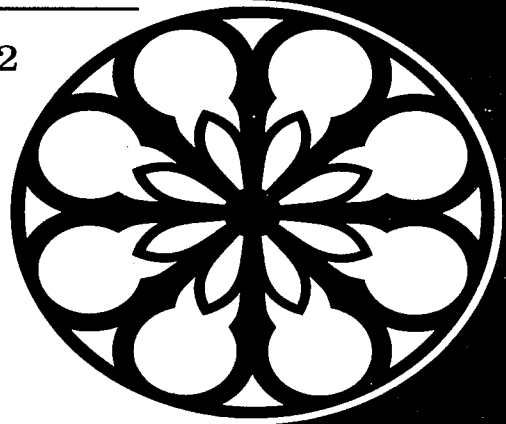


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Putting the Cart Before the Horse:  
The Prejudicial Practice of a “Reverse Bifurcation”  
Approach to Punitive Damages

*Victor E. Schwartz and  
Christopher E. Appel*

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

*Victor E. Schwartz\* & Christopher E. Appel\*\**

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\* Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy, & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, Prosser, Wade, and Schwartz’s Torts (11th ed. 2005). He has served on the advisory committees of the American Law Institute’s Restatement of the Law of Torts: Products Liability, Apportionment of Liability, and General Principles projects. The author acknowledges the support of Altria Group, Inc. in connection with the preparation of this article, however, the views discussed herein are solely those of the author as a scholar of tort law and over a decade of filing amicus briefs in nearly every punitive damages case that has come before the Supreme Court of the United States. Schwartz received his B.A. *summa cum laude* from Boston University and his J.D. *magna cum laude* from Columbia University.

\*\* Christopher E. Appel is an attorney in the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy, & Bacon L.L.P. He received a B.S. from the University of Virginia’s McIntire School of Commerce with a double concentration in Finance and Marketing and an additional Economics degree from the College in 2003, and a J.D. from Wake Forest University School of Law in 2006.

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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.<sup>1</sup> 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"<sup>2</sup> 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

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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.<sup>3</sup> It is intended to separate claims or issues when a single trial would prove cumbersome, confusing, or unfair to the parties.<sup>4</sup> 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.<sup>5</sup> Because this procedural device

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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. Töke, *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.<sup>6</sup>

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.<sup>7</sup> Historically, however, bifurcation had very limited application.<sup>8</sup> It did not exist in the courts of the American colonies as it does today.<sup>9</sup> 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."<sup>10</sup> Bifurcation arose in federal courts of equity under Equity Rule 29, which existed before the promulgation of the Federal Rules of Civil Procedure.<sup>11</sup> 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."<sup>12</sup>

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

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(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.”<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> The

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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 effects 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,<sup>17</sup> which is relevant to liability, or where punitive damages are implicated.<sup>18</sup>

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.<sup>19</sup> 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."<sup>20</sup> 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."<sup>21</sup> By deferring consideration of evidence relevant only to punitive damages, the standard approach to a bifurcated punitive damages trial limits the potential for bias.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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).<sup>28</sup>

Recognizing the benefits of deciding liability before punitive damages, some state courts have adopted straight bifurcation as a matter of common law reform.<sup>29</sup> Other states have adopted such a procedure through court rules or legislation.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> Although the procedural device is “well-recognized” in some jurisdictions,<sup>33</sup> 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.<sup>34</sup>

The nature and scope of asbestos litigation has led to reverse bifurcation where courts seek expedited trials and consolidation of multiple claims.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.”<sup>38</sup> 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.<sup>39</sup>

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,<sup>40</sup> while opponents point to the potential unfairness to defendants.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> Reverse bifurcation, the court found, is a rare and “drastic”<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.’”<sup>54</sup> They provide a “windfall recovery” for plaintiffs.<sup>55</sup>

Like many forms of punishment, punitive damages are designed to “engender adverse social consequences” including, in many instances, debilitating stigma.<sup>56</sup> These “potentially devastating” ramifications can affect a civil defendant’s character, reputation, business, and goodwill.<sup>57</sup> 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<sup>58</sup> and procedural limits on when and how punitive damages may be awarded.<sup>59</sup>

