Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases

Albert P. Bedecarré
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ENVIRONMENTAL TORT CASES

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I. INTRODUCTION

As United States courts become increasingly congested, federal judges are resorting to an increasing variety of techniques to control the onslaught of litigation. Bifurcation of civil trials into distinct phases is a potent weapon in the judicial docket-control arsenal, which also includes mandatory court-annexed arbitration and court-structured settlement conferences. Federal Rule of Civil Procedure 42(b) (Rule 42(b)) provides that a judge may separate any claim or issue of a cause of action, thus creating a series of component stages. Each segment is then tried successively, with plaintiffs having to survive each stage in order to progress to the next, and ultimately to be awarded any remedy.  

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1 Judges at the conference for the Fiftieth Anniversary of the Federal Rules of Civil Procedure discussed trends in judicial practice to control overburdened dockets. The Rules were intended to be transubstantial, meaning that they applied equally to all causes of action. Through the use of local rules, however, judges are resorting to consistently applying methods proven effective in certain types of cases. For example, a judge may order arbitration for all mass tort claims on her docket. Such non-transubstantial local, and often informal, rules are growing in popularity to help dispose of as many cases as possible outside the courtroom. Interview with Daniel R. Coquillette, Dean, Boston College Law School, in Newton, Mass. (Nov. 12, 1988). Dean Coquillette is the Reporter to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

2 Separate trials under Rule 42(b) should be distinguished from severance under Rule 21, which provides in part: “Any claim against a party may be severed and proceeded with separately.” Bifurcated proceedings result in one judgment, while severed claims become independent actions that are tried and decided independently. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2387, at 277 (1971 & Supp. 1982).

The application of Rule 42(b) has expanded since its adoption in 1938. At first, courts used bifurcation merely to separate disparate claims or counterclaims in order to avoid jury confusion or prejudice to parties, or to eliminate frivolous claims outright by trying narrow threshold issues such as jurisdiction or venue. This necessitates of courtroom efficiency compelled the extension of bifurcation into new areas, eventually leading to separation of liability issues from damages issues.

By the early 1960s, there was an active debate as to the propriety of bifurcating liability and damages in tort cases, which discussed the relative benefits and burdens of using Rule 42(b). This era of discussion, however, did not lead to any substantial reforms regarding application of Rule 42(b). Since then, the propriety of bifurcating liability and damages appears to have been taken for granted.

Recently, some courts have "upped the ante" once more by splitting issues within liability to create successive trials on a series of discrete issues before damages issues are reached. This new practice is referred to as "polypurcation" in this Comment.

A concrete example of polypurcation in an environmental tort case illustrates how it works and the kind of trial structure that can result in a polypurcated proceeding. The plaintiffs in a recent toxic tort case were a group of neighboring suburban residents who alleged that the defendants had polluted the municipal wells servicing their homes, and thereby had caused a variety of ailments including leukemia. Over the plaintiffs' strenuous objections, the court adopted a polypurcated trial structure suggested by the defendants. The judge ordered a four-phase structure with the following separate trials: first on causation of the well water contamination alleged to have caused the plaintiffs' illnesses; second on causation of the plaintiffs' leukemias; third on causation of the plaintiffs' other health

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5 See Miner, Court Congestion: A New Approach, 45 A.B.A. J. 1265 (1959). Judge Miner of the Northern District of Illinois was instrumental in promulgating Local Rule 21 in 1959, which provided for routine bifurcation of liability and damages in personal injury and other civil cases in that district.

6 See, e.g., Note, supra note 4 (opposing such bifurcation); Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 VAND. L. REV. 831 (1961) (opposing bifurcation); Miner, supra note 5 (favoring bifurcation); Zeisel & Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 HARV. L. REV. 1606 (1963) (favoring bifurcation).


8 Memorandum in Support of Plaintiffs' Trial Plan at 1-5, Anderson v. Cryovac (No. 82-1672-S) (1986).
problems; and fourth on damages. For the plaintiffs to be awarded any damages, therefore, they had to win all three of the causation trials.

Polyfurcation of this type has provoked claims of undue prejudice by both plaintiffs and defendants, similar to claims made in the 1960s in opposition to bifurcation of liability and damages. Polyfurcation, however, has not elicited any scholarly debate until now. Litigants opposing polyfurcation orders have repeated the arguments of their predecessors, including the claim that this use of Rule 42(b) violates the right to a jury trial. Multiple divisions within liability, they have contended, prevent the parties from presenting the circumstances of their entire liability case to a jury, thereby severely limiting the traditional role of that body. The first court to order liability polyfurcation noted that a jury trial limited to the issue of causation could create a "sterile or laboratory atmosphere in which causation is parted from the reality of injury." Subsequent to that first polyfurcated tort trial, three major environmental cases have had polyfurcation of liability issues. Liability in environmental tort litigation often presents novel questions linked to the particular circumstances encountered by the particular plaintiffs before the court. Polyfurcation of such unique issues may fundamentally affect environmental cases by imposing trial structures that segregate crucial causation issues from the other related liability issues.

This Comment analyzes the suitability of subjecting liability to multiple divisions in the context of environmental tort cases that

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11 Id.
14 Rule 42(b) can be a particularly troubling device in the environmental context. The conclusions reached in this Comment, however, should not be restricted to the environmental context, and may provide a useful paradigm for assessing the propriety of polyfurcation in a wide range of cases involving Rule 42(b). Bifurcation of liability from damages has been used in cases involving antitrust, patents, personal injury, and property damage. See 9 C. WRIGHT & A. MILLER, supra note 2, § 2390, at 297 n.49.
have employed polyfurcation. This Comment’s purpose is to initiate new discussion and debate about Rule 42(b) in order to address the propriety of polyfurcation generally. Section II discusses the history and evolution of bifurcation under Rule 42(b). Section II also reviews the potential problems created by bifurcation, and traces the original debate over bifurcation of liability and damages. Section III introduces three environmental tort cases in which courts have utilized polyfurcation. In light of these cases, section IV analyzes the problems caused by polyfurcating liability issues in these cases. Section IV then proposes a set of guidelines as a possible alternative to unfettered judicial discretion in making the polyfurcation decision.

II. THE EVOLUTION OF BIFURCATION UNDER RULE 42(B)

A. The Scope of the Rule

Promulgation of the first Federal Rules of Civil Procedure (FRCP) in 1938 constituted an effort to consolidate legal and equitable procedures, and to collapse these two parallel systems of justice into one integrated system. The drafters intended the Rules to be “transsubstantial,” meaning they would apply to all civil actions equally, unlike the idiosyncratic, traditional procedural system which had distinct procedures for law and equity cases, as well as for different causes of action in either area.

Specifically, the drafters of Rule 42(b) intended it to provide judges with a tool to separate claims and issues brought together in the same case under the liberal joinder rules of the FRCP. This separation, the drafters thought, would help to avoid excessive confusion or prejudice due to overly complex or inappropriately joined trials. Prior to the promulgation of the FRCP, the practice of

\[16\text{ FED. R. CIV. P. 1-2.}\]
\[17\text{ Id.}\]
\[18\text{ Rule 42(b) provides:}\]
\[\text{The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as described by the Seventh Amendment to the Constitution or as given by a statute of the United States.}\]
\[\text{FED. R. CIV. P. 42(b).}\]
\[19\text{ Federal Rules of Civil Procedure (FRCP) Rules 18 through 20 set the guidelines for joinder of claims and parties, both permissive and required. In addition, Rule 22 allows interpleader actions and Rule 24 allows intervention, both as a right and permissibly. See Note, supra note 4, at 743–44.}\]
hearing issues separately had some antecedents in England's common law and equity courts, as well as in some jurisdictions within the United States. Courts did not routinely employ the existing statutory devices or precedents for separating issues at the time of the FRCP's adoption.

On its face, Rule 42(b) appears to encourage bifurcation, and has been so interpreted by some courts. The Rule grants judges extremely broad discretion as to what may be bifurcated and when, thus ensuring great flexibility in structuring litigation. The three allowable grounds for a bifurcation decision—furthering convenience, avoiding prejudice, and furthering expedition and economy—are set out in the alternative, so that the presence of any one basis is sufficient to sustain such an order. The bifurcation decision, therefore, is committed to the trial court's "informed discretion," based on achieving one or more of these three goals. In every decision about whether to bifurcate in a specific instance, a trial judge must balance the burden imposed on the parties against the potential benefits, and deny separation where the burdens outweigh the benefits.

Significantly, however, the drafters added an express limitation on a judge's power under the Rule in a 1966 amendment emphasizing preservation of the right to a trial by jury. The Advisory Commit-
tee's Note submitted with the amendment stated that "separation of issues for trial is not to be routinely ordered," despite the wide latitude in which judicial discretion operates. The Advisory Committee also emphasized that the Rule "may give rise to problems" in light of a constitutional or statutory right to trial by jury, and proffered this potential conflict as a reason for the amended Rule's express reiteration of Rule 38's command concerning the protection of that right.

Like the 1966 amendment, the Rules Enabling Act (REA) also represents a potential limit on use of bifurcation. The REA confirmed that the FRCP "shall not abridge, enlarge or modify any substantive right," including the right to jury trial guaranteed by the seventh amendment. Most courts, however, have not interpreted the REA strictly when considering what constitutes change in substantive rights or infringement upon the common-law right to a jury trial.

Rule 42(b) was one component in the system of civil procedure that standardized the federal civil practice of the United States. Although splitting of claims and issues had some historical antecedents, it was new to most United States jurisdictions. The broad discretionary power that Rule 42(b) granted to federal judges has few limitations, and several broad goals serve as grounds for using that power.

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31 Proposed Rules of Civil Procedure, 39 F.R.D. 69, 113 (1966). The Note cites to Professor Weinstein's 1961 article containing serious criticisms of routine bifurcation of liability and damages on the grounds that it infringes upon the traditional role of the jury. See Weinstein, supra note 6, which is discussed further infra at notes 101–18 and accompanying text.

32 39 F.R.D. at 113. The Committee cites to United Airlines v. Weiner, 286 F.2d 302 (9th Cir. 1961) as an example of the potential problems that accompany separation. Weiner overturned an order separating the liability and damages phases of the consolidated action of 23 plaintiffs arising out of a mid-air collision. 286 F.2d at 306. The court held that the two issues were not so distinct as to be separable, and that they could not be tried separately without jury confusion and uncertainty. Id.; see also Wright, The Federal Courts a Century After Appomattox, 52 A.B.A. J. 742, 747 (1966) (member of the Advisory Committee suggests that the Advisory Committee purposely took no position on severing liability and damages in the civil context while approving its customary use in admiralty cases because of then-Professor Weinstein's view that separation prevented the jury's "tempering" of the substantive law with a social conscience).


