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## Bifurcation of Civil Trials

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# ESSAYS

## BIFURCATION OF CIVIL TRIALS

*John P. Rowley III* \*

*Richard G. Moore* \*\*

### I. INTRODUCTION

Despite its widespread and long-standing recognition as a valuable docket-control device, the bifurcation of issues in civil trials has generated considerable debate among legal scholars and judges. The state and federal courts both utilize bifurcation, and the Supreme Court of Appeals in Virginia recognized the advantages of the procedural device as early as 1915. Nonetheless, authority for the bifurcation of issues in civil trials in Virginia has remained clouded. The Supreme Court of Virginia lifted at least some of the clouds when it decided *Allstate Insurance Co. v. Wade*, thereby rejecting the position taken in an amicus curiae brief filed by the Virginia Trial Lawyers Association that bifurcation is not authorized under Virginia law.<sup>1</sup> The court further clarified the law of bifurcation when it issued its January 16, 2009 opinion in *Centra Health, Inc. v. Mullins*.<sup>2</sup> Nevertheless, some doubts remain about the availability of the procedure in Virginia.

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1. 265 Va. 383, 392, 394, 579 S.E.2d 180, 185–86 (2003); Brief for Va. Trial Lawyers Ass’n as Amicus Curiae Supporting Appellees, at 10–11, *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003) (No. 021201), 2002 WL 33002932.

2. 277 Va. 59, 78, 670 S.E.2d 708, 718 (2009) (stating that bifurcation of liability and damages is the “most practical means” to prevent prejudice against the defendant).

This article suggests that to clarify any remaining issues, the Virginia General Assembly should enact legislation recognizing discretionary judicial use of bifurcation in appropriate civil cases.

## II. THE BIFURCATION OF CIVIL TRIALS, IN GENERAL<sup>3</sup>

The separate trial of issues is distinct in theory from the trial of severed claims.<sup>4</sup> However, this distinction is often obscured in practice because, at times, courts interchangeably talk of separate trials and severance.<sup>5</sup>

A bifurcated trial involves the “trial of *issues* separately.”<sup>6</sup> Bifurcation properly refers to issues, not claims. Bifurcation results in separate trials, often called phases, of the bifurcated issues, usually resulting in a single judgment.<sup>7</sup> On the other hand, the severance of claims divides a lawsuit into two or more separate and independent causes, with the severed claims becoming en-

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3. An excellent overview and historical treatment of the broad discretion of trial judges to bifurcate issues in civil trial, both state and federal, can be found in Senior U.S. District Judge Weinstein’s decision in *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001).

4. See 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387 (3d ed. 2008 & Supp. 2010). Issues may also be trifurcated, for example, separating not only the issues of liability and damages, but also adjudicating different forms of damages or other issues, such as affirmative defenses. See *id.* § 2390. Some courts have dealt with complex cases by using the practice of “reverse bifurcation,” meaning “try[ing] damages and sometimes causation first, followed by a determination of liability.” *Id.* (noting that a court may further separate the liability phase of the trial into multiple stages when each liability phase depends upon a different theory of liability); see also *Simon*, 200 F.R.D. at 25, 32 (discussing both trifurcation and reverse bifurcation). The ABA Journal E-Report for December 10, 2004 reported that judges throughout the country utilized reverse bifurcation to more efficiently manage the trials of fen-phen cases, based upon the prior successful use of reverse bifurcation in asbestos cases. Molly McDonough, *Going Forward with Reverse Bifurcation*, ABA J. E-REP. (ABA, Chicago, Ill.), Dec. 10, 2004, at 4.

5. See, e.g., *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1122 n.5 (7th Cir. 1999) (recognizing that while “courts generally use the terms sever and separate interchangeably, they are analytically distinct . . . . ‘Separate trials will usually result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently.’” (quoting *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 n.19 (5th Cir. 1993))).

6. BLACK’S LAW DICTIONARY 163 (6th ed. 1990) (emphasis added); accord 75 AM. JUR. 2D *Trial* § 58 (2007) (“Bifurcated trials’ are trials in which only some of the issues of the case will be resolved at one trial, with the rest left for a further trial or other proceedings.”).

7. See Opinion of the Clerk, Supreme Court of Ala., 526 So. 2d 584, 586 (Ala. 1988); 75 AM. JUR. 2D *Trial* § 58 (2007); 88 C.J.S. *Trial* § 17 (2001 & Supp. 2009); 9A WRIGHT & MILLER, *supra* note 4, § 2387.

tirely distinct actions to be tried, with judgment independently entered.<sup>8</sup>

This article is not a promotional for the bifurcation of all civil trials. Indeed, the typical civil trial is a unitary trial, as the separate trial of issues is not the usual course.<sup>9</sup> Nevertheless, the bifurcation of issues in civil trials can be an effective device for docket control and reduction of the expense and duration of trials, and should be utilized more often. While bifurcation has its critics,<sup>10</sup> and can implicate Seventh Amendment issues regarding the use of separate juries when a second jury reexamines a fact tried

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8. See *Houseman*, 171 F.3d at 1122 n.5 (quoting *McDaniel*, 987 F.2d at 304 n.19); *Opinion of the Clerk, Supreme Court of Ala.*, 526 So. 2d at 586; 75 AM. JUR. 2D *Trial* § 58 (2007); BLACK'S LAW DICTIONARY 1498 (9th ed. 2009); 9A WRIGHT & MILLER, *supra* note 4, § 2387.

9. See 75 AM. JUR. 2D *Trial* § 59 (2007); 88 C.J.S. *Trial* § 17 (2001 & Supp. 2009); 9A WRIGHT & MILLER, *supra* note 4, § 2388; William M. Landes, *Sequential Versus Unitary Trials: An Economic Analysis*, 22 J. LEGAL STUD. 99, 99 (1993).

10. See, e.g., Albert F. Brault, *The Issues of Liability and of Damages in Tort Cases Should Not Be Separated for the Purposes of Trial*, 1960 A.B.A. SEC. INS. NEGL. & COMPENSATION L. 274, 277–80 (arguing the presentation of issues in negligence suits is most appropriately a composite picture and that bifurcation may, in many cases, actually frustrate rather than promote judicial economy); Philip H. Corboy, *Will Split Trials Solve Court Delay? A Negative Response*, 52 ILL. B.J. 1004, 1016–23 (1964) (arguing that bifurcation efficiency statistics are overstated); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 505 (1995) (arguing that bifurcation undermines jurors' ability to make informed, broad-based decisions and should rarely be utilized); Landes, *supra* note 9, at 101 (identifying economic advantages and disadvantages of bifurcation); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69 (arguing the bifurcation or trifurcation of issues in mass trials is neither fair nor efficient); Charles Alan Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 747 (1966) (“We should be wary of reforms that are attractive in terms of saving time but have unnoticed substantive effects.”); Sandra A. Smith, Comment, *Polyfurcation and the Right to a Civil Jury Trial: Little Grace in the Woburn Case*, 25 B.C. ENVTL. AFF. L. REV. 649, 681–85 (1998) (arguing that bifurcation undermines the traditional fact-finding process and the development of the law). Judge Jack B. Weinstein's initial reservations about bifurcation, expressed while a Professor at Columbia University, stand in contrast to his views on the bifurcation of issues in civil trials that he articulated while serving as a federal judge for the Eastern District of New York. Compare Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961) (arguing judicial economy justifications for discretionary bifurcation rules are inadequate given the potential impact on the balance of substantive rights as between litigants), with *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 25–51 (E.D.N.Y. 2001) (Weinstein, J.) (approving discretionary bifurcation wherever appropriate, including the bifurcation of general compensatory liability issues from both punitive damages issues and individual compensatory issues).

by a first jury,<sup>11</sup> it finds vigorous support among a significant number of scholars<sup>12</sup> and courts.<sup>13</sup>

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11. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 499–500 (1931); see 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 42.03[2] (2d ed. 1996); The Commercial & Fed. Litig. Section of the N.Y. State Bar, *The Mini-Trial: Bifurcation as an Efficient Device to Promote the Resolution of Civil Cases*, 53 ALB. L. REV. 19, 23–31 (1988) [hereinafter N.Y. State Bar, *The Mini-Trial*]; J.D. Page & Doug Sigel, *Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rule of Civil Procedure 174(b)*, 9 REV. LITIG. 49, 57–59 (1990); Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1069–75 (1962) [hereinafter Note, *Separate Trials on Liability and Damages in "Routine Cases"*]. When bifurcation involves two juries, it may violate the Seventh Amendment where (1) the defendant opposes, or perhaps merely acquiesces, to the procedure and (2) the issue bifurcated is so interwoven with other issues in the case that it cannot be submitted to the jury independently without such confusion and uncertainty as would amount to a denial of a fair trial. 9A WRIGHT & MILLER, *supra* note 4, § 2391; G. Lee Garrett, Jr. & Anthony E. Diresta, *Strategies for Multi-Claim Litigation and Settlement Techniques, in PRODUCT LIABILITY OF MANUFACTURERS: PREVENTION AND DEFENSE 1985*, at 473, 526–28 (PLI Lit. & Admin. Practice, Course Handbook Ser. No. 289, 1985); see also *In re Bradle*, 83 S.W.3d 923, 926–28 (Tex. App. 2002) (holding bifurcation of punitive damages unconstitutional because the second jury is deprived of the totality of the evidence, which is essential to the requirement that punitive damages be proportional to the gravity and severity of the misconduct in issue and the injury sustained); Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 729–37 (2000) (analyzing the constitutional contours of using separate juries in bifurcated trials and concluding that the prevailing presumption against issue bifurcation is unwarranted); W. Russell Taber, *The Re-examination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 DEF. COUNS. J. 63 *passim* (2006) (exploring the validity of the use of separate juries under the Re-examination Clause and outlining strategies to avoid potential constitutional pitfalls).

Seventh Amendment issues can also be implicated in the bifurcation of antitrust claims, where courts must grapple with whether the “fact of damages” element is part of the liability phase or the damages phase. See Geraldine Alexis & Andrea DeShazo, *Punitive Damages: Is Bifurcation Right for Your Case?*, 16 ANTITRUST 82, 82, 85–86 (2002). The problem of having a second jury find no antitrust injury where the first jury found liability presents a Seventh Amendment problem. *Id.* at 82. *But see In re High Fructose Corn Syrup Antitrust Litig.*, 361 F.3d 439, 441 (7th Cir. 2004) (holding that inconsistent findings of jurors in bifurcated antitrust litigation, where jurors hear different evidence, is a difference “in result rather than logic,” which does not give rise to a Seventh Amendment problem). Other courts have permitted the trial of bifurcated issues by separate juries where the second jury does not impermissibly re-examine any fact tried by the first jury. *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999) (upholding bifurcation of a 42 U.S.C. § 1983 action); *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) (upholding bifurcation of causation issues relating to exposure to PCB’s and the issue of liability), *aff’d in part and vacated in part*, 221 F.3d 449 (3d Cir. 2000); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 957–58 (N.D. Ill. 2001) (bifurcating issues of liability damages in a “pattern or practice” employment discrimination case); *Marvin Lumber & Cedar Co. v. PPG Indus.*, No. 4-95-739, 2001 U.S. Dist. LEXIS 25417, at \*12–14 (D. Minn. 2001) (bifurcating warranty of future performance questions from other issues in the dispute), *aff’d in part and remanded*, 401 F.3d 901, 920 (8th Cir. 2005); *Simon*, 200 F.R.D. at 49–51 (permitting bifurcation of general compensatory liability and punitive damages issues, and separate trials on the issues of general and compensatory liability).

12. See, e.g., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.06 (1994) (discussing the potential benefits and justifications of issue bifurcation in complex litigation); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from*

An article by Professor Steven S. Gensler discusses and rebuts many of the arguments previously made against bifurcation.<sup>14</sup> These arguments are based on theories that the Advisory Committee Note to the 1966 Amendment to Federal Rules of Civil

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*Civil Jury Trials*, 40 AM. U. L. REV. 727, 767–68 (1991) (noting that bifurcation may aid jury comprehension, remove bias, and conserve judicial resources); Gensler, *supra* note 11, at 782–83 (“[Bifurcation] holds great promise for increasing efficiency by eliminating unnecessary trial time. . . . [A]vailable evidence suggests that aggressive bifurcation of liability and damages alone could yield savings of as much as 20%.”); Lewis Mayers, *The Severance of Trial Liability from Damage*, 86 U. PA. L. REV. 389, 393–94 (1938) (discussing the advantages of issue bifurcation in negligence actions); Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1268 (1959) (discussing the myriad advantages of bifurcating civil actions); N.Y. State Bar, *The Mini-Trial*, *supra* note 11, at 31 (“[G]reater use of mini-trials would promote judicial economy.”); Page & Sigel, *supra* note 11, at 51; George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 557 (1989) (stating that bifurcation may reduce congestion, albeit not to the extent other scholars have predicted); 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, 1200 (1967) (arguing that efficiency gains from bifurcation can be captured without impairing the judicial process); William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 143–44 (1990) (listing bifurcation among several methods for improving jury trials); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 156–58 (1996) (stating that bifurcation conserves resources, improves jury comprehension of issues, and minimizes juror prejudice); L.H. Vogel, *The Issues of Liability and of Damages in Tort Cases Should Be Separated for the Purposes of Trial*, 1960 A.B.A. SEC. INS. NEGL. & COMPENSATION L. 265, 268–70 (arguing that issue bifurcation will relieve dockets overburdened with complex litigation and reduce prejudice to defendants stemming from jury bias); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1624–25 (1963) (analyzing empirical data and concluding that issue bifurcation could potentially make the judicial system twenty percent more efficient); Thomas D. Aitken, Comment, *Trial Practice: Separate Trials on the Issues of Liability and Damages*, 17 OKLA. L. REV. 114, 121–22 (1964) (stating that issue bifurcation improves judicial economy, reduces jury confusion, and mitigates jury bias); Albert P. Bedecarré, Comment, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B.C. ENVTL. AFF. L. REV. 123, 160–61 (1989) (proposing guidelines for balancing the efficiency of issue bifurcation with fairness concerns); Thomas E. Maloney, Comment, *Implications of Bifurcation in the Ordinary Negligence Case*, 26 U. PITT. L. REV. 99, 100 (1964) (stating that issue bifurcation improves judicial economy, reduces jury confusion, and mitigates jury bias).