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,<sup>60</sup>

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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

libel and slander,<sup>61</sup> malicious prosecution,<sup>62</sup> false imprisonment,<sup>63</sup> and intentional interferences with property.<sup>64</sup> At that time, punitive damages generally “were rarely assessed and likely to be small in amount,”<sup>65</sup> only slightly exceeding compensatory awards.<sup>66</sup>

In the late 1960s, American courts began to depart from the historical intentional tort underpinnings of punitive damages.<sup>67</sup>

“vindictive or exemplary damages” may be awarded “[i]f the assault was committed without fault on the part of the plaintiff in a wanton and wilful manner, and under circumstances of outrage, cruelty, and oppression, or with malice”); *Lyon v. Hancock*, 35 Cal. 372 (1868) (allowing punitive damages in assault and battery actions when malice can be shown).

61. *See, e.g.*, *Louisville & Nashville R.R. Co. v. Ballard*, 3 S.W. 530 (Ky. 1887) (discussing the standard of conduct sufficient to authorize exemplary damages); *Sheik v. Hobson*, 19 N.W. 875 (Iowa 1884) (noting that punitive damages may be awarded in slander actions, though not in this case because the defendant's death ceased the punitory powers of the law).

62. *See, e.g.*, *Brown v. McBride*, 52 N.Y.S. 620 (N.Y. Sup. Ct. 1898) (finding no error where trial court instructed the jury to award “smart money” in wrongful prosecution action if “they found that the defendant instituted the prosecution in wanton or reckless disregard of the rights of the plaintiff”).

63. *See, e.g.*, *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) (noting that punitive damages may be awarded “if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations”); *Green v. S. Express Co.*, 41 Ga. 516 (1871) (affirming grant of new trial because evidence did not sustain an award of more than nominal damages).

64. These included trespass and conversion, for example, *Dorsey v. Manlove*, 14 Cal. 553 (1860); *Singer Manufacturing Co. v. Holdfodt*, 86 Ill. 455 (1877); malicious attachment, for example, *Yazoo & Miss. Valley Railroad Co. v. Sanders*, 40 So. 163 (Miss. 1906); *Schumacher v. Shawhan Distillery Co.*, 165 S.W. 1142 (Mo. Ct. App. 1914); and destruction of property, private nuisance, or similar wrongful conduct, for example, *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Whipple v. Walpole*, 10 N.H. 130 (1839); *Pickett v. Crook*, 20 Wis. 358 (1866) (allowing exemplary damages generally but reversing court's award here because of over-broad jury instructions).

65. *Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

66. *See, e.g.*, *S. Kan. R.R. Co. v. Rice*, 16 P. 817, 818 (Kan. 1888) (\$35 costs and fees, \$10 injury to feelings, \$71.75 punitive); *Fay v. Parker*, 53 N.H. 342, 397 (1872) (\$150 actual, \$331.67 exemplary reduced to “no more than \$150”); *Woodman v. Nottingham*, 49 N.H. 387, 389 (1870) (\$578 actual, \$100 exemplary); *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304, 308 (1869) (\$500 actual damages, \$858.50 exemplary).

67. In 1967, a California appellate court held for the first time that punitive damages were recoverable in a strict products liability action. *See*



Lesser misconduct came to merit punitive relief. The amorphous terms "reckless disregard" became a popular standard for punitive damages liability.<sup>68</sup> A lower standard, namely "gross negligence," became sufficient to support a punitive damages award in some states.<sup>69</sup> In addition, a number of states instituted the "triple trigger" approach of willful, wanton, or gross misconduct, which gave plaintiffs three separate paths to obtain punitive damages.

Changes in punitive damages law and practice impacted both the frequency and size of punitive damages awards. Until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in products liability cases. These punitive damages awards were also modest in proportion to the compensatory damages awarded.<sup>70</sup> In the late 1970s and 1980s, however, the size of punitive damages awards "increased dramatically,"<sup>71</sup> and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."<sup>72</sup> The advent of mass tort litigation led to an increase in punitive damages claims against manufacturers, including the possibility of repeated imposition of punitive awards for

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Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 418 (Ct. App. 1967).

