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Supreme Court of Ohio Considers Challenge to Tort Reform Damages Cap

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The Supreme Court of Ohio recently agreed to consider an appeal challenging the constitutionality of Ohio's statutory cap on noneconomic tort damages, Revised Code section 2315.18. Although the Court has previously upheld the statutory cap against such challenges, the Court's decision to revisit the issue could have major implications for defendants in Ohio products liability cases. The case is *Brandt v. Pompa*, No. 2021-0497.

The Ohio General Assembly passed the statutory cap in April of 2005 as part of a broader tort reform bill known as Senate Bill 80. The General Assembly's stated aim was to curb frivolous lawsuits' deleterious effect on the predictability of the civil justice system and on the Ohio economy broadly. Senate Bill 80 did this by imposing a cap on compensatory tort damages for noneconomic loss, such as "pain and suffering, loss of society, consortium, companionship, care, assistance[.]" and other forms of intangible loss. R.C. § 2315.18(A)(4). The cap does not apply to economic losses, nor noneconomic losses associated with certain injuries such as loss of use of limb or other serious and permanent physical injuries. R.C. § 2315.18(B).

The Supreme Court has considered two constitutional challenges to Senate Bill 80's damages cap: *Arbino v. Johnson & Johnson*, 116 Ohio St. 468, 2007-Ohio-6948, 880 N.E.2d 420, and *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St. 3d 307, 2016-Ohio-8118, 75 N.E.3d 122. *Arbino* was a products liability action where the plaintiff challenged the statutory cap on facial grounds—i.e. a challenge to the statute as a whole, under any circumstances. *Simpkins* involved claims of negligent hiring, retention, and supervision stemming from a church employee's sexual assault of a parishioner. In both cases, the plaintiffs argued the damages cap violated provisions of the Ohio Constitution protecting the right to trial by jury, open courts and a plaintiff's right to a remedy, due process, and equal protection of the laws. And in both cases, the Supreme Court of Ohio rejected the plaintiffs' arguments because 1) the jury still found the facts and the cap simply applied as a matter of law, 2) the capped amount of noneconomic damages still constituted a meaningful remedy, and 3) under a rational basis review the cap bore a

rational relationship to the State's goals of promoting the general public welfare and making the civil justice system more fair and predictable.

The *Brandt* case involves a minor victim of sexual abuse who sued her abuser for various torts and sought damages. The jury found for the plaintiff and, in relevant part, entered an award of \$20 million in noneconomic damages. On the defendant's motion, the trial court applied the statutory damages cap and reduced the \$20 million award to \$250,000. The plaintiff appealed and challenged the constitutionality of the damages cap as applied to her on the same grounds presented in *Simpkins*—that the cap 1) violated her right to a trial by jury because it altered the jury's finding that she had suffered a catastrophic injury; 2) deprived her of a meaningful remedy; and 3) deprived her of due process and the equal protection of the laws because, when reviewed under strict scrutiny, it impinged on fundamental rights and was not narrowly tailored to serve a compelling state interest. She also argued that *Arbino* should be overturned for the same reasons. But the Eighth District Court of Appeals, case number 109517 (March 18, 2021), relied on *Arbino* and *Simpkins* to unanimously reject the plaintiff's arguments.

The plaintiff asked the Supreme Court to accept jurisdiction on April 21, 2021. She advanced the same arguments as in the Eighth District and presented two propositions of law to the Supreme Court. First she argued that the damages cap was unconstitutional as applied to her because it violates her right to a trial by jury, right to a remedy, due process, and equal protection (Proposition 1). Second, she argued that *Arbino* was wrongly decided, should be overruled, and that the Court should find the damages cap to be facially unconstitutional (Proposition 2). On July 14, 2021 the Supreme Court of Ohio voted 4-3 to accept both propositions of law. Justices DeWine, Fischer, and Kennedy dissented. The plaintiff's merit brief is due October 5, 2021.

Although *Brandt* is not a products liability case, the Supreme Court's decision to accept the appeal and revisit the constitutionality of the damages cap could have profound implications for parties to products liability actions. A decision that the cap is unconstitutional as applied to the *Brandt* plaintiff could provide a roadmap for products liability plaintiffs to make the same argument and convince courts their noneconomic damages are substantial enough to avoid the statutory cap. And a decision to overrule *Arbino* and find the cap unconstitutional in all circumstances would affect every products liability case subject to Ohio law.

Vorys has deep products liability experience, both in Ohio and nationwide. Vorys will continue to monitor this case and will provide updates as warranted. Should you have questions about this or other products liability matters, please don't hesitate to contact your Vorys attorney.