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In This Issue

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Reverse Bifurcation in the Mass-Tort Context Can Prevent Prejudice and Promote Efficiency

By Scott W. Saylor and Jon A. Strongman

Products liability plaintiffs will inevitably attempt to artificially escalate compensatory damages through the admission of inflammatory liability evidence. If punitive damages are not recoverable, inflated compensatory damages based in part on company conduct improperly “punish” a defendant. Similarly, even if punitive damages are allowed, artificially inflated compensatory damages inappropriately and unconstitutionally increase the amount of punitive damages recoverable under the *State Farm* ratio analysis.¹

Reverse bifurcation – trying first the issue of damages and second the issue of liability – can prevent this type of prejudice. While reverse bifurcation is not new to the mass-tort context, it has recently received increased attention. On August 30, 2004, Judge Bartle who oversees the diet drug multidistrict litigation, (“MDL 1203”) ordered certain plaintiffs to stipulate to reverse bifurcation to ensure that punitive damages were not awarded under the guise of compensatory damages – a result prohibited by the National Diet-Drug Settlement Agreement. This newsletter will discuss:

- The reverse bifurcation procedure and its origins;
- The authority for reverse bifurcation;
- The pros and cons of reverse bifurcation; and
- The emergence of reverse bifurcation in the diet-drug litigation.

1. What is Reverse Bifurcation and What are its Origins?

The reverse-bifurcation procedure divides a trial into two

phases. In phase one, the jury answers three questions: (1) did the plaintiff suffer a cognizable injury; (2) if so, was the injury caused by the product or conduct at issue; and (3) what is the amount, if any, of compensatory damages for the injury suffered. If the jury determines that the plaintiff did not establish an injury, causation, or damages, the trial ends. If however, the jury answers all three questions in the affirmative, the trial proceeds to phase two. Phase two consists of one question: is the defendant liable for the damages identified in phase one.

Reverse bifurcation first garnered notoriety in the asbestos litigation. The Philadelphia Court of Common Pleas – when faced with an overwhelming number of asbestos cases – developed the procedure to deal with such mass torts in an efficient and productive manner.² “The reverse bifurcated trial simplifies the litigation process If the plaintiffs are not entitled to damages, there is no need to delve into the complexities of liability.”³ As a result of the success in Philadelphia, reverse bifurcation was used to litigate asbestos cases throughout the country.

II. The Authority for Reverse Bifurcation

Reverse bifurcation is not explicitly provided for under the Federal Rules of Civil Procedure or the corresponding rules of the state courts. Nearly every jurisdiction, however, allows a court discretion to order separate trials. *See, e.g., Fed. R. Civ. P. 42(b).*

Under this rule, a court has authority to bifurcate any issues – including the issues of damages and liability – in a manner that will further convenience or avoid prejudice. Accordingly, courts have the discretion to order reverse bifurcation so long as the circumstances dictate that prejudice will be prevented or economy served. In fact, the Advisory Committee Notes to Rule 42 state: “While separation of issues in not to be routinely

ordered, *it is important that it be encouraged where experience has demonstrated its worth.*” (emphasis added).

III. The Arguments For and Against Reverse Bifurcation

A. The Benefits of Reverse Bifurcation

There are two clear advantages of reverse bifurcation: (1) it ensures that a compensatory damage award actually compensates the plaintiff for his injuries and is not artificially inflated to punish the defendant in response to inflammatory liability evidence; and (2) phase two is unnecessary if plaintiff did not suffer a cognizable injury and there is no need to inundate jurors with confusing liability evidence.

1. Prevent Punitive Damages by Another Name

In light of the ongoing efforts across the country to curb out-of-control punitive damage awards, plaintiffs “have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards.”⁴ The pain and suffering component of compensatory damages is, by its very nature, subjective. Accordingly, judges are hesitant to overturn a jury’s award.⁵ This environment has allowed plaintiffs’ attorneys to “manipulate the system by using the defendant’s alleged ‘bad acts’ to augment pain and suffering awards.”⁶ Plaintiffs are able to focus the jury on the wrongdoing of the defendant while straying from the particular injury or damages of the plaintiff.⁷ “As a result, the fundamental purpose of pain and suffering awards--to compensate the plaintiff--is upended. The defendant is ‘punished,’ but the award is not subject to the extensive legal controls that help assure real punitive awards do not cross the constitutional line.”⁸ This outcome is particularly egregious when punitive damages are not recoverable by law or agreement.

