1. **Issue: Competing Purposes Behind Compensatory and Punitive Damages**

   There is no separate cause of action for punitive damages. Rather, punitive damages are a distinct form of damages that may be awarded if liability is established for certain types of causes of action. The purpose of punitive damages is twofold: retribution (or to “punish” for reprehensible conduct) and deterrence (i.e., providing an economic incentive to the wrongdoer and others not to engage in such conduct in the future). As such, punitive damages focus primarily on the defendant – its conduct, its state of mind, and (in many states) its financial condition. In contrast, product liability claims for compensatory damages – which are a distinct type of damages designed to redress a plaintiff’s loss by returning her to where she would have been but for the alleged breach of duty – typically focus on the condition of the product and the effects on the plaintiff.

   Because punitive damages serve different purposes than compensatory damages, it should come as no surprise that some of the evidence that is admissible regarding the liability for

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2. Punitive damages typically are described as being designed to “sting,” but not to bankrupt the defendant; thus, financial condition may come into play in determining the amount necessary to achieve that end.
3. Cooper Indus., 532 U.S. at 432.
and amount of punitive damages may not be admissible regarding the underlying claims for compensatory damages. With respect to liability, courts and litigants have expressed concern that evidence which may only be admissible regarding liability for punitive damages may prejudice a jury's decision regarding liability for the underlying cause of action. With respect to damages, courts and litigants have expressed concerns that wealth or income evidence may tend to prejudice a jury into finding liability for the underlying cause of action, or inflate the amount of the compensatory award. Moreover, the standards of proof may differ between actual and punitive damages, requiring a higher burden of proof for punitive damages. As a result, courts and litigants have struggled to structure trials to avoid prejudicial error and juror confusion in cases that include pleas for punitive damages.

A series of Supreme Court decisions have imposed significant constitutional constraints that limit the scope of punitive damages awarded by juries. These holdings arguably amount to a de facto cap on punitive damages awards, and at least 25 states impose caps on punitive damages, or otherwise limit or prohibit them altogether. However, these decisions have not addressed the issue of preventing the prejudice, confusion, and inefficiency that can arise from the competing purposes behind compensatory and punitive damages.

According to one body of research, the legal construct that separates compensatory damages and punitive damages is sometimes breached—what has been referred to as the “crossover” or “substitution” phenomenon. The crossover phenomenon may occur in two primary forms: (1) compensatory punitive damages; and (2) punitive compensatory damages. Compensatory punitive damages occur where juries award punitive damages as a means to compensate the plaintiff for losses that are “difficult to determine.” Punitive compensatory damages arise in the situation where compensatory damages, such as emotional distress damages, share characteristics with punitive damages. In that context, jury awards may have an increased risk of overlap and double-counting.

On the other hand, another body of scholarship suggests that high-end punitive damages are infrequently awarded, are usually correlated to the plaintiff’s injury, are used for particularly egregious circumstances, and are often reduced by trial and appellate judges. This research also finds that, as compared to judges, juries are not systematically biased against corporations or excessive in awarding punitive damages.

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5 Id. § 12:4.
7 Catherine M. Sharkey, Crossing the Punitive-Compensatory Divide, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 79, 80 (Brian H. Bornstein et al. eds., 2008).
8 See BMW, 517 U.S. at 582.
9 See Campbell, 538 U.S. at 425.
11 Rustad, supra note __, at 1299; Vidmar & Holman, supra note __, at 858.
Regardless of the present restrictions on, or magnitude of, awards of punitive damages, the issue of separating the trial of punitive damages from compensatory damages is a topic that transcends various jurisdictions. As Professor Sharkey has observed, “Our judicial system as a whole would seem to have a vested interest in retaining the punitive-compensatory dichotomy, in large part because of many policies and doctrines that are built upon its foundation.”

Courts and legislatures have looked to several approaches in cases where compensatory and punitive damages are at issue, including efforts to better instruct juries on the distinct purposes of compensatory and punitive damages, restrictions on admissibility of evidence, and caps on punitive damages.

