIRE & C. FIFOOT, CHESHIRE AND FIFOOT'S LAW OF CONTRACT 283 (M. Furmston 9th ed. 1976); E. JENKS, THE BOOK OF ENGLISH LAW 401 (3d ed. 1932); L. SHERIDAN, FRAUD IN EQUITY 7 (1957).

244. *See generally* Smith v. Richards, 38 U.S. (13 Pet.) 26 (1939); McFerran v. Taylor, 7 U.S. (3 Cranch) 270 (1806); M'Broom v. Rives, 1 Stew. 72 (Ala. 1827).

245. Constructive frauds are

> acts, statements, or omissions, which operate as virtual frauds, on individuals, or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable.

J. SMITH, A MANUAL OF EQUITY JURISPRUDENCE 80 (13th ed. 1880). *See also* 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 265 (13th ed. 1886).

246. *See, e.g.*, Arkansas Valley Compress & Warehouse Co. v. Morgan, 217 Ark. 161, 164-65, 229 S.W.2d 133, 136-37 (1950); Daly v. Showers, 104 Ind. App. 480, 485-86, 8 N.E.2d 139, 142 (1937) (en banc); Miller v. Huntington & Ohio Bridge Co., 123 W. Va. 320, 334-35, 15 S.E.2d 687, 695 (1941).

247. 2 COMM. FUT. L. REP. (CCH) ¶ 21,016 (CFTC Apr. 10, 1980), *aff'd sub nom.* Shearson, Loeb, Rhoades, Inc. v. CFTC, Civ. No. 80-7212 (9th Cir. Feb. 12, 1982) (unpublished opinion). It should be noted that unpublished opinions of the Ninth Circuit are not to be regarded as precedent and, with limited exceptions, are not to be cited to the district courts or court of appeals for that circuit. *See* 9th CIR. R. 21(c).

248. 2 COMM. FUT. L. REP. (CCH) at 23,976.

249. *Id.* The CFTC stated:

> [At common law, actual] fraud applied to dealings at arm's-length and required

opinion, the Ninth Circuit affirmed the CFTC's decision in *Gordon*, but it did so on the basis of its conclusion that the facts of the case demonstrated that scienter was present.[250] The court therefore did not reach the question whether the CFTC's analysis of constructive fraud was appropriate.[251]

In any event, the CFTC's decision in *Gordon* did not analyze the equitable origins of the constructive fraud doctrine. But the CFTC apparently does not contend that fraud claims in reparations, constructive or otherwise, are equitable proceedings beyond the common-law protection of the seventh amendment.[252] Nevertheless, claimants in reparations proceedings may still contend that if the CFTC is correct that scienter is not a requirement under section 4b, fraud claims in reparations proceedings are necessarily equitable, constructive fraud claims that are not subject to the seventh amendment.

In *Ernst & Ernst v. Hochfelder*[253] the Supreme Court held[254] that scienter was required in civil damage actions under section 10(b) of the Securities Exchange Act of 1934[255] and under SEC Rule 10b-5.[256] Section 10(b) declares it to be unlawful for any person to use any "manipulative or deceptive device or contrivance" in contravention of SEC rules.[257] In *Aaron v. SEC*[258] the Supreme Court held that the SEC also must establish scienter in its injunctive actions under these fraud provisions and that section 17(a)(1) of the Securities Act of 1933[259] also contains a scienter requirement.[260] The Court stated in *Aaron*:

> The language of § 17(a)(1), which makes it unlawful "to employ any device, scheme, or artifice to defraud," plainly evinces an

---

> the plaintiff to show, *inter alia*, that the defendant had intended to defraud the plaintiff. In contrast, constructive fraud applied to parties having a fiduciary relationship and required the plaintiff to show merely a breach of a fiduciary duty by the defendant fiduciary causing harm to the plaintiff. Constructive fraud did not require a showing of intent to defraud.

Id. (footnotes and citation omitted).

250. Shearson, Loeb, Rhoades, Inc. v. CFTC, Civ. No. 80-7212, slip op. at 2 (9th Cir. Feb. 12, 1982) (unpublished opinion). *See* note 247 *supra*.

251. Shearson, Loeb, Rhoades, Inc. v. CFTC, Civ. No. 80-7212, slip op. at 2 n.1 (9th Cir. Feb. 12, 1982) (unpublished opinion). *See* note 247 *supra*.