68. See, e.g., UTAH CODE ANN. § 78-18-1(1)(a) (2002) (punitive damages may be awarded if the tortfeasor acts willfully and with malice or intentional fraud or "reckless indifference toward, and a disregard of, the rights of others").

69. See, e.g., Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) ("gross negligence").

70. Gillham v. Admiral Corp., 523 F.2d 102, 104 (6th Cir. 1975) (\$125,000 compensatory damages, \$50,000 attorneys' fees, \$100,000 punitive damages), *cert. denied*, 424 U.S. 913 (1976); Toole, 60 Cal. Rptr. at 403 (\$175,000 compensatory damages, \$250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636, 638 (Ill. App. Ct. 1969) (\$920,000 compensatory damages, \$10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

71. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

72. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986) ("Many of these awards were also unprecedented in amount."); see also PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988) (describing tort liability as a ubiquitous tax which was set in place in the 1960s and 1970s); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (terming the litigious 1960s and 1970s a "unique experiment" and modern jury verdicts "guesswork").

essentially the same conduct. In 1989, one respected commentator noted, “hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.”<sup>73</sup>

While the Supreme Court expressly acknowledged the adverse impacts of excessive punitive awards several times in the 1980s, it still “rejected or deferred”<sup>74</sup> several constitutional challenges to them. The Court ruled either that the constitutional provision invoked—such as the Eighth Amendment’s Excessive Fines Clause—was inapplicable to civil litigation<sup>75</sup> or that the defendant failed to preserve such constitutional arguments for appeal.<sup>76</sup>

A major change occurred in 1991, when the Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip* that punitive damages awards had “run wild” in this country and should be subject to constitutional due process limitations.<sup>77</sup> Since then, the Court has increasingly placed legal controls on both the amount and procedures for reaching punitive damage awards, reemphasizing its concern that excessive punitive damages may infringe upon fundamental constitutional rights.<sup>78</sup> These legal controls include substantive due process restrictions on the amount of punitive awards, procedural due process requirements

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73. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989).

74. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17-18 (1990).

75. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (rejecting Eighth Amendment challenge to punitive award on ground that the Excessive Fines Clause was not intended to apply to civil cases).

76. *Id.* at 277-78 (refusing to address Fourteenth Amendment challenge to punitive award where due process violation was not raised below); *Bankers Life & Cas. v. Crenshaw*, 486 U.S. 71, 76 (1988) (refusing to reach federal constitutional claims based on the Due Process Clause and the Contract Clause since those claims were not raised in state court); *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986) (disposing of unrelated issue makes it unnecessary to reach federal constitutional challenges to punitive award).

77. *Haslip*, 499 U.S. at 18.

78. *See, e.g.*, *Philip Morris v. Williams*, 127 S.Ct. 1057, 1063 (2007) (holding that a multi-million dollar punitive damages award against a cigarette manufacturer violated constitutional procedural due process).

for the assessment of punitive damages and for meaningful judicial review, and Commerce Clause limitations on a state's ability to consider activity outside its jurisdiction as a basis for punitive awards.<sup>79</sup>

While these constitutional limitations have reined in many excessive punitive damages awards, the impact of the expansion of punitive damages from a rare, extraordinary form of recovery to mainstream tort remedy has already been realized and indoctrinated. Pleading punitive damages has become standard operating procedure for plaintiffs' attorneys in mass litigation regardless of evidence of the type of putative wrongdoing historically intended to allow such recovery. Reverse bifurcated proceedings that determine punitive damages before liability simply represent a further attempt to relax the constitutional safeguards in place and expand punitive recoveries.

### III. REVERSE BIFURCATION PLACING PUNITIVE DAMAGES FIRST: A NEW AND DANGEROUS PRACTICE

A trial that combines the limited circumstances in which reverse bifurcation could be useful with the narrow purpose and considerable impacts of punitive damages awards creates an indefensible procedural unfairness ripe for creating outcomes based on prejudice, not facts. The determination of punitive damages in the first phase brings forth all of the most damning evidence before any discussion of the basis for imposing liability. In contrast to a bifurcation plan that aims to eliminate the potential for prejudice by removing bad conduct evidence from the view of the jury while objectively considering liability and the extent of harm, a reverse bifurcation plan that decides the case in this manner is clearly intended to maximize, rather than minimize, the likelihood of bias and prejudice. For these reasons, courts have rarely permitted a jury to consider punitive damages

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79. *Id.* at 1062; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2002); *BMW*, 517 U.S. at 562; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993); *Haslip*, 499 U.S. at 31.

in the initial phases of the trial.<sup>80</sup> When allowed, however, such a procedure jeopardizes the due process rights of defendants to a fair trial.