A common precaution taken by courts is trying the case in phases, which often is called “bifurcation” even though, in practice, more than two phases may be used. Bifurcation also can serve the goal of judicial economy. Most jurisdictions require liability for actual damages as a prerequisite for punitive damages, and thus a trial of the actual damages phase can eliminate the need to receive evidence on punitive damages, thereby saving time.

The decision whether to bifurcate a trial leads to sometimes difficult questions of precisely what issues to try in separate phase(s). Many courts separate out the issue of the amount of punitive damages for a separate trial phase because of the potential prejudice stemming from evidence of the defendant’s financial condition. But, as the Supreme Court’s jurisprudence involving the “Gore Guideposts” has allowed for the introduction of evidence not relevant to liability for the underlying cause of action – such as allowing for proof of other so-called “bad acts” for the limited purpose of establishing reprehensibility – some courts have taken to carving the issue of liability for punitive damages for a separate trial phase, too.

As one survey of state punitive damages law has recognized, the manner of defending against punitive damages can confuse a jury:

Phasing trials in two or more stages can eliminate or greatly reduce confusion by the trier of fact. For example, a defendant often will present evidence both that it

12 Sharkey, supra note __, at 81.
13 Id.
14 ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.4 (2011) (“The most efficient number of phases for a punitive damage trial is three phases, namely 1) determination of liability and compensatory damages, 2) determination of whether punitive damages should be assessed, and 3) determination of the amount of punitive damages to assess. By conducting the trial in three phases, judicial resources are not waste3d on evidence and testimony pertaining to punitive damages issues unless the finder of fact first determines that the defendant has liability for compensatory damages. Similarly, testimony and evidence concerning the appropriate amount to assess as punitive damages is not needed unless the finder of fact first determines that punitive damages will be assessed.”).
15 KIRCHER & WISEMAN, supra note __, § 12:4.
16 Id. § 12:11.
17 The three guideposts are: (1) the reprehensibility of the defendant’s conduct; (2) the ratio between punitive and compensatory damages; and (3) comparison to fines or penalties assessed for similar conduct. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).
is not liable for compensatory damages and that its actions are not sufficiently reprehensible to warrant the imposition of punitive damages. Absent a phased trial, these arguments may confuse jurors, causing jurors to rely on evidence presented to support an award of punitive damages to support a determination concerning the defendant’s liability for compensatory damages. Trying a punitive damage case in multiple phases alleviates this problem.18

Ultimately, to determine whether to break punitive damages out into one or more phases of trial is a decision that requires an examination of the elements of the underlying causes of action and of the elements of the substantive punitive damages law. Courts and litigants faced with the decision of whether to bifurcate the trial should pay special attention to the goals of judicial economy and preventing avoidable prejudice and juror confusion from the introduction of sensitive evidence regarding punitive damages that is not necessary to the underlying causes of action.

2. Introduction to Bifurcation

(a) Understanding Bifurcation

The basic premise of bifurcation is that discrete, often dispositive issues are broken off and presented to the factfinder independently. The goal of bifurcation is that the early resolution of an isolated issue will resolve the case, catalyze settlement negotiations, or assist the jury in digesting the issues.19 When used properly and in the appropriate circumstances, the device can allow for the presentation of issues in a manner that arguably promotes efficiency and fairness to litigants on both sides. Bifurcation is used often to separate liability decisions from damages decisions,20 as well as the compensatory stage from the punitive stage of a trial.

