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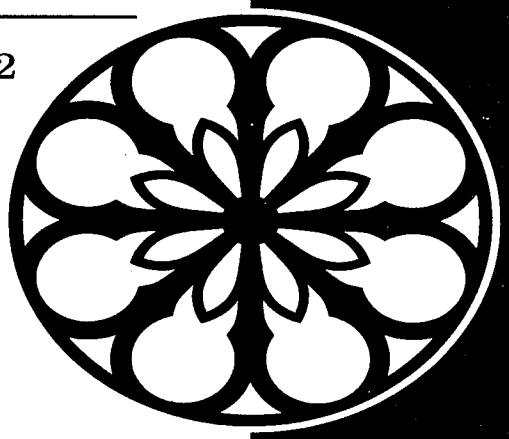

Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages

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PUTTING THE CART BEFORE THE HORSE: THE PREJUDICIAL PRACTICE OF A "REVERSE BIFURCATION" APPROACH TO PUNITIVE DAMAGES

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Recovery of punitive damages is permitted in narrowly circumscribed instances where a party engages in reprehensible conduct justifying penalty beyond compensatory relief.[1] Because the law does not punish people for being bad people, but rather for the willful or malicious tortious acts they commit, it is a precondition that a recognized, legally compensable injury is first established. A few courts, however, have taken a novel approach that does not follow this basic rule. They have adopted procedures proposed by plaintiffs' attorneys that improperly loosen guidelines for the appropriateness and size of punitive damages awards and predispose a jury to apply this rare, harsh penalty. The device termed "reverse bifurcation"[2] has, in some cases, operated to require a jury to consider punitive damages before a full determination of the defendant's liability and before any damages have been imposed. In doing so, a reverse bifurcated approach to punitive damages bypasses the basic rule of tort law requiring a compensable injury, crosses constitutional boundaries, and unfairly prejudices defendants.

This article is the first to closely consider reverse bifurcation involving punitive damages. First, it examines the development and current use of bifurcated proceedings and the motivations behind such use. The article then considers the nature of punitive damages recovery and United States Supreme Court precedent, which is suggestive that reverse bifurcation of punitive damages is unsound public policy as a matter of

1. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, & SCHWARTZ'S TORTS 550 (11th ed. 2005).

2. *In re* Report of the Advisory Group, 1993 WL 30497, at *52 (D. Me. Feb. 1, 1993) ("'Reverse bifurcation' is the inevitable obfuscatory jargon coined by lawyers and judges to describe the trial of a case where damages are established first and liability second.").

constitutional law. Next, the article considers two cases that permitted reverse bifurcation of punitive damages and the outcome of each case. Finally, the article concludes that courts should avoid reverse bifurcation of punitive damages, because it is contrary to fundamental principles of tort law and constitutional procedural due process guarantees.

I. BIFURCATION TODAY

Bifurcation is a judicially created and imposed case management tool.[3] It is intended to separate claims or issues when a single trial would prove cumbersome, confusing, or unfair to the parties.[4] In a bifurcated proceeding, the case is broken down into two parts—or "phases"—where the parties present their case only on certain elements that are the subject of that phase. Courts use this procedure so that the finder of fact, typically a jury, can more easily digest the essential elements of the claim. After the finder of fact determines the first phase, the case is either dismissed or the parties begin presentation of the remaining issues in the second phase, which may not always involve the same finder of fact.[5] Because this procedural device

3. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 715-17 (2000) (discussing judicial development of bifurcation from adoption of the Federal Rules of Civil Procedure in 1938); James A. Henderson, Jr., Fred Bertram & Michael J. Tõke, *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1675 (1995) (analyzing bifurcation in complex litigation); *see also* Notes, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059 (1962); Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 840 (1961) ("There has gradually crept into our law through rule, statute and case law development widespread severance of issues in many types of litigation.").

4. Weinstein *supra* note 3, at 840-44.; 9 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387, at 472 (2d. ed. 1995) (noting that the liberal joinder provisions under the Federal Rules of Civil Procedure assure that parties will face "virtually no restrictions on joinder at the pleading stage").

