

## NEWSLETTERS

# The Catastrophic Loss Exception To Ohio's Noneconomic Damages Cap Continues To Evolve Slowly

September 25, 2014 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

Note: This article appears in the Fall 2014 edition of Barnes & Thornburg LLP's *Toxic Tort Practice Update* e-newsletter.

Caps on noneconomic and punitive damages were a key element of Ohio's seminal tort reform legislation passed in 2005 and held constitutional by the Ohio Supreme Court in 2007. The legislation caps damages for noneconomic losses in a tort action to the greater of: (1) \$250,000; or (2) an amount that is equal to three times the economic loss, as determined by the trier of fact, up to a maximum of \$350,000 per plaintiff or \$500,000 for each occurrence that is the basis of the tort action. Ohio Revised Code Section 2315.18(B)(2).

There is an exception, however. The cap on noneconomic losses is inapplicable when the plaintiff has suffered a catastrophic loss. Ohio Revised Code Section 2315.18(B)(3). Two categories of eligible catastrophic losses are listed in the statute: (a) "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system"; and (b) "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities." *Id.*

The statute's catastrophic loss exception, while critical, has evolved relatively slowly in the courts. Few Ohio courts have addressed the exception since the statute became law in 2005. A pro-defense July 2014 decision from the U.S. District Court for the Southern District of Ohio in *Sheffer v. Novartis Pharmaceuticals*, Case No. 3:12-cv-238 [Doc. 108] (S.D. Ohio, July 15, 2014), continues this gradual development.

In *Sheffer*, the plaintiff raised product liability claims against Novartis Pharmaceuticals claiming that her use of the defendant's prescription drug Zometa caused her to develop osteonecrosis of the jaw, which ultimately caused her jaw to break. During her lawsuit, she testified that the bone had fused but would "never be perfect," and that she still experienced significant jaw pain. She also testified that the injuries to her jaw permanently impaired her ability to care for herself. She indicated that she avoids raw vegetables and other hard, crunchy, or very chewy foods. She conceded, however, that she can chew meat and can generally bathe and dress herself, cook, care for her house, and care for several grandsons, chickens and horses.

In light of this testimony, Novartis filed a motion for summary judgment arguing that plaintiff's recovery of noneconomic damages should be capped by the limits set forth in Ohio Revised Code Section 2315.18(B)(2) and that the catastrophic loss exceptions do not apply as a

## RELATED PRACTICE AREAS

Toxic Substances and Other Torts

matter of law. Plaintiff responded that these issues should not be decided by the Court prior to trial but should be presented to the jury for a determination as to whether one or more of the exceptions apply. She cited *Bransteter v. Moore*, No. 3:09-cv-2, 2009 WL 152317 (N.D. Ohio, Jan. 21, 2009), in which the court held that a surgical scar could constitute a deformity and wanted to decide the matter after hearing trial testimony, and *Ohle v. DJO*, No. 1:09-cv-2794, 2012 WL 4505846 (N.D. Ohio, Sept. 28, 2012), in which the court (somewhat remarkably it seems) similarly held that the question of whether problems resulting from shoulder surgery were a deformity should be determined by the jury.

The *Sheffer* Court noted, however, that Section 2315.18(E)(2) expressly allowed these issues to be determined by the court on summary judgment, relying upon two recent Ohio federal court decisions where summary judgment was granted – one finding as a matter of law that the loss of vision in one eye did not constitute a deformity (*Williams v. Bausch & Lomb Co.*, 2010 WL 2521753 (S.D. Ohio June 22, 2010)) and another holding that a relatively modest surgical scar and spinal decompression did not constitute a deformity (*Weldon v. Presley*, 2011 WL 3749469 (N.D. Ohio Aug. 9, 2011)). Applying these cases to plaintiff's testimony, the Court granted defendant's motion for summary judgment and held that the noneconomic damages limits applied to Plaintiff because Plaintiff was not, as a matter of law, entitled to any of the catastrophic loss exceptions.

The permanent injury exception seems likely to get more thorough treatment from the Ohio Supreme Court at some point. For now, we have just a few unreported and very fact-specific decisions on the scope of the exception. Some of the cases seem more generous to plaintiffs than the General Assembly likely intended in the legislation, others are more promising in taking the critical step of enforcing the noneconomic damages cap at a pre-trial stage. Thorough discovery on the scope of a plaintiff's life activities to elicit testimony such as Ms. Sheffer's on her current condition and activities remains the most effective defense strategy.

For more information about this topic and the issues in this article, please contact Adrienne Pietropaolo in our Columbus office at (614) 628-1404 or at [apietropaolo@btlaw.com](mailto:apietropaolo@btlaw.com).

*©2014 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg.*

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*

Follow us on Twitter [@BTLawNews](https://twitter.com/BTLawNews).