252. Indeed, two of the cases cited by the CFTC in *Gordon*, *id.* at 23,976 n.14, as establishing constructive fraud were jury trials for damages. Those two cases are Mallis v. Bankers Trust Co., 615 F.2d 68 (2d Cir. 1980), and Tom Reed Gold Mines Co. v. United E. Mining Co., 39 Ariz. 553, 8 P.2d 449 (1932). *See also* Hornaday v. First Nat'l Bank, 259 Ala. 26, 65 So. 2d 678 (1952); Conyers v. Graham, 81 Ga. 615, 8 S.E. 521 (1888).

253. 425 U.S. 185 (1976).

254. *Id.* at 193.

255. 15 U.S.C. § 78j(b) (1976).

256. 17 C.F.R. § 240.10b-5 (1981).

257. 15 U.S.C. § 78j(b) (1976).

258. 446 U.S. 680 (1980).

259. 15 U.S.C. § 77q(a)(1) (1976).

260. 446 U.S. at 695.

> intent on the part of Congress to proscribe only knowing or intentional misconduct. Even if it be assumed that the term "defraud" is ambiguous, given its varied meanings at law and in equity, the terms "device," "scheme," and "artifice" all connote knowing or intentional practices.[261]

The Court in *Aaron* concluded, however, that sections 17(a)(2) and (3) of the Securities Act of 1933[262] did not require scienter. The Court stated:

> [T]he language of § 17(a)(2), which prohibits any person from obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact, is devoid of any suggestion whatsoever of a scienter requirement . . . .
>
> Finally, the language of § 17(a)(3), under which it is unlawful for any person "to engage in any transaction, practice, or course of business which *operates or would operate* as a fraud or deceit," . . . quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible.[263]

Similarly, in *SEC v. Capital Gains Research Bureau, Inc.*[264] the Supreme Court held that an intent to deceive was not required under section 206(2) of the Investment Advisers Act of 1940,[265] which prohibits any practice by an investment adviser that "operates as a fraud or deceit upon any client or prospective client."[266] In *Capital Gains* the Court focused on the fact that the SEC was seeking injunctive relief, equitable in nature, and not damages, which required a showing of intent at common law.[267] The Court also noted, however, that the common law had expanded to lessen the restrictive requirements imposed early in its origins.[268] Nevertheless, the Court in *Aaron* refused to extend the rationale in *Capital Gains* to section 10(b) of the Securities Exchange Act because the language in *Capital Gains* focused on the practices prohibited—activites that "operate" as a fraud or deceit—and the *Aaron* Court noted that the history of the Investment Advisers Act offered strong support for not imposing a scienter requirement.[269]

In *Gordon* the CFTC distinguished *Hochfelder—Aaron* had not been decided at the time of the *Gordon* decision—on the ground that, among

---

261. *Id.* at 696 (footnote omitted). One court has stated that "[f]raud has also been defined as any cunning or artifice used to cheat or deceive another." Daly v. Showers, 104 Ind. App. 480, 485, 8 N.E.2d 139, 142 (1937) (en banc).

262. 15 U.S.C. § 77q(a)(1), (2) (1976).

263. 446 U.S. at 696-97 (citation omitted) (emphasis original).

264. 375 U.S. 180 (1963).

265. Id. at 195.

266. Investment Advisers Act of 1940, Pub. L. No. 86-750, § 206(2), 54 Stat. 847, 852 (codified as amended at 15 U.S.C. § 80b-6(2) (1976)).

267. 375 U.S. at 192-93.

268. *Id.* at 194.

269. 446 U.S. at 694-95.

other things, section 4b of the Commodity Exchange Act did not contain the words "manipulative or deceptive device or contrivance" as set forth in section 10(b) of the Securities Exchange Act.[270] But it is quite uncertain whether that distinction will be accepted by the courts. Indeed, the Ninth[271] and Tenth Circuits[272] have held that scienter is required to establish a violation of the Commodity Exchange Act.[273] Consequently, there is considerable doubt whether the courts will hold that the doctrine of "constructive fraud"—whether viewed as an equitable or legal claim—was adopted into section 4b. If section 4b is viewed as not containing a constructive fraud element, that is, if section 4b is interpreted to require that scienter be proven to establish a violation, then actions pursuant to section 4b can be considered common-law fraud actions to which the protection of the seventh amendment applies.