34 Id.

35 See, e.g., Colgrove v. Battin, 456 F.2d 1379 (1972), aff'd, 413 U.S. 149 (1973) (so long as a jury is not denied in cases for which the common law guaranteed a jury, the choice of procedures will not offend these rights); Burlington R.R. v. Woods, 480 U.S. 1 (1987) (Rules that "incidentally affect" parties' substantive rights do not violate the Rules Enabling Act (REA) if "reasonably necessary to maintain the integrity of that system of rules.").
B. Judicial Interpretation, Employment, and Development of Rule 42(b)

Going beyond the text of Rule 42(b) and the REA, the courts have developed tests for bifurcating claims and issues. The United States Supreme Court case of Gasoline Products Co. v. Champlin Refining Co.\textsuperscript{36} serves as a fundamental judicial guideline for determining the propriety of separating issues under Rule 42(b).\textsuperscript{37} Gasoline Products involved an appeals court order for partial retrial of the measure of damages in a contract case.\textsuperscript{38} In reversing that order, the Supreme Court set out the standards for trying issues independently.\textsuperscript{39}

Under the Gasoline Products rule, an issue may be tried independently if it is "so distinct and separable from the others that a trial of it alone may be had without injustice."\textsuperscript{40} The Court stressed that a jury must have all the evidence necessary to establish the existence of the material facts underlying a plaintiff's claim.\textsuperscript{41} If issues are "so interwoven" that they cannot be submitted to a jury without causing jurors "confusion and uncertainty," then they must be tried together.\textsuperscript{42}

Significantly, the Court held that submission to a jury of improperly separated issues would amount to a denial of a fair trial in violation of the seventh amendment.\textsuperscript{43} Thus, the Court held that the right to a jury trial encompasses not only the guaranteed presence of a jury, but also the guaranty that juries will hear interdependent issues together. The particular frailties of juries, while decried by some, were not the overriding concern of the Court in making this decision. The Court focused instead on avoiding confusion of the trier of fact due to incomplete information. The Gasoline Products Court recognized the desirability of hearing issues separately, but at the same time emphasized a court's obligations to the interests of the party opposing separation.

\textsuperscript{36} 283 U.S. 494 (1931).
\textsuperscript{37} Even though Gasoline Products was decided seven years before the adoption of the FRCP, it is the definitive Supreme Court holding on separating issues for trial, or retrial as in Gasoline Products itself. See Weiner, supra note 32, at 304–06; 9 C. WRIGHT & A. MILLER, supra note 2, § 2391, at 303.
\textsuperscript{38} Gasoline Products, 283 U.S. at 496–97.
\textsuperscript{39} Id. at 500–01.
\textsuperscript{40} Id. at 500.
\textsuperscript{41} Id.
\textsuperscript{42} Id. Specifically, the Court held that, because issues regarding the formation and breach of the contract as well as its scope were not clear on the record or in the verdict, the issue of damages alone could not be retried without a trial on liability.
\textsuperscript{43} Id.
Courts routinely apply the elements laid out in *Gasoline Products* to make the bifurcation decision for separate trials as well as for retrial. The criteria have evolved over time for determining what issues are sufficiently "distinct and separable." The continuing question is the extent to which judicial balancing between protection of parties' rights and judicial efficiency has tilted increasingly toward the latter.

1. Claim Bifurcation

Passage of Rule 42(b) did not cause an immediate change in the way courts tried civil cases in the United States. Initially, judges were restrained in their application of the new Rule, and tended to use it in order to separate compound claims, not issues. An obvious use of Rule 42(b) bifurcation arises when a complex claim is brought against a party who then counterclaims with a completely different cause of action. The resulting unified trial of the two or more separate claims would be so complicated for a jury that judges have not been reluctant to separate them.

A similar exercise of the Rule 42(b) power common in the Rule's early history involved the separation of divergent claims, based on separate proofs, brought in one suit by a plaintiff. From the time of the Rule's adoption, however, some courts have refused to separate different claims when the jury would be overly confused as a result of not being presented the complete factual picture elicited in unified trials.

Another common application of the Rule occurs when a court can dispose of one or more claims relatively easily before moving on to

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44 9 C. WRIGHT & A. MILLER, supra note 2, § 2391, at 303.
45 See generally Note, supra note 4.
48 See, e.g., Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 87 (2d Cir. 1939) (Clark, J., concurring) ("Here the evidence to support the first claim would to a considerable extent be different from, and in addition to, that for the second claim, and there would be little, if any, gain in forcing them always to be adjudicated together.").
other claims. An example of this type of case is one containing a claim that will obviously fail to withstand assertion of a statute of limitations or other affirmative defense. Such claims can be eliminated by summary judgment, leaving only viable claims for full trial. Bifurcation in such cases promotes judicial convenience by shortening trial time, and saves parties the time and expense of trying specious claims.

The avoidance of prejudice provides another recurring basis for bifurcating claims. For example, automobile negligence cases were relatively novel and consumed a great deal of court time when the Supreme Court adopted the FRCP. Among the earliest problems noted by commentators was the question of the effectiveness of concealing the defendant’s automobile insurance from the jury by separating plaintiffs’ claims against drivers and insurers for individual trials. Nonetheless, most courts continued to bifurcate automobile negligence trials to avoid potential prejudice, however speculative, to defendants.

Courts also separate claims if evidence of a defendant’s alleged misconduct in relation to one claim might improperly influence the jury to rule against the defendant on other claims. Also, in personal injury cases brought by multiple plaintiffs, one with injuries of a particularly gruesome nature, the courts occasionally separated the plaintiffs’ claims for individual trial. Absent such separation, a jury’s decision regarding both plaintiffs might be influenced, consciously or unconsciously, by the nature of one plaintiff’s injuries.

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50 See Collins, 106 F.2d at 85–86 (easily decided claim separated from more difficult claim in which the facts not too closely connected).


52 See generally Mayers, supra note 20.

53 See DeParq & Wright, Impleader of Defendant’s Insurer Under Modern Pleading Rules, 38 MINN. L. REV. 229, 233–35 (1954) (questioning the ability to hide the presence of auto insurance in light of its widespread use and what the jury learns in voir dire).

54 See Note, supra note 4, at 751. The prejudice to be avoided occurs when the jury brings a verdict against the defendant driver thinking that the driver’s insurance company will actually pay.

55 Id. at 752; see, e.g., Utilities Natural Gas Corp. v. Hill, 239 S.W.2d 431 (Tex. Civ. App. 1951) (contract claim separated from fraudulent shifting of assets because of prejudice to defendants on the former by the latter).


57 See Note, supra note 4, at 752.
2. Issue Bifurcation

Bifurcation of issues within a single claim has had a slower and more controversial development than has claim separation. The most basic reason for granting a separate trial for a single issue is the rationale that a trial of one issue may be dispositive of the entire case. Some courts, alternatively, split issues in order to avoid undue prejudice to a party created by joint hearing of certain issues.

Following the adoption of Rule 42(b), the types of issues that first appeared to be separated regularly were threshold questions such as jurisdiction and venue. Even these procedural issues have not been separated when they were intertwined with the merits of the claim.

Affirmative defenses provide another category of potentially dispositive issues that may be decided with relative ease, and are therefore ripe for bifurcation. Separate trials on the issues of release, statute of limitations, and estoppel are examples of the earliest issue separation applications of Rule 42(b). The FRCP allows for pre-trial pleading and determination of jurisdictional questions, as well as determination of the merits of affirmative defenses. When appropriate, courts can now dispose of these issues through partial or complete summary judgment at the pleading stage.

Judges also have discretion to separate substantive issues. Over time, judges appear to have expanded their conception of what substantive issues are suitable for bifurcation. The propriety of split-
ting liability from damages has been disputed since the adoption of the FRCP.69 At that time, the practice of trying liability and damages issues together, in the view of one commentator who advocated issue separation, was "well-nigh universal; ... an application to a trial court to sever the two issues would doubtless be received with astonishment by the average judge."70 With the adoption of Rule 42(b), judges slowly began to bifurcate liability issues for determination before the damages inquiry in particular cases, but this practice was clearly the exception rather than the rule.71

Two areas where substantive issue bifurcation received early attention were patent and copyright infringement. Cases in these areas include liability elements that courts commonly considered separate and distinct enough to bifurcate from the rest of the claim.72 In patent cases, the separated liability issues include the validity of the patent,73 and, in some cases, the actual infringement issue.74 Most commonly, validity and infringement have been separated for trial together before damages issues were heard.75 Courts deemed bifurcation acceptable in these cases because the liability issues were logically and easily separable from the subsequent damages issues.76 The complexity of damage determinations in such cases also made bifurcation desirable.77 Courts generally granted bifurcation only in cases meeting both of these criteria: when the second trial would not be repetitious and when the questions would be complicated even if heard alone.78

70 Mayers, supra note 20, at 398 (footnote omitted). Mayers found a single case, Rockaway Pacific Corp. v. State, 200 A.D. 172, 193 N.Y.S. 62 (1922), in which liability and damages were tried separately, but the separation was agreed to by both parties at the time of trial. Id. at 398 n.26.
71 See Bowen v. Manuel, 144 So. 2d 341, 343 (Fla. Dist. Ct. App. 1962) (bifurcation of liability and damages "should be the exception rather than the usual practice").
72 See 9 C. WRIGHT & A. MILLER, supra note 2, § 2389, at 286–88.
76 Note, supra note 4, at 760.
77 Id.
78 Id. at 760–61; see also Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942) (first negligence case found in which liability was tried prior to damages). In Rickenbacher, the defendant's train struck the plaintiff's truck. The truck was carrying shipments from 35 consignors from across the country, all of whom would have been required
3. Bifurcation of Liability and Damages in Personal Injury Litigation

The most hotly debated development in issue bifurcation, and the slowest to gain acceptance for common usage, has been the separation of liability from damages in personal injury tort litigation. Courts still disagree about the propriety of regularly separating the two issues in this type of litigation.

An early example of liability and damages bifurcation in a personal injury case was the famous Texas City Disaster Litigation. Texas City was a massive products liability action against the United States, resulting from the explosion of two docked ships loaded with government-manufactured fertilizer. Texas City was a consolidated case of 273 suits. An initial finding of no liability precluded the need to determine individual damages for the 8,485 plaintiffs. The use of bifurcation in this early case might be explained by the potential complexity of damage determinations that would have been necessary in a unified presentation, as in the patent and copyright cases discussed above.

A related reason why separate trials for liability and damages were held in this case was the fact that there were so many plaintiffs joined in the same trial. When possible, courts separate issues common to all plaintiffs in class actions and other large multi-party litigation to avoid duplicative fact determinations. Whatever the
to give damages testimony. Therefore, the judge split the case. Because the jury found for the defendant on the liability issues, presentation of this complicated testimony was avoided.

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79 See infra notes 96–108 and accompanying text.

80 See, e.g., Taft v. Pontarelli, 100 F.R.D. 19, 21 (D.R.I. 1983) ("just determinations are to be preferred in any system of justice to either those which are speedy or inexpensive"); Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978) ("We are advised that where district courts have adopted a general bifurcation rule, a heated controversy among the commentators and the profession has resulted. . . . Thus a routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters.").

81 197 F.2d 771 (5th Cir. 1952), aff’d, 346 U.S. 15 (1953).

82 Id. at 773.

83 Id. at 781.

84 Additionally, the fact that there was no right to a jury trial in the Federal Tort Claims Act, under which the plaintiffs filed, might have influenced the court to allow bifurcation. See Federal Tort Claims Act, ch. 646, 62 Stat. 933 (1948) (current version at 28 U.S.C. 2402 (1982)); see also Comment, Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution, 36 Sw. L.J. 743, 745–46 & n.17 (1982).

85 See Weinstein, supra note 6, at 840–41; see also supra note 4 and accompanying text.

86 E.g., Nettles v. General Accident Fires & Life Assur. Corp., 234 F.2d 243 (5th Cir. 1956); In Re “Agent Orange” Products Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983).
reason for bifurcation of liability and damages in *Texas City*, it was several years before the practice became more commonplace.

Routine bifurcation of liability and damages made a sharp advance when, in 1960, the Northern District of Illinois adopted a local rule that seemingly created a presumption in favor of bifurcation of liability and damages in civil cases. The local rule was intended "to curtail undue delay in the administration of justice in personal injury and other civil litigation." Under this rule, the issue of liability could be adjudicated as a prerequisite to the determination of any and all other issues. It stated that the court was allowed to hear any or all issues together "if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation." The fact that an exceptional finding had to be made for the court not to bifurcate furthers the implication that efficiency-based bifurcation was to be the norm.