A. *Engle v. Liggett Group, Inc.*

A reverse bifurcation plan to permit consideration of punitive damages before a full determination of liability is similar to the approach rejected by a Florida appellate court and the Florida Supreme Court in *Engle v. Liggett Group, Inc.*<sup>81</sup> *Engle* involved a class action composed of all Florida smokers seeking damages against cigarette companies and industry organizations for alleged smoking-related injuries. The initially proposed *Engle* trial plan was divided into three phases. In Phase 1, the jury was to consider general issues related to the defendants' conduct and health effects of smoking, reach findings of fact, and determine entitlement to punitive damages for the class as a whole.<sup>82</sup> This trial plan also proposed to allow the jury, after determining entitlement to punitive damages, to then "determine a 'basis or ratio' for computing punitive damages individually for each class member within each subclass."<sup>83</sup> "In Phase 2, the jury would determine the individual liability and compensatory-damage claims . . . , and then the punitive 'basis or ratio' would be applied to each plaintiff's compensatory award (if any) to determine his or her punitive award."<sup>84</sup> It was not until after the jury returned its Phase 1 verdict, and before the Phase 2 trial began, that the court abandoned the "basis or ratio" method,

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80. Some courts apply a reverse bifurcation approach when punitive damages are at issue, but wait until after compensatory damages, and liability have been determined before addressing punitive recovery. In these cases, compensatory damages are determined in the first phase and liability and punitive damages are determined in the second phase. See, e.g., *Smith v. Celotex Corp.*, 564 A.2d 209, 210 (Pa. Super. Ct. 1989).

81. *Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *aff'd*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, *R.J. Reynolds Tobacco Co. v. Engle*, 2007 WL 1494775 (Oct. 1, 2007).

82. *Id.* at 441.

83. *Id.* at 441 n.2.

84. *Id.*

which was repeatedly objected to by the defendants.<sup>85</sup> “Instead, the court determined the jury would assess punitive damages as a lump sum with respect to the entire class.”<sup>86</sup>

Under the modified trial plan, the jury, in Phase 2, would consider compensatory damages to three individual class representatives and the amount of punitive damages for the entire class.<sup>87</sup> Phase 3 would involve new juries that would decide individual liability and compensatory damages for the estimated 700,000 class members. The result of the first two phases of the trial was a \$145 billion punitive damage award for the class before a determination of individual liability or compensatory damages for all but the three class representatives.<sup>88</sup>

The appellate court described the plan as putting the “cart before the horse.”<sup>89</sup> Relying on the Florida Constitution, the court found that determining class-wide punitive damages before the necessary findings of liability and before a determination of compensatory damages was impermissible, because such a plan:

a) improperly requir[ed] the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) preclud[ed] the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminat[ed] the jury’s discretion to assess punitive damages based upon the individual class members’ varying circumstances.<sup>90</sup>

The court also found it improper to decide punitive damages based on a fictional composite—a generalized “perfect plaintiff”—that supplanted all real class members, whose knowledge, conduct, and other circumstances varied, and that allowed the

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85. *Id.*

86. *Id.*

87. The determination of compensatory and punitive awards was conducted in separate stages in Phase 2. See *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).

88. *Engle v. Liggett Group, Inc.*, 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003).

89. *Id.* at 456.

