

Bifurcation of Civil Cases in South Carolina and the Fourth Circuit

What to Consider and How Parties Can Benefit

By Brian A. Comer

Though how a trial is divided is largely at the discretion of the trial court, “bifurcation” typically means the division of a case into two separate trials. For example, a judge may bifurcate a case so that the jury considers liability in the first trial and assesses the amount of damages in the second trial. 8 *Moore’s Federal Practice*, § 42.20[6][b] (Matthew Bender 3d ed.). Bifurcation may be one of the most important concepts in civil litigation. Bifurcating a case directly impacts how issues are presented at trial and the lens through which a judge or jury views a case.

Conventional wisdom among trial lawyers is that bifurcation tends to be an advantage for the defense because of the “sterile” environment in which the case is tried. However, contrary to this conventional wisdom, several studies have shown higher damage awards for *plaintiffs* where the plaintiff prevails in the first phase and proceeds to a damages phase. These different perspectives raise numerous questions. First, who exactly benefits

from bifurcation? What are the issues a party should consider when evaluating whether to bifurcate a trial? Furthermore, what is the law of bifurcation in South Carolina and the Fourth Circuit? This article seeks to answer these questions and provide some guidance concerning this important—but often underutilized—concept.

Arguments For and Against Bifurcation

Traditional thought is that bifurcation provides a procedural advantage to defendants by hamstringing the plaintiff’s ability to present his or her case. One study noted that defendants in bifurcated trials prevailed 56 percent of the time, versus only 34 percent of the time in unitary trials. T. Callahan & H. Zeisel, *Split Trials and Time Saving: A Statistical Analysis*. 76 *Harv. L. Rev.* 1606, 1612 (1963) (examining unitary and bifurcated trials in civil tort cases in northern Illinois federal courts). Defendants cite numerous benefits that support these odds.

First, when a trial court bifurcates the trial into liability and damages cases, defendants are able to exclude from the liability phase evidence that is related solely to a plaintiff’s injury. This limitation significantly decreases the chance that a jury will allow the severity of a plaintiff’s injury to influence its determination of liability. Studies have shown that the “sympathy effect” of a plaintiff’s injuries on a jury’s determination of liability is very real. See James M. Beck & Anthony Vale, *Drug and Medical Device Product Liability Deskbook* §11.02(1)(c)(ii) (Law Journal Press 2007) (2004). Certain studies have also shown that jurors better understand and use evidence more appropriately in bifurcated trials. See Martin J. Bourgeois & M. Shea Adams, *Separating Compensatory and Punitive Damage Award Decisions by Trial Bifurcation*, 30 *Law & Hum. Behav.* 11 (2006). Defendants will also argue that bifurcation promotes judicial economy. If the jury returns a defense verdict during the liability

phase of a bifurcated trial, then the court and the parties save the time and resources of presenting damages evidence to the jury.

Conversely, plaintiffs typically argue that bifurcation creates a "sterile" or "laboratory" environment that hides the seriousness of a plaintiff's injuries and removes the "human element" from the proceedings. *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982). In addition, if members of a jury are aware they will be able to go home if they check one box during the liability phase of a trial, fatigue might push an otherwise undecided or split jury to adopt the path of least resistance ... and head for the exits. Plaintiffs may also point to constitutional issues. The reexamination clause of the Seventh Amendment states that, "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Some courts have interpreted this clause to mean that overlapping issues cannot be bifurcated, or else

the same "fact" would be reexamined. W. Russell Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation: Analyzing the Constitutional Hurdle to Bifurcated Trials*, 73 Def. Couns. J. 63, 64 (2006). Other courts have ruled that the clause places no prohibitions on bifurcation. *Id.*

However, bifurcation does not necessarily have to be a "zero-sum game" between the parties (i.e., where the party opposing a motion to bifurcate automatically "loses" if the motion is granted). Numerous studies have examined the issue of bifurcation, and where liability and damages are bifurcated, some studies suggest that while the defendant retains a procedural advantage, the plaintiff has a chance at obtaining a "much larger" damages award if he or she can prevail during the liability phase. See Kenneth S. Bordens & Irwin A. Horowitz, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 Law & Hum. Behav. 269, 284 (1990). In another study that analyzed bifurcation of compensatory and punitive dam-

ages, jurors ruled on compensatory damages before any punitive evidence relating to the defendant's malice and wealth was introduced. E. Greene, R. Winter & W.D. Woody, *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law & Hum. Behav. 187 (2000). The study found that bifurcation had no impact on the amount of the compensatory award, and punitive damage amounts were actually higher in bifurcated trials than in unitary trials. *Id.* But see S. Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 322 (1998) (finding that when the evidence favoring the plaintiff on liability is moderately strong, jurors in unitary trials award *more* in compensation than they do in bifurcated trials).