13. Louis Harris & Assocs., Inc., *Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 743–45 (1989) (reporting that 94% of federal judges surveyed had bifurcated at least one case and 84% of the judges surveyed felt that bifurcation helped the judicial process); see also *LoCicero v. Humble Oil & Ref. Co.*, 52 F.R.D. 28, 30 (E.D. La. 1971) (“If a separate trial of part of the issues may make unnecessary the trial of other issues it is only reasonable to follow the course which saves the time of the court and reduces the expenses of the parties.” (quoting 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 943 (Wright ed. 1961))); *Reines Distribs., Inc. v. Admiral Corp.*, 257 F. Supp. 619, 620 (S.D.N.Y. 1965) (“When there is a possibility, . . . of shortening the trial considerably by holding a separate trial on an issue, the court should exercise its discretion and try the issue separately if such a procedure will not prejudice either side.”) (internal citation omitted).

14. Gensler, *supra* note 11.

Procedure Rule 42 created a presumption against bifurcation;<sup>15</sup> that bifurcation is pro-defendant;<sup>16</sup> that bifurcation infringes on the proper role of the civil jury;<sup>17</sup> and that bifurcation may create a “sterile trial environment” where plaintiffs cannot present their entire case before juries.<sup>18</sup> A number of other commentators have analyzed or discussed the effect of bifurcated litigation on trial outcome, particularly from the perspective of whether bifurcation favors the plaintiff or the defendant,<sup>19</sup> and counsel may be swayed by these commentators to seek or reject bifurcation in a particular case. The careful litigator, however, will want to read those discussions in light of Professor Gensler’s detailed and compelling analytical article before opposing bifurcation.

While individual plaintiffs and defendants may have varying personal opinions regarding when and how bifurcation should be used, Professor Gensler compellingly demonstrates that there is no empirical evidence to support, much less to conclude, that bifurcation of civil trials favors either the plaintiff or the defendant.<sup>20</sup> Moreover, whether bifurcation is appropriate in any par-

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15. See *id. passim*. Gensler also notes, however, that “[a] presumption for bifurcation might be just as bad as a presumption against bifurcation.” *Id.* at 714; see also *Simon*, 200 F.R.D. at 27. In *Simon*, Senior District Judge Weinstein considered that the Advisory Committee Note to Rule 42(b), taken as a whole, “did not limit in any way the trial judge’s historic discretion to sever issues for trial in individual cases.” 200 F.R.D. at 27.

16. See Gensler, *supra* note 11, at 741.

17. See *id.* at 748–64.

18. See *id.* at 764–71.

19. See, e.g., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.06 cmt. f (1994); Alexis & deShazo, *supra* note 11, at 83–84; Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors’ Liability Judgments*, 28 J. APPLIED SOC. PSYCHOL. 1477, 1487–92 (1998); Doyle W. Curry & Rosemary T. Snider, *Bifurcated Trials: How to Avoid Them—How to Win Them*, 24 TRIAL, Mar. 1988, at 47; Dan Cytryn, *Bifurcation In Personal Injury Cases: Should Judges Be Allowed to Use the “B” Word?*, 26 NOVA L. REV. 249, 254–59 (2001); Andrew L. Frey & Dennis P. Orr, *Litigating Damages: Actual and Punitive*, 29 LITIG., Winter 2003, at 33, 36 (2003); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury’s Role*, 26 U. TOL. L. REV. 505, 513 (1995); Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 260 (1998); Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269, 275–84 (1990); Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 308–30; Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 182–96; Wright, *supra* note 10, at 747; Ziesel & Callahan, *supra* note 12, at 1609–12. The New Jersey Supreme Court has also encouraged judges to utilize New Jersey Rule 4:38-2(b), providing for permissive bifurcation of liability and damage issues. N.J. Sup. Ct. Directive No. 3-77 (1977).

20. Gensler, *supra* note 11, at 745, 783.

ticular case is essentially a fact-driven determination.<sup>21</sup> Further, the decision to grant or decline bifurcation is entirely within the sole discretion of the court, and that decision is informed by objective considerations that are not weighted in favor of the parochial litigation interests of one litigant or another.<sup>22</sup> Those controlling considerations include the interests of justice, the avoidance of undue prejudice or hardship to one or both of the parties, the clarification or simplification of the proceedings or issues, judicial efficiency or economy, avoidance of jury confusion, reduction of the duration or expenses of trial, facilitation of settlement, avoidance of inconsistent jury verdicts, or speeding a just determination of the case.<sup>23</sup> In the absence of the court directing bifurcation *sua sponte*, either party may advance or oppose a motion for bifurcation, but the court's decision will rest entirely on one or more of the foregoing considerations, and not upon whether bifurcation will provide a more favorable litigation posture for either litigant.<sup>24</sup>

Support for selective bifurcation can be found in federal practice and the statutes of various states. For example, New York encourages judges "to order a bifurcated trial of the issues of liability and damages in [personal injury actions] where it appears that bifurcation may assist in a clarification or simplification of [the] issues and a fair and more expeditious resolution of the action."<sup>25</sup> New Jersey mandates bifurcated trials in "[a]ny actions involving punitive damages . . . , if requested by any defendant,"<sup>26</sup> as does Texas.<sup>27</sup> Indeed, as Professor Gensler notes, "many states encourage—or even require—bifurcating punitive-damage issues."<sup>28</sup> To date Virginia has not done so, albeit, as noted subsequently, in 1994 there was an unsuccessful legislative attempt to require bifurcation of the issue of punitive damages, at the defendant's request,<sup>29</sup> and in 2004 Virginia circuit court denied the re-

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21. See 9A WRIGHT & MILLER, *supra* note 4, § 2388 (discussing different factual issues that may lead a court to bifurcate a trial).

22. *Id.*

23. See *id.*

24. See *id.*

25. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.42, 206.19 (2008).

26. N.J. STAT. ANN. § 2A:15-5.13(a) (West 2000).

27. See *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994).

28. Gensler, *supra* note 11, at 740 n.211 (citing James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 446–53 (1995)).

29. See *infra* notes 197–203 and accompanying text.

quest of a defendant insurance company to bifurcate the issue of punitive damages, giving no reason for the denial.<sup>30</sup> In the federal courts, since the advent of Rule 42(b),<sup>31</sup> bifurcation of issues in civil trials has been widely used “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.”<sup>32</sup> The majority of states that have adopted statutes and rules comparable or identical to Rule 42(b) have had similar experiences.<sup>33</sup>

Underlying the exercise of judicial discretion<sup>34</sup> in whether to bifurcate issues for separate trial are certain determinations beyond those embodied in Rule 42(b) and its state analogues. In this connection, bifurcation is appropriate as a flexible and useful instrument to avoid confusion, and to provide a convenient me-

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30. *McLean v. Owens-Illinois, Inc.*, No. 31799V-04, 2004 WL 2813474, at \*2 (Va. Cir. Ct. Aug. 25, 2004) (Newport News City).

31. In the federal courts, Rule 42(b) authorizes the bifurcation of issues; the severability of claims is authorized by Rule 21. See 5 MOORE, *supra* note 11, ¶ 42.03[1].

32. FED. R. CIV. P. 42(b). Any one of these standards is sufficient to justify bifurcation. See WRIGHT & MILLER, *supra* note 4, § 2388.

Examples of the “to avoid prejudice” prerequisite for bifurcation are when evidence admissible solely for one issue (e.g., damages) may cause jury prejudice on another issue (e.g. liability), or the jury may learn a defendant is insured in a unitary trial. See *id.* However, the avoidance of prejudice contemplated by Rule 42(b) has been held not to “come into play [when] the action is tried by the court.” *In re Paris Air Crash of March 3, 1974*, 69 F.R.D. 310, 319 (C.D. Cal. 1975) (citing *United States v. Int’l Bus. Machs. Corp.*, 60 F.R.D. 654, 656 (S.D.N.Y. 1973)).

33. Outside Virginia, most states and the District of Columbia authorize some degree of bifurcation of issues in some instances by means of judicial decision, but usually by rules of court or statutes embodying the essential language of Rule 42(b). For example, a Connecticut statute permits the court in all civil actions, whether by jury or bench trial, to “order [ ] one or more of the issues joined [to] be tried before the others.” CONN. GEN. STAT. § 52-205 (2005). Case law makes it clear that such bifurcation of the issues may be the *sua sponte* action of the trial court. *Swenson v. Sawoska*, 559 A.2d 1153, 1156 (Conn. App. Ct. 1989), *aff’d*, 575 A.2d 206 (Conn. 1990). Louisiana limits bifurcation to issues of liability and damages, if consented to by all parties. LA. CODE CIV. PRO. ANN. art. 1562 (2010). Nebraska, by statute, addresses only the bifurcation of the issue of the bar of the statute of limitations, upon motion of any party, NEB. REV. STAT. § 25-221 (2006), but case law supports the broad discretion of the trial court to bifurcate other issues in civil actions. See *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846, 851 (Neb. 2001) (impliedly approving the parties’ bifurcation of liability and damages); *Yopp v. Batt*, 467 N.W.2d 868, 879 (Neb. 1991). *But see* *Iley v. Hughes*, 311 S.W.2d 648, 649 (Tex. 1958) (disapproving of different juries determining contested liability and damage issues in a personal injury claim). *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 31 (E.D.N.Y. 2001), contains a representative overview and summary of the various states’ rules and statutes granting state trial judges broad discretion to bifurcate issues for trial. See also *Cytryn*, *supra* note 19, at 253–54 (reviewing the case law of states other than Florida dealing with bifurcation).

34. In jurisdictions where bifurcation is authorized, the decision to bifurcate a civil trial is one committed to the sound discretion of the trial court. See *Simon*, 200 F.R.D. at 25; 9A WRIGHT & MILLER, *supra* note 4, at § 2388.

thod of disposing of litigation as fairly and quickly as possible.<sup>35</sup> Philosophically and practically, the interest of efficient judicial administration should control. Therefore, bifurcation is appropriate if a single issue could be dispositive of the entire case or is likely to lead the parties to negotiate a settlement, or if resolution of the issue might make it unnecessary to try the other issues in the litigation.<sup>36</sup> Courts favor bifurcation of liability and damages, because a finding of no liability is case-dispositive.<sup>37</sup> On the other side of the same coin, a finding of liability often furnishes an impetus for the defendant to seek to negotiate settlement.<sup>38</sup> Bifurcation is also appropriate if it would simplify or clarify the proceedings; permit a more orderly disposition of the case; reduce hardship to the parties; speed a just determination; promote a logical presentation to, or avoid confusion of, the jury; reduce the discovery time period; avoid possibly inconsistent jury verdicts; or otherwise be in the interests of justice.<sup>39</sup>

Those same philosophical and practical determinations make bifurcation inappropriate where the burdens of a separate trial outweigh the benefits, such as when the separate trial of an issue will involve extensive proof of substantially the same facts and examination of the same witnesses as the other issues; inconvenience the court; prejudice the rights of the parties; cause undue expense; or require the expenditure of additional time when compared to a unitary trial.<sup>40</sup> Bifurcation is also inappropriate where multiple issues are intertwined, or are identical or closely re-

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35. See 88 C.J.S. *Trial* § 9 (2001 & Cum. Supp. 2007); 9A WRIGHT & MILLER, *supra* note 4, § 2387.

36. See *Kiser v. Bryant Elec. (In re Beverly Hills Fire Litig.)*, 695 F.2d 207, 216 (6th Cir. 1982) (“[W]hether resolution of a single issue would likely be dispositive of an entire claim is highly relevant in determining the efficacy of bifurcation.”); 9A WRIGHT & MILLER, *supra* note 4, § 2388.

37. See *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 151 (1st Cir. 2003); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999).

38. See *de Villiers*, *supra* note 19, at 184 (“Bifurcated trials almost always result in settlement of damages after a pro-plaintiff liability verdict.”); *Maloney*, *supra* note 12, at 104-05.