An example is illustrative. In 2001, a Mississippi jury awarded ten plaintiffs a total of \$100 million in compensatory damages in a Propulsid product-liability case.⁹ Propulsid was a prescription drug used in the treatment of nighttime heartburn. It was withdrawn from general use in 2000. Under Mississippi law, the first phase of the trial involved the determination of liability and compensatory damages; punitive damages were to be considered in a separate proceeding.¹⁰ Despite the fact that punitive damages were not at issue in the first phase of the trial, plaintiffs nonetheless focused on evidence of defendant's bad acts including draft marketing documents that were never distributed and inflammatory memos drafted after the drug was withdrawn.¹¹ In closing argument, plaintiffs' counsel referred to the defendant's "guilt" and even referenced the Bible passage where Jesus cleared the temple of greedy money changers.¹² The result: the jury awarded each plaintiff \$10 million in compensatory damages despite gross differences in the plaintiffs' alleged injuries, expenses, and life expectancies.¹³ A seventy-nine year old plaintiff received the same award as a four-year old plaintiff, and they both received the same award as a plaintiff who suffered only \$535 in medical expenses.¹⁴ The court ultimately declined to proceed with a punitive damages phase as the judge concluded that defendants did not act maliciously.¹⁵

Reverse bifurcation can prevent this prejudice. Importantly, in a reverse bifurcated trial, liability evidence is limited to phase two – after the jury has already determined the amount of compensatory damages. In determining compensatory damages, the jury is not tainted by any "bad company conduct," but instead is forced to focus on evidence of the plaintiffs injuries and the cause of those injuries.

2. Promote Efficiency and Reduce Confusion

Reverse bifurcation not only prevents prejudice, it promotes efficiency. In the mass-tort context, plaintiffs with no injury – or an

injury with a clear alternative cause – often jump on the litigation bandwagon hoping to hit the jackpot with a jury who simply wants to "send a message" to the defendant. In a reverse-bifurcated proceeding, a plaintiff with no injury or a clear alternative cause never gets to the liability phase; if the defendant prevails in phase one, phase two is unnecessary. Such a trial would last a few days as opposed to several weeks and unnecessary expenses and judicial resources would be spared.

Moreover, if punitive damages are unrecoverable, phase two is often avoided if the jury returns a fair compensatory damages award. If the jury award is reasonable, a defendant may very well settle the case for that amount as opposed to incurring additional expenses in trying liability. This has proven to be the case in reverse bifurcation trials across the country.

Finally, in a reverse-bifurcated proceeding, the jury is not overwhelmed with complicated medical evidence and complicated liability evidence at the same time. This leads to less jury confusion and a more accurate result.

B. The Arguments Against Reverse Bifurcation

Plaintiffs will fight reverse bifurcation tooth and nail because, as discussed above, inflammatory liability evidence will inevitably escalate compensatory damages (and the resulting attorneys' fees). Plaintiffs will argue: (1) reverse bifurcation is not a recognized procedure under the applicable rules and breaks from a centuries-old tradition; (2) the jury cannot determine compensatory damages in a vacuum; and (3) reverse bifurcation will result in duplicative evidence and witnesses.

Plaintiffs point out that reverse bifurcation is unconventional; it is not explicitly provided for under the applicable rules of civil procedure and there is no reason to change the way courts have historically tried cases (i.e., "there is no reason to fix what is not broken ..."). Plaintiffs will further

emphasize that courts are fully capable of controlling the introduction of improper evidence. In this regard, however, plaintiffs ignore that – as detailed above – courts have wide discretion to bifurcate issues for trial. Plaintiffs also overlook (understandably) the increasing problem of out-of-control pain and suffering awards (i.e., “the system does in fact need to be fixed . . .”).

Plaintiffs will also argue that jurors will be confused as to why they are determining damages without also understanding the liability issues. Plaintiffs state that the liability evidence is the “context” for the damages evidence and the two should not be separated. In reality, jurors in reverse bifurcated trials have not had difficulty determining damages apart from liability.

Finally, plaintiffs argue that damages and liability are interwoven and a reverse-bifurcated trial will result in the duplication of evidence and the need to call witnesses twice. Plaintiffs point out that their experts will provide opinions both on what caused plaintiffs’ injuries as well as the defendant’s conduct. Additionally, plaintiffs argue that causation issues are often inextricably linked to the issue of liability. For example, understanding the mechanism of action (or cause) for a particular injury may be relevant to demonstrating that the defendant should have known about a particular risk (liability). As a result, experts would have to testify twice, and in the second phase, reiterate in large part what they testified about in phase one. It would be incorrect to argue that there would never be an intersection between evidence of causation, damages, and liability. Moreover, it is true that a witness may need to testify in both phases of a reverse-bifurcated trial. These concerns, however, must still be weighed against the potential of imposing improper (and perhaps unconstitutional) damages on a defendant.

IV. The Diet-Drug Experience

A. Background

In 1999, Wyeth and the class of all former users of the diet medications Redux and Pondimin entered into a \$3.7 billion Nationwide Class Action Settlement Agreement. Judge Harvey Bartle, III of the U.S. District Court for Eastern District of Pennsylvania, sitting as Multi-District Litigation Judge for the Diet Drug Litigation (“the MDL Court”), oversees the Settlement Agreement and has retained the exclusive jurisdiction to administer, supervise, interpret and enforce the Settlement Agreement.

The Settlement Agreement allows class members to opt-out at various stages of the litigation. Those plaintiffs who chose to opt-out initially were free to pursue all their available remedies elsewhere. Those class members who did not opt-out initially were, however, then given an opportunity to opt-out later, so-called “downstream,” at an “intermediate” or “back-end” stage (“Intermediate and Back-End Opt-Outs”). There are approximately 55,000 downstream opt-out diet drug cases pending across the country.