In an attack on the validity of the local rule immediately upon its implementation, the United States Court of Appeals for the Sixth Circuit held that "the essential character of the trial by jury was preserved." The court added a significant warning, however, that this type of separation should be administered carefully. In some cases, the appeals court stated, questions as to the injury will have an important bearing on questions of liability.

The Northern District of Illinois rule and similar rules that followed it in other jurisdictions made the practice of bifurcating liability and damages a much more common judicial device in personal injury litigation. Two federal districts have stated explicitly that bifurcation of liability and damages in tort cases is presumptively favored unless a party affirmatively shows why bifurcation would be

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87 Civil Rule 21, Federal District Court, Northern District of Illinois, 2 FED. RULES SERV. 2d 1048 (1960).
88 Id.
89 Id.
91 Id. at 643 (citing Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494, 497–98 (1931)).
92 Id. at 643–44.
93 Other federal district courts have adopted local rules similar to Local Rule 21. See, e.g., D. CONN. R. 10(b); W.D. LA. R. 20; N.D.N.Y. R. 40; N.D. OHIO R. 18.01; E.D. TENN. R. 18.2. States have also adopted provisions similar to Rule 42(b). See, e.g., ARIZ. R. CIV. P. 42(b); MINN. R. CIV. P. 42.02; CAL. CIV. PROC. CODE § 1048 (West 1980). But cf. Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 651 (1958). In *Iley*, the Texas Supreme Court held that the issues of liability and damages were inseparable in the personal injury field, even though the State had a rule almost identical to Rule 42(b). See TEX. R. CIV. P. 174(b).
inappropriate.\textsuperscript{94} Most courts, however, continue to make the bifurcation decision on a case-by-case basis, in accordance with the standards contained in Rule 42(b) and embodied in decisions following the \textit{Gasoline Products} test.\textsuperscript{95}

\textbf{C. Problems Identified in the Debate Over Separating Liability and Damages}

Since before the passage of the Federal Rules, scholars, judges, and practitioners have debated the propriety of routinely separating liability issues from those of damages. This debate identified various benefits and harms that could result from bifurcating trials along these lines.

Proponents of bifurcation tended to stress its efficiency, the savings in time and expense for the court and, secondarily, for the parties.\textsuperscript{96} For example, one pro-bifurcation study showed that a

\textsuperscript{94} Southern District of Illinois, Order of Foreman, J., states that cases will be tried “on a split trial basis unless good cause can be shown to do otherwise.” Eastern District of Tennessee Rule 18.2 provides in part that “the parties in diversity litigation will have the burden of showing that the liability and damage issues should be tried simultaneously or otherwise the liability and damage issues will be tried in sequence.” E.D. TENN. R. 18.2.

The Local Rules Project was authorized by the United States Judicial Conference to conduct a study of local rules of civil procedure in all of the federal district courts. Interview with Mary P. Squiers, Project Director, Local Rules Project, in Newton, Mass. (Sept. 5, 1989). The Local Rules Project Report identified the Southern District of Illinois Order and the Eastern District of Tennessee Rule as inconsistent with Rule 42(b) because Rule 42(b) assumes a unified trial unless bifurcation furthers convenience or avoids prejudice. LOCAL RULES PROJECT REPORT, U.S. JUDICIAL CONFERENCE, at 121 (1988). The Local Rules Project recommends that these rules be rescinded due to their contradiction of Rule 42(b). Id. at 120.

\textsuperscript{95} See, e.g., H.B. Fuller Co. v. National Starch & Chem. Corp., 555 F. Supp. 622, 625 (D. Del. 1984) (“It is true of any case that a separate trial on a dispositive issue might save some time and energy; however, that fact has not led to the routine bifurcation of trial for the simple reason that judicial economy is not the be all and the end all of the administration of justice.”); R.E. Linder Steel Erection Corp. v. Wedemeyer, Cernik, Corrubia, Inc., 585 F. Supp. 1530, 1534 (D. Md. 1984) (“the court believes that any savings in time and expense which might result from a bifurcation is wholly speculative”).

twenty percent savings in trial time is possible with routine bifurcation because: damages do not have to be tried if a plaintiff fails to establish liability; more directed verdicts issue; and settlements become more likely after liability is established. Proponents argued that simplifying a jury's task by limiting the scope of questions before it improved judicial economy. Proponents believed that bifurcated proceedings were often more just than the traditional unified trial. Trials on damages alone, after liability has been established, avoid prejudice to defendants by divorcing emotion and passion from the strictly rational question of liability.

Opponents' arguments against bifurcation centered around fairness, focusing on the contention that parties, primarily plaintiffs, were denied their right to a fair trial due to an alteration in the traditional role of the jury. Opponents emphasized the role of the jury as a popular institution providing a social conscience, and tempering rigid technicalities of substantive law by "fusing" issues of liability and damages. In this view, plaintiffs spread their entire case before the jury, organized as they see fit to achieve a commonsense presentation. The jury must then weigh all the factors before it and reach a verdict.

The classic example of jury fusion of issues as part of an evolutionary tort system is jury treatment of contributory negligence

97 Zeisel & Callahan, supra note 96, at 1624–25.
98 See Miner, supra note 96, at 1268. Additional reasons for regular bifurcation of liability and damages advanced therein include: reduction of the court docket; inducement for defendants found liable to settle; reduction of frivolous claims; and reduction of costs to parties. Id.; see also In re Paris Air Crash of March 3, 1974, 69 F.R.D. 310, 321 (C.D. Cal. 1975).
99 See Vogel, supra note 96, at 269; Schwartz, supra note 96, at 1213–14.
100 Id.; see also McKellar v. Clark Equip. Co., 101 F.R.D. 93, 95 (D. Me. 1984) (liability and damages separated to avoid prejudice to defendant from jury exposure to plaintiff's severe injuries); Campolongo v. Celotex Corp., 681 F. Supp. 261, 263 (D.N.J. 1988) (punitive damages separated because of prejudicial and inflammatory nature of such "conduct-related" proofs).
102 Note, supra note 85, at 761; Kalven, supra note 101, at 165–67; Weinstein, supra note 101, at 832–35.
103 See D. LOUISELL & G. HAZARD, CASES ON PLEADING AND PROCEDURE, 875–76 (1979); Rosenberg, supra note 101, at 47–49.
Before comparative fault standards emerged to correct the inequities of the strict contributory negligence defense, juries were fusing the questions of liability and damages to find defendants liable even when a plaintiff was partially at fault. In practice, this meant that a jury took a plaintiff's share of the blame into account when assessing damages, and simply awarded a suitably lower verdict. This system, of course, is what a comparative negligence scheme employs.

Although defendants in personal injury trials traditionally won verdicts of no liability forty-two percent of the time, cases tried with separate damages and liability proceedings resulted in defendants' verdicts seventy-nine percent of the time. This statistical fact demonstrates a "pronounced substantive backlash" from a procedural rule. According to the opponents of presumptive bifurcation, it is plaintiffs, not defendants, who are unfairly prejudiced by such use of Rule 42(b).

Some courts expressed concern about possible abuse of the Rule and the unfairness that would result. One court of appeals simply stated that "[t]he touchstone in reviewing bifurcated proceedings, is whether the party bearing the burden of proof was unfairly prejudiced by the procedures employed. Rule 42(b) permits bifurcation to 'avoid prejudice,' not to create it."

III. BEYOND SIMPLE BIFURCATION: POLYFURCATION OF DISCRETE LIABILITY ISSUES

Courts generally employ Rule 42(b) to make relatively simple divisions up to and including separating liability issues from those of damages in tort litigation. Virtually all of the commentary to date about the Rule concerns this type of bifurcation. The past few years, however, have presented the courts, quite unheralded and little noted, with a far more complex extension of the separation process referred to in this Comment as "polyfurcation."

Polyfurcation in tort cases is the practice of making multiple separations within the general question of liability, thereby spawning a potentially numerous succession of intra-liability trials before a court reaches the damages question, if it ever does at all. Causation is the

104 See Kalven, supra note 101, at 164–68; Weinstein, supra note 101, at 834–35.
105 Kalven, supra note 101, at 167.
106 Rosenberg, supra note 101, at 47–48 (citing Zeisel & Callahan, supra note 96).
107 See id. at 48.
liability issue most commonly separated for initial trial. Like causation, the liability issues that have been polyfurcated are always potentially dispositive of tort claims.

Polyfurcation thus invites an even more dramatically pitched controversy between the goals of efficiency and fairness, because it opens litigation to the possibility of judicially approved "divide and conquer" divisions within the heart of the litigation. As to efficiency, polyfurcation might allow a narrow but dispositive issue to be blown out of proportion if split off for individual trial, when it would likely absorb only a tiny fraction of a full trial's time. As to unfairness, polyfurcation might so truncate each step of a plaintiff's proofs as to make it incoherent to a trier of fact.

The first tort case to order such polyfurcation was In re Beverly Hills Fire Litigation, an action brought against manufacturers and installers of aluminum wiring alleged to have caused a fire in a crowded supper club. The fire took the lives of 165 patrons and employees and injured many others. The trial judge ordered three separate trials: a cause-in-fact determination; a determination of whether cooperative or concerted activities by defendants violated a legal standard of care; and finally, if the plaintiffs prevailed in the first two trials, a trial on damages. The jury concluded in the first trial that the connection of the suspect aluminum wire to an electrical device did not cause the fire. Thus, the defendant prevailed.

The Sixth Circuit Court of Appeals approved the issue polyfurcation, but reversed the lower court on other grounds. The court was not persuaded by the plaintiffs' argument that no caselaw sup-

110 See, e.g., id.
111 See infra notes 270–74 and accompanying text for a discussion of the impact of the "all-or-nothing" approach attorneys must take when faced with a narrow but potentially dispositive issue.
114 Id. at 210.
115 Id.
116 Id. at 211.
117 Id. at 217–18. A juror had conducted an improper experiment at home that tended to contradict plaintiffs' evidence as to the hazards of aluminum wiring, and informed his fellow jurors of these results. Id. at 211.
ported the judge's authority to bifurcate the issue of causation. It also rejected the plaintiffs' contention that courts had gone no further than to separate issues of liability from issues of damages.\textsuperscript{118} Rather, simply citing the broad language of Rule 42(b), which states that "any separate issue"\textsuperscript{119} may be bifurcated, the court held that there was no reason to adopt a different standard with regard to causation.\textsuperscript{120} According to the appellate court, the time and expense potentially saved by disposition of the causation issue were reasonable grounds for the district court's polyfurcation order.\textsuperscript{121}

The court of appeals recognized the strong argument made by the plaintiffs against a trial limited to causation, however, and proceeded to limit its holding to the particular circumstances of the case.\textsuperscript{122} The plaintiffs' argument was outlined by the court of appeals as follows:

\begin{quote}
There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of the injury.\textsuperscript{123}
\end{quote}

The court suggested that apprehension of such effects on a jury might well cause courts to reject bifurcation of the causation issue in less complex cases.