Bifurcation is best understood as the trial of separate issues within a single case.21 This is sometimes confused with severance,22 which is another device used to promote efficiency and limit confusion and prejudice.23 Severance is outlined in Rule 21 of the Federal Rules and allows any claim to be severed and tried separately. The key difference is that severance takes one lawsuit and splits it into two or more lawsuits, while bifurcation separates out certain issues

18 ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.5 (2011).
21 See BLACK’S LAW DICTIONARY 163 (6th ed. 1990) (“‘Bifurcated trials’ are trials in which only some of the issues of the case will be resolved at one trial, with the rest left for a further trial or other proceedings.”).
22 See Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1122 n.5 (7th Cir. 1999) (“Courts generally use the terms sever and separate interchangeably, they are analytically distinct . . . . Separate trials will usually result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently.”); WRIGHT & MILLER, supra note __, § 2387, at 87–89.
for separate trials within a single lawsuit. Severed cases will result in multiple decisions, often made by multiple factfinders. “Bifurcated” or “phased trial” cases result in the entry of a single judgment, comprised of decisions from multiple trials, or phases, typically heard by a single factfinder.

(b) Federal Use of Bifurcation

Bifurcation of issues is permissible in federal courts and in most state courts as well. In federal courts, Rule 42(b) governs bifurcation. Rule 42(b) was adopted in 1937 and, short of a 2007 stylistic amendment, has not changed. The Rule gives discretion to the judge, stating that “the court may order a separate trial of one or more separate issues . . . .” The court is advised to bifurcate only for “convenience, to avoid prejudice, or to expedite and economize,” and the court “must preserve any federal right to a jury trial.” Federal judges have absolute discretion to allow the separation of trials, and in the appropriate circumstances they have applied this authority as a practical and effective means of managing cases. While either party can request bifurcated trials, the judge has the authority to do so without the consent of the parties.

The key element to the federal practice is that the judge’s decision be one of informed discretion, whereby the decision to bifurcate is one that, considering the totality of circumstances, will achieve the purposes of Rule 42(b). And the Rule states very simply three grounds of consideration that can lead a judge to order separate trials: (1) in furtherance of convenience, (2) to avoid prejudice, or (3) for the purposes of efficiency and economy. Punitive damage cases fall primarily under the second prong, where “the possibility of prejudice, however remote, justifies a separate trial.” However, the judge also considers the general overlap between issues in deciding if the potential prejudice of a unitary trial outweighs its economy. Federal law takes the position that this decision is properly entrusted to the sound discretion of the judge. While the ultimate decision can be complex, the Seventh Circuit has implemented a three-step process that illuminates and simplifies the judge’s decision-making process: (1) whether separate trials would avoid prejudice or promote judicial economy, (2) whether

24 Id.
25 Id.
26 Id. at 299; Wright & Miller, supra note __, § 2387.
27 A circuit-by-circuit survey of federal courts’ approaches to conducting phased trials in cases involving punitive damages can be found in Robert W. Hammesfahr & Lori S. Nugent, Punitive Damages: A State-By-State Guide to Law and Practice § 3.8, at 115-37 (2011).
28 Fed. R. Civ. P. 42(b) (advisory committee notes); Wright & Miller, supra note __, §2381, at 6–7.
29 Fed. R. Civ. P. 42(b).
30 Id.
31 Wright & Miller, supra note __, § 2388.
32 Id.
33 Id.
34 Id.
bifurcation would unfairly prejudice the non-moving party, and (3) whether separate trials would violate the Seventh Amendment.35

A common use of bifurcation in federal courts is the separation of liability from damages, especially in the punitive damage context.36 While the Manual for Complex Litigation instructs that “particular care” must be taken when considering bifurcation in certain areas of litigation (such as antitrust),37 the general view in federal courts is that bifurcation is a discretionary tool that should be used by judges in appropriate situations to effectively manage cases and avoid prejudice.38

### 3. Bifurcation in the Punitive Damages Context

Bifurcation in the punitive damages context concerns the separation of compensatory and punitive damages stages of trial.39 There are various justifications for bifurcation in the punitive damages context. From the perspective of judicial efficiency, in a bifurcated trial, if the jury finds no compensatory liability damages, then the court and parties are spared further time and expense as the proceedings on punitive liability have become unnecessary. A court may also view bifurcation as a key to promoting settlement, knowing that a loss in the compensatory trial may encourage the defendant to negotiate.

