



Sections 3-1701(d) and (e) provide that coverage and bad faith are to be heard in “an” action and by “the” trier of fact. Specifically, Section 13-1701(e) provides that “. . . [n]otwithstanding any other provision of law, if *the trier of fact in an action under this section* finds in favor of the insured *and finds* that the insurer failed to act in good faith, the insured may recover from the insurer . . . [actual and other damages].”(emphasis added). Plainly, “the” trier of fact in “an action” means one jury, not two; and an award of actual (and other damages) for bad faith can only follow from a finding of coverage *and* bad faith by that one trier of fact. No Maryland appellate case holds otherwise.<sup>1</sup>

The need for one trier of fact complicates Defendant’s request for bifurcation. Thus, if Plaintiff prevails on Counts I and II, the jury would have to return to court some months later to hear Count III, after discovery on Count III. While such arrangement is possible in theory, it hardly furthers convenience, as Rule 2-503(b) requires. And while Defendant posits some prejudice by having to defend Counts I, II, and III concurrently, Defendant does little to show why options less onerous than bifurcation, e.g., jury instructions and a special verdict sheet, would fail to ameliorate the prejudice.

Even if Section 3-1701 permits bifurcation with two juries, the overlap in Plaintiff’s three counts is too substantial (*see* Plaintiff’s Opposition at Pages 4-5) to conclude that bifurcation would further convenience. On the contrary, if Plaintiff prevails on Count II, bifurcation would mean that a second jury would hear much of the evidence already received by the first.

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<sup>1</sup> Defendant cites *David S. Brown Enterprises, Ltd., et al. v. Affiliated FM Ins. Co.*, Case No. 18-cv-0319-RDB (D. Md. April 30, 2018) for the proposition that bifurcation is permissible. Given that the parties agreed to bifurcation, the United States District Court did not detail whether the separate trials it ordered would occur before one jury or two, or otherwise address what Section 3-1701 requires.

Presumably, collateral estoppel might reduce some of this duplication, but identifying the factual issues to which collateral estoppel might apply is not straight forward either. Given these difficulties, the court is not convinced that bifurcation is appropriate.

Wherefore, for the foregoing reasons, it is this 5<sup>th</sup> day of June, 2019, by the Circuit Court for Montgomery County, Maryland hereby ordered that Defendant's Motion for Bifurcation be and is hereby DENIED.

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Anne K. Albright  
Judge  
Circuit Court for Montgomery County,  
Maryland