39. See 75 AM. JUR. 2D *Trial* § 65 (2007); see also *Gensler*, *supra* note 11, at 772 (“[T]he available evidence indicates that the presumption against bifurcation probably hinders judicial efficiency.”).

40. See 75 AM. JUR. 2D *Trial* § 69 (2007).

lated,<sup>41</sup> so that bifurcation of one issue may not be had without injustice to the trial of the remaining issues.<sup>42</sup>

The bifurcation of liability and damages occurs most frequently in personal injury actions, but it is a procedure equally useful in other tort and contract cases.<sup>43</sup> Indeed, “[o]rdering separate trials of liability and damages . . . was commonplace in the seventeenth-century [common-law] action of account-render.”<sup>44</sup> “Equitable accounting actions were also regularly bifurcated into liability and damages phases.”<sup>45</sup>

Contract issues may also be appropriate for a bifurcated trial. The interpretation of a significant contract term may be particularly appropriate for resolution in a bifurcated proceeding.<sup>46</sup> So too with a separate trial on the issues of the existence or the genuineness of a contract, and its validity under the statute of frauds, which in many cases should be decided before a trial of the issues of breach and damages.<sup>47</sup> Bifurcation is also appropri-

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41. *Id.*; see also *Britton v. Farmers Ins. Group (Truck Ins. Exch.)*, 721 P.2d 303, 320 (Mont. 1986).

42. See *Ennix v. Clay*, 703 S.W.2d 137, 139 (Tenn. 1986) (citing *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931)).

43. The benefits of a bifurcated issue of liability are not limited to personal injury cases. For example, a finding of breach of contract leaves only the remedy for decision; therefore, the finding of breach is a determination of liability. See *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 19 (1st Cir. 2001) (construing arbitration bifurcated into issues of liability and damages); see also 5 MOORE, *supra* note 11, ¶ 42.03[1]; 9A WRIGHT & MILLER, *supra* note 4, § 2390; Mayers, *supra* note 12, at 393; Vogel, *supra* note 12, at 267, 269; Aitken, *supra* note 12; Note, *Original Separate Trials on Issues of Damages and Liability*, 48 VA. L. REV. 99, 99–101 (1962) [hereinafter Note, *Original Separate Trial on Issues*]; Eunice A. Eichelberger, Annotation, *Propriety of Ordering Separate Trials as to Liability and Damages, Under Rule 42(b) of Federal Rules of Civil Procedure, in Contract Actions*, 79 A.L.R. FED. 812, 812–19 (1986) (discussing multiple situations in which courts have elected to bifurcate).

44. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 25–26 (E.D.N.Y. 2001) (citing Mayers, *supra* note 12, at 391). It appears, however, that at common law, bifurcation was permitted only in an action for account-render. See John J. Watkins, *The Right to Trial By Jury in Arkansas After Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649, 706 & n.345 (2002) (finding no bifurcation of liability and damages at common law (citing Margaret Gammill, Note, *Civil Procedure Rule 42(b)—Bifurcation of the Issues of Liability and Damages at Trial*, 5 U. ARK. LITTLE ROCK L.J. 405, 406 (1982))).

45. *Simon*, 200 F.R.D. at 26 (citing Mayers, *supra* note 12 at 391).

46. See, e.g., *N. Cent. Airlines, Inc. v. Cont'l Oil Co.*, 574 F.2d 582, 587 n.12 (D.C. Cir. 1978) (“The separate issue which the court addressed . . . involved the most critical question in the litigation and was a very appropriate subject for bifurcated consideration.”); see also Gensler, *supra* note 11, at 726–27 (providing many recent examples of judges bifurcating issues in contract cases, such as “affirmative defenses, liability and damages, and punitive damages”) (footnotes omitted).

47. See *Canister Co. v. Nat'l Can Corp.*, 3 F.R.D. 279, 280 (D. Del. 1943); see also

ate for other contract issues, such as duress; the capacity to contract; third-party beneficiary status; authenticity of a signature; and the parties' rights under contract modification, extension or cancellation.<sup>48</sup> The issue of breach is, of course, the issue of liability, which may appropriately be bifurcated from the issue of damages.<sup>49</sup>

A partial list of issues appropriate for bifurcation in other cases includes: jurisdiction; venue; pleas in abatement; discharge in bankruptcy; capacity to sue; authenticity of signature; affirmative defenses, such as statute of limitations, estoppel, laches, res judicata, and statute of frauds; various tort issues, such as agency, degrees of negligence, scope of employment, and place of an accident; issues raised by a counterclaim, third-party claim, or cross-claim;<sup>50</sup> the validity of a release;<sup>51</sup> whether a dry dock was a vessel;<sup>52</sup> whether a flood was an Act of God;<sup>53</sup> the validity of a mining claim;<sup>54</sup> prior art;<sup>55</sup> and the issues of validity, title, infringement and damages in patent and copyright cases,<sup>56</sup> unless it would "in-

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Burkhard v. Burkhard, 175 F.2d 593, 595 (10th Cir. 1948); 75 AM. JUR. 2D *Trial* § 131 (2007) (noting the discretion of the trial judge).

48. See, e.g., K.N.B. v. M.C. (*In re* Interest of N.Z.B. and M.T.B.), 779 So. 2d 508, 511 (Fla. Dist. Ct. App. 2000); Zupan v. Zupan, 576 N.Y.S.2d 616, 616 (N.Y. App. Div. 1991).

49. See Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc., 867 F. Supp. 686, 689 (N.D. Ill. 1994); Witherbee v. Honeywell, Inc., 151 F.R.D. 27, 29 (N.D.N.Y. 1993) (citing Kimberly-Clark Corp. v. James River Corp. of Va., 131 F.R.D. 607, 608–09 (N.D. Ga. 1989)); Acme Resin Corp. v. Ashland Oil, Inc., 689 F. Supp. 751, 753 (S.D. Ohio 1987).

50. See 9A WRIGHT & MILLER, *supra* note 4, § 2389; Garrett & Diresta, *supra* note 11, at 508–16; N.Y. State Bar, *The Mini-Trial*, *supra* note 11, at 19–23. "[T]he Sixth Circuit has recognized that 'separate trials on a statute of limitations issue are particularly appropriate' when a decision on that issue would minimize court time and litigation expenses." Yacub v. Sandoz Pharm. Corp., 85 F. Supp. 2d 817, 828 (S.D. Ohio 1999) (quoting Yung v. Raymark Indus., Inc., 789 F.2d 397, 401 (6th Cir. 1986)).

51. See, e.g., Bowie v. Sorrell, 209 F.2d 49, 50–51 (4th Cir. 1953).

52. Bernardo v. Bethlehem Steel Co., 200 F. Supp. 534, 535 (S.D.N.Y. 1961).

53. Huffmaster v. United States, 186 F. Supp. 120, 124 (N.D. Cal. 1960).

54. United States v. Mulligan, 177 F. Supp. 384, 385 (D. Or. 1959).

55. Hall Lab. v. Nat'l Aluminate Corp., 95 F. Supp. 323, 325–26 (D. Del. 1951).

56. See, e.g., Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 312 (E.D.N.C. 1998); Eaton Corp. v. Auburn Gear Inc., 8 U.S.P.Q.2d (BNA) 1373, 1374 (N.D. Ind. 1988) (noting that patent cases are often uniquely amenable to bifurcation); Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 587 F. Supp. 1112, 1116–17 (D. Del. 1984). *But see* Markman v. Westview Instruments, Inc., 517 U.S. 370, 390 (1996) (holding that construction of patent claims, including disputed terms of art within such claims, is a question of law reserved for court, not a matter subject to the Seventh Amendment right to a jury trial; and whether infringement occurred is a question of fact for a jury); see also Steven M. Bauer et al., *First Markman, Now Festo: A Simplified Approach to Patent Litigation Trials*, 4 SEDONA CONF. J. 73, 78 (2003) (suggesting bifurcation of infringement issues within a process that ends with a combined *Markman-Festo* and

convenience the court or seriously prejudice the rights of some of the parties."<sup>57</sup>

The issue of punitive damages is properly bifurcated from the issues of liability and compensatory damages, where evidence as to the existence or amount of punitive damages may be prejudicial to consideration of those other issues.<sup>58</sup> The issue of causation of a loss, for example, by fire, is properly bifurcated from the issue of liability among numerous defendants and the issue of damages.<sup>59</sup> Employment discrimination cases also lend themselves to the bifurcation of issues.<sup>60</sup> In a products liability case, it is proper to bifurcate the issue of whether the defendant manufactured, designed, or sold the product.<sup>61</sup> In insurance cases, the issues of coverage and whether the insurer acted in bad faith are appropriately bifurcated.<sup>62</sup> In cases involving the Federal Tort Claims Act, it is proper to bifurcate the issue of whether the plaintiff presented a timely administrative claim,<sup>63</sup> an issue which is also often present in state court suits against a sovereign defendant. Further, in class action litigation, the courts often bifurcate the issue of class certification from the merits.<sup>64</sup>

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summary judgment hearing); Thomas L. Creel & Robert P. Taylor, *Bifurcation, Trifurcation, Opinions of Counsel, Privilege and Prejudice*, in WINNING STRATEGIES IN PATENT LITIGATION 1995, at 823, 825 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Serv. No. G4-3952, 1995) (discussing appropriate uses of bifurcation in patent litigation).

57. *Swofford v. B & W, Inc.*, 336 F.2d 406, 415 (5th Cir. 1964).

58. See *Mattison v. Dall. Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990). As previously discussed, "many state [statutes] encourage—or even require—bifurcating punitive-damage issues." Gensler, *supra* note 11, at 740 n.211.

59. *Kiser v. Bryant Elec. (In re Beverly Hills Fire Litig.)*, 695 F.2d 207, 216–17 (6th Cir. 1982).

60. *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 618–19 (4th Cir. 1984).

61. *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 541–42 (8th Cir. 1977).

62. *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 500–01 (5th Cir. 1985); see also *Schmidt v. Cal. State Auto. Ass'n*, 127 F.R.D. 182, 185 (D. Nev. 1989) (bifurcating breach of contract and tort claims in an insurance case).

63. *Joplin v. United States*, 74 F.R.D. 4, 5–6 (E.D. Okla. 1976).

64. See, e.g., *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 238 (E.D. Mich. 1997); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004).

In the absence of contrary statutory mandate or guidance,<sup>65</sup> there is general consensus on the order in which bifurcated issues should be tried. Logically and practically, an issue that, “if decided in the defendant’s favor will dispose of the whole case, should be tried first[,] . . . and issues of law should be determined before proceeding to the determination of issues of fact.”<sup>66</sup> When liability and damages are bifurcated, the issue of liability should be tried first.<sup>67</sup> Legal issues are generally tried before equitable issues where the right to trial by jury is implicated.<sup>68</sup> In cases involving punitive damages, the issues of liability and compensatory damages should be tried before the issue of whether punitive damages should be awarded,<sup>69</sup> and the latter issue tried before the issue of the amount thereof.<sup>70</sup> In any bifurcated trial, however, in the absence of statutory mandate,<sup>71</sup> determination of which issue should be tried first is left to the discretion of the trial court.<sup>72</sup>

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65. In New York, for example, when issues of liability and damages are bifurcated in a personal injury action, “the issue of liability shall be tried first, unless the court orders otherwise.” N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.42(b), 206.19(b) (2008). In New Jersey, where punitive damages are bifurcated at the request of a defendant, statute prescribes the order in which the issues are to be tried, with no room for judicial discretion. N.J. STAT. ANN. § 2A:15-5.13 (West 2000).

66. 88 C.J.S. *Trial* § 10 (1955); see *Mitchell v. Fed. Intermediate Credit Bank*, 164 S.E. 136, 137 (S.C. 1932); 75 AM. JUR. 2D *Trial* § 165 (2007).

67. See sources cited *supra* note 4.

68. 9A WRIGHT & MILLER, *supra* note 4, § 2388 (“If, however, issues of fact are common to both the legal and the equitable claims and a jury has been demanded on the issues material to the legal claim, a jury must be permitted to determine these issues prior to decision of the equitable claim.”) (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962)); accord *Danjaq L.L.C. v. Sony Corp.*, 263 F.3d 942, 962 (9th Cir. 2001); *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 170 (9th Cir. 1989). If, however, “the legal and equitable claims do not involve common issues, the district court has discretion to regulate the order of trial.” *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) (citing *Dollar Sys., Inc.*, 890 F.2d at 170–71).

69. This is consistent with Virginia law, under which an award of compensatory damages “is an indispensable predicate for an award of punitive damages, except in actions for libel and slander.” *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 159, 313 S.E.2d 384, 388 (1984) (citing *Newspaper Publ’g Corp. v. Burke*, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976)); accord *Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1137 n.3, 277 S.E.2d 225, 227 n.3 (1981).

70. See *Frey & Orr*, *supra* note 19, at 36 (“In most states, the defendant is entitled to have a bifurcated proceeding consisting of a first phase in which all issues are tried except amount of punitive damages, and a second, depending upon the verdict, in which the amount of punitive damages is set.”).

71. For example, Georgia requires bifurcation of the entitlement to punitive damages and setting the amount thereof, with the issue of entitlement to be tried first. GA. CODE ANN. § 51-12-5.1(d) (2000).