As further justification for the lower court's decision, the circuit court characterized the fire as a major disaster generally known to the jurors through media coverage.\textsuperscript{124} The court held that when combined with the limited evidence presented at the trial, this general knowledge adequately apprised the jury of the general circum-

\textsuperscript{118} Id. at 216. The court of appeals cited Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 542 (8th Cir. 1977), as approving bifurcation of causation. The separate trial in Beeck, a product liability case, determined whether the defendant had in fact manufactured the pool-slide at issue. Significantly, therefore, the only case the court cited for support of separating the causation issue did not actually involve such a use of bifurcation. Rather, it demonstrated a use much closer to simple, traditional uses such as determining validity of a patent in an infringement case. See, e.g., Woburn Degreasing Co. of New Jersey v. Spencer Kellogg & Sons, 37 F. Supp. 311 (1941).

\textsuperscript{119} See supra note 18 for the text of Rule 42(b).

\textsuperscript{120} Id. at 216.

\textsuperscript{121} Id. at 217-18. But cf. Baker v. Waterman S.S. Corp., 11 F.R.D. 440, 441 (S.D.N.Y. 1951) ("A paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience . . . must yield thereto.").

\textsuperscript{122} 695 F.2d at 217.

\textsuperscript{123} Id.

\textsuperscript{124} Id.
stances in which the fire arose. On remand, the trial judge had discretion to polyfurcate the case in the same manner.

Several federal courts have followed the *Beverly Hills* precedent in environmental tort cases, raising the possibility of a renewed and even more dramatic debate about the contending values of efficiency and fairness noted by the Sixth Circuit. These environmental tort trials have employed the polyfurcation device to separate out various causation issues for determination prior to other liability and damages issues.

The first major environmental litigation after *Beverly Hills* to invoke liability-issue polyfurcation was the massive Agent Orange litigation in the Eastern District of New York. Hundreds of Vietnam War veterans and their families brought this action against both the manufacturers of the defoliant known as Agent Orange and the United States government, which used it in Vietnam. Chief Judge Jack B. Weinstein certified two plaintiff classes, and ordered a separate trial on general causation to determine whether the various injuries suffered by plaintiffs could have been caused by Agent Orange.

The causation trial was to be a “test case” with representative claimants for each type of injury alleged. A negative causality finding on any injury type would end all claims based on that injury, just as a finding of a causal relationship between Agent Orange and an injury type would resolve the general causation issue for all of those claims in favor of the plaintiffs.

The court noted that a total or partial determination that plaintiffs could not prove causation would save considerable time for the court

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125 Id.
126 These three cases, while noted here, are discussed further in Section IV, *infra*.
127 *In re “Agent Orange” Products Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983). The *Agent Orange* class action was brought by more than 15,000 named individuals, mostly Vietnam veterans and their families, who claimed to be directly or indirectly injured by military spraying of the herbicide Agent Orange during the war. Seven out of an original 24 corporate entities and the United States government were defendants to the action. P. SCHUCKE, *AGENT ORANGE ON TRIAL* 4-5 (1986).
129 Judge Weinstein took over the *Agent Orange* case in 1983 when Judge Pratt, who had presided over the case since 1979, was elevated to the Second Circuit Court of Appeals. P. SCHUCKE, *supra* note 127, at 110–11. It is interesting to note that, as a law school professor, Judge Weinstein wrote one of the articles attacking the routine bifurcation of liability and damages. *See supra* notes 101–105 and accompanying text.
130 *Agent Orange*, 100 F.R.D. at 724.
131 Id. at 723.
132 Id.
and the parties. Any positive causality determination would re­
require further trials of the defendants’ liability and possible affirma­
tive defenses. If plaintiffs were also successful in these class trials, individual trials for specific causation and damages would follow, either in the Eastern District of New York or in the jurisdiction of origin for the individual plaintiffs' claims.

Defendants contested the class certification and argued that a general causation trial followed by further trials, possibly before other juries, would violate their right to have a single jury rule on their liability to each individual plaintiff. In denying defendants' objections, the court stated that “tacit admissions” that a defendant’s product could have caused a plaintiff’s injuries were commonplace in product liability suits. The question remaining for the subsequent jury or juries would be whether the product actually did cause the specific injury.

The defendants petitioned for a writ of mandamus to the Court of Appeals for the Second Circuit to compel the lower court to vacate the class certification. They argued, in part, that the issue of general cause, identified as a common issue for the class certification, was insignificant, and therefore, was not a proper basis for certification. The Second Circuit declined to issue the writ, thereby upholding the class certification. Shortly after this appeal failed, and as jury selection was about to begin, the parties agreed to a settlement. While admitting to no liability, the defendant manufacturers agreed to pay to the plaintiff class $180 million.

In re Richardson-Merrell “Bendectin” Products Liability Litigation presents another example of a case in which the court separated the general causation issue from other liability issues. The Bendectin case consolidated approximately 1200 actions, from dif­

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133 Id.
134 Id. at 724; see also Agent Orange, 565 F. Supp. 1263, 1275–77 (E.D.N.Y. 1983) (order by Judge Pratt scheduling a class-wide trial on the issues of defendants’ liability, general causation, and the governmental contractor defense).
135 Agent Orange, 100 F.R.D. at 724.
136 Id. The court expressed its faith in juries’ ability to separate a tacit belief that a product could cause harm from its consideration of whether the product actually inflicted a plaintiff’s injury.
138 Id. at 860.
139 Id. at 860–61.
141 Id. at 14.
ferent districts, brought by persons alleging birth defects as a result of ingestion of Bendectin, an anti-nausea drug, during pregnancy.\textsuperscript{143} The district judge coordinating this multi-district litigation ordered a polyfurcated trial structure in which the general causation issue was to be tried first for all plaintiffs, to be followed by a trial on the other common liability issues, if necessary.\textsuperscript{144} Specific causation and damages issues were to be heard in the districts of origin if the plaintiffs prevailed in the first two trials.\textsuperscript{145} The Bendectin plaintiffs opposed this polyfurcation, relying in part on the language in Beverly Hills\textsuperscript{146} warning against divorcing causation from the reality of the injury.\textsuperscript{147}

A twenty-two day trial took place solely on the issue of general causation over the plaintiffs' objections to such a trial structure. At trial, the parties presented strictly scientific and technical evidence, and took testimony solely from nineteen expert witnesses.\textsuperscript{148} When the presentation of evidence was complete, the court presented a single question to the jury: does Bendectin cause birth defects?\textsuperscript{149} After less than one day's deliberation, the jury answered the question in the negative, and returned a verdict for the defendant.\textsuperscript{150}

In justifying its polyfurcation decision, the court referred to Rule 42(b),\textsuperscript{151} noting that, on a national scale, the Bendectin litigation had

\textsuperscript{143} The plaintiffs in Bendectin alleged that 18 million American women and 14 million more outside this country took the drug until Merrell ceased its production for "compelling non-medical reasons." Kaufman & Lauter, Bendectin Verdict Doesn't End Suits, 74 Nat'l L.J., Mar. 25, 1985, at 3, col. 2. There were hundreds more Bendectin-related cases pending at the time of this trial.

\textsuperscript{144} 624 F. Supp. 1212 app. at 1249–50.

\textsuperscript{145} Id. at 1250.

\textsuperscript{146} 695 F.2d at 207, 217 (6th Cir. 1982); see also supra notes 113–25 and accompanying text.

\textsuperscript{147} 624 F. Supp. at 1221–22.

\textsuperscript{148} Id. at 1218.

\textsuperscript{149} Id. at 1222. The question presented to the jury was:

Have the plaintiffs established by a preponderance of the evidence that ingestion of Bendectin at therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects?

624 F. Supp. 1212 app. at 1268. If the jury answered "No," then they were to enter a verdict for defendants. If it answered "Yes" to the above question, they were to determine which defects Bendectin caused from a list provided to them. Id.

\textsuperscript{150} Id. at 1218. Not all Bendectin suits had the same outcome. In Oxendine v. Merrell-Dow Pharmaceuticals, 506 A.2d 1100 (D.C. 1986), the verdict for a single plaintiff in the amount of $750,000 was reinstated by the District of Columbia Court of Appeals, which reversed the trial court's judgment notwithstanding the verdict in favor of the defendant. The jury found that Bendectin was a teratogen, caused birth defects, and caused the injuries the plaintiff suffered. This unified, single-phase trial took place before the consolidated trial in the Southern District of Ohio, although the Oxendine appeals decision came out after the above case was decided.

\textsuperscript{151} 624 F. Supp. at 1221.
the potential for immobilizing the entire federal judiciary.\textsuperscript{152} The opinion also referred to concerns about judicial economy and potential delays that plaintiffs would have encountered if any other procedure had been employed.\textsuperscript{153}

The court recognized and agreed with the \textit{Beverly Hills}\textsuperscript{154} dicta to the effect that polyfurcation had the potential to damage a plaintiff's case by isolating sterile factual questions from a plaintiff's very real situation.\textsuperscript{155} In response to this concern, the court instructed the jurors at the beginning of the trial that, even though the evidence presented would be technical, the case was significant to many people, and that they should consider how the evidence related to people on both sides.\textsuperscript{156}

Next, the court considered the effect of excluding all plaintiffs from the courtroom who were under ten years of age and those above that age with visible defects.\textsuperscript{157} The court highlighted a theme in the plaintiffs' arguments that the presence of the crippled children would enable the jury to render a more fair and impartial verdict. To the court, however, it seemed beyond argument that the presence of deformed children at the causation trial might confuse the issue or mislead the jury.\textsuperscript{158} Noting that excluding the children from the courtroom during the damages phase of the trial would indeed violate plaintiffs' due process rights, the court held that the probative value of their presence during the causation trial was nonexistent while the prejudice to defendant was beyond calculation.\textsuperscript{159}

\textsuperscript{152}Id.
\textsuperscript{153}Id. The court also cites to cases in its circuit that upheld bifurcation decisions, including: Helminski v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985); \textit{In re Beverly Hills Fire Litigation}, 695 F.2d 207 (6th Cir. 1982), \textit{cert. denied}, 461 U.S. 929 (1983); Koster v. 7-Up Co., 595 F.2d 347 (6th Cir. 1978); Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965).
\textsuperscript{154}695 F.2d at 217.
\textsuperscript{155}624 F.2d at 1222.
\textsuperscript{156}Id. The court instructed the jury:

The evidence in this case will indicate that this is a consolidated case; that is, the plaintiffs represent some hundreds of other plaintiffs. . . . Let me suggest to you that what you are about to do may be one of the most important things you will ever do in your entire life. This is a significant case. . . . It involves not only the plaintiffs, who are individuals; it involves people, scientists, people who have done experiments, people who are employees of the defendant company. The totality of this case involves people and while you will hear technical evidence I do point out to you that at all times you should keep in mind that on both sides there are people involved.

\textit{Id.}
\textsuperscript{157}Id. at 1222–24.
\textsuperscript{158}Id. at 1222–23 (the court drew a parallel to Rule 403 of the Federal Rules of Evidence, which provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . ").
\textsuperscript{159}Id. at 1223–24. In making this decision, the court employed a test established in Helminski
The plaintiffs appealed many of the trial court’s evidentiary and trial structure rulings to the Sixth Circuit Court of Appeals. The court of appeals stated that the propriety of the polyfurcation ruling was the most troubling issue presented to it on appeal. With no precise guidelines for reviewing Rule 42(b) rulings and only abuse of discretion as a basis for review, the circuit court upheld the lower court’s polyfurcation order and its various evidentiary holdings. The appeals court also approved the exclusion of the children from the courtroom.

*Anderson v. W.R. Grace & Co.* is a third environmental case that considered the propriety of separating causation questions from other liability issues for the purpose of conducting separate trials. Members of a neighborhood, who suffered from leukemia, brought this action against W.R. Grace & Company and Beatrice Corporation claiming that the defendant companies caused their illnesses by polluting the municipal wells serving their homes.