5. *See, e.g.*, Francis v. City of New York & Human Res. Admin., 235 F.3d 763, 766 (2nd Cir. 2000) (affirming decision to have separate juries decide liability and damages in Title VII action); McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298, 304-05 (5th Cir. 1993) (affirming the use of separate juries to determine issues of comparative negligence and indemnification in rail worker personal injury action). *But see* Fritz v. Wright, 907 A.2d 1083, 1095 (Pa. 2006)

serves to isolate potentially confusing parts of a case, it is generally used only in complex litigation.[6]

A court's authority to order a bifurcated proceeding arises out of its discretionary authority to separate a trial for judicial convenience or to avoid prejudice.[7] Historically, however, bifurcation had very limited application.[8] It did not exist in the courts of the American colonies as it does today.[9] Courts instead relied on other related forms of trial management devices including: "remittitur, new trial, judgment notwithstanding the verdict (JNOV), demurrer to the evidence, directed verdict, special verdict, . . . and nonsuit."[10] Bifurcation arose in federal courts of equity under Equity Rule 29, which existed before the promulgation of the Federal Rules of Civil Procedure.[11] Today, Federal Rule of Civil Procedure 42(b), or its state law equivalent, is generally invoked to permit a bifurcated proceeding "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[12]

The authors of Rule 42(b) intended bifurcation of issues for

(announcing a "same-juror" rule in which all jurors, including dissenting jurors, from the first phase of a bifurcated trial must participate in the second phase).

6. Gensler, *supra* note 3, at 708.

7. *See, e.g.*, FED. R. CIV. P. 42(b).

8. Simon v. Philip Morris, Inc., 200 F.R.D. 21, 25-26 (E.D.N.Y. 2001) (discussing a two-stage procedure for the English common law action of account-render); *see also* Gensler, *supra* note 3, at 715; Lewis Mayers, *The Severance for Trial of Liability from Damage*, 86 U. PA. L. REV. 389, 391 (1938) (discussing the history of bifurcated proceedings).

9. *Simon*, 200 F.R.D. at 33; *see also* James C. Lopez, *Appellate Control of Excessive Jury Verdict Since* Gasperini v. Center for Humanities*: From* Nisi Prius *Courts to "*Gasperini *Hearings,"* 66 U. CIN. L. REV. 1323, 1333-34 (1998).

10. Lopez, *supra* note 9, at 1333-34 (internal citations omitted).

11. Equity Rule 29 empowered federal judges in courts of equity to sever issues for separate trial, stating in part, "Every such point of law going to the whole or a material part of cause or causes of action stated in the bill may by called up and disposed of before final hearing, at the discretion of the court." Equity Rule 29 (1911); *see also* Finley v. Asphalt Paving Co. of St. Louis, 69 F.2d 498, 498 (8th Cir. 1934) (allowing separate trial on a licensing defense in patent infringement suit); Allen v. Philadelphia Co., 265 F. 817, 817-18 (3rd Cir. 1920) (applying Equity Rule 29 to separate basic issues in complex railroad bondholder dispute).

12. FED. R. CIV. P. 42(b); *see also* Susan E. Abitanta, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 744 (1982).

separate trial to be ordered sparingly and only "where experience has demonstrated its worth."[13] In personal injury litigation, for example, courts have usually heeded the drafters' cautions and rejected the routine use of bifurcation of liability and compensation issues so as not to disrupt the traditional decision-making process of juries.[14] The primary use of bifurcated proceedings is, therefore, relegated to mass litigation, such as product liability, where the number of plaintiffs and case complexities make the potential efficiency and juror-simplification gains more apparent. In such instances, courts have applied both bifurcated and reverse bifurcated approaches.