72. See *Miller v. Am. Bonding Co.*, 257 U.S. 304, 308 (1921).

An in-depth analysis of the positions of those who support and criticize the bifurcation of civil trials<sup>73</sup> clearly reflects that bifurcation significantly assists in the maintenance of docket control<sup>74</sup> and reduces the expense and duration of trials.<sup>75</sup> Indeed, one study, concluding that bifurcation is a powerful remedy for court congestion, reflected that “[s]eparation of issues will save, on the average, about 20 percent of the time that would be required if these cases were tried under traditional rules.”<sup>76</sup> In the same vein, an exhaustive study of bifurcation in the federal courts under Rule 42(b) concluded: “[O]n the whole the separate trial has proved a very flexible and useful instrument for preventing confusion, avoiding prejudice, and providing a convenient method of disposing of litigation as fairly and quickly as possible. The rule serves its purpose in modern pleading.”<sup>77</sup>

Other commentators accord with this view. Page and Siegel explained:

The federal model provides a mechanism to conserve judicial resources, save litigants time and money, and improve the quality of the fact-finding process. In this age of crowded dockets, soaring legal costs, and declining public confidence in the legal system, courts should use bifurcation in all cases in which appropriate grounds for bifurcated trial exist.<sup>78</sup>

These observations about the efficacy of bifurcation in the federal courts provide a powerful incentive for the full utilization of this docket-control and litigation-efficiency device in state courts, where appropriate.

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73. Compare *supra* note 10, with *supra* note 12.

74. See Schwartz, *supra* note 12, at 1199 (“[T]he alleviation of calendar congestion [is] the principal end served by severance.”); Bedecarré, *supra* note 12, at 123 (“Bifurcation of civil trials into distinct phases is a potent weapon in the judicial docket-control arsenal . . .”).

75. See *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 27 (E.D.N.Y. 2001) (“Severance of issues is one of the trial judge’s most useful trial management devices to ensure the just and efficient determination of civil actions . . .”).

76. Zeisel & Callahan, *supra* note 12, at 1624, cited with approval in *LoCicero v. Humble Oil & Ref. Co.*, 52 F.R.D. 23, 30 (E.D. La. 1971). Wright and Miller characterize this as “[a] competent study.” 9A WRIGHT & MILLER, *supra* note 4, § 2390 & n.15.

77. Note, *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, 762–63 (1955), quoted in *In re Paris Air Crash of March 3, 1974*, 69 F.R.D. 310, 319–20 (C.D. Cal. 1975).

78. Page & Siegel, *supra* note 11, at 75.

### III. APPEAL IN THE CONTEXT OF A BIFURCATED CIVIL TRIAL

Because the topic of appeal is so broad, its discussion, even in the context of bifurcation, will be limited to its application to the issues most often bifurcated, namely, liability and damages, with an emphasis on Virginia law.

Bifurcation fits comfortably within the normal rules governing the finality of orders or decrees required to support appeals. There is a broad consensus that, in the absence of a statute to the contrary, orders directing the bifurcation of issues for trial are interlocutory, and not ordinarily immediately “appealable.”<sup>79</sup> The law in Virginia is in accord, and contains no statutes to the contrary.<sup>80</sup>

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79. See, e.g., *Day v. Davis*, 989 So. 2d 1118, 1120 (Ala. Civ. App. 2008); see Gary D. Spivey, Annotation, *Appealability of State Court Order Granting or Denying Consolidation, Severance, or Separate Trials*, 77 A.L.R.3d 1082, §§ 2(a), 3 (1977); see also *Sun Dial Corp. v. Fink*, 128 A.2d 440, 441 (Md. 1957) (citing *Dixon Livery Co. v. Bond*, 117 Va. 656, 658, 86 S.E. 106, 107 (1915)) (denying appeal as premature from an interlocutory order for the trial of separate issues and upholding the trial court’s discretion to enter such order). The First Circuit has determined, however, that where an arbitration case has been bifurcated into liability and damages phases, the arbitral award as to liability is a final award under the Federal Arbitration Act, and thus subject to judicial review. See *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 235 (1st Cir. 2001).

80. See VA. CODE ANN. § 8.01-670 (Repl. Vol. 2007 & Cum. Supp. 2010). Except for judgments in certain specified cases, a “final judgment” is required for an appeal to the Supreme Court of Virginia to be authorized in “any other civil case.” *Id.* An interlocutory decree or order may support an appeal to the Supreme Court of Virginia if it grants, dissolves, or denies an injunction; requires “money to be paid or the possession or title to property be changed”; or is one “[a]djudicating the principles of a cause.” *Id.* The phrase “adjudicates the principles of the cause” means that

the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules or methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject matter of the suit.

*Thrasher v. Lustig*, 204 Va. 399, 402, 131 S.E.2d 286, 288–89 (1963) (quoting *Lancaster v. Lancaster*, 86 Va. 201, 204–05, 9 S.E. 988, 990 (1889)); see *Ind. Ins. Guar. Ass’n v. Gross*, 268 Va. 220, 220–21, 598 S.E.2d 322, 322 (2004) (defining a decree or order which adjudicates the principle of a cause); *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 107, 524 S.E.2d 420, 428 (2000) (same); *Ragan v. Woodcroft Vill. Apartments*, 255 Va. 322, 327, 497 S.E.2d 740, 743 (1998) (same).

The Virginia Code permits the appeal of certain interlocutory orders and decrees to the supreme court, by permission, but it does not appear to encompass orders directing the bifurcation of issues. § 8.01-670.1 (Repl. Vol. 2007 & Cum. Supp. 2010); see also *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 243, 591 S.E.2d 76, 77 (2004) (deciding an appeal under Virginia Code section 8.01-670.1). Under section 8.01-670.1, the immediate interlocutory appeal contemplated requires, inter alia, a written certification by the court

that the order or decree involves a question of law as to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling

A determination of an interlocutory, but nevertheless dispositive issue—for example, liability in a personal injury case, bifurcated from the issue of damages—in favor of the defendant would support an appeal, since the court would thereupon issue a final judgment in accordance with the finding.<sup>81</sup> On the other hand, a finding of liability in favor of the plaintiff in a bifurcated trial is not a final appealable order, since damages remain to be determined.<sup>82</sup>

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precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issue will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) the court and the parties [apparently all of the parties] agree it is in the parties' best interest to seek an interlocutory appeal.

§ 8.01-670.1 (Repl. Vol. 2007 & Cum. Supp. 2010).

Virginia Code section 8.01-374.1 authorizes the consolidation of actions or the bifurcation of separate issues in certain multiple-party asbestos cases seeking recovery for personal injury or wrongful death. § 8.01-374.1 (Repl. Vol. 2007). Section 8.01-374.1(C) provides that any order issued pursuant to section 8.01-374.1 "shall, for purposes of appeal, be an interlocutory order[.]" and denies the appealability of "[a]ny findings of the court or jury in any bifurcated trial . . . until a final order adjudicating all issues on a specific claim or consolidated group of claims has been entered." *Id.* While the General Assembly obviously wanted to statutorily prescribe these appellate rules in asbestos cases, it appears that section 8.01-374.1(C) is simply declaratory of normal appellate principles in bifurcated cases. *See id.*

81. *See, e.g.,* *Town of Vinton v. Bryant*, 238 Va. 229, 231, 384 S.E.2d 76, 77 (1989) (holding that where plaintiff fails to produce preponderating evidence of defendant's negligence as a proximate cause of the event resulting in damages the defendant is entitled to final judgment); *accord* *W.S. Hoge & Bros. v. Prince William Coop. Exch.*, 141 Va. 676, 681, 126 S.E. 687, 688 (1925) (stating that "[b]efore one can recover damages it must appear that some injury has been suffered" for which the defendant is liable) (citations omitted).

82. *See* *Weizenbaum v. Weizenbaum*, 12 Va. App. 899, 902–03, 407 S.E.2d 37, 39 (1991) (stating that a finding of liability in a bifurcated trial was not a final appealable order because there was no final appealable order until the amount of the lump sum alimony was determined). This is the general rule in both federal and state courts. *See, e.g.,* *Henrietta D. v. Giuliani*, 246 F.3d 176, 180 (2d Cir. 2001) (stating that a judgment determining liability only and leaving prospective relief for another day is a "classic example of non-finality" (quoting *Taylor v. Bd. of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961))); *Guy v. Dzikowski (In re Atlas)*, 210 F.3d 1305, 1308 (11th Cir. 2000); *Fascetti v. Fascetti*, 795 So. 2d 1094, 1095 (Fla. Dist. Ct. App. 2001) (noting Florida's deletion of its prior Rule of Appellate Procedure effective January 1, 2001, which had permitted "appeal of non-final orders determining the issue of liability in favor of a party seeking affirmative relief"); *John Cheeseman Trucking, Inc. v. Dougan*, 805 S.W.2d 69, 70–71 (Ark. 1991) (stating that orders determining liability in plaintiff's favor and deferring issue of damages are not final appealable orders); *Rapid Taxi Co. v. Broughton*, 535 S.E.2d 780, 782 (Ga. Ct. App. 2000) (same); *Krupp v. Gulf Oil Corp.*, 557 N.E.2d 769, 771 (Mass. App. Ct. 1990) (same); *Bautista v. Kolis*, 754 N.E.2d 820, 824–25 (Ohio Ct. App. 2001) (same). However, in New York, while the rule is the same as the foregoing in cases in which a single jury hears and decides, in a continuous trial, the bifurcated issue of liability, followed immediately by the issue of damages—where there is a break between the trial on the issues of liability and damages, or the jury is discharged after a liability trial—the defendants will be permitted

Where a nondispositive issue has been bifurcated for trial—for example, the issue of the plaintiff's contributory negligence in a negligence action in which the defendant's conduct is alleged to be *both* negligent, and willful and wanton—the determination of the contributory negligence issue is not a final, appealable judgment. If the contributory negligence determination is in favor of the defendant, it is interlocutory because no final determination has been made as to the defendant's liability for his conduct,<sup>83</sup> which may still be established if that conduct is determined to be willful and wanton, and the plaintiff's conduct did not rise to that level.<sup>84</sup> If the contributory negligence determination is in favor of the plaintiff, it is also interlocutory because the absence of that defense does not establish the defendant's liability.<sup>85</sup>

The foregoing reasoning applies to a determination of any other nondispositive issue which has been bifurcated. Such a determination will, by definition, neither be one which definitely determines the rights of the parties, leaving nothing further to be done by the court, save ministerial action, nor one which adjudicates the principles of the cause.<sup>86</sup> Further, such a determination will not support an interlocutory appeal.<sup>87</sup> That conclusion seems clear from the Supreme Court of Virginia's February 27, 2009 decision in *Comcast of Chesterfield County, Inc. v. Board of Supervisors of Chesterfield County*, in which Comcast attacked the County's effort to impose personal property taxes on certain of its equip-

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an appeal from the interlocutory judgment on liability. See *Bank of N.Y. v. Ansonia Assocs.*, 656 N.Y.S.2d 813, 815, 817 (N.Y. App. Div. 1997).

83. See *Wilby v. Gostel*, 265 Va. 437, 445–46, 578 S.E.2d 796, 800–01 (2003) (stating that allegations of both negligence and willful and wanton conduct do not represent separate claims or theories of liability, but merely different degrees of proof that can be applied to the same theory of liability).

84. A plaintiff's contributory negligence is not a defense where the defendant's conduct is willful and wanton, unless the plaintiff's conduct also rose to that level. *Wolfe v. Baube*, 241 Va. 462, 465, 403 S.E.2d 338, 339 (1991). Of course, where the defendant's liability is solely predicated upon simple negligence, a determination of the plaintiff's contributory negligence, if that issue is bifurcated, will require the court to enter judgment in favor of the defendant. See *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 432, 297 S.E.2d 675, 680 (1982); *Smith v. Va. Elec. & Power Co.*, 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963) (“[O]ne who is guilty of negligence or contributory negligence, which causes or efficiently contributes to his injuries is not entitled to recover damages therefor[e].”) (citations omitted).

85. See, e.g., *Connelly v. City of Omaha*, 769 N.W.2d 394, 397–400 (Neb. 2009).

86. See *James v. James*, 263 Va. 474, 481, 562 S.E.2d 133, 137 (2002).

87. See *Comcast of Chesterfield Cnty., Inc. v. Bd. of Supervisors*, 277 Va. 293, 306–07, 672 S.E.2d 870, 876–77 (2009).

ment.<sup>88</sup> The circuit court bifurcated the proceeding into an initial “classification” issue, to determine whether the property was taxable and, if necessary, a subsequent “valuation” issue, to determine the amount of any tax.<sup>89</sup> The circuit court issued an order ruling that the property at issue was taxable as business tangible personal property.<sup>90</sup> Ten days later, and before the circuit court addressed the valuation issue, which included a motion to compel Comcast to respond to certain of the county’s discovery requests, Comcast filed a notice of appeal to the circuit court’s ruling on the classification issue.<sup>91</sup> The Supreme Court of Virginia dismissed Comcast’s appeal as improvidently granted, holding the circuit court’s ruling was not a final order, as the record clearly revealed matters remaining for the circuit court to resolve; namely, the motion to compel and resolution of the second issue through a valuation of Comcast’s property.<sup>92</sup> The court also held the circuit court’s order was not appealable as an interlocutory order under either Virginia Code sections 8.01-670 or 8.01-672.<sup>93</sup> The circuit court’s order did not meet any of the express exceptions to the amount in controversy requirement of section 8.01-672, or any of the express authorizations for an interlocutory appeal contained in section 8.01-670(B) (an appeal under section 8.01-670(A) requires a final judgment).<sup>94</sup>

#### IV. BIFURCATION OF DISCOVERY

Whenever a court decides to bifurcate segregated issues for separate trial, it has a concomitant, discretionary power to bifurcate discovery<sup>95</sup>—either *sua sponte* or in response to a motion.<sup>96</sup>

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88. *Id.* at 296, 672 S.E.2d at 870.