90. *Id.*

introduction of evidence of years of conduct that was “untethered to any individual plaintiff.”<sup>91</sup>

The Florida Supreme Court unanimously affirmed the appellate court’s decision to vacate the punitive damages award.<sup>92</sup> The Florida Supreme Court held, “[a]s a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed.”<sup>93</sup> A majority of the *Engle* court further concluded that the trial court erred in allowing the jury to consider entitlement to punitive damages during Phase 1 of the trial.<sup>94</sup> The court held that “a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty.”<sup>95</sup> The *Engle* court recognized that the jury’s general findings on certain factual issues and elements of liability were insufficient to support a punitive damage award when the jury had not determined crucial elements of the case, such as whether any of the class members relied upon the defendants’ representations or were injured by the defendants’ conduct.<sup>96</sup> In other words, the trial court erred in permitting the jury in Phase 1 to consider punitive damages when that jury “did *not* determine whether the defendants were liable to anyone.”<sup>97</sup>

#### B. *Chemtall, Inc. v. Bowers*

This well-reasoned opinion was not shared by a West Virginia trial court, which, subsequent to the *Engle* decision, adopted a similar reverse bifurcation scheme where plaintiffs sought medical monitoring for diseases they claimed may develop in the future because of their exposure to polyacrylamide flocculants (products used to treat coal wash water at coal

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91. *Id.* at 467 n.48, 455-56.

92. *Engle v. Liggett Group, Inc.*, 945 So. 2d. 1246, 1262 (Fla. 2006).

93. *Id.*

94. *See id.* at 1262-63.

95. *Id.* at 1262 (citing *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989)).

96. *Id.* at 1263.

97. *Id.* (emphasis in original) (quoting *Engle*, 853 So. 2d at 450).

preparation plants). In *Chemtall, Inc. v. Bowers*, the Circuit Court of Marshall County initially certified a class action on behalf of residents of seven states—a decision the West Virginia Supreme Court of Appeals vacated.<sup>98</sup> Upon remand, the Circuit Court sidestepped the certification issue and instead proceeded by adopting a reverse bifurcation trial plan.<sup>99</sup>

In the first phase of the trial plan, proposed by plaintiffs and accepted nearly verbatim by the court,<sup>100</sup> the jury would consider whether a defendant's conduct warranted punitive damages as well as specific liability issues suggested by the plaintiffs.<sup>101</sup> If the jury determined that the defendant's conduct justified imposition of punitive damages, then the jury could set a "multiplier" that the court would later apply to any medical monitoring recovery.<sup>102</sup> Not until the second phase of the trial would the court and jury consider class certification and medical monitoring issues.<sup>103</sup> In this instance, the punitive damages multiplier would apply to each defendant found liable.<sup>104</sup>

In its order accepting the trial plan, the Circuit Court stated plainly (but with no supporting citation) that "bifurcating issues of product defect and punitive damages, if applicable, is an orderly and efficient manner of disposing of these matters and protecting the interests of the parties."<sup>105</sup> The defendants, in response, sought a writ of prohibition and mandamus challenging the constitutionality of the trial order.<sup>106</sup> The issue is pending

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98. *State ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 786 (W. Va. 2004).

99. *See generally* *Stern v. Chemtall Inc.*, 617 S.E.2d 876 (W. Va. 2005).

100. *Compare* Memorandum Order at 27, *Stern v. Chemtall Inc.*, 617 S.E.2d 876 (W. Va. 2005) (No. 03-C049M) (Marshall County Cir. Ct. Jan. 9, 2007) *with* Plaintiffs' Proposed Case Management Order at 1, *Stern v. Chemtall, Inc.*, 617 S.E.2d 876 (W. Va. 2005) (No. 03-C049M) (Marshall County Cir. Ct. May 10, 2006).

101. Memorandum Order, *supra* note 100, at 27.

102. *Id.* at 27-28; *see* Memorandum of Law in Support of Defendant's Petition for Writ of Prohibition and/or Mandamus at 20-23; *see also* *Chemtall Inc. v. Madden*, 607 S.E.2d 772 (W. Va. 2004).

103. Memorandum Order, *supra* note 100, at 28-29.

104. *Id.* at 27.

105. *Id.* at 26-27.

106. Memorandum of Law in Support of Defendant's Petition for Writ of Prohibition and/or Mandamus, *supra* note 102, at 16-23.

before the West Virginia Supreme Court of Appeals at this writing.<sup>107</sup>

Such a trial plan, as in *Engle*, contravenes due process safeguards that protect civil defendants from the arbitrary imposition of punishment. The highly unorthodox procedures devised by plaintiffs, and adopted by the West Virginia lower court, deny defendants a fair trial and should be held unconstitutional.

