



LINDENBERG, *Plaintiff-Appellee*,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY, *Defendant-Appellant*.

Nos. 17-6034/6079, Decided March 28, 2019

U.S. Court of Appeals for the Sixth Circuit

Introduction:

In *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018), the Sixth Circuit held that Tennessee common law permits courts to award punitive damages to a plaintiff who is suing an insurer for bad-faith refusal to pay on a policy. The court also ruled that the state statute that capped Lindenberg's punitive-damage award at \$500,000 violated the Tennessee Constitution's guarantee of a jury trial. The insurer petitioned the Sixth Circuit for rehearing *en banc*, which the court denied. Judge Bush's dissent from that denial argues that because Tennessee's highest court has not ruled definitively on either question of state law at issue in *Lindenberg*, the Sixth Circuit should have certified those issues to the state supreme court. The dissent explains the principles of constitutional federalism and judicial comity that underlie federal courts' certification of state-law issues to state courts and notes how federal-court guesswork can lead to detrimental forum shopping.

Opinion Digest:

JOHN K. BUSH, Circuit Judge, dissenting from the denial of rehearing *en banc*.

This 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. Tompkins*, 304 U.S. 64 (1938). I therefore respectfully dissent from the denial of rehearing.

To explain the reasons for my dissent, some history first is in order. The "judicial Power" of Article III extends to, among other categories, "Controversies ... between Citizens of different States" and between state citizens and foreign citizens or subjects. U.S. Const. art. III, § 2. A common Antifederalist criticism of the United States Constitution was that it granted too much power to federal courts at the expense of states generally and state judiciaries in particular. Responding to Antifederalist criticism, Federalists defended federal-court authority to hear such cases—what would be called diversity jurisdiction—as a way to give out-of-state or foreign litigants a fair shake in court. Federal courts were thought to have less bias than state courts in favor of in-state parties, and diversity jurisdiction was designed to address the perceived unfairness of state courts. Diversity jurisdiction did not violate federalism principles because it did not deputize federal courts to apply a different law than would have applied in the case had it been decided in state court.

This understanding underlay Section 34 of the Judiciary Act of 1789, enacted by the First Congress, which provided that "the laws of the several states, except where the [C]onstitution, treaties or statutes of the United

The Honorable John K. Bush was confirmed to the Sixth Circuit on July 20, 2017.

Judge Bush had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature.

States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.” Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (emphasis added).

In the *Erie* decision, the Supreme Court confirmed that “laws of the several states” includes the decisions of the state courts as well as enacted statutes and other sources of state law. *See Erie*, 304 U.S. at 78. This holding is derived from constitutional principles of federalism. *See id.* at 77–78. Therefore, under *Erie*, federal courts sitting in diversity must make an informed assessment of what state law is by looking to state courts’ decisions as well as to state statutes and state constitutions.

However, a federal judge’s assessment of state law “cannot escape being a forecast rather than a determination” if the state courts have not yet definitively resolved an issue. *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 499 (1941). A federal court might make an inaccurate forecast and later be proved wrong if the state supreme court decides the issue the other way.

Probably in response to the problem of inaccurate federal-court guesses, Florida in 1945 was the first state to enact a certification procedure, whereby the state high court could accept and decide questions of state law necessary to the decision of lawsuits pending in federal courts of appeal. The Supreme Court recognized the procedure for the first time in *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 212 (1960). Today, all of the states except North Carolina have certification procedures. ***

Because the Supreme Court has not announced concrete rules to govern lower federal courts in deciding whether to certify questions, those lower federal courts have had to make their own guidelines. Our circuit standards do nothing to narrow the discretion left to each district judge and Sixth Circuit panel. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (stating only that certification may be appropriate where a question of state law is “new” and “unsettled”). 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 decisionmaking in these recurring situations; what is more, this was the ideal case in which to begin delineating those standards. Specifically, we should seriously consider establishing a presumption in favor of certification where, as here, the state supreme court has not settled the issue; a prior published panel decision has addressed the issue but the current panel is inclined to disagree with the prior decision; and neither party objects to certification.

Sixth Circuit case law states that certification is appropriate if the question of state law is “new” and “unsettled,” but that case law unfortunately fails to provide guidance in a recurring set of cases. *Transamerica*, 50 F.3d at 372. Those are the cases in which the question may not be new in the sense that no court has addressed it, but a decision from a federal court has the foreseeable potential to create a different state-law rule than what the state supreme court would have produced.

This is such a case. A previous decision of this circuit held that punitive damages were unavailable on a claim for bad-faith breach of an insurance contract. *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012). A later Tennessee Court of Appeals decision, by contrast, held that punitive damages were available. *See Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 275–76 (Tenn. Ct. App. 2013). Finding that *Riad* had discredited *Heil*, the panel majority here departed from circuit precedent. *Lindenberg v. Jackson Nat’l Life Ins. Co.*, 912 F.3d 348, 357–59 (6th Cir. 2018). As a result, the panel majority reached a decision that is not opposed by any controlling Tennessee authority but that nonetheless presents a significant danger of being wrong, for reasons discussed thoroughly by the dissent. *See id.* at 372–76 (Larsen, J., dissenting in part). If and when the Tennessee Supreme Court reaches the issue, it may well hold that punitive damages are not available on a bad-faith claim. As to the state constitutional question, there is also substantial reason to doubt that the Tennessee Supreme Court will invalidate the punitive-damages cap under the Tennessee constitution. *See id.* at 379–86 (Larsen, J., dissenting in part); *see generally* Br. Amici Curiae Chamber of Commerce of the United States of America, American Tort

Reform Association, National Association of Manufacturers, National Federation of Independent Business, Small Business Legal Center, and American Property Casualty Insurance Association. In the meantime, plaintiffs who want punitive damages but seek to avoid the cap will be likely to file in federal district court.