Yet even if the equitable doctrine of constructive fraud ultimately is determined to be a part of section 4b of the Commodity Exchange Act, CFTC reparations proceedings still may be viewed as common-law actions because the only remedy permitted in a CFTC reparations proceeding is a claim for "damages."[274] The CFTC has no power to grant equitable relief.[275] Consequently, whatever the outcome on the scienter issue, a

---

270. 2 COMM. FUT. L. REP. (CCH) ¶ 21,016, at 23,980 (CFTC Apr. 10, 1980), *aff'd sub nom.* Shearson, Loeb, Rhoades, Inc. v. CFTC, Civ. No. 80-7212 (9th Cir. Feb. 12, 1982). *See* note 247 *supra*.

271. CFTC v. Savage, 611 F.2d 270, 283 (1979). The Court in *Savage* did hold, however, that the antifraud provisions for commodity trading advisors in the Commodity Exchange Act, 7 U.S.C. § 6*o* (1976 & Supp. IV 1980), did not contain a scienter standard. 611 F.2d at 285.

272. Master Commodities, Inc. v. Texas Cattle Management Co., 586 F.2d 1352, 1356 (10th Cir. 1978).

273. *See also* McCurnin v. Kohlmeyer & Co., 347 F. Supp. 573, 575 (E.D. La. 1972), *aff'd*, 477 F.2d 113 (5th Cir. 1973) (7 U.S.C. § 6b only applies to willful misconduct); Palmer Trading Co. v. Shearson Hayden Stone, Inc., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,900, at 23,654 (N.D. Ill. Apr. 20, 1979) (7 U.S.C. § 6b requires some showing of deception). The CFTC eliminated the requirement of willfulness from its antifraud rule for commodity options, 17 C.F.R. § 32.9 (1981), and it has been concluded that this removed any scienter requirement from that rule. *See* CFTC v. United States Metals Depository Co., 468 F. Supp. 1149, 1162 n.55 (S.D.N.Y. 1979); CFTC v. J.S. Love & Assocs. Options Ltd., 422 F. Supp. 652, 659-60 (S.D.N.Y. 1976). *See also* Auditore v. Rosenthal & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,658, at 22,667 (N.D. Ga. May 26, 1978). *See generally* Markham & Meltzer, *Secondary Liability Under the Commodity Exchange Act—Respondeat Superior, Aiding and Abetting Supervision, and Scienter*, 27 EMORY L.J. 1115, 1171-72 (1978). *But see* CFTC v. Sterling Capital Co., 2 COMM. FUT. L. REP. (CCH) ¶ 21,169, at 24,787 (N.D. Ga. Feb. 20, 1981) (knowing, intentional conduct required, but not necessary to prove intent to injure customer); Gravois v. Fairchild, Arabatzis & Smith, Inc., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706, at 22,878 (E.D. La. Nov. 9, 1978) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)).

274. *See* 7 U.S.C. § 18(e) (1976).

275. *See id.* The CFTC is only authorized to award damages and to take administrative action against persons registered with it to enforce reparations awards. *Id.* § 18(a).

reparations proceeding involving fraud claims still may remain an action for damages, which at common law would have required a jury trial.

Other sections of the Commodity Exchange Act are less definable in terms of their common-law origin. For example, about five percent of commodity futures claims in CFTC reparations during fiscal year 1981 involved section 4h of the Act,[276] which requires commodity futures contracts to be traded on, or subject to, the rules of a contract market. A company selling futures contracts other than through a contract market would violate section 4h.[277] Other claims that may be brought under the Commodity Exchange Act involve manipulation,[278] failure to register,[279] failure to segregate funds,[280] and failure to keep proper records.[281] But every case will involve a damage claim, and damages were the traditional subject of common-law actions.[282] Thus, in every case customers will claim that they have suffered a monetary loss as the result of some wrongdoing on the part of a person handling their account and that they should be compensated by damages. Damage actions are exactly the kinds of actions that were handled by the courts of law at the time of the seventh amendment's adoption.