Just before the case went to trial, after four years of thorough discovery on all issues in the case, the defense moved to have a series of mini-liability trials pursuant to Rule 42(b). The plaintiffs objected strenuously, arguing that the party bearing the burden of proof customarily had the right to determine the sequence of factual issues presented at trial. Additionally, Rule 42(b) bifurcation re-
mained the exception rather than the rule, and the plaintiffs contended that the defendants’ plan would serve Rule 42(b)’s goals of efficiency and avoidance of confusion only if the defendants won in the first phase. Finally, the plaintiffs themselves made a counter-proposal that, if the court wished to serve efficiency by bifurcating, the compensatory and punitive damages questions should be separated for trial subsequent to a unified liability presentation and determination.

Granting the defendants’ motion, the court ordered a polyfurcated trial in four phases. The first trial would determine legal responsibility for exposure, that is, whether the defendants’ toxic solvents had reached plaintiffs’ water supply. Legal exposure in the Anderson case necessitated findings that the defendants dumped chemicals on their own property, that the chemicals actually migrated from the defendants’ property to the municipal wells, and that these events occurred at a time when the defendants were legally liable in tort.

Although the defendants’ solvents might previously have reached the plaintiffs, only proof that the solvents reached the plaintiffs between certain dates could be used as a basis for liability. If the plaintiffs proved that one or both of the defendants’ solvents reached the wells inside the period of liability, the second trial would decide whether the chemicals caused the plaintiffs’ leukemias. The third trial would take up causation of the array of alleged health claims other than leukemia. The fourth trial would assess compensatory and punitive damages.

Having prepared for a full, unified trial, the plaintiffs reorganized their proofs and arguments to address the narrowed initial question, which took four months to try. Within the already limited question of legal exposure, the judge ultimately decided to submit to the jury

169 Id. at 2–3. Plaintiffs cite several cases for the proposition that proposed time savings must be very likely for bifurcation to be ordered. See, e.g., R.E. Linder Steel Erection Co. v. Wedemeyer, Cernik, Corrubia, Inc., 585 F. Supp. 1530, 1534 (D. Md. 1984) (“the court believes that any savings in time and expense which might result from bifurcation is wholly speculative”; motion denied); Organic Chem., Inc. v. Carroll Prod., Inc., 86 F.R.D. 468, 471 (W.D. Mich. 1980) (“it is very likely that there will be an overlapping of evidence”; motion denied).

170 Plaintiffs’ Memorandum, supra note 168, at 5.

171 Anderson v. Cryovac, Inc., 862 F.2d 910, 914 (1st Cir. 1988); see also Pacelle, supra note 166, at 77, col. 2.

172 862 F.2d at 914.

173 Id.

174 See id.; see also Pacelle, supra note 166, at 77, col. 2.

175 See Pacelle, supra note 166, at 77, col. 2.

176 862 F.2d at 914.
four further-narrowed interrogatories as to each defendant. The jury returned a verdict of no liability for the defendant Beatrice Corporation and a self-contradictory verdict of negligence against W.R. Grace for contamination of the wells. Based on the jury's confused verdict against Grace, the court ordered a new trial with regard to that defendant.

The Agent Orange Litigation, the Bendectin Litigation, and Anderson v. W.R. Grace provide examples for an analysis of the propriety of splitting off discrete intra-liability issues for separate trial in environmental tort cases. Both the Agent Orange Litigation and the Bendectin Litigation involved separation of general causation issues. The Anderson case had multiple splits even within the causation issue: the first issue was a narrow causation issue regarding proof of responsibility for the pollution in question; the second and third were injury etiology questions; and the last was the question of damages.

Both plaintiffs and defendants in these environmental tort cases raised various issues on the fairness of polyfurcation. Some of the arguments parallel those made in the previous controversy over simpler forms of bifurcation, but polyfurcation adds new quantitative and qualitative problems that deserve recognition in their own right as a novel legal conundrum.

IV. BALANCING COMPETING VALUES IN THE NEW ERA OF POLYFURCATION

A. A Functional Analysis

To understand the problematic nature of polyfurcation, it is helpful to analyze the impact that bifurcated and polyfurcated trial structures have had on the conduct of past cases.

1. Understanding the Roots of Polyfurcation

As pressures of efficiency and economy of judicial resources mounted over time, courts expanded their conceptions of properly
separable claims, defenses, and issues. Courts have moved beyond the once-extreme separation of liability and damages, and have made intra-liability divisions. Beeck v. Aquaslide-N-Dive Corp. offers a perfect example of a separated issue that was completely independent of any other issue. The trial court in Beeck separated the discrete issue of whether the defendant had manufactured the swimming pool slide involved in an accident. Upon a positive finding by the jury on that question, a further trial of the remaining issues of the products liability claim would have been tried.

The factual question of who manufactured the slide did not depend upon any other issue in this case, and was ascertainable upon very limited proofs. To decide the manufacture issue, the jury did not have to address whether the product was defective or if any defect was the proximate cause of the accident. Liability ultimately depended upon the defendant's construction of the slide, but the issues of causation and defect were completely distinct from whether the defendant had manufactured it.

The jury in Beeck found that the defendant had not manufactured the slide, ending the case at that stage. The procedures employed in arriving at that early decision, however, did not prejudice the plaintiffs in any way. This trial structure clearly served economy of the court's and the parties' time because the limited trial on the manufacture issue was very short. Separation also spared the defendant from possible prejudice by jury sympathy for plaintiffs' severe injuries. A unified trial would have necessitated such damages evidence, which could have obscured the independent determination of who manufactured the slide.

In In re Beverly Hills Fire Litigation, the true origin of polyfurcation, the court obviously thought it was separating a Beeck-type question when it ordered an initial trial on the causation in fact of the supper club fire. The causation issues in Beverly Hills were

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182 See supra note 44 and accompanying text.
183 562 F.2d 537 (8th Cir. 1977).
184 Id. at 541.
185 Id. at 542.
186 Id.
187 Unfortunately, the statute of limitations had run out for plaintiffs' claim so that they could not sue the actual manufacturer. 526 F.2d at 539. Generally, however, a quick determination like that made in Beeck would allow a plaintiff to seek out the responsible party before tolling of the statute of limitations.
189 See id. at 216. The Beverly Hills court cited the Beeck separation as precedent for hearing causation before other liability issues. This reliance on Beeck is questionable. Sepa-
more bound up with the merits than the manufacture issue in *Beeck*, but the issues that the court separated in *Beverly Hills* still met the distinct and separable test.

The plaintiffs in *Beverly Hills* alleged three theories of liability, but the judge ordered that only a concerted action theory could be used to find liability.190 When the trial judge gave this order, he determined three elements that the plaintiffs had to prove in order to prevail: a causal relationship between the use of the aluminum wire and the fire; cooperation or concerted activities by the defendants; and violation by such actions of a legal standard of care owed to the plaintiffs.191 The first element, causation in fact, was the subject of the initial trial under the judge’s polyfurcation order.192

In this initial trial, the jury had to determine both the general causation question—whether aluminum wire had the propensity to cause fires—and the specific causation question—whether the aluminum wiring at the supper club had in fact started the fire.193 These two questions formed a separately triable unit because they did not have any bearing on the other liability issues identified. By combining the general and specific questions of causation, the *Beverly Hills* court assured that the full circumstances of the plaintiffs’ causation argument were before the jury.

The nature of the causation issue presented in *Beverly Hills* was also suited to separate jury consideration. Laypersons can be assumed to have at least a general knowledge of how electrical receptacles are wired, and, more importantly, an understanding of the relationship between electrical current and how heat might build up at connections. Indeed, the problem in *Beverly Hills* was complex because of the extent of fire damage and the resulting uncertainties about the starting point of the fire.194 The issues themselves, however, were not foreign to everyday experience.

The jury did not need to make a leap of faith to find for the plaintiff on the causation issue. Either the jury would believe that the aluminum wires were faulty and sparked the fire, or it would believe...
one of the alternative causes proposed by the defendants, such as one of the various code violations alleged to exist at the time of the fire. In the end, the jury accepted an alternative argument, and found for the defendants.

Although the break between causation and the rest of the claim was not as clean as the separation of the manufacture issue in Beeck, the Beverly Hills polyfurcation rightfully survived examination by the Sixth Circuit Court of Appeals. Using the language of Rule 42(b) and various precedents, the court balanced the interests of the court and the parties in upholding the decision.

2. A New Balance in an Old Framework

In re Bendectin Products Liability Litigation involved allegations that the morning sickness drug Bendectin was teratogenic, that is, that it caused birth defects in children born to mothers who used it. Anderson v. W.R. Grace concerned exposure to toxic solvents through pollution of the plaintiffs' drinking water supply, and the leukemias allegedly resulting from that exposure. In re Agent Orange Products Liability Litigation was a sprawling class action about the possible carcinogenic and other effects of a potent herbicide upon Vietnam veterans who were exposed to it, and the alleged teratogenic effect the exposure had on the veterans' children. Although Beeck and Beverly Hills raised traditional questions of liability under common accidents, Bendectin, Anderson, and Agent Orange involved intricate, novel, and hard-to-grasp issues of liability for toxic exposure, which cannot be described as traditional.

Polyfurcation of causation issues in Bendectin, Anderson, and Agent Orange represents a distinct qualitative jump from the issues separated in prior cases. Quantitatively, too, these environmental cases involved divisions that went well beyond separating liability and damages, and go even further than the polyfurcation in Beverly Hills. For example, in Bendectin the only issue before the jury was the generic question of whether the drug causes birth defects, not whether it caused the particular plaintiffs' birth defects.

195 Id. at 220–21.
196 Id. at 216–17.
197 Id.
Environmental litigation most often involves novel causation issues, over which experts disagree. This uncertainty makes it much more difficult for lay jurors who are faced with deciding technical issues solely on the basis of what the parties present at trial. Given the difficult nature of environmental causation issues, it is no surprise that causation is regarded as the most troublesome problem facing the environmental plaintiff today. Both courts and commentators have proposed various reforms to account for the difficulties associated with proving a link between exposure to toxics and illnesses such as cancer, given the low level of certainty that medical science can offer.

Because causation is often more tenuous in the environmental field than in more routine personal injury or products liability cases, it is particularly important that procedures employed by the courts hearing these claims do not unduly prejudice parties to environmental litigation. In answering the question of whether individual issues of causation in environmental litigation are separate and distinct enough to be heard alone, judges must take the problematic nature of such issues into account to ensure fairness. Unfortunately, analysis of the environmental cases utilizing polyfurcation shows that this factor has been ignored to the detriment of parties on both sides.

The Bendectin litigation offers a clear example of how polyfurcation of liability issues in environmental tort cases can prejudice plaintiffs in violation of Rule 42(b) and the Gasoline Products test. A functional analysis like that conducted for Beeck and Beverly Hills in the preceding section illuminates the difficulties presented to plaintiffs who attempt to litigate their claims within a polyfurcated

201 In the Bendectin litigation, for example, out of the 19 expert witnesses testifying, 10 supported the plaintiff’s argument that Bendectin was teratogenic and 9 supported the defendant’s claim that it was not. See 624 F. Supp. at 1218.


203 In an age when an estimated 40 percent of all cancer deaths in the United States result from chemicals in the environment, effective incorporation of environmental claims into the tort system must be taken seriously. See Brennan & Carter, Legal and Scientific Probability of Causation of Cancer and Other Environmental Diseases in Individuals, 10 J. HEALTH, POL., POL’Y, AND LAW 33, 34 n.12 (1985).
trial structure. The problems faced by the jury in deciding these polyfurcated cases also become clear.