89. *Id.* at 298, 672 S.E.2d at 872.

90. *Id.* at 299, 672 S.E.2d at 872.

91. *Id.*

92. *Id.* at 301, 672 S.E.2d at 873–74

93. *Id.* at 303–07, 672 S.E.2d at 874–77.

94. *Id.*; see VA. CODE ANN. § 8.01-670 (Repl. Vol. 2007 & Cum. Supp. 2010).

95. As with the bifurcation of issues, bifurcation of discovery rests with the sound discretion of the trial court. See *Easton v. City of Boulder*, 776 F.2d 1441, 1447 (10th Cir. 1985) (citations omitted); *Epixtar Corp. v. McClain & Co. (In re Epixtar Corp.)*, No. 08-0128-BKC-AJC, 2009 Bankr. LEXIS 2271, at \*5 (Bankr. S.D. Fla. Aug. 13, 2009) (citing *Harrington v. Cleburne Cnty. Bd. of Educ.*, 251 F.3d 935, 938 (11th Cir. 2001)); *Brittingham v. Cerasimo, Inc.*, No. 2:08-CV-216-TLS-PRC, 2008 U.S. Dist. LEXIS 99076, at \*2 (N.D. Ind. Dec. 8, 2008).

96. *F & G Scrolling Mouse L.L.C. v. IBM Corp.*, 190 F.R.D. 385, 390 (M.D.N.C. 1999). “A decision to bifurcate a case into separate trials *immediately* requires another equally

Where issues are bifurcated, bifurcated discovery permits discovery on the initial issue, and stays discovery on the remaining issue(s).<sup>97</sup>

Many of the same factors relevant to the bifurcation of issues also inform the decision of whether to bifurcate discovery.<sup>98</sup> Some courts, however, have identified additional factors, such as the breadth of the discovery sought and the burden of the party responding to it;<sup>99</sup> the potential for simplification of discovery and the conservation of resources;<sup>100</sup> and whether bifurcated discovery will promote the interests of “fairness and efficiency.”<sup>101</sup>

Bifurcation significantly impacts discovery. Indeed, one court has observed that simplification of discovery is “the major benefit of bifurcation” in some cases.<sup>102</sup> Concurring in this observation, another court recently emphasized that “[o]ne of the purposes of bifurcation . . . is to defer costly discovery and trial preparation costs pending the resolution” of a potentially dispositive preliminary issue.<sup>103</sup>

While a decision to bifurcate a case into separate trials requires the immediate decision of whether to bifurcate discovery, it does not mandate bifurcated discovery.<sup>104</sup> Sometimes a bifurcated trial may not require bifurcated discovery. Further, “a court may stage discovery so that only the more . . . expensive phases of damage discovery, such as expert witness or third-party witnesses, or [the more] sensitive subjects such as attorney opinions, are set for the last part of the discovery period.”<sup>105</sup>

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important one—should discovery also be bifurcated and either stayed or staged.” *Id.* (emphasis added).

97. *See id.* at 390–91 (explaining that a court may choose the order in which the issues are tried to regulate the order of discovery).

98. These factors have been previously discussed, and include convenience, judicial economy, expedience, and prejudice. *See, e.g.,* *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999) (discussing the factors considered under Rule 42(b) of the Federal Rules of Civil Procedure); *Devito v. Barrant*, No. 03-CV-1927, 2005 U.S. Dist. LEXIS 22444, at \*435 (E.D.N.Y. Aug. 23, 2005) (same).

99. *See Chesney v. Valley Stream Union Free Sch. Dist.* No. 24, 236 F.R.D. 113, 115 (E.D.N.Y. 2006).

100. *F & G Scrolling Mouse L.L.C.*, 190 F.R.D. at 390.

101. *Harris v. Option One Mortg. Corp.*, 261 F.R.D. 98, 111 (D.S.C. 2009).

102. *Industrias Metálicas Marva, Inc. v. Lausell*, 172 F.R.D. 1, 4 (D.P.R. 1997).

103. *Epixtar Corp. v. McClain & Co. (In re Epixtar Corp.)*, No. 08-01208-BKC-AJC, 2009 Bankr. LEXIS 2271, at \*6 (Bankr. S.D. Fla. Aug. 13, 2009).

104. *F & G Scrolling Mouse L.L.C.*, 190 F.R.D. at 390.

105. *Id.* (footnote omitted).

Federal court decisions reflect numerous instances of bifurcated discovery.<sup>106</sup> However, bifurcated discovery has not been found in any reported Virginia circuit court decision. Nevertheless, given the Supreme Court of Virginia's explicit recognition of judicial discretion to bifurcate discrete issues for separate trial, as reflected in *Dixon, Wade*, and *Centra Health*, it is reasonable to predict that when presented with the issue the court will give equal recognition to the judicial discretion of Virginia circuit courts to bifurcate discovery.<sup>107</sup>

## V. BIFURCATION OF ISSUES IN VIRGINIA CIVIL TRIALS

### A. *The Role of the Virginia Courts*

Bifurcation in Virginia of both criminal trials and domestic relations cases is an accepted procedure, but it has not been generally employed in civil trials, even though as early as 1915, the Supreme Court of Appeals of Virginia approved of the discretionary, and apparently sua sponte, bifurcation of issues by the trial court in a civil trial. In *Dixon Livery Co. v. Bond*, the court rejected the defendant's contention that the action of the trial court, in submitting to the jury the question of partnership "as a preliminary and separate issue," was erroneous.<sup>108</sup> The court held that "this was a matter of procedure within the discretion of the trial

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106. See, e.g., *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 603 F. Supp. 2d 1, 1-2 (D.D.C. 2009); *Harris*, 261 F.R.D. at 111; *Kreger v. Gen. Steel Corp.*, No. 07-575, 2008 U.S. Dist. LEXIS 12568, at \*3 n.2 (E.D. La. Feb. 19, 2008); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 275 (S.D.N.Y. 2008); *Gates v. Rohm & Haas Co.*, No. 06-1743, 2007 U.S. Dist. LEXIS 33257, at \*6 (E.D. Pa. May 3, 2007).

107. But see Report of the Boyd Graves Study Committee-Uniform Scheduling Order, ¶ III(6)(b), June 23, 2008, available at <http://vba.affiniscap.com/associations/11069/files/18.%20TAB%2012%20UNIFORM%20SCHEDULING%20ORDER.pdf> (reflecting that the Committee declined to make a recommendation regarding the inclusion in that Order of bifurcated discovery between liability and damages). This appears to have been a recognition of the discretionary nature of bifurcating discovery, militating against its routine inclusion in a scheduling order.

108. 117 Va. 656, 658, 86 S.E. 106, 107 (1915) (emphasis added). The action was brought by "a partnership doing business under the firm name of D.S. Bond, . . . to recover the amount of an unpaid check and to protect fees and charges thereon." *Id.* at 657, 86 S.E. at 107. The defendant livery company filed a plea of *nil debit*, a plea of offset, and a plea denying the partnership. *Id.* Trial was first had on the plea denying the partnership. *Id.*

court, and the defendants could not have been prejudiced by the course which was taken.”<sup>109</sup>

*Dixon* was relied upon in a 1962 *Virginia Law Review* article for the premise that “it seems that the courts have the power, even in the absence of statute, to order separate trials of any issues . . . .”<sup>110</sup> An earlier *University of Pennsylvania Law Review* article is in accord, observing that “[i]n some jurisdictions the inherent power of the courts of law to sever any issue seems to be assumed, as in *Dixon Livery Co. v. Bond*.”<sup>111</sup> *Dixon* has also been cited by the Court of Appeals of Maryland for the proposition that “a separate trial of issues is within the discretion of a trial court, even in the absence of statutes or rules on the subject.”<sup>112</sup> Moreover, two Virginia circuit court opinions have expressly cited *Dixon*, albeit not for authority to bifurcate issues, but for the discretionary authority to sever counts or claims.<sup>113</sup>

For some reason, the Supreme Court of Virginia has never cited *Dixon* in any subsequent case, and until its April 17, 2003 decision in *Wade*, and its January 16, 2009 decision in *Centra Health*, its decisions after *Dixon* were essentially bereft of any

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109. *Id.* at 658, 86 S.E. at 107.

110. Note, *Original Separate Trial on Issues*, *supra* note 43, at 102 (citing *Dixon*, 117 Va. 656, 86 S.E. 106 (1915)). Other authorities support the inherent authority of a court to bifurcate a civil trial on separate issues. See *Swenson v. Sawoska*, 559 A.2d 1153, 1156 (Conn. App. Ct. 1989), *aff'd*, 575 A.2d 206 (Conn. 1990); *Ibey v. Ibey*, 55 A.2d 872, 873 (N.H. 1947); *Robertson v. Ephraim*, 18 Tex. 118, 122 (Tex. 1856); *Charron v. Nw. Fuel Co.*, 128 N.W. 75, 76–77 (Wis. 1910); *Mayers*, *supra* note 12, at 396. Illinois apparently takes a contrary view, denying a trial court the inherent authority to bifurcate issues of liability and damages over objection by the defendant, *Mason v. Dunn*, 285 N.E.2d 191, 192–93 (Ill. App. Ct. 1972), but permitting bifurcation when the parties consent, *Richter v. Nw. Mem'l Hosp.*, 532 N.E.2d 269, 274–75 (Ill. App. Ct. 1988). *But see Curran v. Bosze*, 566 N.E.2d 1319, 1345 (Ill. 1990) (upholding the trial court's refusal to bifurcate issues, but implying that other circumstances might have produced a contrary result).

111. *Mayers*, *supra* note 12, at 396 n.18. Indeed, *Mayers* goes on to argue that “without any express statutory or other authorization, our courts, unless prevented by specific restriction or limitation (of which no instance has been found) have the inherent power to sever any issue for separate trial.” *Id.* at 396. Unfortunately, *Mayers* utilizes the word “sever,” properly applicable to the severance of claims, to describe the distinctly different process of ordering the separate trial of issues.

112. *Sun Dial Corp. v. Fink*, 128 A.2d 440, 441 (Md. 1957).

113. See *Waterside Capital Corp. v. Nat'l Assisted Living L.P.*, 59 Va. Cir. 466, 469 (2002) (Norfolk City) (a sua sponte action by the circuit court, blurring the distinction between the bifurcation of issues and the severance of counts by proposing the latter, but describing the procedure as the former); *Song v. Ju*, No. 116942, 1993 WL 946286, at \*4 (Va. Cir. Ct. Oct. 25, 1993) (Fairfax County) (citing *Dixon* as authority to order “separate trials,” but choosing to deny plaintiffs’ “motion to sever” certain counts of the counterclaim on discretionary grounds).

discussion of, or guidance concerning, the bifurcation of issues in civil trials,<sup>114</sup> even where the court recognized that such bifurcation had occurred in the trial court.<sup>115</sup> Thus, in *Wilcox v. Lauterbach Electric Company*, the court noted, without criticism or approval, that the trial court entered a default judgment over the defendants' objection, but reserved for "further adjudication" the issue of punitive damages until it subsequently granted the plaintiff's nonsuit of "all issues of punitive damages."<sup>116</sup> Similarly, in *Chesapeake & Potomac Telephone Co. of Virginia v. Sisson & Ryan, Inc.*, the court observed that the parties agreed to submit the question of attorneys' fees to the trial court following the verdict, but neither approved nor criticized that procedure.<sup>117</sup>

In *Philip Morris Inc. v. Emerson*, in which sixteen plaintiffs sued the defendants for compensatory and punitive damages, the Supreme Court of Virginia noted that, by the agreement of the parties, the trial was bifurcated as to issues of liability and damages but made no comment as to the propriety, efficacy or authorization for that procedure.<sup>118</sup> The court similarly acknowledged

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114. In *Leech v. Beasley*, 203 Va. 955, 961, 128 S.E.2d 293, 297 (1962), the Supreme Court of Virginia upheld the trial court's rejection of the plaintiff's motion for separate trials of his claims from the causes of action asserted in the counter-claims filed against him (former Rule 3:8 permitted and current Rule 3:9(d) permits the trial court, in its discretion, to order a separate trial of any cause of action asserted in a counterclaim). The court in *Leech* was concerned with former Rule 3:8 and with its perception that what the plaintiff sought through successive trials was to assume positions in those suits which were inconsistent with each other or mutually contradictory. *Id.* at 960-61, 128 S.E.2d at 297. While *Leech* did not involve the bifurcation of issues, and never cited *Dixon*, it did note, broadly, that it is the policy of the law to avoid wherever possible, needless delay, expense and consumption of the court's time if these factors would be present in "separate trials." *Id.* at 961, 128 S.E.2d at 297.