Whereas the general consensus is that bifurcation is a vehicle for judicial efficiency or docket control, in the punitive damage context, separating issues can be a useful means of avoiding prejudice where appropriate.40 The concern voiced in many quarters is that in a unitary trial where punitive damages are tried alongside compensatory damages, jurors may be exposed to evidence pertinent to punitive damages, which in turn may improperly color their views as to compensatory liability and damages. In this regard, prejudice may arise if the jurors are unable to delineate between facts pertinent to compensatory liability and damages, and facts pertinent to punitive liability and damages. This potential problem with delineation may be reflected in the jury’s finding of compensatory liability and award of compensatory damages. At the same time, a jury’s consideration of facts pertinent to compensatory liability and damages in a unitary trial

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35 See Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999). Regarding the Seventh Amendment concern, this occurs when a second jury reexamines a fact that was tried by the first jury. See Rowley & Moore, supra note __, at 3–4. The Supreme Court has determined that the trial of separate issues in the same case to separate juries is permissible as long as the issues are so “distinct and separable” that the second jury will not make factual determinations already settled by the first jury. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931); cf. In re Rhone-Poulence Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that the proposed trial plan violated the Reexamination Clause, where one jury was to consider the common issue of negligence while subsequent juries considered comparative negligence and proximate cause).

36 Wright & Miller, supra note __, § 2390.


38 Id. § 10.13, at 12.

39 Trifurcation separates compensatory liability/damages, punitive liability, and punitive damages.

40 See Rowley & Moore, supra note __, at 12 (finding that avoiding prejudice is a main purpose behind employing bifurcation in the punitive damage context).
should not automatically be deemed improper or subject to bifurcation where the two issues may overlap or otherwise be intertwined or interdependent.\textsuperscript{41} Thus, where its use would be appropriate, bifurcation may provide an “acoustic separation” that will assist jurors in demarcating compensatory and punitive issues.

On the other hand, a sort of “reverse prejudice” may result from the separation of compensatory and punitive damage assessments. While preserving the determination of punitive damages until after the resolution of compensatory liability may effectively shield the defendant from prejudice at the first trial, if in fact the defendant is found liable for compensatory damages, the jury will be assessing the question of punitive damages for a defendant whom they have already labeled a law-breaker. In other words, the finding of liability in the first trial can act as a sort of scarlet letter on the defendant, and it may make the finding of punitive liability more likely. Indeed, one empirical study found that although defendants in bifurcated trials stood a better chance of winning on the issue of compensatory liability, if found liable, the odds that the defendants would also be held liable for punitive damages increased significantly, as did their overall net loss.\textsuperscript{42}

4. State Approaches Toward Bifurcation

States vary widely with their approaches to bifurcation. As of 2008, twenty-one states required bifurcation (or even trifurcation\textsuperscript{43}) in certain situations.\textsuperscript{44} Indeed, most states authorize bifurcation in some instances.\textsuperscript{45} Most states have statutes or rules of court explaining the specific rules of bifurcation, whereas some states’ bifurcation practices live only in the case law.\textsuperscript{46} This section provides an overview of selected state approaches toward bifurcation.\textsuperscript{47}

\textsuperscript{41} See Meiring de Villiers, A Legal and Policy Analysis of Bifurcated Litigation, 2000 Colum. Bus. L. Rev. 153, 157-58; 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2D § 2391, at 505 (1995) (bifurcation should be “denied when the evidence on the two subjects is overlapping or the liability and damages issues are so intertwined that efficiency will not be achieved or confusion may result from any attempt at separation”).

\textsuperscript{42} See Landsman, et al., supra note __, at 329 (finding that defendants prevailed on the issue of compensatory liability 60 percent of the time in bifurcated trials, as opposed to only 43 percent in unitary trials).