Limited to the general causation issue in the first trial, the *Bendectin* plaintiffs had to prove, by a preponderance of the evidence, that Bendectin caused birth defects.\textsuperscript{204} If Bendectin was a teratogen, it was a "low-grade" variety, meaning either that it caused birth defects in a small percentage of infants whose mothers took the drug during pregnancy or that the resulting defects were less severe.\textsuperscript{205} The infamous sedative thalidomide was a "high-grade" teratogen, which caused severe defects twenty percent of the time. Any effects of Bendectin, however, would occur in significantly fewer cases.\textsuperscript{206} Teratologists suggest that, for several reasons, low-grade teratogens may be even more dangerous than high-grade teratogens in the long run.\textsuperscript{207}

The elusive nature of causation issues when dealing with a possible low-grade teratogen makes the individual experiences of a given plaintiff indispensible to a fair determination. In their motion for judgment notwithstanding the verdict and for a new trial, the *Bendectin* plaintiffs characterized the jury's verdict as advisory.\textsuperscript{208} They reasoned that the jury based its verdict solely on hypothetical facts not connected to the plaintiffs' particular situation, and therefore that the verdict did not result from a true case or controversy. The plaintiffs argued that the judge exceeded his authority under Rule 42(b), making the verdict a legal nullity.\textsuperscript{209} Another asserted error was the exclusion of crippled minor plaintiffs from the courtroom during the polyfurcated initial causation trial.\textsuperscript{210} Polyfurcation and

\textsuperscript{204} See supra notes 142--50 and accompanying text.
\textsuperscript{206} Id. Thalidomide was banned in 1961 after the results of its use during pregnancy were discovered. The high frequency and unique nature of defects encountered made the causal link relatively obvious. Id.
\textsuperscript{207} Id. The effects of low-grade teratogens are harder to detect, harder to prove teratogenic given the background rate of defects, harder to distinguish when multiple drugs were ingested during pregnancy, and, because of these factors, harder to have removed from the market.

*Bendectin* was on the market for approximately 30 years before Merrell-Dow Pharmaceuticals voluntarily stopped manufacturing it. Thalidomide was only on the market a short time before it was forced off. Id. Millions more women took Bendectin over those 30 years than could have possibly used Thalidomide during its short time of availability. Bendectin was the only prescription drug ever to be prescribed specifically for pregnant women, and its apparent safety allowed doctors to continue to prescribe it. This drug provides an example of how a low-grade teratogen can become more dangerous and insidious than a more obvious high-grade teratogen. *Id.* at 56.
\textsuperscript{208} 624 F. Supp. at 1222.
\textsuperscript{209} Id.
\textsuperscript{210} Id. In a National Law Journal article after the trial, one of the plaintiffs' attorneys said
the exclusionary rulings, plaintiffs' argument continued, created a sterile laboratory environment where causation was parted from the reality of plaintiffs' injuries.\textsuperscript{211}

In its order denying plaintiffs' motions, the trial court disposed of the plaintiffs' assertion that the verdict was a nullity in one short paragraph. The court held that the sole issue put to the jury was appropriate, and that Rule 42(b) allowed for its separation.\textsuperscript{212} Reasoning that if the plaintiffs failed to prove the essential causation element that ingestion of Bendectin caused birth defects, the court stated that "it matters not what else they might establish."\textsuperscript{213}

The \textit{Bendectin} court cited both \textit{Beeck} and \textit{Beverly Hills} as precedent for its polyfurcation decision.\textsuperscript{214} Neither of those cases, however, could support separation of the general causation issue for individual trial. \textit{Beeck}'s separation of the manufacture issue did not divide the substantive merits of the plaintiff's claims.\textsuperscript{215} \textit{Beverly Hills} combined the general and specific causation issues.\textsuperscript{216} Without acknowledging that it did so, the \textit{Bendectin} court extended Rule 42(b) further than any other court.

Plaintiffs' contentions about the negative impact of the trial's polyfurcated structure, on the other hand, find support in the record of this case. Exclusionary evidentiary rulings further limited the already narrow scope of the initial causation trial. Although there was some dispute as to whether plaintiffs were allowed to present any evidence about particular plaintiffs' experiences,\textsuperscript{217} the trial certainly did not focus on the particular causation of any plaintiff's birth defects. The judge allowed no evidence on dosages or possible synergistic effects of other drugs taken, and he instructed the jury to assume that prescribed doses were taken.\textsuperscript{218} These elements of specific causation were too interwoven with general causation to be heard separately.

that the judge's procedural rulings on bifurcation and exclusion of plaintiffs had deprived the plaintiffs of a "full and fair adjudication of their rights." Kaufman & Lauter, \textit{supra} note 143, at 22, col. 1.

\textsuperscript{211} 624 F. Supp. at 1221.

\textsuperscript{212} \textit{Id.} at 1222.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} See \textit{supra} notes 183-87 and accompanying text.

\textsuperscript{216} See \textit{supra} notes 188-97 and accompanying text.

\textsuperscript{217} \textit{In re Bendectin Litigation}, 857 F.2d 290, 317 (6th Cir. 1988). The court of appeals notes some confusion on this point, but holds that plaintiffs were allowed to present individual case history testimony through one expert. The expert witness, however, did not offer any such evidence. \textit{Id.}

\textsuperscript{218} 624 F. Supp. at 1228-29.
Various other pieces of evidence that could have affected the jury's deliberations were deemed outside the scope of the general causation trial. Plaintiffs were not permitted to introduce any evidence about alleged conflicts of interest or fraud in the preparation of the Bendectin studies relied upon by the defendant. In its review of the judgment, the court of appeals stated that this restriction was probably the most serious consequence of the polyfurcation order. The appeals court upheld the lower court's order to allow only attacks on the methodology used in the studies in the first trial, however, because that order did not amount to an abuse of discretion.

A unified trial of all liability issues would have incorporated all questions about the defendants' studies simultaneously. As it was, the jury took the various studies at face value. Its decision may well have been different with evidence that the defendant's studies were not purely scientific or impartially conducted.

The trial court also excluded all references to thalidomide based on the possible prejudice to defendants by jury association of thalidomide to the defendant who did not manufacture that drug. Defendant Merrell-Dow Pharmaceuticals had tested thalidomide, however, and the plaintiffs intended to show that the defendant's testing failed to detect the very powerful teratogenic effects of thalidomide so that the jury could appreciate the possibility of error in Bendectin testing. This evidence would have provided the jury with some context for assessing the studies proffered by the defendant. Its absence thus handicapped the jury.

On a broad scale, the jury did not have enough of the entire picture to make an informed and just decision on the plaintiffs' claims. The elements excluded from the plaintiffs' proofs were too interwoven with the narrow question actually presented to the jury. Exclusion of all plaintiffs under the age of ten and those above that age with visible defects further served to isolate the reality of the plaintiffs' situation. The plaintiffs were also prohibited from showing any photographs to illustrate the nature of the defects allegedly caused by Bendectin. In fact, the jury only saw plaintiffs without visible

219 857 F.2d at 317–19.
220 Id. at 317–18.
221 Id. at 318.
222 Id. at 321–22.
223 Id.
224 Id. at 323.
injuries in the courtroom, which could have hurt the credibility of plaintiffs' claims.\textsuperscript{225}

Additionally, the Sixth Circuit refused to utilize two alternative causation theories to alter the burden of proof in plaintiffs' favor. It found that linking ingestion of Bendectin with birth defects was not a matter of common experience, which would prompt use of such alternate theories.\textsuperscript{226} This finding is ironic because it is exactly the kind of information that the trial court should have taken into account in a broad review of the proposed polyfurcation. In that context, the court might have recognized that the uncommon nature of the causation issue made it inappropriate for a separate hearing.

Unlike the \textit{Beverly Hills} case, which involved a single fire in which all of the injuries occurred, this case concerned the unique experiences that hundreds of individuals had with a possibly toxic drug.\textsuperscript{227} A lay jury would have been much better prepared to answer the plaintiffs' claims in such a complex case after a complete liability presentation.

The issue tried initially in \textit{Anderson v. W.R. Grace & Co.}\textsuperscript{228} related more directly to the plaintiffs' particular circumstances than that heard first in the \textit{Bendectin} case. Nevertheless, polyfurcation caused a confused and uncertain verdict that was ultimately dismissed.\textsuperscript{229} A novel environmental pollution claim like that in \textit{Anderson} necessitates giving the jury contextual background or plaintiffs will seldom prevail, and potential environmental dangers will be allowed to continue. To take an obvious example from \textit{Anderson}, evidence of when the plaintiffs first suffered the effects of leukemia would have given the jury a chance to decide when the toxins first might have reached the wells.\textsuperscript{230}

Prior to the polyfurcation, the \textit{Anderson} plaintiffs intended to make their presentation in a fashion that tracked the development of their grievance: the illness; the recognition that many neighbors were at the hospital for the same reasons; the suspicion about the strange smell in the water; the discovery of the contamination; the

\textsuperscript{225} See id. The plaintiffs made this exact argument in their appeal.

\textsuperscript{226} Id. at 314.

\textsuperscript{227} Judge Jones wrote a separate and hesitant concurrence regarding the polyfurcation order in the \textit{Bendectin} appeal, raising this distinction. Id. at 327 (Jones, J., concurring). Judge Jones dissented on the issue of excluding the plaintiffs from the courtroom. Id. at 330.


\textsuperscript{229} See supra notes 178–79 and accompanying text.

\textsuperscript{230} See Pacelle, supra note 166, at 77, col. 3.
studies conducted that linked the disease to the toxins; and finally, tracing the chemicals to the defendants. By structuring their case in this way, the plaintiffs could make the relationships of different pieces of information apparent to the jury. Instead of this sequence of presentation, however, the polyfurcation order constrained the plaintiffs to the contamination issue standing alone in the first trial. Evidence of the onset of the leukemias was restricted to the second-phase trial. As the plaintiffs argued in opposition to the polyfurcation, the liability issues of the defendants' conduct, plaintiffs' exposure, and plaintiffs' injuries were inextricably linked. Presented with only complex and technical questions of hydrogeology associated with the contamination, the jury was never in a position to evaluate the relevance of one piece of information to another because they did not have the whole story.

The various technical dissections and compartmentalizations of the trial process had clearly disoriented the jury of laypersons. Jurors later told a reporter that they were thrown into "utter shock" when they saw the very specific, technical questions in the interrogatories. Until then, they had thought they would be called upon to decide simply whether the defendants were liable for injuring the plaintiffs, or, in the words of one juror, whether the defendants were "guilty or innocent."

The jury suffered from a general misconception about use of the term "preponderance of evidence." Some jurors thought the term meant that they should quantify the amount of testimony in favor of the plaintiffs' proposition, and that they could only find for the plaintiffs if there was a larger quantity of evidence in favor of that proposition than for other propositions. On that basis, the jury found that defendant Beatrice had not polluted within the crucial "window of liability" because the plaintiffs offered many witnesses testifying about dumping solvents on the ground before the "window" period, but only two witnesses testifying that the defendants dumped during that period.

231 See Plaintiffs' Memorandum, supra note 168, at 1; see also Pacelle, supra note 139, at 77, col. 1.
232 See Pacelle, supra note 166, at 77, col. 1.
233 Id. at 77, col. 2.
234 Memorandum, supra note 168, at 3.
235 Id. at 77, col. 3 (statement of plaintiffs' attorney Jan Schlictman).
236 Id. at 166, at 78, col. 4.
237 Id.
238 Id.
239 Id. Specifically, in regard to defendant Beatrice Corporation, the interrogatories asked
The jury meant to find defendant W.R. Grace negligent and liable for the contamination, and answered the interrogatories with that intention. It did not understand the relationship between two almost identical questions, however, and contradicted itself in its responses to these questions. This inconsistency was the basis for throwing out the verdict and ordering a new trial.