A. Ordinary "Straight" Bifurcation

The most common means of bifurcation is to separate liability and damages.[15] Juries decide central issues such as causation in the first phase and if liability is established, convene to determine the amount of damages in the second phase. In some cases, courts have broken trials into three or more parts.[16] The

13. FED R. CIV. P. 42(b) advisory committee's note, 39 F.R.D. 69, 113 (1966); *see also* WRIGHT & MILLER, *supra* note 4, at 279 n.1; Notes, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 MINN. L. REV. 743, 757 (1955) (listing cases bifurcating affirmative defenses) [hereinafter *Separate Trial*].

14. Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3rd Cir. 1978) (stating that the use of bifurcation may have substantive affects on the outcome of trials, particularly personal injury negligence actions); Iley v. Hughes, 311 S.W.2d 648, 651 (Tex. 1958) (prohibiting outright severance of liability and compensatory damage issues in personal injury litigation); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 827 (1984) (discussing the severance of issues to permit joint trials in mass litigation); *see also* Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY'S L.J. 879, 912-14 (2005) (discussing common criticisms of bifurcated proceedings).

15. *See, e.g.*, Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007) (bifurcating wrongful termination claim into liability and damages phases); Anastasio v. Schering Corp., 838 F.2d 701, 707 (3rd Cir. 1988) (affirming decision to have separate juries decide liability and damages in age discrimination action); Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686, 696 (9th Cir. 1977) (bifurcating securities fraud class action between liability and damages).

16. As the Seventh Circuit has explained, "there is no rule that if a trial is

effect of sequential and distinct consideration of liability and damages is to focus the jury on the merits of the case and avoid further litigation costs and consumption of scarce judicial resources in the event liability is unsupported. While this "straight" bifurcation approach is the most typical, some courts employ similar bifurcated procedures to rule on the availability of a particular affirmative defense,[17] which is relevant to liability, or where punitive damages are implicated.[18]

When punitive damages are at issue in a bifurcated trial, the phases are modified so that punitive damages issues are only considered *after* the jury has determined compensatory liability and damages.[19] Courts use the procedure because it prevents evidence that is highly prejudicial from being heard by jurors and improperly considered when they are determining basic liability. The punitive damage phase of a trial often involves evidence relevant only to the amount of punishment, if any, to be meted out. For example, evidence of a defendant's wealth is irrelevant

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bifurcated, it must be bifurcated between liability and damages. The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication." Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995).

17. *See, e.g.*, Baxter v. Peterson, 58 Cal. Rptr. 3d 686, 689 (Cal. Ct. App. 2007) ("Defenses based on the statute of limitations are frequently bifurcated and tried separately from a plaintiff's liability case."); Price v. Fox Entm't Group, Inc., 499 F.Supp.2d 382 (S.D.N.Y. 2007) (bifurcation of estoppel defense); Barszczewski v. Workers Comp. Appeal Bd. (*Pathmark Stores, Inc.*), 860 A.2d 224, 226 n.6 (Pa. Commw. Ct. 2004) (bifurcation of timeliness of *res judicata* defense); *see also Separate Trial*, *supra* note 13, at 755-59 (reviewing cases granting separate trials with respect to independent dispositive issues).

18. *See, e.g.*, Adkins v. Crown Auto, Inc., 488 F.3d 225, 233 (4th Cir. 2007) (stating that the court decided to conduct a bifurcated trial "in the event that the issue of punitive damages arises"); Alexander v. City of Milwaukee, 474 F.3d 437, 439 (7th Cir. 2007) (bifurcating liability in one phase and compensatory and punitive damages in second phase); Morgan Stanley & Co. v. Coleman Holdings, Inc., 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007) (vacating $1.58 billion compensatory and punitive damages award from bifurcated punitive damages proceeding); *see also* Stephan Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 304-05 (1998) (discussing the increased use of bifurcated punitive damage trials and assessing data from bifurcation study).

