

# PUBLICATION

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## U.S. Court of Appeals Declares Tennessee Punitive Damages Cap Unconstitutional | Part 2: Breaking Down the Issues

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In Part 1 of our alert on a recent case decided by the U.S. Court of Appeals for the Sixth Circuit, we examined the facts of *Lindenberg v. Jackson Nat'l Life Ins. Co.* and noted the importance of the divided panel's holding that Tennessee's statutory cap on punitive damages violates the right to jury trial embodied in the Tennessee Constitution. In Part 2, we turn to a deeper analysis of the issues involved in the case, which have already led to an application for *en banc* review of the decision by the full 16-member Court.

### Tennessee's Statutory Punitive Damages Cap

Punitive damages are awarded not as compensation for a plaintiff's actual damages, but to punish and deter intentional, malicious, and fraudulent misconduct. Tennessee's cap on punitive damages, [Tennessee Code Annotated Section 29-39-104](#), was part of a tort reform bill passed by the Tennessee General Assembly in 2011. In its current form, with certain exceptions not relevant here, the statute caps punitive damages at two times the amount of compensatory damages awarded or \$500,000, whichever is greater.

The constitutionality of certain punitive damage awards has been addressed by both federal courts and, through review of state legislature enactments limiting or restricting punitive damages, state courts across the country. Tennessee's cap on compensatory damages, which raises similar issues to the punitive damages cap addressed in the *Lindenberg* case presently under consideration, is being challenged in a series of cases that have not yet found their way to the Tennessee Supreme Court. The primary legal challenges to the constitutionality of the caps are that they violate the Tennessee Constitution's right to jury trial "findings of fact" and/or that they violate the Tennessee Constitution's separation of powers provisions.

### Diversity Jurisdiction and "Certification" of Tennessee State Law Issues

The reason that the *Lindenberg* case was in federal court was because the plaintiff invoked the court's "diversity jurisdiction," applicable when the plaintiff and defendant are citizens of different states and the amount in controversy exceeds \$75,000. Cases brought in this fashion are governed by the "substantive" law – a term that can be tricky – of the state where the dispute arose and the "procedural" law of the federal court in which the case sits.

The parties in *Lindenberg* recognized that at least one of the issues raised after the trial by the defendant insurance company – whether the punitive damages claim should be capped – involved an "unsettled" issue of Tennessee state law. Under such circumstances, the court, acting on the request of one or more of the parties, or on its own, can "certify" specific legal issues to the state's highest court. The plaintiff asked the district court to certify the issue of whether the Tennessee Legislature could constitutionally cap punitive damages in the manner it did. The district court ultimately agreed to certify two questions to the Tennessee Supreme Court, both focusing on the constitutionality of the punitive damages cap.

Notably, the parties' briefing on certification did not address – and the district court did not certify – the separate question of the preclusive effect of Tennessee's bad faith statute on the availability of common law

punitive damages. The defendant had previously sought to dismiss the plaintiff's punitive damages claim on that ground, but the district court had denied the motion.

The Tennessee Supreme Court recognized that the two certified questions raised issues of first impression, which would ordinarily result in the court accepting the certification request. But, noting that the issue of the preclusive effect of the bad faith statute – itself an unresolved issue of state law – had not been certified, the Supreme Court declined the invitation to answer the questions submitted by the district court.

The Supreme Court's reasoning for not accepting the certification questions submitted by the federal district court judge appears in a brief order declining the certification request:

"It appears to this Court that it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages in this case in which the question of the availability of those damages in the first instance has not been and cannot be answered by this Court."

Although declining to answer the questions submitted by the district court, the Supreme Court signaled its willingness to consider "both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from the final judgment in this case."

The majority opinion in *Lindenberg* declined to address the reasons why the Tennessee Supreme Court would or would not accept a certification request. It simply noted that the certification request on the punitive damages cap had been denied, in an "unpublished" order, which was neither "binding or precedential."

### **Judge Larsen's Dissent**

Judge Larsen, the third panel member in the *Lindenberg* case, is a high-profile recent appointee to the Sixth Circuit. A former Michigan Supreme Court Justice, her name appeared on a "short list" of potential U.S. Supreme Court nominees released by the Trump campaign during the 2016 general election. Judge Larsen was appointed to the Sixth Circuit in November 2017. She dissented from the majority's holding on the punitive damages cap issue.

Judge Larsen believed that the majority erred by abrogating prior Sixth Circuit precedent, *Heil Co. v. Evanston Insurance Co.*, holding that Tennessee's bad faith statute precludes a claim for common law punitive damages. In her view, the *Heil* case was the controlling precedent for the court to follow if it chose to address the Tennessee law issue directly. That case, if considered good law, would have necessitated dismissal of the punitive damages claim.