The confusion evidenced by the jury's inconsistent findings indicated that it did not understand how the issues related to one another. The Gasoline Products test was designed to avoid this type of uncertainty and confusion in jury deliberations. Applying the standards set out by the Supreme Court in Gasoline Products to the Anderson case inevitably leads to the conclusion that the structure imposed there was improper because of the jury's inability to grasp the significance of its actions. The issues simply were not separate and distinct enough for individual hearing. Lacking more information, the jury was inhibited in trying to decide the fragmented issues presented to it in the interrogatories. This structure unduly prejudiced the plaintiffs in violation of Rule 42(b), and the substance of the jury trial right delineated in Gasoline Products.

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the jurors to determine if the plaintiffs had established by a preponderance of the evidence that Beatrice had dumped after 1968. Interrog. No. 2 re: Beatrice Corp. See Appendix. There had been a great deal of testimony about Beatrice's dumping from the late 1950s to the mid-1960s, but there were only two witnesses who testified about dumping after 1968. Pacelle, supra note 166, at 78, col. 4. The jurors felt that the "preponderance," what they thought of as the bulk, of the evidence was about early dumping and therefore responded that the bulk of the evidence did not prove that Beatrice dumped during the key period. Id. An answer of "No" to that question was the end of deliberations regarding Beatrice because the jury was instructed to go no further beyond such an answer. The negative response was equivalent to a finding of no liability given the polyfurcated structure of the case, and therefore was dispositive of the entire claim.

240 Id. at 79–80.

241 Id. First, the jury was asked in Interrogatory No. 2 what the earliest date the dumping, found to have "substantially contributed" to the wells' pollution in Interrogatory No. 1, had such an effect. See Appendix. The jury answered "Not determined" because it could not agree on an answer. Pacelle, supra note 166, at 79, col. 4. Then, in Interrogatory No. 3 it was asked whether the pollution resulted from Grace's negligence, which the jury found in the affirmative. See Appendix. Interrogatory No. 4 was intended to ask the same question as No. 2 with the additional characterization that waste was dumped negligently. The jurors told the reporter who wrote the story that if that was how they understood it then they would have responded "Not determined" as they did in No. 2. Pacelle, supra note 166, at 80, col. 3. Instead, the jurors thought it meant that they should decide when Grace had dumped enough chemicals to contaminate the wells, and they agreed on a date proposed by one of them. Id. at 80, col. 2. The inconsistency, of course, stems from the fact that, if they could not decide when the chemicals got to the wells, they certainly could not decide when the negligently dumped chemicals got there. Id. at 80.

242 Id. at 80, col. 3.
Like the *Bendectin* and *Anderson* cases, *In re “Agent Orange” Product Liability Litigation* involved the separation of novel causation issues. Whether Agent Orange caused the injuries experienced by veterans exposed to the toxin in Vietnam’s jungles and whether that exposure caused the physical defects in the veterans’ offspring are unique questions outside a jury’s common experience. Yet, with nothing more than general evidence on the possible toxicity and teratogenicity of Agent Orange, the court was ready to submit to a jury a single issue that could be dispositive of the claims of thousands of plaintiffs.

If the plaintiffs were exposed to Agent Orange at all, it would have occurred in different circumstances and at different levels. The defendants opposed a class-wide trial solely on general causation because a class trial on this issue could never be dispositive of individual plaintiff’s claims. Any attempt to make class-wide determinations could unduly prejudice defendants in subsequent trials. All subsequent juries would have to be informed of a blanket determination that Agent Orange conceivably could cause the plaintiffs’ injuries.

The Second Circuit Court of Appeals upheld the class certification, but expressed considerable doubt about the significance of the general causation issue standing alone. The court accepted the defendants’ argument that anything, even water, can be harmful in certain circumstances and at certain levels. That argument, it held, “would seem to dispose of the [general causation] issue, so defined, without more.” Finding other common issues that supported joining the class, the court suggested that the problem with the general causation issue could be overcome by framing it in different terms, or by having class trials on issues other than causation.

Although Judge Weinstein applied the *Gasoline Products* test in making his polyfurcation order, general causation in the *Agent Orange* case cannot meet the separate and distinct test. Early in the litigation, Judge Pratt ordered the separate initial trial of the manufacturers’ affirmative defense. The defendants claimed that they...
were operating under a government contract and were therefore protected from liability. After several years of discovery, Judge Pratt repudiated his earlier order because a separate hearing would not be possible.\footnote{In re “Agent Orange” Products Liability Litigation, 565 F. Supp. 1263, 1275-77 (E.D.N.Y. 1983).} The court found that the issues of the affirmative defense, liability, and general causation “no longer remain[ed] discrete and separate.”\footnote{Id. at 1276.} In the mind of the court at that time, those issues merged to such an extent that a trial on the government contract defense would necessarily involve most of the evidence needed for trial of the issues relating to liability and general causation.\footnote{Id. at 1276-77.}

Despite his explicit recognition that Judge Pratt had found these issues to be inextricably interwoven only months before, Judge Weinstein ordered the general causation issue separated for initial determination before the other liability and affirmative defense issues.\footnote{In re “Agent Orange” Products Liability Litigation, 100 F.R.D. 718, 722-24 (E.D.N.Y. 1983). From the language in this order, it seems that Judge Weinstein believed the order of hearing the issues would somehow alleviate the problem of interdependence. Deciding causation, and then turning to the affirmative defense and liability, therefore becomes appropriate. Id. at 723.} Given the findings of Judge Pratt, it was obvious that hearing these issues separately would have been confusing, and at the very least would have required duplicative factual presentations.\footnote{Id. at 1276-77.} Judge Weinstein was similarly undaunted by the later language of the Second Circuit questioning the viability of general causation as an appropriate issue for separate trial.\footnote{In re Diamond Shamrock Chem. Co., 725 F.2d 858, 860 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).} Either of these reasons should have been enough to require unified presentation under \textit{Gasoline Products}, but a polyfurcated structure was maintained up to the time of settlement.

Efficiency and judicial economy were proffered by the court as reasons for the polyfurcation.\footnote{See \textit{Agent Orange}, 565 F. Supp. at 1276-77.} The potential for inducing settlement was also mentioned approvingly several times in Judge Weinstein’s order.\footnote{In re \textit{Diamond Shamrock Chem. Co.}, 725 F.2d 858, 860 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).} He stated that a trial on general causation “may serve to resolve the claims of individual members [of the class] in a way that determinations in individual cases would not, by enhancing
the possibility of settlement among the parties." One of plaintiffs' attorneys characterized the court's actions regarding the trial structure as part of the judge's "grand design of settlement."

It can be argued that by selecting the general causation issue for a separate initial trial, Judge Weinstein could influence both plaintiffs and defendants to settle. Causation was tenuous and difficult for the plaintiffs to prove. The defendants, on the other hand, were obviously worried that a jury determination of a general causal link between Agent Orange and the plaintiffs' injuries would hurt them in subsequent trials on specific causation and damages. Thus, each party had doubts about a trial limited to general causation, and might have been pressured to settle due to that possibility.

B. Guidelines for Maintaining the Balance Between Efficiency and Fairness in Polyfurcation Decisions

From the foregoing analysis, a number of suggestions emerge to help guide courts as they make polyfurcation decisions. By following these suggestions, courts can assure fairness and uphold the right to a jury trial, and at the same time promote efficiency and economy. These suggestions can be summarized as follows:

1. Fairness and avoidance of prejudice should transcend efficiency and economy.
2. A careful assessment should be made to determine whether a smaller trial will be a shorter trial.
3. Polyfurcation decisions should be made early in the litigation, before extensive discovery is conducted on all issues.
4. Polyfurcation should not be ordered when there is doubt that a jury can sufficiently comprehend a narrow issue to be tried individually.
5. Polyfurcation should not be ordered at all where liability issues are interdependent.
6. Causation in fact should be the smallest allowable unit for a separate trial.

259 Id. at 723.
260 P. Schuck, supra note 127, at 139.
261 See id. at 112–19 (in his first meeting with the parties' attorneys, Weinstein shifted the focus onto causation, and said the case would be "better settled than tried").
262 In re "Agent Orange" Products Liability Litigation, MDL No. 381, at 96 (E.D.N.Y. Sept. 25, 1984) (preliminary memorandum and order on settlement) (Judge Weinstein outlines in depth all the problems with proving plaintiffs' case, focusing on causation as the central problem).
263 See 100 F.R.D. at 724.
7. Inducement to settle should not be used as a justification for polyfurcation decisions.

Fairness is a prominent theme of the Federal Rules of Civil Procedure, the first Rule of which states that all of the Rules "shall be construed to secure the just . . . determination of every action." When Congress approved the Federal Rules of Civil Procedure by passing the Rules Enabling Act, it too stressed that the Rules were not to "abridge, enlarge, or modify any substantive right," and specifically referred to preserving the right to a jury trial as guaranteed by the seventh amendment. Rule 42(b) is a useful component of this comprehensive system of rules used to govern civil practice in the federal courts. As part of this system, it must be applied in conformance with the high standard of fairness that the FRCP incorporates.

Rule 42(b) can promote efficiency and avoid prejudice, but it can also create problems of illogic, disrupt the coherence of trial presentation, and actually engender prejudice. Case law supports the notion that in assessing whether bifurcation is appropriate, concern for fairness and the avoidance of prejudice are objectives that transcend the promotion of efficiency or economy.

Even on efficiency grounds, polyfurcation does not necessarily meet the goals of Rule 42(b). In regard to both Bendectin and Anderson, the time-savings that served as a basis for polyfurcation become questionable when one looks at the length of the limited first-phase trials. In Anderson, the trial of one aspect of causation took seventy-eight trial days. In Bendectin, the general causation trial lasted twenty-two days. If the lengths of these narrow trials could be extrapolated to trial of all the issues, then the long duration of trials for these discrete issues could be seen as justification for polyfurcation.

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266 U.S. Const. amend. VII. FRCP 38(a) integrates the seventh amendment into the Rules.
267 See supra notes 96-100 and accompanying text.
268 See supra notes 101-108 and accompanying text.
269 See, e.g., Martin v. Bell Helicopter, 85 F.R.D. 654, 658 (D. Colo. 1980) ("A paramount consideration at all times . . . is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience . . . must yield thereto.").
270 862 F.2d at 914.
271 857 F.2d at 316.
272 See In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation, 624 F. Supp. 1212, 1221 (S.D. Ohio 1985) (just such an argument is made by the court, which projects that the "Bendectin litigation alone had the capability of substantially immobilizing the Federal Judiciary").
Arguably, however, the narrowed issues received virtually as much trial time, and certainly as much preparation, media attention, and ego, as a unified trial would have received. Separate trial of these issues, therefore, potentially could have doubled the amount of trial time, or more, if the full case ultimately had proceeded to a verdict. Accordingly, the fractured polyfurcated structures could be the very cause of the drawn-out presentations on such narrow issues, and not necessarily a dramatic time-saver overall.