\textsuperscript{43} “Trifurcation” is a type of polyfurcation—the splitting of a single issue into multiple trials—that refers to expanding the traditional bifurcation model (splitting issues of liability and damages) to include separate trials for liability and for different types of damages (i.e. compensatory and punitive). See Wright & Miller, supra note __, § 2390 at 172–73 & nn.22–23; see, e.g., In re Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1988) (affirming the district court order to trifurcate trials for issues of liability, causation, and damages). Some states require trifurcation in the punitive damage context, such that there are separate trials for (1) compensatory liability and damages, (2) punitive liability, and (3) punitive damages. See Sharkey, supra note __, at 84 n.21.

\textsuperscript{44} Sharkey, supra note __, at 84 & n.21.

\textsuperscript{45} Rowley & Moore, supra note __, at 8 n.33.

\textsuperscript{46} Id.

\textsuperscript{47} For a state-by-state analysis of the law regarding phasing the trial of punitive damages claims, see Robert W. Hammesfaehr & Lori S. Nugent, Punitive Damages: A State-By-State Guide to Law and Practice § 3.8, at 137-97 (2011).
(a) Illinois

The history of bifurcation in Illinois is complicated. The right to bifurcate arose from the common law, where courts held they had the inherent authority to order a split trial. Later, Illinois courts reversed course and determined that judges could not separate the issues of liability and damages, as there was no basis for this authority in law. The Illinois legislature later contributed to the evolution of the practice, when the 1995 Illinois Tort Reform Act created a specific right for defendants, upon request, to have separate trials for punitive damages claims. However, the Act was later deemed unconstitutional in its entirety, and no subsequent legislation has been passed concerning the matter.

Bifurcation rules in Illinois now live within its case law. The general principle is that bifurcation is available at the circuit court’s discretion, especially when there is a threat of jury confusion or party prejudice. However, the decision in Mason v. Dunn prohibiting a “split issue trial” at the objection of either party still stands. That is to say, it is not clear whether bifurcation of liability from damages is allowed in Illinois courts absent any authorizing legislation.

(b) Wisconsin

Wisconsin is another state that has taken legislative action in addressing separation. The statute reads as follows:

Consolidation; separate trials. . . . (2) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross claim, counterclaim, or 3rd-party claim, or of any number of

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48 Compounding the lack of codified practices, Illinois courts also use the term “severance” as a general term that can refer either to Rule 21 severability or Rule 42(b) separation of issues. See, e.g., Mason v. Dunn, 285 N.E.2d 191 (2d Dist. 1972); III. Law & Practice, § 15 (2011) (“The term ‘sever’ is used broadly, and when a trial court orders an issue or claim severed, more often than not the court is simply providing for separate trials and not that the claims thereafter should proceed as separate actions.”).

49 Opal v. Material Serv. Corp., 133 N.E.2d 733 (1st Dist. 1956); Lutgert v. Schaefflein, 47 N.E.2d 359, 364 (1st Dist. 1943) (“The court has ample power to order separate trials where the trial of all the issues presented by the various parties might tend to confuse the jury”).

50 Dunn, 285 N.E.2d at 193.


52 735 ILCS 5/2-1115.05(c) (1995).

53 Best v. Taylor Machine Works, 689 N.E.2d 1057, 1106 (Ill. 1997) (holding that although many provisions, including 735 ILCS 5/2-1115.05, were not being challenged, the entire Act was deemed invalid on grounds of severability).


56 Note that authorization could also come from the Illinois Supreme Court. Id.
claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.\(^57\)

The Wisconsin statute was modeled after federal Rule 42(b), but, according to the legislative history, purposely omitted the right to trials for separate issues.\(^58\) While early drafts of the rule included a provision allowing bifurcation of issues, the Judicial Council Committee voted to exclude the provision, noting, “The rule has been intentionally written to provide that only claims can be bifurcated and that issues cannot be bifurcated.”\(^59\) Although this revision received pushback from many concerned parties, including judges and representatives from local bar associations, the rule was adopted in 1976 without allowance for bifurcation of issues.\(^60\) And so, similar to the situation in Illinois, courts in Wisconsin require legislation to authorize the separation of issues, and are not permitted to exercise their general case management discretion to authorize bifurcation of issues.\(^61\)