Curtis v. Loether[283] and *Pernell v. Southall Realty*[284] held that even new statutory causes of action are protected by the seventh amendment if they involve rights and remedies traditionally enforced in an action at law. For example, in *Loether* the Court stressed that the relief at issue was damages,

---

276. Letter, *supra* note 7.

277. *See* 7 U.S.C. § 6h (1976); CFTC v. Comercial Petrolera Internacional S.A., 2 COMM. FUT. L. REP. (CCH) ¶ 21,222, at 25,106-07 (S.D.N.Y. June 26, 1981); CFTC v. Co Petro Mktg. Group, Inc., 502 F. Supp. 806, 817-18 (C.D. Cal. 1980); *In re* Stovall, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,941, at 23,784 (CFTC Dec. 6, 1979).

278. 7 U.S.C. § 6(c) (1976).

279. *Id.* § 6(k). In East Side Church of Christ v. National Plan, Inc., 391 F.2d 357, 362 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968), the court, acting pursuant to § 29(b) of the Securities Exchange Act, held that the failure of a broker-dealer to register with the SEC permitted a customer to void transactions effected by the broker-dealer. That right of action was rejected in an action brought under the Commodities Exchange Act in Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 738-39 (N.D. Cal. 1978). *See also* Moody v. Bache & Co., 570 F.2d 523, 527 n.6 (5th Cir. 1978).

In Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980), *vacated and remanded*, 102 S. Ct. 2228 (1982), it also was held that there was no private right of action for recovery of damages under the Commodity Exchange Act for failure to register. *Id.* at 177. But in Woodman v. London Commodity Options, 2 COMM. FUT. L. REP. (CCH) ¶ 21,021 (CFTC Feb. 29, 1980), a CFTC administrative law judge held that there could be recovery of damages in cases in which the customer proved that it had relied on the broker's failure to disclose that it was not registered. *Id.* at 24,008.

280. 7 U.S.C. § 6(d)(2) (1976).

281. *Id.* § 6(n).

282. *See* text accompanying notes 232-39 *supra*.

283. 415 U.S. 189 (1974). *See* text accompanying notes 163-73 *supra*.

284. 416 U.S. 363 (1974). *See* text accompanying notes 174-80 *supra*.

"the traditional form of relief offered in the courts of law."[285] In *Pernell* the Court stated that "[t]his Court has long assumed that actions . . . for damages to a person or property are actions at law triable to a jury."[286] The remaining questions are whether common-law remedies were inadequate for claims of commodity futures traders and whether the Commodity Exchange Act created a new "public right" that is not subject to the protections of the seventh amendment.

C. New "Public Right" or Old Remedy in a "New Bottle"

In *Pernell* the Supreme Court stated in dictum that the seventh amendment should not apply if Congress has provided an administrative forum for the settling of disputes.[287] In the subsequent decision of *Atlas Roofing*, however, the Supreme Court did not interpret the seventh amendment so broadly. Rather, it concluded that new "public rights" could be created by Congress and assigned to an administrative forum if common-law remedies were inadequate. In the words of the Court, "[w]holly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated."[288] In *Atlas Roofing* there was a "new cause of action, and remedies therefor, unknown to the common law."[289] This same standard applies in equity, which is also outside the reach of the seventh amendment: equity will not act when there is an adequate remedy at law and money damage constitutes an adequate remedy.[290]

At least seventy-five percent of all claims in CFTC reparations involve fraud, a cause of action known to the common law since at least 1789—two years before the adoption of the seventh amendment.[291] The

---

285. 415 U.S. at 196. The Court noted that some forms of monetary relief may not be subject to the seventh amendment, such as reimbursement of back pay, which the Court found to be a form of restitution. *Id.* at 196-97.

286. 416 U.S. at 370. The Court stated that when an action is "for the recovery of a money judgment, the action is one at law." 416 U.S. at 370 (quoting Whitehead v. Shattuck, 138 U.S. 146, 151 (1891)). *See also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 29 (1916).

287. 416 U.S. at 383.

288. 430 U.S. at 458. The Court in *Atlas Roofing* stated that the issues before it do not involve purely "private rights." In cases which do involve only "private rights," this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master. Crowell v. Benson, 285 U.S. 22, 51-65 (1932). The Court there said: "On the common law side of federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." Id., at 51.

430 U.S. at 450 n.7.

289. 430 U.S. at 461.

290. *See, e.g.*, SCM Corp. v. Xerox Corp., 507 F.2d 358, 363 (2d Cir. 1974); Danielson v. Local 275, 479 F.2d 1033, 1037 (2d Cir. 1973).

