

PUBLICATION

Sixth Circuit Denies Petition to Rehear En Banc in *Lindenberg*

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In January 2019, we issued a client alert regarding *Lindenberg v. Jackson National Life Insurance Co. et al.* In that case, the U.S. Court of Appeals for the Sixth Circuit rendered a 2-1 split decision on the issues of whether Tennessee law allowed an award of punitive damages and whether Tennessee's caps on non-monetary compensatory and punitive damages are constitutional. The Sixth Circuit panel effectively overruled a decision from another panel of this Court, which declined to permit both punitive damages and damages for bad faith against an insurer based on its interpretation of controlling Tennessee law on that subject. It then held that caps imposed by the Tennessee legislature on punitive damage awards are not constitutional. The panel, also by a 2-1 vote, previously declined to certify these state law issues to the Tennessee Supreme Court, which had previously declined to certify the constitutional issue without an accompanying certification request on the issue of whether punitive damages were allowed in a bad faith action.

Counsel for Jackson National Life Insurance Company filed a petition for rehearing en banc. The full court ordered Lindenberg to file a response and also granted leave to the U.S. Chamber of Commerce to file an amicus brief.

On Friday, March 29, the Court entered an order denying the petition for rehearing en banc. The issue stirred some strong reactions amongst the 16 active duty judges on the Sixth Circuit. The separate opinions are unusual for an order denying en banc review.

The order denying rehearing is short and to the point, and it is accompanied by a separate opinion from Judge Eric L. Clay, who wrote the 2-1 panel decision. In his concurring opinion, Judge Clay begins by stating:

"It is incredulous that some of my colleagues would have this court establish rigid, mechanical, and unflinching criteria for certification to state courts in lieu of our established practice of trusting panels to exercise their experience, discretion, and best judgment to determine when certification is appropriate."

Judge Clay goes on to say that there are many factors that enter into the decision to ask for certification and that, "[t]hese multifarious considerations cannot be reduced to a checklist or simple mathematical formula, as my colleagues would have us believe." He then concludes that "...the mere fact that ceding our discretion would be easier, and perhaps even more expedient, is not an adequate reason for us to shirk our judicial obligations." The district court, Judge Clay noted, had already certified the constitutional questions involved in the case to the Tennessee Supreme Court. That Court, "after waiting approximately seven months," declined the certification request.

Judge John K. Bush dissented from the denial of rehearing en banc. In Judge Bush's judgment, "[t]his case presents an unusually strong set of reasons for certification to the Tennessee Supreme Court of State – Law questions. It also highlights the need for our circuit to clarify and define certification standards to address the constitutional federalism considerations that underlie *Erie Railroad Co. v. Thompkins*." Judge Bush observed that the U.S. Supreme Court has not announced concrete rules to govern lower federal courts in deciding whether to certify questions:

"This lack of direction creates the potential for intra-circuit conflict as to when certification is appropriate and reduces predictability. The lack of predictability convinces me that this circuit should have more concrete standards to guide its decision-making in these recurring situations; what is more, this was the ideal case in which to begin delineating those standards."

Judge Bush's analysis included a previous decision of the Sixth Circuit finding that punitive damages were unavailable on a claim for a bad faith breach of an insurance contract (*Heil Co. v. Evanston Ins. Co.*). A later Tennessee Court of Appeals decision, by contrast, held that punitive damages were available (see *Riad v. Erie Ins. Ex. Co.*). Judge Bush also observed that the Tennessee Supreme Court has made it clear that it views certification as a valuable mechanism for preserving the sovereignty of state courts (*Haley v. Univ. of Tenn. – Knoxville*). Judge Bush considered the Court's failure to grant en banc review a "missed opportunity" and stated that he would welcome review of the issue from the U.S. Supreme Court in order to provide guidance to the federal courts.

Judge John B. Nalbandian filed a separate dissenting "Statement," joined by three other circuit judges, in which he stated that the decision "marks a missed opportunity for our court to more firmly establish its commitment to a 'cooperative judicial federalism,'" citing *Arizonans for Official English v. Arizona*. He points out, however, that the panel's decision not to certify the questions of 1) whether there is a common law right of action for punitive damages, as well as a bad faith penalty against an insurance company, and 2) whether the damage caps are unconstitutional, does not preclude other courts from certifying the issue. In other words, Judge Nalbandian essentially invited another panel from the Sixth Circuit or any district court judge to certify the same questions to the Tennessee Supreme Court should they arise again. He concluded that:

"[f]ederal courts have a duty to properly decide questions of state law. It's a duty 'from which we may not shrink.' ... We are, after all, merely predictors of state law (*Stryker Corp. v. Excel Ins. Am.*). We speculate about how the state judiciary might answer these unsettled questions. But stare decisis does not turn unsettled questions of state law into settled ones. And federal courts must always be free to seek answers from the only judicial body capable of providing them."

En banc review generally requires a majority of votes from the full Court of Appeals active judges. In this case, although a majority voted against en banc review, a substantial minority voted in its favor. It is clear that Judge Bush would have liked to have seen the full Court use this case to establish clearer standards for the granting of en banc review. It is clear that Judge Clay was aggrieved that any of his colleagues thought that en banc review should have been granted based on the certification issue. Judge Nalbandian, as previously noted, practically encourages district judges to certify the same questions to the Tennessee Supreme Court.

The law was unsettled before *Lindenberg* was decided, and it remains unsettled now. As we indicated in our [first alert](#), the *Lindenberg* decision will be binding on district courts within the Sixth Circuit, but will not be binding authority – only persuasive authority – in the state courts of Tennessee. The Tennessee Attorney General's office and counsel for Jackson National have both advised us that they know of no cases presently in the Tennessee appellate courts that present these issues. If and when such cases reach the Tennessee Court of Appeals, the parties could file a motion pursuant to Tennessee Code Annotated Section 16-3-201(d) requesting that the Tennessee Supreme Court "reach down" and hear the case before the Court of Appeals acts so that the questions may be answered more expeditiously. In the alternative, as Judge Nalbandian reminds us, either a federal district court in Tennessee could certify the issues to the Tennessee Supreme Court, or the Sixth Circuit in a subsequent case could do so.

Until then, we are left with *Lindenberg* governing these issues in the federal courts in the Sixth Circuit and with state courts being free to follow *Lindenberg* or not, as those courts see fit. It will be important, of course, for

counsel to preserve these issues in the trial court, state or federal. Counsel with cases pending in district court should consider moving for certification just as Judge Nalbandian suggests.

Baker Donelson has several cases in state court in which the damage caps are arguably in play. We will be monitoring them closely and looking for the right opportunity to get these questions to the Tennessee Supreme Court. Until then, this uncertainty will affect pleadings, discovery, settlement discussions, jury trials, and post-verdict motion practice in all Tennessee courts. In cases that may be removed from state to federal court, the decision is a factor weighing in favor of a defendant remaining in state court, but this should be part of a careful analysis of other factors, including the profiles of the state court judge and jury pool in comparison to the federal venue. Counsel should also be mindful that the Tennessee Supreme Court may well have settled the law on this issue by the time a removed case goes to trial in federal court.

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