(c) Indiana

Indiana has codified bifurcation within its Rules of Court:

**Rule 42. Consolidation--Separate trials:**

**(B) Separate trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

**(C) Submission to Jury in Stages.** The Court upon its own motion or the motion of any party for good cause shown may allow the case to be tried and submitted to the jury in stages or segments including, but not limited to, bifurcation of claims or issues of compensatory and punitive damages.\(^62\)

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\(^57\) WIS. STAT. § 805.05 (2010).
\(^58\) Waters v. Pertzborn, 627 N.W.2d 497, 503 (Wis. 2001).
\(^59\) Id. (quoting Letter from Reuben W. Peterson, Chairman of the Judicial Council, to the Honorable Michael T. Sullivan, Circuit Court for the Milwaukee County (Apr. 16, 1974) (on file with the Wisconsin State Law Library)).
\(^60\) Waters, 627 N.W.2d at 505. Note that WIS. STAT. § 805.09(2) further supports the legislature’s intention to preclude bifurcation of issues, at least to different juries, stating, “A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions.”
\(^61\) Waters, 627 N.W.2d at 906 (holding that WIS. STAT. § 906.11(1), which grants authority to judges to control the general order of trials, was not sufficient to authorize bifurcation of issues).
\(^62\) Indiana Rules of Court, Trial Procedure Rule 42 (2009).
Although separation of issues, including punitive damages, is authorized by the Rules, and while judges have wide latitude in granting separate trials, Indiana courts are apparently reluctant to authorize bifurcation, preferring a unitary trial. Indiana trial courts are tasked with balancing “the interests of convenience and economy against the likelihood of substantial prejudice to the defendant’s case.” Indiana appellate courts require an actual showing of prejudice as a prerequisite to overturn a refusal to bifurcate by the trial court, lending substantial deference to the trial courts.

**(d) New York**

Under New York Civil Practice Rule 603, trial courts are vested with the discretionary authority to sever issues of liability and damages. Under the rule, “[i]n furtherance of convenience or to avoid prejudice the court may order severance of claims, or may order a separate trial of any claim or of any separate issue.” It “may [also] order the trial of any claim or issue prior to the trial of the others.”

In addition, under the New York Rules of Court, “[j]udges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action.” “Where a bifurcated trial is ordered, the issues of liability and damages shall be severed and the issue of liability shall be tried first, unless the court orders otherwise.”

There is a split of views among courts in New York, however. In the Second Judicial Department, the practice is to bifurcate the issues of liability and damages for the purpose of efficiency and to minimize, with regard to liability, any appeal to sympathy regarding the

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65 Id. at 750 (citing Yoder, 696 N.E.2d at 414).
66 N.Y. C.P.L.R. 603.
67 Id.
68 New York Rules of Court § 202.42(a); see also Section 206(19)(a) of Uniform Rules for Court of Claims (“[j]udges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action”).
69 New York Rules of Court § 202.42(b).
physical injuries sustained. In contrast, “the general practice in the First Department . . . is to conduct unified trials rather than to bifurcate the liability trial from the damages trial.”

New York courts generally deny motions to bifurcate where they reasonably conclude that bifurcation would not result in more expeditious resolution of the action, or where liability and damages issues are intertwined. Thus, for example, if it is likely that the parties would have to endure two trials and that two separate juries would need to be impaneled due to the coordination of expert witnesses, then a motion to bifurcate can be denied because it would not result in a more expeditious resolution. Another factor New York courts consider in disallowing bifurcation is the existence of a number of witnesses required to provide testimony as to both issues of liability and damages. While New York law does not speak to the bifurcation of punitive damages per se, courts in New York are vested with the authority to order bifurcation of “any separate issue,” which would include punitive damages.