This is exactly the sort of forum-shopping that the *Erie* decision was meant to reduce. *See Erie*, 304 U.S. at 74–75 (stating that federal courts’ application of a general common law “made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court” and “rendered impossible equal protection of the law”). ***

Indeed, dissenting from a Second Circuit panel’s decision to decide a state tort-law issue instead of certifying, Judge Guido Calabresi wrote:

[F]ederal courts ... have tended to be far too reluctant to certify questions to the state courts.... Specifically, federal courts have all too often refused to certify when they can rely on state lower court opinions to define state law. I view this reluctance as both wrong and unjust.

Reluctance to certify is wrong because it leads to precisely the kind of forum shopping that *Erie* ... was intended to prevent. *See Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8 ... (1965) (noting that one of the aims of the *Erie* decision was “discouragement of forum-shopping”). *This is especially so in situations where there is some law in the intermediate state courts, but no definitive holding by the state’s highest tribunal.*

When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity.... Federal courts that refuse to certify end up “mak[ing] important state policy, in contravention of basic federalism principles.” *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting)....

McCarthy v. Olin Corp., 119 F.3d 148, 157–59 (2d Cir. 1997) (Calabresi, J., dissenting) (emphasis added) (footnotes and some citations omitted).

Judge Frank Easterbrook of the Seventh Circuit sounded the same theme in his opinion for the en banc court in a tort case that raised unsettled state-law questions:

In a case such as [this tort case].... any substantial divergence between the federal court’s estimate of state law and the state’s view of its own law will funnel all similar litigation to federal court.... If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly[,] any departure in the [defendant’s] favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely *state law*.

Todd v. Societe BIC, S.A., 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (citation omitted). If Calabresi and Easterbrook—two prominent federal judges of sometimes differing perspectives—have voiced identical worries about incentivizing forum-shopping through reluctance to certify, we in the Sixth Circuit should consider taking a definite step toward remediating those worries. ***

[On] the constitutional question, it is unusual for the panel to have invalidated a state statute on state constitutional grounds. This decision is in tension, in two respects, with the approach that the Supreme Court of the United States and our court have counseled in similar cases.

First, the Supreme Court and our court have indicated that abstention or certification is appropriate where a decision on state law may allow the federal court to avoid a *federal* constitutional question. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976); *Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406, 410–11 (6th Cir. 2008). Because federalism concerns as well as avoidance concerns appear in a case like this one, where a *state* constitutional question lurks behind a predicate state-law question, certification seems doubly wise. *** Second, and relatedly, the Supreme Court has indicated that the possibility of making an *Erie* guess that results in invalidating a state law should be avoided where certification makes avoidance possible. *See Arizonans*, 520 U.S. at 79. ***

[A]ll factors seem to point toward certification here. But because our circuit has no guidelines for certification beyond suggesting that it is appropriate for novel and unsettled questions of state law, the panel could disregard the availability of the certification procedure.

To clarify our standards is the primary reason we should have granted rehearing in this case. The case is appropriate for en banc reconsideration in other ways as well, however. The Federal Rules of Appellate Procedure state that one ground for en banc rehearing is a split in circuit precedent. *See* Fed. R. App. P. 35(a)(1). We have that here. Furthermore, our circuit rules state that a panel decision may not be overruled except by the en banc court. 6th Cir. R. 32.1(b). The panel decision here not only departs from precedent but also creates a major risk of horizontal forum-shopping, in contravention of fundamental federalism principles. Thus, it involves an issue of great importance. *See* Fed. R. App. P. 35(a)(2) (providing for en banc rehearing in cases of “exceptional importance”).

In addition, to the extent our internal operating procedures counsel against rehearing solely state-law issues, *see* 6th Cir. I.O.P. 35(a), we would not be reconsidering such issues en banc here. As for the state-law issues, we would not be deciding them: we would simply be asking the state court to do that. *** But, in any event, if we had reheard this case en banc, we could have considered a very important *federal* question: what certification standard should apply in our circuit to implement the constitutional federalism principles articulated by *Erie* and its progeny.

In other words, we should have used this case to articulate more meaningful standards to guide certification decisions. At the very least, there should be a presumption in favor of certification where, as here, a state supreme court has not decided an issue; neither party objects to certification; and a prior precedential panel decision of this court stands between the current panel and the decision it wishes to reach on state law. *** There should likewise be a presumption in favor of certification where the panel is facing an unclear issue of state constitutional law. *See LeFrere*, 582 F.3d at 1268.

Such a presumption would not upend the way we currently decide cases in the Sixth Circuit. I am not advocating for certifying questions in a vast set of new situations or for requiring every panel to certify if a certain group of boxes is checked. However, I do think we should make it easier for litigants to predict when this court will certify questions and easier for the en banc court to determine whether a panel has made a grave error in deciding a question of unsettled state law itself instead of certifying.

In sum, we have missed an opportunity to address a significant issue that is likely to recur. Assuming the Supreme Court provides no further guidance (but perhaps it will, which I would welcome), the burden falls on each circuit to define standards for certifying questions, and at some point we should examine our standards more carefully. Otherwise, we risk validating the prediction of the Antifederalists: that an encroaching federal judiciary would use federal judicial power to diminish the power of state judiciaries. To minimize the risk of unnecessary interference with the autonomy and independence of the states, we should more frequently accept state courts’ open invitations to pose to them certified questions regarding their own law.