In short, a bifurcated trial may be a gamble for both parties. The plaintiff risks losing the case, while the defendant risks losing substantially more money in a damages award. It is difficult to delineate the exact scope of the risk. Those stud-

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ies that simulated trial suffer from the limitations that only an actual trial can produce, i.e., juror fatigue, artful opposing counsel and judicial sympathy.

How South Carolina State Courts Approach Bifurcation

Numerous states have statutes that provide for bifurcation under certain circumstances, such as upon the motion of one of the parties. See, e.g., statutes allowing a party to request bifurcation so that punitive damages are tried as a separate issue from liability and compensatory damages in Arkansas (Ark. Stat. Ann. § 16-55-211), Minnesota (Minn. Stat. Ann. § 549.20(4)), New Jersey (N.J. Stat. § 2A:15-5.13), North Carolina (N.C. Gen. Stat. §1D-30), North Dakota (N.D. Cent. Code § 32-03.2-11(2) through (4)), and Ohio (O.R.C. Ann. 2315.21). South Carolina is different from many other states in this respect. There are no South Carolina statutes that mandate or otherwise provide guidance concerning bifurcation in the civil context. In 1997, a bill was introduced in the S.C. House of Representatives that would have, in part, automatically bifurcated trials involving punitive damages. H.R. 3059, 112th Gen. Assembly, 1st Sess. (S.C. 1997). However, the bill never made it out of committee.

Instead, bifurcation in South Carolina is generally governed by Rule 42(b) of the S.C. Rules of Civil Procedure. Rule 42(b) sets forth that the court can order a separate trial of any number of claims or issues to further convenience, avoid prejudice or to promote expedition and economy. Generally, courts granting bifurcation have done so to promote simplicity, clarity or efficiency, or to avoid prejudice. See, e.g., *Doe ex. rel. Roe v. Orangeburg County Sch. Dist. No. 2*, 335 S.C. 556, 518 S.E.2d 259 (1999); *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 108, 512 S.E.2d 510 (S.C. App. 1998). Further, "there is no *per se* rule that the same jury must decide both issues." *Fortune v. Gibson*, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991). However, if a court grants bifurcation, it needs to ensure that a party

will not lose its right to a full jury trial on all legal issues or that such a right is appropriately waived. 4 S.C. Jur. Action §43 (1991) (citing *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987)).

South Carolina courts have held that a decision by a court to grant or deny bifurcation cannot be immediately appealed. Parties have attempted to argue that the mode of trial is a "substantial right" that is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) (1976). However, South Carolina courts have refused to extend their interpretation of this statute to orders concerning bifurcation. See *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 334 (2000). Upon appeal, a judge's order to grant or deny bifurcation is reviewed pursuant to an abuse of discretion standard. *Senter*, 341 S.C. at 77.

Frequently, a motion to bifurcate requests separate trials concerning liability and damages. These motions are addressed to the sound discretion of the trial court. *Senter*, 341 S.C. at 77, 533 S.E.2d at 577. The same is true for motions seeking bifurcation of punitive damages. *Durham v. Vinson*, 360 S.C. 639, 645, 602 S.E.2d 760, 763 (2004). According to South Carolina courts, bifurcation of liability and damages in a civil case is appropriate under Rule 42(b) "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice. See, e.g., *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68 n.8, 73, 533 S.E.2d 331, 333 n.8 (2000); *Creighton*, 334 S.C. at 108, 512 S.E.2d at 516. Conversely, the Supreme Court of South Carolina has encouraged bifurcation in medical malpractice cases: "We encourage judges, however, to bifurcate trials in complex medical malpractice cases ..., particularly when bifurcation helps to clarify and simplify the issues." *Durham*, 360 S.C. at 645. The holding also noted that courts must continue to heed the "separate issue" mandate, but that it was within a judge's discretion to deter-