(e) New Jersey

In contrast to New York, where a defendant requests, a New Jersey trial court must bifurcate the trial of punitive damages issues from the trial of underlying liability and compensatory damages, with the punitive damages issues tried at the second phase of the bifurcated trial. The court has no choice in the matter. Evidence relevant only to punitive damages is inadmissible in the liability and compensatory damages phase. Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial.

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70 Wahid v. Long Island R.R. Co., 15 Misc.3d 1120(A), 839 N.Y.S.2d 438, 2007 WL 1119905, at *1-2 (N.Y. Sup. 2007); see also Mazur v. Mazur, 288 A.D.2d 945, 732 N.Y.S.2d 204 (4th Dep’t 2001) (“As a general rule, ‘[i]ssues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately unless plaintiff's injuries have an important bearing on the issue of liability’’) (internal citations omitted).
72 Carpenter v. County of Essex, 888 N.Y.S.2d 278, 279-80 (3d Dep’t 2009); see also Iglesias v. Brown, 872 N.Y.S.2d 830, 831 (4th Dep’t 2009) (“An exception to that general rule arises . . . where the injuries sustained have an important bearing on the issue of liability”) (internal quotation marks and citations omitted); Madden v. Town of Greene, 894 N.Y.S.2d 854, 855-57 (N.Y. Sup. Ct. 2010).
73 Madden, 894 N.Y.S.2d at 864.
74 Id.
75 Rowley & Moore, supra note __, at 7 (“Support for selective bifurcation can be found in federal practice and the statutes of various states . . . . [F]or example, New York . . . .”).
76 N.J.S.A. 2A: 15-5.13(a)-(b), (d).
77 N.J.S.A. 2A: 15-5.13(a)-(b); Model Jury Charge (Civil), § 8.61.
78 N.J.S.A. 2A: 15-5.13(c).
New Jersey courts also have discretion under Rule 4:38-2 to sever claims for purposes of convenience and the avoidance of prejudice.\(^80\) This discretion is augmented by the provisions of Rule 4:29-2, which authorizes the court to “order separate trials or make other orders to prevent delay or prejudice,” and by Rule 4:10-3, which authorizes the court to issue orders restricting discovery.\(^81\) The New Jersey Supreme Court has also encouraged judges to utilize Rule 4:38-2(b), and bifurcate liability and damage issues.\(^82\)

(f) Additional States With Mandatory Bifurcation Provisions

In addition to New Jersey, several other states have mandatory bifurcation provisions, including Missouri, North Carolina, Texas, and Ohio.

The Missouri statute mandates bifurcation of punitive damages if requested by any party. However, it allows liability for punitive damages to be determined in the first stage of the trial, reserving only the amount of punitive damages for the second stage:

1. All actions tried before a jury involving punitive damages, including tort actions based upon improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party.

2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant’s financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages.

3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.\(^83\)

The North Carolina and Texas bifurcation statutes both mandate bifurcation when requested by the defendant only. However, in North Carolina, both liability for and amount of punitive damages are separated from compensatory liability and damages:

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages.

\(^{80}\) R. 4:38-2(a).
\(^{81}\) N.J. Ct. R. 4:29-2; 4:10-3.
\(^{82}\) Rowley & Moore, supra note   , at 6 n.19 (citing N.J. Sup. Ct. Directive No. 3-77 (1977)).
\(^{83}\) V.A.M.S. § 510.263 (emphasis added).
if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.\(^8^4\)

On the other hand, like Missouri, the Texas statute allows punitive ("exemplary") liability to be determined alongside compensatory liability, but mandates bifurcation of only the amount of punitive damages if requested by the defendant:

(a) \textit{On motion by a defendant}, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.

(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.

(c) In the first phase of a bifurcated trial, the trier of fact shall determine:

1. \textit{liability} for compensatory and \textit{exemplary damages}; and

2. the amount of compensatory damages.