19. *See, e.g., Morgan Stanley & Co.*, 955 So. 2d at 1131.

to whether the defendant caused the plaintiff's alleged harm. If presented to a jury when it is determining basic liability, evidence of net worth may lead some jurors to render a compensatory award simply because they believe that the defendant "can afford it."[20] Inflammatory documents or unconscionable actions of a defendant's staff present other types of evidence that would only serve a prejudicial effect. While juries may be "instructed to ignore such evidence" in determining liability, "it is difficult, as a practical matter, for jurors to do so."[21] By deferring consideration of evidence relevant only to punitive damages, the standard approach to a bifurcated punitive damages trial limits the potential for bias.[22] In some complex cases, courts have even trifurcated trials—allowing the jury to first decide compensatory liability and damages, then punitive damages liability, then the amount of any punitive damages—to further reduce the potential that the jury may improperly consider irrelevant and highly prejudicial evidence.[23]

The Supreme Court of Mississippi in *Bradfield v. Schwartz* recently explained the importance of separating presentation of

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20. As Justice Sandra Day O'Connor observed in *TXO Production Corp. v. Alliance Resources Corp.*:

> Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

509 U.S. 443, 491 (1993) (O'Connor, J., dissenting).

21. Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1018 (1999).

22. *Id.* at 1018-19.

23. *In re* Bendectin Litig., 857 F.2d 290, 308-09 (6th Cir. 1988) (affirming trifurcation of liability, causation and damages in products liability lawsuit against pharmaceutical company for manufacturing anti-nausea medication for expectant mothers that allegedly caused birth defects); Webster v. Boyett, 496 S.E.2d 459, 463-64 (Ga. 1998) (discussing the merits of trifurcation but not employing it in that case); *see also* 42 U.S.C. § 300aa-23(a)-(d) (2004) (trifurcating actions into three stages: liability, compensatory damages, and punitive damages for civil actions against vaccine manufacturers).

liability *before* punitive damages.[24] The court recognized, "without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages."[25] A trial court plan that allows a jury to consider punitive damages at the same time as compensatory liability and damages is

> a troubling scenario when one considers that under such procedure, not only is the jury subject to possibly returning an inflated compensatory damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.[26]

Other courts have agreed that evidence related to punitive damages should be removed from the jury's determination of liability and compensatory damages to the "extent humanly possible" to avoid the "taint and suspicion" that would otherwise pervade the verdict.[27]

Bifurcation, when used appropriately, can help prevent that unfair result. In such cases, the jury first resolves the issue of compensatory damages before determining the amount of punitive damages, if any, to be paid by the defendant, and evidence relevant solely to the issue of punishment is inadmissible during the compensatory damages phase of the trial. Bifurcated trials also help jurors "compartmentalize" trial proceedings. By tackling compensatory and punitive issues separately and successively, jurors are better able to separate the

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24. Bradfield v. Schwartz, 936 So. 2d 931 (Miss. 2006).

25. *Id.* at 938; *see also* Hartford Underwriters Ins. Co. v. Williams, 936 So. 2d 888, 897 (Miss. 2006) (explaining the clear legislative design to determine liability for punitive damages separately and holding that failure to do so may constitute reversible error).

26. *Bradfield*, 936 So. 2d at 938.

27. Campolongo v. Celotex Corp., 681 F. Supp. 261, 264 (D.N.J. 1988) (upholding trial court plan in which jury considered strict liability and compensatory damages before negligence claims and punitive damages).

burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a heightened burden of proof for punitive damages required in most state courts (e.g., proof by clear and convincing evidence).[28]

Recognizing the benefits of deciding liability before punitive damages, some state courts have adopted straight bifurcation as a matter of common law reform.[29] Other states have adopted such a procedure through court rules or legislation.[30] The American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws have all supported bifurcated punitive damages trials.[31] However, when trial courts employ a reverse bifurcation approach to punitive damages, all of the benefits—reduction in the admission of prejudicial evidence, simplification of matters for the jury, and prevention of unnecessary litigation costs—are reversed as well, maximizing the potential for jury bias and excessive awards.

B. Reverse Bifurcation

Reverse bifurcation places the determination of damages in the first phase and consideration of liability in the second phase. This is an "extraordinary" approach that is far less common than straight bifurcated proceedings.[32] Although the procedural device is "well-recognized" in some jurisdictions,[33] its application

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28. *See* Schwartz, *supra* note 21, at 1013-14.