115. In *Bremer v. Doctor's Building Partnership*, 251 Va. 74, 75-76, 465 S.E.2d 787, 788 (1996), the lower court decided, prior to trial, the issue of whether warranties contained in a purchase agreement remained effective after modification. Nonsuit was granted to the plaintiff after the defendant obtained a favorable judicial interpretation of that agreement. *Id.* at 80-81, 465 S.E.2d at 791. However, for reasons not disclosed in its opinion, the Supreme Court of Virginia chose to ignore the bifurcation issue, and no mention of it was made therein.

116. 233 Va. 416, 418-20, 357 S.E.2d 197, 198-99 (1987).

117. 234 Va. 492, 500, 362 S.E.2d 723, 728 (1987); see also *Lee v. Mulford*, 264 Va. 562, 565-66, 611 S.E.2d 349, 351 (2005) ("We are aware of many cases in which the parties, with the concurrence of the trial court, have bifurcated the fact-finding process.") (citing *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 559, 587 S.E.2d 581, 582 (2003); *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 500, 362 S.E.2d 723, 728 (1987)).

118. 235 Va. 380, 394, 368 S.E.2d 268, 275 (1988).

the conduct of a bifurcated trial in four subsequent cases, without further comment thereon.<sup>119</sup>

In 1994, the Supreme Court of Virginia declined an opportunity to address the propriety of bifurcating the issue of liability from the issue of punitive damages when it rejected the defendant's (appellant's) attempt to argue that the trial should have been bifurcated.<sup>120</sup> The court found that the defendant's financial data should not have been submitted to the jury until after it had first decided the issue of the defendant's liability, on the ground that such claim had not been preserved for appeal.<sup>121</sup> A similar declination occurred in *Majorana v. Crown Central Petroleum Corp.*, where the court found that, in the absence of a record reflecting the reason for the plaintiff's objection to the trial court's grant of the defendant's motion to bifurcate the trial into liability and damages phases, it could not discern whether the objection raised on appeal had been properly preserved below.<sup>122</sup>

A case on the very periphery of bifurcation of issues is *Clark v. Kimnach*, a personal injury case in which the Supreme Court of Virginia upheld the rejection of proffered instructions that would have required the jury to base its verdict solely on the issue of which party's vehicle was on the wrong side of the road.<sup>123</sup> There was no judicial bifurcation of the issues, including those of liability and damages.<sup>124</sup> Moreover, the court's reason for upholding the rejection of the proffered instructions strangely did not discuss the issue of bifurcation.<sup>125</sup> The instructions were held to be improper because they would have unreasonably limited the issue of

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119. See *Wilkins*, 266 Va. at 558, 559, 587 S.E.2d at 582 (noting that the parties agreed to reserve the issue of attorneys' fees and ask for determination by the trial court); *Hensley v. Dreyer*, 247 Va. 25, 28–29, 439 S.E.2d 372, 374–75 (1994) (making no distinction between the bifurcation of issues and the severance of claims; the court allowed "bifurcation" of a claim originally filed as a third-party cross-bill, after permitting withdrawal of a non-suit thereto, subsequent to receipt of the trial court's letter opinion ruling on the underlying litigation); *Spotsylvania Cnty. Sch. Bd. v. Seaboard Sur. Co.*, 243 Va. 202, 206, 415 S.E.2d 120, 122 (1992) (noting that, by pretrial order, the trial court directed that the trial consist of three phases—liability, damages and the remaining issues); *Hamer v. Sch. Bd. of Chesapeake*, 240 Va. 66, 69, 393 S.E.2d 623, 625 (1990) (noting that bifurcation of the issue of necessity of the taking from other issues in a condemnation proceeding).

120. *Hamilton Dev. Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 44, 445 S.E.2d 140, 143 (1994).

121. *Id.*

122. 260 Va. 521, 529–30, 539 S.E.2d 426, 430 (2000).

123. 198 Va. 737, 741–42, 747, 96 S.E.2d 780, 784–85, 788 (1957).

124. *Id.* at 739–40, 96 S.E.2d at 782–83.

125. See *id.* at 741–44, 96 S.E.2d at 784–86.

the proximate cause of the accident, and “deprived the jury of the right to consider any other negligence of the operators which might have efficiently contributed to the accident.”<sup>126</sup>

The 2003 decision in *Allstate Insurance Co. v. Wade* appears to put to rest the claim of many attorneys and the concern of many trial judges that bifurcation was not authorized by Virginia law, except where expressly provided for by statute.<sup>127</sup> Indeed, the Virginia Trial Lawyers Association argued that view of the law in an amicus curiae brief filed in *Wade*,<sup>128</sup> but the supreme court did not adopt that position. Rather, the court stated:

A determination in a civil trial regarding the bifurcation of a jury’s consideration of issues is a matter for the trial court’s discretion and requires consideration of whether any party would be prejudiced by granting or not granting such request, as well as the impact on judicial resources, expense, and unnecessary delay.<sup>129</sup>

*Wade* did not, however, cite *Dixon*, and the foregoing quote was arguably unnecessary to the court’s ruling, which upheld the trial court’s refusal to bifurcate compensatory and punitive damages issues.<sup>130</sup>

In 2005, the Supreme Court of Virginia specifically discussed the issue of bifurcation in *Lee v. Mulford*.<sup>131</sup> The court acknowledged that it was “aware of many cases in which the parties, with the concurrence of the trial court, have bifurcated the fact-finding process.”<sup>132</sup> In *Lee*, the trial court refused to award attorney’s fees in a post-verdict proceeding, despite a promissory note’s provision for attorney’s fees, and plaintiff’s contention, made after the ver-

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126. *Id.* at 742–43, 96 S.E.2d at 784, 785.

127. 265 Va. 383, 389, 393, 579 S.E.2d 180, 183, 185 (2003).

128. Brief for Va. Trial Lawyers Ass’n as Amicus Curiae Supporting Appellees, *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003) (No. 021201), 2002 WL 33002932.

129. *Wade*, 265 Va. at 393, 579 S.E.2d at 185.

130. *Id.* at 397, 579 S.E.2d at 187; *see also* *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 203, 206, 585 S.E.2d 557, 566–67 (2003) (inferentially acknowledging that a bifurcated trial on the issues of liability and damages is authorized in discussing the rule that a new trial on all issues is generally the appropriate remedy “when a litigant makes a prejudicial closing argument to a jury in a non-bifurcated trial,” but rejecting the application of the rule in a non-bifurcated trial where the evidence overwhelmingly supports a finding of liability, and remanding the case for a new trial on damages only).

131. 269 Va. 562, 611 S.E.2d 349 (2005).

132. *Id.* at 565–66, 611 S.E.2d at 351 (citing *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 559, 587 S.E.2d 581, 582 (2003); *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 500, 362 S.E.2d 723, 728 (1987)).

dict, that it was customary to argue the issue of attorney's fees post-trial.<sup>133</sup>

In affirming the trial court in *Lee*, the supreme court rejected the existence or enforceability of any "custom" to argue attorney's fees post-trial, and held that "[a]bsent agreement of the parties with the concurrence of the court, or pursuant to contract or statute with specific provisions, a litigant is not entitled to bifurcate the issues and have the matter of attorney's fees decided by the trial court in post-verdict proceedings."<sup>134</sup> Inexplicably, the court in *Lee* not only failed to cite either *Dixon* or *Wade*, but did not acknowledge the principle exposed in *Dixon*, that the trial court had the inherent power to bifurcate issues, including the issue of attorney's fees.<sup>135</sup> In a decision decided the same day, *Safrin v. Travaini Pumps USA, Inc.*, the court applied Rule 1:1, finding that the trial court erred in reinstating a confessed judgment entered eight months earlier to liquidate the sum for attorney's fees, which it had earlier awarded, but had not set a specified sum.<sup>136</sup> The court characterized its decision in *Lee* as "holding that absent specific provisions in a contract or statute to the contrary, or a prior agreement of the parties with the concurrence of the trial court, a litigant is not entitled to have attorney's fees decided by the court in post-verdict proceedings."<sup>137</sup> Taken together, neither *Lee* nor *Safrin* overturned *Dixon* or *Wade*, or specifically rejected their explicit recognition of the inherent power of a trial court to bifurcate issues. Indeed, *Lee* appears to turn on the particular circumstances at trial, where the promissory note was submitted to the jury with instructions to consider it as a whole, including its provision for attorney's fees and the plaintiff's lack of evidence concerning such fees.<sup>138</sup> When the jury's verdict provided for damages to the plaintiff, but for each party to pay its own legal fees, it is understandable that neither the trial court nor the supreme court was going to give the plaintiff a second bite at the apple by permitting him to seek attorney's fees post-verdict.

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133. *Id.* at 564–65, 622 S.E.2d at 350.

134. *Id.* at 567–68, 611 S.E.2d at 352.

135. *Id.*

136. 269 Va. 412, 415, 419, 611 S.E.2d 352, 354, 356 (2005).

137. *Id.* at 417 n.1, 611 S.E.2d at 355 n.1. The Supreme Court of Virginia quoted this same language from *Lee* in *Bates v. McQueen*, 270 Va. 95, 103, 613 S.E.2d 566, 570 (2005), a case addressing the issue of the entitlement to an award of attorney's fees and the amount of that award, in arbitration. *Bates* did not involve an issue of bifurcation.

138. *Lee*, 269 Va. at 564, 611 S.E.2d at 350.

In 2006, the Supreme Court of Virginia tacitly accepted that bifurcation of issues had occurred at the trial court in both *Cangiano v. LSH Building Co.*<sup>139</sup> and *PMA Capital Insurance Co. v. US Airways, Inc.*<sup>140</sup> Neither *Cangiano* nor *PMA Capital Insurance Co.* cited *Dixon* or *Wade*, nor did they discuss the principles set out therein. Similarly, in its February 27, 2009 decision in *Comcast*—discussed previously in the context of the appeal of bifurcated issues—the court tacitly approved the propriety of the circuit court’s bifurcation action.<sup>141</sup> However, *Comcast* neither provided any exposition of the authority for or principles of bifurcation, nor cited *Dixon*, *Wade*, or *Centra Health*.

The Supreme Court of Virginia’s most recent in-depth discussion of bifurcation in civil trials came in its January 16, 2009 decision in *Centra Health v. Mullins*.<sup>142</sup> The court held that the contested issue of causation isolated the administrators of a decedent’s estate from any requirement to make a pre-trial election between their alternative claims for wrongful death (Virginia Code section 8.01-50), and a survival action for the decedent’s personal injuries (Virginia Code section 8.01-25).<sup>143</sup> The court acknowledged it was mindful of the defendant’s contention that such circumstances may subject a defendant to potential prejudice by the possibility that “the jury could conflate the differing elements of damages from each claim in rendering a single verdict.”<sup>144</sup> However, the court opined that:

[A] defendant can obviate this potential for prejudice by requesting that the trial be bifurcated into separate proceedings to determine liability and damages. Indeed, in a case where there is any doubt as to when compelling an election would be proper, bifurcation is the

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139. 271 Va. 171, 623 S.E.2d 889 (2006). In *Cangiano*, the parties, with the trial court’s approval, agreed “to bifurcate the issues and try LSH’s claims for declaratory judgment and specific performance, and then try LSH’s claims for attorney’s fees and costs post-trial, if necessary.” *Id.* at 175, 623 S.E.2d at 892.

140. 271 Va. 352, 626 S.E.2d 369 (2006). In *PMA Capital Insurance Co.*, the trial court, in a bench trial, “bifurcated the proceeding into an initial phase to determine if coverage existed under the terms of the Policy [for business interruption insurance] and, if necessary, a second phase to determine damages.” *Id.* at 357, 626 S.E.2d at 372.

141. *Comcast of Chesterfield Cnty., Inc. v. Bd. of Supervisors*, 277 Va. 293, 298, 301, 672 S.E.2d 870, 872–73 (2009).

142. 277 Va. 59, 670 S.E.2d 708 (2009).

143. *Id.* at 78–79, 670 S.E.2d at 718.