mine when issues are distinct. *Id.*

A brief survey of a few South Carolina cases illustrates the principles of bifurcation and how they are applied by South Carolina courts. In *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 108, 512 S.E.2d 510 (Ct. App. 1998), the plaintiffs argued that the trial judge abused his discretion when he decided to bifurcate the liability and damages portions of a slip and fall case three weeks before trial. *Id.* at 109. The South Carolina Court of Appeals disagreed. "The trial judge found it would be significantly shorter to try the liability phase of the case separately because of the extensive medical testimony regarding [plaintiff's] injuries, as well as the numerous discovery problems related thereto." *Id.* It would also obviate the expense of out-of-state physicians having to appear to testify if the jury entered a verdict for the defendant concerning liability. *Id.* The Court of Appeals held that there was no prejudice to the plaintiffs and that damages testimony relating to the plaintiff's injury was not necessary to establish liability. *Id.* "[T]he trial judge ordered bifurcation only after considering convenience, expedition and judicial economy as required under Rule 42(b)." *Id.*

Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760 (2004), involved bifurcation of actual and punitive damages in a medical malpractice trial. In the first phase, the jury found liability, awarded \$2,250,000 in actual damages and found the physician's conduct to be willful, wanton or in reckless disregard of the plaintiff's rights. The case then proceeded to the punitive damages phase. *Id.* at 763. The issue on appeal was whether the trial court erroneously admitted evidence of misconduct by the physician toward a third-party during the punitive damages phase. *Id.* at 763, 766. The S.C. Supreme Court held that the evidence should not have been admitted due to its unduly prejudicial nature (i.e., the fact that it was unrelated to his actions toward the plaintiff) and ordered a new punitive damages phase. *Id.* at 766. *Durham* is instructive because, as

discussed *supra*, it encouraged bifurcation of complex medical malpractice cases. *Id.* at 763, n. 2. In addition, the Supreme Court's reversal only required a new punitive damages phase of the trial, as opposed to a new trial altogether. This further illustrates the judicial economy benefits of bifurcated proceedings.

Bifurcation in the Fourth Circuit

Federal Rule of Civil Procedure Rule 42(b) is substantively identical to the South Carolina Rule and also provides the basis for bifurcation motions in Fourth Circuit federal practice. The Fourth Circuit appears to take a more liberal approach to bifurcation than South Carolina state courts, although specific practice varies among the various districts.

The limited number of Fourth Circuit Court of Appeals cases have emphasized the discretion of district court judges. District court judges in the Fourth Circuit have broad discretion to determine when bifurcation is appropriate under the federal rules. See, e.g., *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1443 (4th Cir. 1993). This discretion is far-reaching. For example, the Fourth Circuit Court of Appeals has concluded that despite the advantages of consolidated trials, bifurcation of cross-claims is not an abuse of discretion. *In re Hutchinson*, 5 F.3d 750, 758 (4th Cir. 1993). The court has also indicated, in dicta, that bifurcation of liability and damages "remains an available solution" where evidence relating to the amount of damages might be prejudicial to determining the appropriate level of liability. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991). In at least one Fourth Circuit appellate case, the court extolled the advantages of bifurcation in a class discrimination case, while acknowledging the "great deference to the special capability of a trial judge." *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381, 387 (4th Cir. 1982) (remanding for reconsideration of the motions at issue). The selection of verdict forms and presentment of evidence to the jury are also within the discretion of the trial judge, including situations in which bifur-

cation is employed. See *Buschi v. Kirven*, 775 F.2d 1240, 1260-61 (4th Cir. 1985) (affirming decision to use general verdict form in the liability phase of a bifurcated trial rather than withhold a defense that plaintiffs claimed was relevant to the damages phase of the trial).

The Court of Appeals has also indicated that there should be a greater willingness to bifurcate where determination of one issue may be highly prejudicial or confusing to the resolution of another issue. See, e.g., *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109 (4th Cir. 1991). For example, in *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440 (4th Cir. 1993), the plaintiffs brought both federal and state law claims following an automobile collision with a train. *Id.* at 1442. The Fourth Circuit found that the trial judge abused his discretion in failing to bifurcate federal and state law claims under the circumstances because the plaintiffs' evidence—though relevant to the Federal Employers' Liability Act claim—was "incitive" and "irrelevant" with regard to the plaintiffs' state law claims. *Id.* at 1443. Similarly, the court determined that evidence relevant to determining the state law claims, including loss of consortium, was irrelevant and prejudicial to the federal claim. *Id.* Thus, having to resolve both claims at once resulted in "considerable jury confusion." *Id.* at 1444. The court concluded that where resolution of a federal question was necessary to determine whether or not the federal claim could proceed at all, and evidence of the federal and state claims produced an unacceptably prejudicial overlap of irrelevant evidence, failure to bifurcate effectively denied the defendant a fair trial. *Id.* at 1445.