29. *See generally* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992).

30. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West 2001); MINN. STAT. ANN. § 549.20 (West 2001); MISS. CODE ANN. § 11-1-65(1) (West 2001).

31. *See Punitive Damages: A Constructive Examination*, 1986 A.B.A. SEC. LITIG. SPECIAL COMM. ON PUNITIVE DAMAGES 19; *Report on Punitive Damages of the Comm. on Special Problems in the Administration of Justice*, AM. COLL. OF TRIAL LAW. 18-19 (1989); Unif. Law Comm'rs' Model Punitive Damages Act § 11 (approved July 18, 1996); *Enterprise Responsibility for Personal Injury-Reporters' Study* 2 A.L.I. 255 n.41 (1991).

32. *Campolongo*, 681 F. Supp. at 262 ("The magnitude of the [asbestos caseload] problem invites the employment of extraordinary case management techniques provided they equally serve the litigants, the court and the ends of justice.").

33. Urbach v. Flintkote Co., 79 Pa. D. & C.4th 307, 328-29 (C. P. Pa., Phila.

is commonly limited to complex litigation such as that involving asbestos.[34]

The nature and scope of asbestos litigation has led to reverse bifurcation where courts seek expedited trials and consolidation of multiple claims.[35] By first resolving the amount an asbestos defendant will pay for a particular type of asbestos-related illness, courts can approximate the total liability cost given the number of claimants and determine whether the damage award is justified and whether the defendant can absorb the cost. This practice can facilitate recovery to more claimants while reducing the uncertainty of liability for defendants faced with a multitude of claims.[36] It can also save time and money for both parties and provide judicial efficiency for courts by encouraging settlements and reducing the need for a more lengthy trial.[37]

As Judge Jack B. Weinstein of the Eastern District of New York noted, reverse bifurcation is "useful where the parties have excellent information about the likelihood of success on the issue of liability and the real sticking points are the individual issues

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County 2005).

34. *See* State *ex rel.* Atkins v. Burnside, 569 S.E.2d 150, 161 (W. Va. 2002) (prohibiting continued use of reverse bifurcation in the case). Reverse bifurcation has also been used in complex litigation involving the dietary drug Fen-Phen. *See* Melissa Nann, *Fen-Phen Trials Get Under Way In Philadelphia*, THE LEGAL INTELLIGENCER, July 30, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1090180201945. The judges at Philadelphia's Complex Litigation Center, which consolidates Pennsylvania's mass tort cases, indicated that the court might decide to use reverse bifurcation in all Fen-Phen cases. *See generally* Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 238 (2006).

35. Fraysure v. A-Best Prods. Co., No. 83017, 2003 WL 22971024, *4 (Ohio Ct. App. Dec. 18, 2003) (not reported in N.E.2d) ("We find that the inherent complexities involved in asbestos litigation coupled with the trial court's desire to expedite the trial more than justified its decision to implement a reverse bifurcation format.").

36. Stevenson, *supra* note 34, at 220. ("The value of reverse bifurcation is its elimination of uncertainty and unpredictability about the stakes in any given case, thus allowing parties to assess more accurately the relative costs of continuing with the litigation.").

37. *See* Angelo v. Armstrong World Indus., Inc. 11 F.3d 957, 964 (10th Cir. 1993) ("Reverse bifurcation obviously saves time and money by eliminating some cases after the first phase, thus avoiding trial of the defendants' liability."); Simon v. Philip Morris, Inc., 200 F.R.D. 21, 25 (E.D.N.Y. 2001); *see also* Stevenson, *supra* note 34, at 248.

of causation and damages."[38] In certain types of mass litigation like asbestos, whether a product is defective is usually not the major point of contention, which can make deciding damages before a complex determination of individual causation an effective case management tool. In fact, approximately nineteen percent of all asbestos trials use a bifurcated approach, with reverse bifurcation the more common choice.[39]