(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.\(^8^5\)

Ohio is a prime example of a state struggling with the complexities of settling on a bifurcation scheme. Ohio has both permissive and mandatory bifurcation provisions in its statutes, which has generated confusion among its courts. On February 2, 2011, the Ohio Supreme Court accepted two cases to decide a conflict in the lower courts with regard to the bifurcation provisions of SB 80, Ohio’s Tort Reform law. In \textit{Havel v. Villa St. Joseph}, No. 2010-2148, the Court will decide if the mandatory bifurcation provision of RC 2315.21 (B)(1) is unconstitutional because it conflicts with the discretionary standards in Civil Rule 42 (B). In \textit{Flynn v. Fairview Village Retirement Community, Ltd.}, No. 2010-1881, the Court will address the issue of whether the trial court’s denial of a motion requesting mandatory bifurcation of a punitive damage claim is immediately appealable. The outcome of these cases will likely have a significant impact on trial strategies where punitive damages are involved.

5. \textbf{Recommendation}

\(^8^4\) N.C.G.S.A. § 1D-30 (emphasis added).

\(^8^5\) V.T.C.A. § 41.009 (emphasis added).
While the federal bifurcation rule does not explicitly address punitive damages, federal courts in general have embraced the phased trial of cases involving punitive damages and exercised bifurcation as a vital tool in case management. The implementation of bifurcation among separate states varies, with some requiring it in various forms, while others merely allow it.86

Any decision to separate an issue or issues for a separate phase of the trial – in front of the same jury, of course – should be premised on the goals of preventing prejudicial error and juror confusion, as well as promoting judicial efficiency. As such, one must first look to the law applicable to the underlying cause of action to determine what evidence may be admissible to prove the elements of the causes of action. Then, one must consider the elements of proving liability for and the amount of punitive damages. If the evidence admissible to prove punitive damages would be inadmissible to prove the underlying causes of action, there may be an issue that is ripe for bifurcation.

Certain types of evidence – such as wealth evidence – are viewed as highly prejudicial. And yet such evidence is admissible in proving punitive damages in many states. Courts and litigants should bifurcate where such prejudicial evidence is admissible solely on the issue of the amount of punitive damages.

Some cases, however, will present a much more difficult decision with respect to whether to bifurcate an issue such as the liability for punitive damages. Whether a sufficient risk of prejudice or juror confusion exists in such instances may depend on the facts of the specific case before the court, particularly what is admissible to establish factors such as reprehensibility. Where there is little evidence of conduct that is different in kind from the evidence that will be used to establish liability for the underlying causes of action, bifurcation of the issue of liability for punitive damages may not be appropriate. But where the evidence to be used to establish liability for punitive damages differs substantially from that which will be used to establish liability for the underlying causes of action, the risk of prejudice is heightened and may justify separating the issue of liability for punitive damages out for separate trial.

Where bifurcation of an issue is ordered, the same jury should be used to adjudicate the issue. This promotes judicial economy, but it also provides due process and Seventh Amendment protections against separate juries reaching conflicting opinions about the same evidence.

Similarly, where bifurcation is ordered, the issues relating to the underlying substantive causes of action should be decided before any issues related to punitive damages are adjudicated. Some courts – particularly in West Virginia – have allowed so-called “reverse bifurcation” in certain cases, having jurors decide the amount of damages before deciding liability. Such bifurcation may or may not be more convenient and prevent prejudice when it is used in cases involving only compensatory damages. That, however, is beyond the scope of this report. But

86  Sharkey, supra note __, at 80.
where a jury is asked to fix *punitive* damages prior to any finding of liability even for the underlying tort, the risk of prejudice is clear. Such reverse bifurcation should not be allowed.\(^{87}\)

[Alternative] On the other hand, the federal approach to bifurcation is not necessarily shared by all jurisdictions or parties to a lawsuit. From the perspective of allowing greater local flexibility and fairness to all, perhaps bifurcation of punitive damages should be allowed where both parties consent to (or seek) it and a judge agrees, or in the alternative, if at least one party consents to (or seeks) it, and a judge agrees.

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