144. *Id.* at 78, 670 S.E.2d at 718.

most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other.<sup>145</sup>

While the decision is unclear whether the foregoing language is dicta or a holding of a reasoned rejection of the defendant's claim of prejudicial error, it represents clear support and approval of a trial court's discretion to bifurcate issues where appropriate in civil trials. The court's pointed citation of *Wade's* expansive view of the application of bifurcation evidences that the court views bifurcation in a broad context, not narrowly limited to election of remedy cases: "[B]ifurcation . . . is a matter for the trial court's discretion and requires consideration of whether any party would be prejudiced by granting or not granting such request, as well as the impact on judicial resources, expense, and unnecessary delay."<sup>146</sup>

The Court of Appeals of Virginia has also approved bifurcation of discrete issues, although its decisions are of limited precedential authority in general civil trials. The Court of Appeals of Virginia, pursuant to Virginia Code section 20-107.3(A), has affirmed the trial court's action of retaining jurisdiction in a final decree of divorce to adjudicate the ancillary issue of equitable distribution.<sup>147</sup> Both the Court of Appeals of Virginia and the Virginia circuit courts describe this process as "bifurcation."<sup>148</sup> Moreover, the Court of Appeals of Virginia has indicated its broad support for bifurcating a trial on the issues of liability and damages, albeit in the context of a family law case.<sup>149</sup> However, given the limited appellate jurisdiction of the court of appeals<sup>150</sup> and the specific authorization for the foregoing procedure in Virginia Code section 20-107.3(A), these decisions do not confirm the existence of a broad authority for Virginia trial courts to conduct bifurcated trials of separate issues in non-matrimonial cases.

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145. *Id.*

146. *Id.* (quoting *Allstate Ins. Co. v. Wade*, 265 Va. 333, 393, 579 S.E.2d at 180, 185 (2003)) (internal quotation marks omitted).

147. VA. CODE ANN. § 20-107.3(A) (Cum. Supp. 2010).

148. See, e.g., *Clark v. Clark*, 11 Va. App. 286, 292-93, 300-01, 398 S.E.2d 82, 85, 90 (Ct. App. 1990); *Walker v. Walker*, 19 Va. Cir. 390, 391 (1990) (Clarke County). This was the basis for the bifurcation of the issue of the settlement of the allotment from the issue of accounting for rent in *Gaynor v. Hird*, No. 1113-93-4, 1994 Va. App. LEXIS 239, at \*1 (Ct. App. Apr. 26, 1994).

149. *Weizenbaum v. Weizenbaum*, 12 Va. App. 899, 902, 407 S.E.2d 37, 39 (Ct. App. 1991).

150. § 17.1-405 (Repl. Vol. 2010).

In 1969, the United States Court of Appeals for the Fourth Circuit provided some guidance as to when Virginia law might preclude bifurcation. *C.W. Regan, Inc. v. Parsons, Brinkerhoff, Quade & Douglas* applied Virginia law in determining that separate trials on the issues of liability and damages are not appropriate where "the separate and unconnected [faults] of several people may have produced the total damage[s]."<sup>151</sup>

The issue of bifurcation of civil trials in Virginia is not the exclusive province of the appellate courts. Even prior to *Wade* and *Centra Health*, the Virginia circuit courts were conducting bifurcated trials of separate issues in cases where the courts found it appropriate.<sup>152</sup> The reported decisions of the Virginia circuit courts also reflect the trial judges' utilization of this effective docket-control device in the Circuit Courts for the cities of Norfolk,<sup>153</sup> Alexandria,<sup>154</sup> Richmond,<sup>155</sup> and Roanoke.<sup>156</sup> Bifurcation of liability and damages was, however, denied by the Loudoun County Circuit Court in *Amax Concrete Corp. v. Isom*.<sup>157</sup> The court made this decision primarily because it rejected the consolidation of the four cases in which the bifurcation was sought, after balancing the advantages of judicial economy against the possible prejudice to the parties, including the complexity of determining and explaining the role of all of the attorneys to the jury, the resultant delay of some of the cases already scheduled for trial, the complicated nature of required instructions, and the potential for the receipt of prejudicial evidence.<sup>158</sup> The Loudoun County Circuit

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151. 411 F.2d 1379, 1388 (4th Cir. 1969). To support this proposition, the Fourth Circuit subsequently discussed two Virginia cases, *Heldt v. Elizabeth River Tunnel District*, 196 Va. 477, 84 S.E.2d 511 (1954), and *Panther Coal Co. v. Looney*, 185 Va. 758, 40 S.E.2d 298 (1946), neither of which involved bifurcating the trial to separate the issues of liability and damages. *Regan*, 411 F.2d at 1388.

152. See, e.g., *City of Virginia Beach v. Nala Corp.*, 53 Va. Cir. 309, 338 (Cir. Ct. 2000) (Norfolk City).

153. E.g., *E. Va. Med. Sch. v. Found. for the Howard and Georgeanna Jones Inst. for Reprod. Med.*, 69 Va. Cir. 452, 454 (Cir. Ct. 2006) (Norfolk City); *Commonwealth v. Bay Towing Corp.*, 44 Va. Cir. 466, 466 (Cir. Ct. 1998) (Norfolk City).

154. E.g., *Commonwealth v. Tauber*, 43 Va. Cir. 5, 11 (Cir. Ct. 1997) (Alexandria City), *aff'd*, 255 Va. 445, 499 S.E.2d 839 (1998).

155. E.g., *Luzik v. Commonwealth*, 36 Va. Cir. 300, 300 (Cir. Ct. 1995) (Richmond City).

156. E.g., *Saunders v. City of Roanoke*, 13 Va. Cir. 378, 379-80 (Cir. Ct. 1988) (Roanoke City).

157. 20 Va. Cir. 91, 92 (Cir. Ct. 1990) (Loudoun County).

158. *Id.* at 92-93.

Court has since bifurcated a trial in what it considered to be appropriate circumstances.<sup>159</sup>

The Fairfax County Circuit Court has also been amenable to bifurcation in appropriate cases.<sup>160</sup> In *Roscigno v. DeVille*, the court bifurcated the issues of liability and equitable relief from monetary damages.<sup>161</sup> In *Heitt v. Barcroft Beach, Inc.*, the court bifurcated the trial on issues requiring different burdens of proof—clear and convincing versus preponderance of the evidence—to avoid jury confusion in the application of law to its findings of fact.<sup>162</sup> In *Landrith v. First Virginia Bank*, the court bifurcated the issues surrounding the construction of a will from matters of surcharge and accounting.<sup>163</sup> In *Brenco Enterprises, Inc. v. Takeout Taxi Franchising Systems, Inc.*, the court bifurcated the case, setting only some of the counts of the amended bill of complaint for trial.<sup>164</sup> The court in *Brenco* apparently took this action sua sponte, and while it used the word “bifurcated,” its action was to sever claims, not to try disputed issues separately.<sup>165</sup>

The Fairfax County Circuit Court denied bifurcation in *Collins & Clark, Inc. v. National Cellular Partners*, where the defendant requested bifurcation on the issue of whether it was a party to the contract that was the subject of the suit.<sup>166</sup> The court expressed no antipathy toward bifurcation, but reasoned that “having a jury

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159. See, e.g., *Luck Stone Corp. v. Loudoun County*, 28 Va. Cir. 37, 37 (Cir. Ct. 1992) (Loudoun County) (bifurcating the issue of whether certain sales were at wholesale for the purpose of the Business Professional and Occupational License tax).

160. See *Bremer v. Doctor's Building Partnership*, 251 Va. 74, 75–76, 465 S.E.2d 787, 788 (1996), where the Fairfax County Circuit Court bifurcated and determined the issue of the meaning of the parties' contract before the plaintiff nonsuited. See also the Fairfax County Circuit Court decision in *Ramsey v. Regency at McLean Unit Owners' Ass'n*, 31 Va. Cir. 12, 16–17 (Cir. Ct. 1993) (Fairfax County), bifurcating the issue of attorney's fees from the other elements of damages, a procedure the court subsequently followed in *Danielson v. Thoburn L.P.*, No. 2004-224667, 2005 Va. Cir. LEXIS 216, at \*3–4 (Cir. Ct. Nov. 8, 2005) (Fairfax County); and *AC Technical Inc. v. Morris*, 48 Va. Cir. 229, 229 (Cir. Ct. 1999) (Fairfax County); as did the Newport News Circuit Court in *Wilkins v. Peninsula Motor Cars, Inc.*, 59 Va. Cir. 329, 333 & n.2, (Cir. Ct. 2002) (Newport News City), *rev'd on other grounds*, 226 Va. 558, 562–63, 587 S.E.2d 581, 584 (2003); and the Chesterfield County Circuit Court in *McIlavy v. CarLoanCo., Inc.*, 49 Va. Cir. 567, 569–70 (Cir. Ct. 1998) (Chesterfield County).

161. 28 Va. Cir. 96, 97 (Cir. Ct. 1992) (Fairfax County).

162. 23 Va. Cir. 399, 399–400 (Cir. Ct. 1991) (Fairfax County).

163. 40 Va. Cir. 59, 61 (Cir. Ct. 1995) (Fairfax County).

164. No. 177164, 2003 Va. Cir. LEXIS 86, at \*21 (Cir. Ct. May 23, 2003) (Fairfax County).

165. *Id.*; see also *supra* notes 6–8 and accompanying text.

166. No. 112342, 1992 WL 885037, at \*1–2 (Cir. Ct. Nov. 25, 1992) (Fairfax County).

deliberate on a single preliminary issue with the prospect that the case would still go forward if the Plaintiff receives an adverse verdict on the single issue does not promote judicial economy.”<sup>167</sup>

Other than attorney’s fees, the Virginia circuit courts have bifurcated issues including the following: a county or city’s power to impose certain fees from the issue of whether there was a reasonable basis for that fee;<sup>168</sup> the width of a certain street from the issue of boundary line location;<sup>169</sup> the issue of whether the circuit court’s prior order appointing a receiver should be declared null and void, because it was procured by fraud, from “the other remaining issues, including damages”;<sup>170</sup> and the issue of the effect of plaintiff’s execution of a release.<sup>171</sup>

Apparently, only one circuit court decision has addressed the bifurcation of punitive damages. In *McLean v. Owens-Illinois, Inc.*, the Newport News City Circuit Court denied the request of a defendant life insurance company to bifurcate the issue of punitive damages, but gave no reason for that denial.<sup>172</sup>

Prior to *Wade* and *Centra Health*, there appears to have been only one Virginia circuit court that questioned its authority to permit bifurcation of the issues of liability and damages. In *Henry v. Bullard & Butler*, the court denied defendant Butler’s motion to bifurcate, which was based upon the alleged potential for the significant danger of prejudice in a unitary trial.<sup>173</sup> The trial judge stated that “[t]he Court finds that there is no *statutory* authority for this Court to bifurcate the issues of liability and damages in this particular circumstance.”<sup>174</sup> It is not clear whether the perceived absence of specific statutory authority for bifurcating is-

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167. *Id.* at \*2.

168. *Tidewater Bldgs. Ass’n v. City of Va. Beach*, 14 Va. Cir. 39, 39 (Cir. Ct. 1988) (Virginia Beach City).

169. *Upshaw v. Town of Port Royal*, 13 Va. Cir. 152, 152, 155–56 (Cir. Ct. 1988) (Caroline County).

170. *City of Va. Beach v. Nala Corp.*, 53 Va. Cir. 309, 338–39 (Cir. Ct. 2000) (Norfolk City).

171. *Aswad v. Norfolk S. Ry. Co.*, No. 04-2536, 2006 Va. Cir. LEXIS 43, at \*63–65 (Cir. Ct. Apr. 18, 2006) (Portsmouth City). The Portsmouth City Circuit Court based the bifurcated procedure on the Richmond City Circuit Court’s decision in *Bolen v. Overnite Transportation*, 3 Va. Cir. 345, 347–48 (Cir. Ct. 1985) (Richmond City).

172. No. 31799V-04, 2004 WL 2813474 at \*2 (Cir. Ct. Aug. 25, 2004) (Newport News City).

173. No. CL 99-564, 2001 Va. Cir. LEXIS 152, at \*1 (Cir. Ct. July 23, 2001) (Chesterfield County).

174. *Id.* (emphasis added).

sues of liability and damages was merely one of the factors balanced by the *Bullard & Butler* court, or whether it was dispositive in the court's decision. However, the fact that the court questioned its authority—in the absence of a specific statutory enactment—to effect bifurcation in the case highlights the need for additional legislative clarification and guidance in this area. Regrettably, none of the legislation considered by the Virginia General Assemblies from 1998 to 2009 dealt with this matter.<sup>175</sup>

### B. *Influence of the Virginia Rules of Court*

While the Supreme Court of Virginia has evidenced its support for the bifurcation of issues in civil trials, both the Rules of the Supreme Court of Virginia and the Virginia Code fail to reflect complementary support. Despite the guidance of *Dixon, Wade*, and *Centra Health*, the Rules of the Supreme Court of Virginia, promulgated pursuant to Virginia Code section 8.01-3, are not helpful in addressing bifurcation in civil cases. Rules 3:9(d) and 3:10(d) authorize the circuit court, in its discretion, to order the separate trial of any “cause of action”<sup>176</sup> asserted in a counterclaim, or cross-claim, respectively.<sup>177</sup> The Rules are otherwise si-

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175. Senate Bill 333, introduced in the 2006 General Assembly by Senator Mark D. Obenshain (R-Harrisonburg), was not enacted. S.B. 333, Va. Gen. Assembly (Reg. Sess. 2006). Had it been, it would have established a new section 58.1-5015, providing for the bifurcation, prior to the commencement of trial, of any issue in the resolution of disputes involving taxes administered by the Department of Taxation. *Id.* Such a bifurcation of issues would have been permitted upon a motion of the parties or an order of the court. *Id.*

176. A “cause of action” has a precise meaning in Virginia law and is to be distinguished from “an action”; the two terms are “quite different.” *Trout v. Commonwealth Transp. Comm’r*, 241 Va. 69, 73, 400 S.E.2d 172, 173–74 (1991). A cause of action is “a set of operative facts which, under the substantive law, may give rise to a right of action.” *Id.*, 400 S.E.2d at 174 (internal quotation marks omitted). For the definition of “cause of action” for the purpose of res judicata see *Allstar Towing, Inc. v. City of Alexandria*, 231 Va. 421, 425, 344 S.E.2d 903, 905–06 (1986). An “action,” on the other hand, is defined by Virginia Code section 8.01-2 as including “all civil proceedings, whether at law, in equity or statutory in nature,” in circuit or general district court. VA. CODE ANN. § 8.01-2 (Repl. Vol. 2007 & Cum. Supp. 2010).