There is considerable disagreement, however, on the usefulness and fairness of reverse bifurcation, even where punitive damages are not at issue. Proponents argue the same merits of judicial economy and issue simplification as with traditional bifurcation,[40] while opponents point to the potential unfairness to defendants.[41] The limited number of studies on traditional bifurcated proceedings suggest there is a trade-off at work in which plaintiffs are more likely to be awarded higher verdict amounts, but defendants are more likely to prevail when the essential case issues are analyzed independently and without prejudicial evidence.[42] Straight bifurcated trials can, therefore, provide a screening mechanism for unmeritorious claims. By contrast, reverse bifurcated procedures could produce the opposite effect by predisposing juries to the idea of liability. When trials are reverse bifurcated, as is the case in thousands of asbestos proceedings, the plaintiffs are more likely to win at trial compared with non-bifurcated proceedings.[43]

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38. *Simon*, 200 F.R.D. at 32 (citing *Angelo*, 11 F.3d at 963).

39. *See* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 374, 379 (2006) (examining data from nearly all asbestos claims that were tried to a verdict in the United States between mid-1987 and March 2003).

40. *See, e.g.*, Warren F. Schwartz, *Severance—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation*, 20 VAND. L. REV. 1197 (1967); Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1268 (1959).

41. *See infra* notes 79 to 105.

42. *See* Gensler, *supra* note 3, at 741-47 (summarizing studies conducted on the impact of trial bifurcation).

43. *See* MICHELLE J. WHITE, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials*, Nat'l Bureau of Econ. Research Working Paper No. 9362, 2002, http://papers.nber.org/papers/w9362; *see also* Melissa Nann, *More Companies Pursuing Both Parts of Asbestos Trials*, THE LEGAL INTELLIGENCER, Oct. 30, 2003 (stating that a jury in an asbestos case

Furthermore, because reverse bifurcation examines damages before the underlying elements of a cause of action, certain arguments and defenses may be lost. For example, New York State Associate Justice Helen Freedman recognized that reverse bifurcation has "virtually eliminated" the state of the art defense in that state.[44] In addition, the organization of the trial may be used to avoid choice of law issues, which may permit plaintiffs to engage in forum shopping.[45]

In a negligence and wrongful death action involving exposure to chemical substances, the Supreme Court of Appeals of West Virginia criticized and invalidated the use of reverse bifurcation where a trial plan would have tried damages and causation prior to liability.[46] In that case, the court found that such a procedure would result in "significant confusion" of the issues and not permit the parties to present evidence in an organized and effective manner.[47] Reverse bifurcation, the court found, is a rare and "drastic"[48] technique potentially appropriate "only for a fairly narrow category of cases" in which the court anticipates a short damages trial and lengthy determination of liability.[49]

Despite these possible shortcomings, reverse bifurcation could prove useful in the limited circumstances described by courts. As a case management tool, it encourages settlement and provides administrative relief by reducing clogged court dockets. When punitive damages are introduced, however, the effect is radically different.[50] Defendants who may have sought a reverse

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deliberated three hours during the damages phase and deliberated five minutes during the liability phase).

44. Helen Freedman, *Product Liability Issues in Mass Torts—View From the Bench*, 15 TOURO L. REV. 685, 689 (1999).

45. *Id.* at 689-90.

46. *See* State *ex rel.* Atkins v. Burnside, 569 S.E.2d 150, 156-57 (W. Va. 2002).

47. *Id.* at 161.

48. *Id.* at 156 (quoting Walker Drug Co. v. La Sal Oil. Co., 972 P.2d 1238, 1245 n.7 (Utah 1998) (finding reverse bifurcation to be an abuse of discretion)).

49. *Id.* at 156 n.2 (quoting State *ex rel.* Crafton v. Burnside, 528 S.E.2d 768, 770 n.1 (W. Va. 2000)).