At the district court level, the courts appear to view bifurcation as an available procedural tool for ensuring fair and efficient trials. District courts in the Fourth Circuit have noted that while an overlap of claims should "caution against bifurcation," an overlap between liability and damage issues does not preclude an otherwise justified bifurcation. See, e.g., *F & G Scrolling Mouse L.L.C. v. IBM Corp.*, 190 F.R.D.

385, 388 (M.D.N.C. 1999). However, the broad discretion afforded by Rule 42(b) suggests that courts may employ other options before resorting to bifurcation. See, e.g., *Pernanza Hill v. USA Truck, Inc.*, Civil Action No.: 8:06-CV-1010-GRA, 2007 U.S. Dist. LEXIS 39197 (D.S.C. May 30, 2007) (concluding that jury instructions were sufficient to cure alleged prejudice).

In addition, there are conflicting views concerning bifurcation's usefulness as a procedural option. For example, the District Court of South Carolina has found that "federal trial courts have increasingly realized the benefits of bifurcated trials." *Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415 (D.S.C. 1974). Other district courts hold the opposite view and operate with a presumption against bifurcation. See, e.g., *Walhonde Tools*, 2007 WL 1768714 at *7 ("[t]he piecemeal trial of separate issues ... is not to be the usual course"); see also *F & G Scrolling Mouse L.L.C. v. IBM Corp.*, 190 F.R.D. 385 (M.D.N.C. 1999) ("[n]othing else appearing, a single trial will be more expedient and efficient").

Despite these conflicting views, a review of available district court cases demonstrates certain trends among Fourth Circuit district courts. For example, district courts are particularly likely to bifurcate patent claims. As one court stated, "[P]atent cases are often uniquely amendable to bifurcation because of the complex nature of the damages determination and the extensive discovery that is often necessary to prove the nature and extent of those damages." *Novopharm Ltd. V. Torpharm, Inc.*, 181 F.R.D. 308, 310 (E.D.N.C. 1998). However, as their discretion allows, courts are empowered to craft orders tailored to the specific facts of the case and may well bifurcate trial while leaving discovery consolidated. See, e.g., *White Chemical Corp. v. Walsh Chemical Corp.*, 116 F.R.D. 580, 582 (W.D.N.C. 1987) (where the court bifurcated the trial but concluded that consolidated discovery would aid in conserving judicial resources as well as facilitate quicker resolution of the underlying claims); *Cherdak v. Stride*

Rite Corp., 396 F.Supp. 602, 605 (D.Md. 2005) (reaching the same conclusion). Fourth Circuit district courts have also bifurcated § 1983 claims as between the government and the individual defendants. See, e.g., *Dawson v. Prince George's County*, 896 F.Supp. 537, 539-40 (D. Md. 1995) (ordering separate trials where issues of proof and anticipated defenses would complicate any consolidated proceeding). However, at least one court has been reluctant to apply the same concept to tort cases involving individual and corporate defendants. See, e.g., *Dotson v. Joseph*, No. Civ.A. 3:04CV10099, 2006 WL 2400479 (W.D.Va. Aug. 18, 2006) (denying both bifurcation and severance motions for a claim against another motorist and his insurance company).

At least one court has proposed and applied a checklist of factors that should be considered when faced with bifurcation. In *F & G Scrolling Mouse L.L.C. v. IBM Corp.*, 190 F.R.D. 385, 388 (M.D.N.C. 1999), the court also set forth five factors that should be considered before a court decides to bifurcate: severability of the issues, simplification of discovery and the conservation of resources, prejudice to parties, the effect of bifurcation on the potential for settlement and the suitability of bifurcating trial but not discovery. *Id.* at 387-392.

Conclusion

Deciding whether a case is appropriate for bifurcation is a difficult question with no easy answer. The factual considerations of the case (including the strength or weaknesses of a party's liability arguments), whether there are overlapping issues, the nature of the damages and the venue for the action will likely dictate whether bifurcation is worth pursuing. Even if an attorney believes the court will allow bifurcation, he or she should carefully consider whether bifurcation is likely to produce a favorable result.

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