#### IV. THE CONSTITUTIONALITY OF CONSIDERING PUNITIVE DAMAGES BEFORE LIABILITY AND COMPENSATORY DAMAGES

Determining punitive damages before liability raises serious constitutional issues. In a series of decisions, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment places procedural and substantive limits on punitive damages awards to protect civil defendants from arbitrary or excessive punishment.<sup>108</sup> A reverse bifurcation procedure violates procedural due process, because it leaves the jury to determine a punitive damages ratio without a nexus to the defendants' conduct toward any particular plaintiff or group of plaintiffs.

##### A. Inadequate Procedural Protections Render Punitive Damage Awards Unconstitutional

The Supreme Court has repeatedly emphasized the

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107. West Virginia is one of the only states in the nation that has a single appellate court with full discretionary review over civil cases. See National Center for State Courts, State Court Caseload Statistics, 2005: State Court Structure Charts (2006), available at [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/State%20Court%20Caseload%20Statistics%202005.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf). For that reason, it is uncertain whether this precise issue will be considered at all on appeal.

108. See *Philip Morris v. Williams*, 127 S. Ct. 1057, 1062-63 (2007); *State Farm Mut. Aut. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-35 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-56 (1998); *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 9-12 (1990).



importance of procedural protections for defendants as essential to sustaining a punitive damage award.<sup>109</sup> The Court has recognized that unlimited judicial or jury discretion “may invite extreme results that jar one’s constitutional sensibilities.”<sup>110</sup> Reverse punitive damage bifurcation procedures illustrate a powerful example of that warning in practice.

In determining whether a method of calculating punitive damages violates due process, a benchmark is whether the plan departs from traditional procedures.<sup>111</sup> “When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.”<sup>112</sup> The adequacy of procedural protections is particularly important when they involve punitive damages because such awards “pose an acute danger of arbitrary deprivation of property[,]” and come with “the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”<sup>113</sup>

A reverse bifurcation procedure appears to make it very difficult, if not impossible, for defendants to receive a fair trial once the jury considers issues relevant to punitive damages. If punitive damages evidence is paraded before the jury at the initial phase of the trial, then defendants will be painted as “bad actors” before the jury even considers whether (and to what extent) defendants are legally responsible for damages. Procedural safeguards for defendants in criminal proceedings parallel this concept. For example, the visible shackling of a prisoner during trial has the “inherently prejudicial” effect of

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109. See *Philip Morris*, 127 S. Ct. at 1065 (finding that jury instruction did not properly cabin jury discretion and led to arbitrary punishment); *Leatherman*, 532 U.S. at 443 (holding that review of punitive damage award must be de novo); *Oberg*, 512 U.S. at 420-21 (finding unconstitutional the limited authority of Oregon appellate courts to review punitive damages awards).

110. *Haslip*, 499 U.S. at 18 (citing *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)).

111. *Oberg*, 512 U.S. at 421.

112. *Id.* at 430 (citations omitted).

113. *Id.* at 432.

branding that prisoner as a criminal before any determination of liability.<sup>114</sup> The Supreme Court has, therefore, prohibited the practice at both the trial's guilt and penalty phases as a violation of due process.<sup>115</sup> Punitive damages in civil proceedings, which further the objectives of criminal law,<sup>116</sup> are equally vulnerable to prejudicial displays of evidence where juries' emotions and sensibilities are inflamed prior to a full presentation of the facts of the case. Moreover, reverse bifurcation procedures represent an unusual and extraordinary route for deciding punitive damages. They are assuredly not a time-tested common law procedure; instead, they place defendants at great risk of prejudiced and arbitrary results.