A plaintiff who has properly exercised a downstream opt-out right may file a separate lawsuit against Wyeth subject to certain limitations set forth in the Settlement Agreement. Most notably, the Settlement Agreement bars downstream opt-outs from asserting a claim for punitive or exemplary damages. This prohibition on punitive damages has been recognized as the “central pillar” of the Settlement Agreement.¹⁶

Despite this bar on punitive damages, plaintiffs across the country have repeatedly tried to inject inflammatory evidence into these downstream opt-out trials. As the Third Circuit has noted: “the actual conduct of the litigation raised justifiable fear in the [MDL Court], and among the counsel for defendant and the class, that the plaintiffs were seeking to obtain through the back door what they were barred from receiving through the front.”¹⁷

B. MDL Pretrial Order 3888

In response to plaintiffs' repeated attempts to skirt the settlement agreement, the MDL Court issued orders enjoining plaintiffs from introducing evidence in state court actions relevant only to punitive damages. The plaintiffs appealed these injunctions to the Third Circuit. The Third Circuit reinforced the importance of the punitive damages bar, concluding that: "Allowing state court actions to run afoul of [the punitive damages bar] would fatally subvert the [settlement] and render the agreement (and the Court's jurisdiction) nugatory."¹⁸ The Third Circuit, however, ultimately concluded that the MDL Court's evidentiary injunctions were overbroad.¹⁹ The Third Circuit made clear, however, that the MDL Court was free to consider other options outside of evidentiary restrictions and even raised the possibility of reverse bifurcation: "the [MDL Court] could direct the parties to agree to a bifurcated trial – where damages are determined apart from liability – in the event that the state court were to deem it advisable."²⁰

In response to the Third Circuit recommendation, the MDL Court issued Pretrial Order ("PTO") 3888 on August 30, 2004. PTO 3888 ordered certain plaintiffs in the diet-drug litigation to stipulate to reverse bifurcation. The MDL Court held that the diet-drug litigation presented extraordinary circumstances due to the Settlement Agreement's bar on punitive damages, and that reverse bifurcation would protect this bar. While the MDL Court has declined to apply PTO 3888 to *every* downstream opt-out plaintiff in the nation, it will revisit the issue at the beginning of 2005 in light of plaintiffs' conduct in upcoming diet-drug trials.

C. *The Philadelphia Court of Common Pleas*

Outside of the MDL, some state courts have decided on their own that reverse bifurcation was appropriate for diet-drug trials. There are currently approximately 13,000 downstream opt-out cases currently pending in

the Philadelphia Court of Common Pleas, and to date, approximately seven of these cases have been tried. Five of the trials were by reverse bifurcation while two were not. The five reverse-bifurcated trials averaged approximately one week while the non-bifurcated trials averaged close to three-weeks.

Judge Alfred DiBona and Judge Nitza Quinones-Alejandro presided over the non-bifurcated trials. Critically, both have since decided to use reverse bifurcation. In his second diet-drug trial, Judge DiBona ordered reverse bifurcation, stating: "What I did in the first fen-phen trial, I chose to go straight through. That was my decision. I have now realized that my colleagues are correct. So, hereafter, any cases in this courtroom will be by reverse bifurcation."²¹ This experience in Philadelphia reiterates that, in the proper context, reverse bifurcation can prevent punitive damages under the guise of compensatory damages while saving time and resources.

V. Conclusion

In the mass-tort context, inflated pain and suffering damages have become the "quasi" punitive damages. Such inflated compensatory damages are especially prejudicial when punitive damages are prohibited. Reverse bifurcation offers a procedural tool to prevent this prejudice and ensure that compensatory damages serve their purpose: to adequately compensate plaintiff for his injuries (and not to punish defendant for "bad conduct"). In addition, reverse bifurcation can save resources by preventing plaintiffs with meritless claims from delving into the liability evidence in hopes of hitting an unwarranted jackpot.

Endnotes

1. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).
2. *See, e.g., Jones v. John-Manville Corp.*, 1991 Phila. Cty Repr. Lexis 18 (1991) ("As has become the practice for most asbestos cases, issues of medical causation and damages are

- bifurcated and tried before issues involving theories of liability and product identification. This practice, originated in Philadelphia and since named 'reverse bifurcation,' has become the norm across the country.
3. *White v. Owens-Corning Fiberglass Corp.*, 668 A.2d 136, 142, n.3 (Pa. Super. 1996).
 4. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. Rev. 47, 49 (2002).
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. *Id.* at 65.
 10. *Id.*
 11. *Id.* at 66.
 12. *Id.*
 13. *Id.* at 67.
 14. *Id.*
 15. *Id.* (noting that the judge also reduced the award to \$48.5 million).
 16. *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 306 (3rd Cir. 2004).
 17. *Id.* at 300.
 18. *Id.* at 306.
 19. *Id.*
 20. *Id.* at 318.
 21. *Berntson v. Wyeth*, trial transcript, August 17, 2004, at 13:3-8.