On the most notable issue, concerning the constitutionality of the Tennessee Legislature's cap on punitive damages, Judge Larsen interpreted applicable federal law to require that – in order to invalidate the cap – the court find Tennessee's cap on punitive damages unconstitutional "beyond any reasonable doubt." Based on this standard of review, and her interpretation of the available historical evidence and case law, she concluded that "the majority ha[d] not carried its burden" on this issue.

Judge Larsen compared the majority's holding to analogous federal precedent upholding caps on damages in the context of an analysis of the U.S. Constitution's Seventh Amendment's right to jury trial, in the process expressing skepticism over whether Tennessee's constitutional right to jury trial is so different from the U.S. Constitution's jury trial right as to require a different result. She disagreed with the majority's view that procedural revisions or limitations in Tennessee on a jury's assessment of damages, such as damages "multipliers" and judge-"suggested" reductions in awards (remittiturs) on pain of ordering a new trial, are not themselves an indication of constitutional limits to the jury's right to assess damages as a "fact finding." She

questioned whether the majority had correctly resolved the issue of whether the right to have a jury consider punitive damages in a case such as this one existed in North Carolina at the time Tennessee adopted its own Constitution.

Judge Larsen also addressed, in detail, an important procedural issue that the parties had not identified or briefed: whether a proper application of federal court "choice of law" principles made Tennessee's statutory caps on punitive damages a "state law issue" at all. Judge Larsen believed a serious question existed as to whether this case should be resolved under federal law standards applicable to the Seventh Amendment right to jury trial, where the courts had previously applied state law caps to limit a federal court jury's award of punitive damages.

### Next Steps and Consequences

The defendant insurance company has petitioned the full appellate court for a rehearing "*en banc*." The Sixth Circuit, like most other federal courts of appeals, rarely grants such petitions, accepting only three in 2018. The applicable standard for such a review, set forth in the court's Internal Operating Rule 35, is that it is an "extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." Under the circumstances of this case, only the 16 active circuit judges would be eligible to vote on or participate in an *en banc* determination.

The applicable Internal Operating Rule also provides that "[a]lleged errors in the determination of state law or in the facts of the case ... or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*." This part of the Rule is likely to be relied upon by the plaintiff in opposing the petition for *en banc* review.

Despite this restrictive language, this case may well be one of those "exceptions to the rule" resulting in a review by the full court. The stark differences in judicial philosophy evident in the approaches taken in this case by the majority of the three-judge panel and the dissenting judge, and particularly the forcefulness and comprehensive nature of the analysis of the issues expressed in the dissent, increase the chances that the full court will want to weigh in on this case. Justification for the review could fall under the "precedent-setting error" of declining what Judge Larsen considered a clear "invitation" to certify a state law issue, whether the punitive damages caps issue is a "procedural" or "substantive" state law issue, or the part of the case addressing the propriety of both a punitive damages *and* a bad faith finding, which resulted in the majority of the panel essentially overruling a previous Sixth Circuit case on this subject.

One possibility is that the court will grant a rehearing *en banc* and then certify the state law issues to the Tennessee Supreme Court, as Judge Larsen believed the panel should have done originally. The issue would then be squarely within the purview of the state's highest court, which could still choose not to accept the certification, though the language of the order declining the certification request would make that unlikely. The Tennessee Supreme Court's acceptance of the certification would accelerate the timetable for a resolution of a key issue of tort reform that has not yet resulted in a decision by that court. If the full court grants an application for *en banc* review, the "choice of law" issue raised by Judge Larsen is another potential basis for setting aside the panel decision.

Whether or not the full Sixth Circuit roster of active judges reconsiders its opinion, the focus on this issue will likely turn to the state courts in Tennessee. The same reasoning that applies to the majority opinion in this case can be used to strike down the Tennessee Legislature's cap on compensatory damages in personal injury actions. State courts can and do essentially overrule contrary federal precedent purporting to interpret that state's laws. Given the stakes, litigants are likely to vigorously contest the propriety and amount of such

awards in the months ahead. We will stay tuned for additional developments as the federal and state court systems work through the thorny procedural and substantive issues presented in the *Lindenberg* decision.

For more information about the *Lindenberg* decision and its impact on litigation in Tennessee, please contact [Buck Wellford](#), [Buck Lewis](#), [Matt Mulqueen](#), or any of the members of Baker Donelson's [Litigation Group](#).