#### B. Punitive Damages Must Reflect the Harm to the Individual Before the Court and Conduct at Issue in the Case

A theme of the Supreme Court's recent jurisprudence is that punitive damages may only punish a defendant for conduct directed toward those before the court and the harm to those parties.<sup>117</sup> The Supreme Court could not be clearer on this point than in its recent decision in *Philip Morris v. Williams*.<sup>118</sup> In that case, involving a lawsuit for negligence and deceit brought by a smoker's widow, an Oregon court refused to instruct the jury that it could not punish the defendant for injuries of persons not before the court. The resultant \$79.5 million punitive damage award was reduced by the trial court to \$32 million, but fully reinstated by the intermediate appellate court.<sup>119</sup> In vacating the award, the Supreme Court did not consider the excessiveness of the punitive damage award, but focused its inquiry on whether the procedures used were sufficient to avoid an arbitrary

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114. *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986).

115. See *Deck v. Missouri*, 544 U.S. 622, 626, 633 (2005). Shackling a prisoner during trial is permitted where justified by an essential state interest such as in courtroom security. See *Flynn*, 475 U.S. at 568-69.

116. See *Schwartz & Lorber*, *supra* note 53.

117. See *Philip Morris v. Williams*, 127 S. Ct. 1057, 1063 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003).

118. *Philip Morris*, 127 S. Ct. at 1063-64.

119. *Id.* at 1061-62.

result.<sup>120</sup> The basis of its finding that punitive damages cannot be awarded from harm to “strangers in the litigation,” is salient to a reverse bifurcated trial tactic:

For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing . . . that the other victim was not entitled to damages . . .

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant’s conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.<sup>121</sup>

Where a jury is to consider punitive damages before a full determination of liability and damages, the defendant does not have “an opportunity to present every available defense” before such a decision is made.<sup>122</sup> Consideration of punitive damages before hearing a case leaves the same crucial questions unanswered as in *Philip Morris*: how many victims are there, how serious are their injuries, and how did their injuries occur?

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120. *Id.* at 1062-63.

121. *Id.* at 1063 (internal quotations and citations omitted).

122. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

*Philip Morris* does not permit a jury to decide whether a defendant's conduct warrants punitive damages—and the appropriate amount or multiplier for such damages—in the absence of answers to these questions. There is no need to wait until the jury returns a punitive damage award and then consider whether it is constitutionally excessive. The reverse bifurcation procedures alone, if implemented, violate the Supreme Court's mandate and create an unacceptable risk of an arbitrary award.

The Supreme Court's earlier decision in *State Farm Mutual Automobile Insurance Company v. Campbell*<sup>123</sup> further illustrates the need for a punitive damage determination to focus on the defendant's conduct directed toward the individual or individuals before the court. In *State Farm*, the Court ruled that the Utah Supreme Court erred in finding that State Farm's nationwide policies, rather than the conduct directed toward the plaintiffs, could support a punitive damages award.<sup>124</sup> Although the Supreme Court was concerned with the violation of federalism principles that effectively allowed a local court in one state to set regulatory policy in a sister state, "a more fundamental reason" for its invalidation of the award was the lack of a nexus between the punishment and the Campbells' harm.<sup>125</sup> The Court held:

A defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff

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123. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

124. *Id.* at 420.

125. *Id.* at 422.

obtains.<sup>126</sup>

A reverse bifurcation procedure, by contrast, would have a jury reach a punitive damage amount or multiplier before knowing who is before the court, the extent of harm they experienced, and whether the defendants are responsible for their injuries. It is the same type of “hypothetical claim” that the Supreme Court found impermissible in *State Farm*.

### C. A Ratio Cannot be Reached in a Vacuum

The determination of whether, and to what extent, punitive damages may be awarded cannot occur in a vacuum, unanchored to any claim that has been shown to be eligible for damages, and before determination of the amount of any recovery. The Due Process Clause of the Fourteenth Amendment precludes such arbitrary imposition of punishment. As the Supreme Court has repeatedly found, punitive damages can only be awarded to punish a defendant for harm to those before the court, and the punishment must be proportional to the offense.<sup>127</sup>

In *BMW*, the Supreme Court outlined its now well-known three prong test for reviewing punitive damages. This test considers (1) the degree or reprehensibility of the defendant’s misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.<sup>128</sup> Without a determination of liability or the extent of compensatory damages before deciding punitive damages, the third prong of this test fails on its face. When a court implements a reverse punitive damages bifurcation plan, there is no way a jury can non-arbitrarily determine a

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126. *Id.* at 422-23; see also *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18-20 (1990) (instructing that punitive damage awards must take into consideration “the character and the degree of the wrong as shown by the evidence” and be based on “[a] meaningful *individualized* assessment of appropriate deterrence and retribution”) (emphasis added) (quoting App. 106).