177. VA. SUP. CT. R. pt. 3, R. 3.9(d), 3.10(d) (Repl. Vol. 2010).

lent as to the separate trial of issues,<sup>178</sup> a deficiency which requires correction.

### C. *Bifurcation under the Virginia Statutes*

The Virginia General Assembly has not been helpful in confirming the inherent judicial authority of Virginia circuit courts to bifurcate civil trials, or in statutorily clarifying the cases and circumstances under which the bifurcation of issues may occur. A legislature is presumed to be familiar with the case law in effect at the time it enacts legislation which may impact upon that law.<sup>179</sup> Accordingly, the Virginia General Assembly is presumed to have been familiar with *Dixon* in 1977 when, as part of the revision and recodification of former Title 8 of the Virginia Code, to current Title 8.01 (Civil Remedies and Procedure), it enacted Virginia Code section 8.01-281(B).<sup>180</sup> However, section 8.01-281(B) authorizes the court, “upon motion of any party, [to] order a *separate trial* of any claim, counterclaim, cross-claim, or third-party claim, and of *any separate issue* or of any number of such claims[.]”<sup>181</sup> Inasmuch as *Dixon* approved the exercise of a court’s discretionary and sua sponte authority to order the separate trial of issues, the inclusion in section 8.01-281(B) of the modifier “upon motion of any party” before the authority of a court to order a separate trial of any separate issue raises the question of

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178. The separate trial of issues is not addressed in either Rule 3:21(b), which provides that any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by written demand, nor in Rule 3:21(c), which provides that in the jury demand a party may specify the issues which it wishes so tried (otherwise the party is deemed to have demanded trial by jury for all the issues so triable). R. 3:21(b), (c) (Repl. Vol. 2010). The separate trial of issues is also not addressed in Rule 3:22, which provides the procedure for trying issues: (1) by either a jury or the court when the right to a jury trial exists and has been demanded; (2) by the court when there is no demand for a jury trial or where the right to a jury trial does not exist; (3) by the court with an advisory jury in certain cases; and (4) by a jury with the consent of the parties, upon order by the court, on a claim not triable by right by a jury, with the jury’s verdict having the same effect as if trial by jury had been a matter of right. R. 3:22 (Repl. Vol. 2010).

Rules 3:21 and 3:22 would appear to provide a structure equally applicable to unitary and bifurcated civil trials, but should be amended to specifically apply to the latter to obviate any question in this regard.

179. *Wicks v. City of Charlottesville*, 215 Va. 274, 276, 208 S.E.2d 752, 755 (1974); *Davis v. Commonwealth*, 58 Va. (17 Gratt.) 617, 623 (1867); see also 2B NORMAN J. SINGER & J.P. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 50:1 (7th ed. 2008).

180. Act of Apr. 1, 1977, ch. 617, 1977 Va. Acts 1052, 1097 (codified as amended at VA. CODE ANN. § 8.01-281(B) (Repl. Vol. 1977)).

181. *Id.* (emphasis added).

whether the General Assembly intended to circumscribe the discretionary authority approved in *Dixon*.<sup>182</sup> That question was not addressed in *Allstate Insurance Co. v. Wade*, although had it been, presumptively, the court would have answered it in the negative.<sup>183</sup> In any event, the reviser's note to section 8.01-281(B) tends to cloud the plain statutory language of section 8.01-281, because the reviser's note describes section 8.01-281(B) as providing only for the severance of *claims* for a separate trial,<sup>184</sup> ignoring the plain statutory language which includes the authority to order the separate trial of *any separate issue*.<sup>185</sup>

A further question is raised by the language of section 8.01-281(B), which authorizes the "separate trial of any claim, counterclaim, cross-claim, or third-party claim, and . . . of *any number* of such claims."<sup>186</sup> But section 8.01-281(B) only authorizes the separate trial of *any separate issue*,<sup>187</sup> and does not contain the language of Rule 42(b) of the Federal Rules of Civil Procedure, authorizing *both* the separate trial of *any separate issue*, or *any number of issues*.<sup>188</sup> Accordingly, it is statutorily unclear whether the judicial authority to order the separate trial of a separate issue under Virginia Code section 8.01-281(B) is limited to a *single* issue.<sup>189</sup>

The Virginia General Assembly complicated the bifurcation picture even further in its 1992 enactment of section 8.01-374.1(B),<sup>190</sup> which generally parallels the language of Rule 42 of

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182. *See id.*

183. *Dixon Livery Co., Wade, and Centra Health* may be construed as recognizing a court's discretion to bifurcate issues as declaratory of the court's authority at common law. Assuming that construction of the cases is correct, section 8.01-281(B) must be read in context with the common law, which is not considered altered or changed by statutory enactment, unless the legislative intent be plainly manifested. *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (citation omitted); *City of Newport News v. Commonwealth*, 165 Va. 635, 650, 183 S.E. 514, 520 (1936) (citations omitted).

184. § 8.01-281 revisers' note (Repl. Vol. 2007 & Cum. Supp. 2010).

185. *Id.* § 8.01-281(B) (Repl. Vol. 2007 & Cum. Supp. 2010).

186. *Id.* (emphasis added).

187. *Id.*

188. FED. R. CIV. P. 42(b).

189. *See* § 8.01-281(B); see also the subsequent discussion of Virginia Code section 8.01-267.6, authorizing of the separate trial of any number of issues in multiple claimant litigation. *Id.* § 8.01-267.6 (Repl. Vol. 2007).

190. Section 8.01-374.1 was originally to expire on June 30, 1995. "Acts 1992, c. 615, cl. 2, which provided for the expiration of this section on June 30, 1995, was repealed by Acts 1995, was repealed by Acts 1995, c. 14, cl. 1, effective June 30, 1995, and by Acts 1995, c. 138, cl. 1, effective March 9, 1995." *Id.* § 8.01-374.1 note (Repl. Vol. 2007).

the Federal Rules of Civil Procedure in providing for the consolidation of cases involving common issues of law and fact, and for judicial discretion to order “separate or bifurcated trial of any claim, or number of claims, cross-claims, counterclaims, third-party claims, or *separate issues* . . . .”<sup>191</sup> Section 8.01-374.1(B) is, however, limited to asbestos cases in which recovery is sought for personal injury or wrongful death.<sup>192</sup> The consolidation provisions of the statute are applicable only when more than forty such asbestos cases are pending in a circuit court, and its bifurcation provisions are applicable only “in such consolidated hearings.”<sup>193</sup> Because of these latter circumstances, the bifurcation provisions of section 8.01-374.1(B) were arguably necessary because of an uncertainty at the time of its enactment as to whether *Dixon Livery Co.* or section 8.01-281(B) provided sufficient authority for discretionary bifurcation in consolidated cases. While *Wade* and *Centra Health* may have eliminated any such uncertainty, legislative clarification is certainly called for.

The Virginia General Assembly had an opportunity to bring some clarification to this situation in its 1995 session, but it failed to do so when House Bill 2106, sponsored by then Delegate William C. Mims (R-Leesburg), was not enacted.<sup>194</sup> House Bill 2106 would have added a new Virginia Code section 8.01-270.1(C), which paralleled Rule 42(b) of the Federal Rules of Civil Procedure, and unequivocally would have authorized the discretionary bifurcation of issues in *any civil action*.<sup>195</sup> Significantly, subsection

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191. *Id.* § 8.01-374.1(B) (Repl. Vol. 2007). This section also recognizes that such bifurcated proceedings may include an award of punitive damages against any defendant where compensatory damages have been awarded to an individual plaintiff against such defendant. *Id.*

192. *Id.* § 8.01-374.1(A)–(B).

193. *Id.*

194. H.B. 2106, Va. Gen. Assembly (Reg. Sess. 1995); see H. JOURNAL, House of Delegates of Va., Reg. Sess. 258 (1995). While the 1995 General Assembly failed to enact House Bill 2106, the 1997 General Assembly assigned House Bill 1565, introduced by Delegate C. Richard Cranwell (D-Vinton), to the House Committee for Courts of Justice, where it died. See H. JOURNAL, House of Delegates of Va., Reg. Sess. 78, 1958 (1997). House Bill 1565 would have prevented a court from ordering separate or bifurcated trials on the issues of liability and damages over the objection of the defendant. H.B. 1565, Va. Gen. Assembly (Reg. Sess. 1997).

195. H.B. 2106, Va. Gen. Assembly (Reg. Sess. 1995).

two of House Bill 2106 stated that “the provisions of this act are declaratory of existing law.”<sup>196</sup>

The 1995 General Assembly also did not enact House Bill 1070, introduced by Delegate William J. Howell (R-Fredericksburg), originally introduced in the 1994 session and continued to 1995 by the Committee for Courts of Justice, where it died.<sup>197</sup> House Bill 1070 would have required that the trier of fact in civil actions involving punitive damages, at the defendant’s request, first determine compensatory damages, exclusive of any evidence of punitive damages, with the latter to be heard in a separate proceeding.<sup>198</sup>

The 1995 General Assembly not only failed to enact House Bills 1070 and 2106, but it enacted the Multiple Claimant Litigation Act, adopting standard procedures to be used in the joinder, transfer, consolidation or other combination of civil actions brought by six or more plaintiffs in which common questions of law or fact predominate—so-called mass tort cases arising from railroad derailments, airplane crashes, or oil spills.<sup>199</sup> Section 8.01-267.6, part of the Multiple Claimant Litigation Act, provides for separate or bifurcated trials of “one or more claims, cross-claims, counterclaims, third-party claims, or separate issues.”<sup>200</sup> Section 8.01-267.6 is limited to combined actions under the Multiple Claimant Litigation Act, and its bifurcation provisions require the motion of a party, similar to the language of section 8.01-281(B), unlike the judicial discretion for bifurcation authorized by section 8.01-374.1(B) in the consolidated hearings of asbestos cases.<sup>201</sup> It may be that the bifurcation provisions of section 8.01-267.6 were necessary because of a desire to preclude the exercise of judicial discretion in the bifurcation of claims or issues in non-asbestos multiple claimant litigation and, as with section 8.01-374.1(B), because of an uncertainty as to whether ex-

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196. *Id.*

197. H.B. 1070, Va. Gen. Assembly (Reg. Sess. 1995); see H. JOURNAL, House of Delegates of Va., Reg. Sess. 300, 2265 (1994).

198. *Id.*

199. Act of Mar. 24, 1995, ch. 555, 1995 Va. Acts 855, 856 (codified as amended at VA. CODE ANN. §§ 8.01-267.1 to -267.9 (Repl. Vol. 2007)). House Bill 250 was introduced by Delegate Joseph P. Johnson, Jr. (D-Abington). See H. JOURNAL, House of Delegates of Va., Reg. Sess. 162 (1994).

200. § 8.01-267.6 (Repl. Vol. 2007) (authorizing the separate trial of any separate issue).

201. Compare *id.*, with *id.* § 8.01-374.1(B) (Repl. Vol. 2007).

isting case law and prior statutory enactments provided sufficient authority for bifurcation in consolidated or other combined cases. This is, however, yet another example of Virginia's confusing statutory treatment of bifurcation, and it reinforces the need for legislative clarification. After the demise of House Bill 1565 in the 1997 General Assembly,<sup>202</sup> no further legislative attempts have been made to address the bifurcation of issues in civil cases.<sup>203</sup>

## VI. CONCLUSION

Consistent with *Dixon*, *Wade*, and *Centra Health*, and in light of the foregoing, bifurcation of civil cases in Virginia is an area that warrants appropriate consideration by the Virginia General Assembly, and the Boyd-Graves Conference. While the separate trial of issues is not, and should not be, the routine procedure for conducting all civil trials, bifurcation is a valuable judicial tool whose statutorily authorized use in appropriate cases deserves to be clearly prescribed and encouraged.

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202. H.B. 1565, Va. Gen. Assembly (Reg. Sess. 1997).

203. Senate Bill 333, introduced in both the 2006 and 2007 sessions of the General Assembly by Senator Mark D. Obershaim (R-Harrisonburg), addressed bifurcation of issues solely in tax cases. S.B. 333, Va. Gen. Assembly (Reg. Sess. 2006 & 2007); see S. JOURNAL, Senate of Va., Reg. Sess. 59 (2006); *id.* at 1573 (2007).