291. *See* text accompanying notes 227-41 *supra*.

remedy in CFTC reparations—damages—is the same remedy available at common law. Thus, CFTC reparations are simply an old remedy in a new forum. It creates no new "public right" beyond that known at common law. For this reason, reparations claims cannot be considered "public rights" needed because of the inadequacy of existing remedies. In other words, reparations did not create a new remedy to replace an inadequate one. It simply created a new forum.

It may be that Congress intended to create a more efficient forum that would process Commodity Exchange Act claims faster than would a court encumbered by the requirements of a jury trial. But in *Pernell* the Supreme Court rejected the idea that there is "some necessary inconsistency between the desire for speedy justice and the right to jury trial."[292] In fact, CFTC reparations proceedings have not provided any speedier relief to claimants. In 1978 a Senate Committee noted that the CFTC had a maximum capacity of some 250 reparation cases per year and that at the time it had a backlog of some 285 cases and expected an additional 1000 cases to be filed that year. This backlog continues to grow each year at the rate of over 1000 cases a year.[293] Consequently, it is clear that the elimination of a jury trial in CFTC reparations proceedings cannot be justified on the ground that the CFTC provides a speedier resolution of claims, even if such a standard were viewed as a sufficient basis for creating a new "public right" that is not protected by the seventh amendment.

The remaining issue is whether Congress may, by fiat, negate the protection of the seventh amendment by simply assigning common-law claims to an administrative agency, as suggested by the dictum in *Pernell*. That would be a rather cavalier interpretation of an amendment the Supreme Court has jealously guarded. But it is exactly that issue which the courts must face in passing on the constitutionality of CFTC reparations proceedings. No other constitutional amendment has been given such a slippery interpretation, and no other fundamental protection has ever been so easily removed from the Constitution. For this reason, the decision in *Atlas Roofing* arguably may be limited to the facts of that case.

In *Myron v. Hauser*[294] the Eighth Circuit held that Congress could negate the protections of the seventh amendment simply by assigning the claim to an administrative agency (the CFTC) for adjudication. This appears, however, to be too simplistic a view of the exception from the seventh amendment that has been permitted for administrative proceedings. In reparations the CFTC is actually acting in a judicial capacity, adjudicating "legal" claims between private parties like those decided in courts of law for some 200 years. Acting as a surrogate judicial body, the CFTC

---

292. 416 U.S. at 384.

293. *See* S. REP. NO. 850, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. CODE CONG & AD. NEWS 2087, 2104; Letter, *supra* note 7.

294. 673 F.2d 994 (8th Cir. 1982).

is exercising exactly the same functions as would a common-law court. It is therefore difficult to accept the Eighth Circuit's conclusion that, without more, the mere involvement of an administrative agency in the adjudication of claims by private parties excludes the protections of the seventh amendment.

VI. CONCLUSION

The seventh amendment requires a right to a jury trial in fraud actions at common law. Most CFTC reparations proceedings will be actions for fraud, and because the CFTC is limited solely to awarding damages in reparations proceedings, the parallel to common law actions is complete. The earliest federal reparations proceedings initially did not provide for the right to a jury trial, but subsequently were changed by Congress to meet what it and the agency (the ICC) administering those proceedings believed were the requirements of the seventh amendment.[295] The CFTC reparations procedure in the Commodity Exchange Act did not follow that historical precedent. Rather, by a last minute amendment, it placed the fact-finding decision in the hands of a federal agency.

In *Atlas Roofing* the Supreme Court held that the right to jury trial did not attach when Congress created a new "public right" and a new remedy. The Supreme Court, however, also previously held that merely codifying a statutory remedy did not convert it into a public right that would exclude the right to a jury trial.[296] In the case of CFTC reparations, there is no new public right or remedy created. The only change has been to create a new forum for an old remedy.

Thus, the real issue presented by CFTC reparations is whether Congress can, by fiat, remove the protection of the seventh amendment from a common-law remedy by simply assigning the claim to an administrative body. Certainly, *Atlas Roofing* did not go so far, and the "fundamental" right of a jury trial should not be disposed of so cavalierly. To the extent that the dicta in *Pernell* can be read broadly to permit Congress to commit the adjudication of common-law actions to an administrative forum and thereby eliminate the protections of the seventh amendment, the important constitutional protection of the seventh amendment is simply rendered a nullity.

---

295. *See* note 96 *supra*.
296. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974).