50. When a Mississippi trial judge threatened to put the issue of punitive damages before the jury in a 1998 reverse bifurcated trial of twelve asbestos plaintiffs, the defendants promptly settled all twelve cases, reportedly for the

bifurcated procedure would no longer do so if punitive damages are at issue.[51] Alternatively, in such cases, a trifurcated trial in which compensatory damages, liability, and punitive damages are considered separately and in that order might be appropriate. Yet when punitive damages are on the table and considered early in the trial, the potential for substantial prejudice develops and the scales of justice tip to a constitutionally suspect level.

II. THE PURPOSE AND EXPANSION OF PUNITIVE DAMAGES

Any procedure that could improperly broaden the application of punitive damages recovery raises cause for alarm in light of the purpose behind this limited form of punishment. The Supreme Court has expressed serious concern that punitive damages awards in this country have "run wild," jeopardizing fundamental constitutional rights.[52] This is, in part, due to the public becoming desensitized to excessive damage awards and a gradual deviation from the historical purpose behind punitive damages.[53] Punitive damages are not normal civil or tort law damages; they are not awarded to compensate for a harm. That purpose is accomplished by compensatory damages, which provide recovery for both economic losses (e.g., lost wages, medical expenses, and substitute domestic services) and non-

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full amount of compensatory damages, or $48 million. An emergency appeal on the issue of bias was filed with the Mississippi Supreme Court, but was denied. All of the remaining 1,738 claims were then settled on terms favorable to the plaintiffs. *See* David Austern, *The Manville Trust Experience*, Mealy's Asbestos Bankruptcy Conference (Claims Resolution Management Corp., Fairfax, VA, 2001).

51. *See In re* Diet Drugs, 123 Fed. Appx. 465, 470 (3rd Cir. 2005) (holding that opt-out class action plaintiffs could not argue punitive damages in accordance with federal class action agreement and enjoining plaintiffs from arguing that a reverse bifurcated proceeding should not be used); *see also* Stevenson, *supra* note 34, at 262 (reverse bifurcation of trials involving punitive damages ". . . is problematic because either evidence about the tort itself must come in the first phase (essentially negating the bifurcation), or must be decided later, after a subsequent phase that usually does not occur.").

52. Pac. Mut. Life. Ins. Co. v. Haslip, 499 U.S. 1, 18 (1990).

53. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 51-52 (2002).

economic losses (e.g., pain and suffering). Punitive damages are awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'"[54] They provide a "windfall recovery" for plaintiffs.[55]

Like many forms of punishment, punitive damages are designed to "engender adverse social consequences" including, in many instances, debilitating stigma.[56] These "potentially devastating" ramifications can affect a civil defendant's character, reputation, business, and goodwill.[57] For this reason, controls are imposed under the Due Process Clause of the Fourteenth Amendment on both substantive limits on the size of a punitive damages award[58] and procedural limits on when and how punitive damages may be awarded.[59]

Until the mid-twentieth century, punitive damages were available only for a relatively small group of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery,[60]

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54. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (quoting Banker's Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment). All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan, and Washington State, permit the award of punitive damages. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. *See* PRODUCT LIABILITY DESK REFERENCE - A FIFTY-STATE COMPENDIUM (Morton Daller ed., 2005).

55. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981).

56. Addington v. Texas, 441 U.S. 418, 426 (1979).

57. *Browning-Ferris*, 492 U.S. at 281 (Brennan and Marshall, JJ., concurring); *see also* Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) ("[T]he impact of [a punitive damages award] is unpredictable and potentially substantial."); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 417-18 (1967) (Punitive damages awards can have "momentous and serious . . . consequences" for civil defendants).

58. *See* BMW of North Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1990). *Cf.* Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (striking down punitive damages award as "excessive, unreasonable, and violative of due process").

59. *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

60. *See, e.g.*, Trogden v. Terry, 90 S.E. 583, 585 (N.C. 1916) (finding sufficient evidence of malice to sustain jury's punitive damages award in assault action); Ward v. Blackwood, 41 Ark. 295, 299 (1883) (noting that