127. See *Philip Morris*, 127 S. Ct. at 1063; *State Farm*, 538 U.S. at 422-23; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996).

128. *BMW*, 517 U.S. at 574-75.

proportional amount or a multiplier (as initially proposed in the *Engle* case and ordered in the *Chemtall* case) without first knowing the extent of the alleged harm at issue. There is simply no basis for comparison because the degree and extent of civil liability are unknown.

As the Supreme Court further recognized in *BMW*, the ratio between punitive damages and the actual harm inflicted on the plaintiff “[is] perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award.”<sup>129</sup> The Supreme Court’s consistent refusal to adopt a “bright line” test for determining the constitutional propriety of the ratio between punitive damages and the actual or even potential damage to the plaintiff reaffirms the need for the fact finder to determine liability and economic damages before considering punitive damages.<sup>130</sup> Instead of a mathematical formula, the Supreme Court has provided specific guidance to courts for evaluating the excessiveness of punitive damages that greatly exceed compensatory damages. The constitutionally permissible size of the ratio varies based on the reprehensibility of the defendant’s conduct and the harm to the particular individual or individuals before the court.

For instance, in ordinary cases a punitive damage award of four times compensatory damages “may be close to the line” of constitutional permissibility.<sup>131</sup> In some cases, the Court has suggested that low awards of compensatory damages may justify a higher ratio if the act is “particularly egregious,” results in “a small amount of economic damages,” or the monetary value of the harm is difficult to measure.<sup>132</sup> On the other hand, a substantial compensatory award, which may itself include a punitive element, may permit no more than a 1:1 ratio between punitive and compensatory damages.<sup>133</sup>

These constitutional principles cannot be satisfied where a

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129. *Id.* at 580.

130. *See id.* at 582-83.

131. *Haslip*, 499 U.S. at 23-24.

132. *BMW*, 517 U.S. at 582.

133. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-26 (2003).

jury determines a punitive damages amount or a multiplier before knowing precisely what claimants are before the court, before knowing the level of reprehensibility of the defendants conduct toward those plaintiffs, and before knowing the economic damages incurred by those plaintiffs. Put simply, a court reviewing a punitive damages award focusing on the ratio of compensatory to punitive damages cannot even begin its thought process if there is no determination of compensatory damages from which to begin. Such a process makes a sham of the Supreme Court's holding in the *Leatherman* case that the fundamentals of procedural due process have a meaningful de novo review and whether a lower court properly applied the Supreme Court's three prong test as to whether an award was constitutional.<sup>134</sup>

The lack of basis from which to meet constitutional requirements is also likely to increase juror confusion over the issues, which contradicts the purpose of a case management tool to facilitate the fair and efficient dissolution of a case. A reverse bifurcation approach to punitive damages, therefore, reduces certainty in how a court or jury will interpret the evidence, increasing risks and inhibiting fair settlements. It is a lose-lose proposition.

## V. CONCLUSION

As a case management tool, reverse bifurcation serves no constructive function when punitive damages are alleged. The arguable merits in terms of judicial economy, issue clarification, and fairness are negated and reversed when the jury is presented prejudicial evidence without first addressing a basis of liability and compensatory damages. Defendants are characterized as bad actors before the real trial even begins, tainting any verdict that is rendered. Such plaintiff-sponsored procedures circumvent

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134. The Supreme Court's decision in *Oberg* established a requirement for meaningful appellate review of punitive damages determinations. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994). The Supreme Court built on this requirement in *Leatherman*, holding that appellate de novo review of punitive damages awards was necessary to comport with constitutional due process. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

constitutional protections that guard against excessive and prejudicial punitive damages awards. There is, quite simply, no practical basis or constitutionally permissible justification for a court to allow a jury to determine punitive damages before they have made a legitimate finding of liability and can award compensatory damages.