Most polyfurcation decisions come at the close of discovery and often very near trial time.\textsuperscript{273} The parties prepare for full presentation along traditional lines, only to be fettered by a restricted trial structure. For plaintiffs' lawyers in particular, the natural response may well be to extend possibly their only opportunity to get evidence before a jury, and to explore every potential avenue no matter how dubious. Whereas the separated issue might have taken up a small fraction of a unified trial, it grows out of proportion when it becomes potentially an all-or-nothing opportunity for plaintiffs.

Judicial economy is often a self-sufficient rationale for making more and more divisions in trial structures, and should be rethought in light of these potential contradictions. Courts should not blindly assume that smaller trials equal shorter trials. Instead, they should conduct an informed balancing of the benefits and burdens of polyfurcation as the Rule's drafters envisioned.\textsuperscript{274} Structural decisions should also be made early enough in a case that unnecessary discovery can be postponed until after the initial trial or trials. This practice would further reduce the duration of many cases, and possibly limit the effects of the all-or-nothing mentality that polyfurcation engenders.

The Anderson case also demonstrates that complex environmental tort cases may cause sufficient jury confusion to merit a retrial.\textsuperscript{275} The purpose of the Rule is not served when retrials result from splintered hearing of liability issues that induce the jury into giving an invalid verdict. If a court doubts that a jury could comprehend sufficiently a narrow issue standing alone, then it should not permit the separation of issues.\textsuperscript{276}

\textsuperscript{273} See \textit{supra} notes 167–76, 231–35 and accompanying text.
\textsuperscript{274} See \textit{supra} notes 24–31 and accompanying text.
\textsuperscript{275} See \textit{supra} notes 230–42 and accompanying text.
\textsuperscript{276} Payne v. A.O. Smith Corp., 578 F. Supp. 533, 539 (1983) (bifurcation denied because it was "equally likely that bifurcation, as suggested by the defendants, will extend the time of trial, rather than shorten it"); Kohnke v. Herter, 579 F. Supp. 1523, 1526 (D. Minn. 1984).
In addition to the problem of defeating efficiency by necessitating retrials, jury confusion has an even more troubling potential for unfairness. The extent of a jury's confusion will not always be as evident as it was in *Anderson*, and unsound verdicts will be allowed to stand. Environmental tort causation is so complex and so far outside the common experience of ordinary jurors that fractured causation presentations in this context necessarily leave jurors without sufficient information on which to base a valid verdict. It is difficult to understand, for example, how a lay jury could determine fairly the claims of thousands of sick and dying Vietnam veterans and their children based solely on the hypothetical question of whether Agent Orange was toxic and teratogenic. 277

Exclusion of many of the *Bendectin* plaintiff children due to the extremely limited scope of their one and only trial highlights another way that polyfurcation can distort a jury trial. 278 By presenting the jury with no evidence about the experience of the particular plaintiffs and by allowing only apparently healthy children into the courtroom, the *Bendectin* judge created an atmosphere of confusion and misapprehension in which to decide the plaintiffs' very serious claims.

Many cases will involve interdependent issues that require a unified liability presentation in order to avoid jury confusion and unnecessary doubling of presentations. The allegations of fraudulent scientific studies in *Bendectin* should have been presented along with those studies in order to give the jury some way to assess their credibility. 279 This is but one example of how relevant evidence can be excluded by limiting too narrowly the scope of a trial.

The problem of interdependent issue separation is compounded by the presence of cross-over issues, which often must be relitigated in subsequent trials when plaintiffs prevail in the initial phases. As the first judge in the *Agent Orange* case discovered, the issues there were so interwoven that most of the evidence needed for general causation would also be needed for the liability and affirmative defense issues. 280 If the plaintiffs had won in the first phase, they would have had to present much of the same evidence to the subsequent jury or juries, thereby defeating any supposed judicial economy and actually making the overall trial longer. Polyfurcation, therefore,

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277 See supra notes 243–49 and accompanying text.
278 See supra notes 224–25 and accompanying text.
279 See supra notes 219–21 and accompanying text.
280 See supra notes 250–53 and accompanying text.
should not be ordered when there are significant cross-over issues that must be retried in later phases.

The functional analysis conducted in this Comment shows that the divisions made in *Anderson*, *Bendectin*, and *Agent Orange* were in all probability overly narrow and abstracted the plaintiffs' claims from reality. Hypothetical questions of general causation, removed from all connections to the circumstances that led a plaintiff to bring suit, are an improper foundation for a verdict on an entire claim. Divisions that go beyond causation in fact, the combination of general and specific causation, cannot meet the *Gasoline Products* distinct and separable test.

The polyfurcation ordered by the court in *Beverly Hills* constituted a distinctly triable unit. General and specific causation in the context of a fire at a restaurant gave the jury enough information to determine the validity of the plaintiffs' claims properly and fairly. Polyfurcation of causation in fact like that in *Beverly Hills*, therefore, should be the furthest allowable separation, if polyfurcation is deemed appropriate at all.

When bifurcation is taken to the extreme exhibited in *Anderson*, *Bendectin*, and *Agent Orange*, the role of the jury is transformed from that of an impartial factfinder and social conscience into that of a sort of special master assigned technical questions removed from a particular case or controversy. Rule 42(b) contains the specific guarantee that the right to jury trial as established by the seventh amendment to the Constitution shall be "preserv[ed] inviolate." *Gasoline Products*, along with many subsequent decisions, make clear that the drafters of the seventh amendment were concerned with the substance of the common law right and not with the form that it took. The change in form that Rule 42(b) bifurcation permits, therefore, does not offend the seventh amendment per se. The transgression occurs when the substance of that right is changed by a procedural rule such that the role of the jury is mutated. Juries are meant to be impartial to the claims of both parties, but the jury was never meant to be detached from the reality and humanity of those claims.

Polyfurcation of narrow and sometimes hypothetical questions violates the command of the seventh amendment and Rule 42(b), which guarantee the preservation of the right to a jury trial. Polyfurcation

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281 See *supra* notes 189–97 and accompanying text.
of causation issues in *Anderson, Bendectin,* and *Agent Orange* also violated each of the criteria listed in Rule 42(b) and the *Gasoline Products* test, which courts habitually use to evaluate propriety of bifurcation orders. Unified presentation of liability issues would have prevented these various problems, and therefore would have been consistent with the fairness standards of the FRCP and the tort system as a whole.

Inducement to settle, furthermore, is neither one of the goals of Rule 42(b), nor one of the allowable grounds for making a bifurcation decision. There is a real possibility that judges will use the burdens imposed by polyfurcation to try to induce settlements in order to clear their admittedly overcrowded dockets. It appears that this occurred in the *Agent Orange* litigation. The *Agent Orange* court’s own statements about settlement inducement, added to the duplicative nature of the trials that would have resulted, indicated that settlement was at least a part of the judge’s basis for polyfurcating the trial. Such a potentially prejudicial use of Rule 42(b) should be rejected as improper.

Courts must recognize that polyfurcation in environmental tort cases in particular, and indeed in all complex litigation, can produce prejudice and defeat the purposes of Rule 42(b) as it did in the cases discussed above. The guidelines set out in this Section, and hopefully in future applications of the prudential considerations noted in this Comment, define standards that the appellate courts should seek to enforce in their reviews of polyfurcation decisions in the trial courts.

V. CONCLUSION

Polyfurcation of tort liability issues is a recent development, and it has occurred with little or no critical discussion by scholars. Polyfurcation has proved to be an unpredictable next step in the evolution of Rule 42(b), which is now commonly used to separate liability and damages issues for trial. The device, as it has been used in environmental tort litigation, raises serious questions of propriety that concentrate primarily on potential prejudice to the parties. Both plaintiffs and defendants can be adversely affected by polyfurcation.

Applying a test developed by the Supreme Court for determining the suitability of issues for divided trials, this Comment analyzes

284 FED. R. CIV. P. 42(b). See supra note 18 for the text of the Rule.
285 See supra notes 258–63 and accompanying text.
286 Id.
serious defects that arose in three major environmental cases that applied polyfurcation within liability. Separated issues turned out to be not so distinct and separable that their independent hearing could be had without injustice. The issues of liability in these cases were often too interwoven to be separated.

Juries have decided plaintiffs' claims based solely on hypothetical general causation issues completely detached from the circumstances experienced by the particular plaintiff. This structure does not preserve the substantive nature of the right to a jury trial guaranteed by the seventh amendment and echoed in Rule 42(b). The verdict in Anderson v. W.R. Grace & Co., for example, was so confused by the truncation of evidence presented and the form of jury interrogatories submitted that the entire trial was tainted and a new trial was ordered. The primary goal of Rule 42(b) is to promote efficiency and economy in federal civil litigation. Polyfurcation that results in retrial not only fails to promote this goal, but actually exacerbates the congestion in federal courts.

Another example of the potential for prejudice resulting from polyfurcation is provided in In re “Agent Orange” Products Liability Litigation. There, a federal appellate court disapproved the trial court's polyfurcation of general causation because it lacked any connection to the circumstances of the members of the large and varied plaintiff class. The trial court in that case continued with the polyfurcated structure, and openly admitted that inducement to settle was one reason for the polyfurcation order. Settlement is not a basis for bifurcation decisions provided by Rule 42(b), and is therefore inappropriate.

Because polyfurcation of significant liability issues in tort claims is a new phenomenon, it has not yet gained a great deal of momentum. This Comment suggests, in Section IV, a list of guidelines that should define the terms of when polyfurcation should and should not be ordered. Developing rules for employing polyfurcation like those outlined there, or making the determination that polyfurcation is inappropriate in any complex environmental tort case, is therefore still feasible and desirable. Congress could clarify the Rule legislatively, but this course does not appear to be necessary if appellate courts review the problem conscientiously and impose reasonable limitations on the use of polyfurcation.
APPENDIX


1. Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Grace site after October 1, 1964 *and* substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22, 1979?

   A. TRICHLOROETHYLENE? Yes ____ No ____
   B. TETRACHLOROETHYLENE? Yes ____ No ____
   C. 1,2 TRANSDICHLOROETHYLENE? Yes ____ No ____

   [If you have answered “No” to all these chemicals, you need not proceed further.]

2. If you have answered “Yes” in Question 1 as to any chemical(s), what, according to the preponderance of the evidence, was the earliest time that such chemical(s) disposed of on the Grace site after October 1, 1964 made a substantial contribution to the contamination of Wells G and H—with respect to

   A. TRICHLOROETHYLENE? Month ____ Year ____
   B. TETRACHLOROETHYLENE? Month ____ Year ____
   C. 1,2 TRANSDICHLOROETHYLENE? Month ____ Year ____

   [If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write “ND” for Not Determined.]

3. If you have answered “Yes” in Question 1 as to any chemical(s), please answer the following question:

   Have the plaintiffs established by a preponderance of the evidence that the substantial contribution to the contamination of Wells G and H prior to May 22, 1979 by chemicals disposed of on the Grace site after October 1, 1964 was caused by the negligence of Grace, that is, the failure of Grace to fulfill any duty of due care to the plaintiffs—with respect to
A. TRICHLOROETHYLENE?  
Yes ___  No ___

B. TETRACHLOROETHYLENE?  
Yes ___  No ___

C. 1,2 TRANSDICHLOROETHYLENE?  
Yes ___  No ___

[Only answer with respect to a chemical as to which you answered “Yes” on question 1.]

4. If you have answered “Yes” to any part of question 3, what, according to a preponderance [sic] of the evidence, was the earliest time at which the substantial contribution referred to in question 3 was caused by the negligent conduct of this defendant—with respect to

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<td>A. TRICHLOROETHYLENE?</td>
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<td>C. 1,2 TRANSDICHLOROETHYLENE?</td>
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[If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write “ND” for Not Determined.]