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## The Effect of Kansas Tort Reform on Tomorrow's Asbestos Litigants: Robbing Peter to Pay Paul

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### INTRODUCTION

The ticking time bomb that takes the form of some types of asbestos-induced disease will soon combine with an undesirable aspect of Kansas tort reform to frustrate justice in Kansas courtrooms. When deciding whether to award punitive damages, Kansas courts must consider:

[T]he total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.<sup>1</sup>

Most, if not all, asbestos defendants have been subjected to either compensatory, exemplary, or punitive damage awards. Future Kansas plaintiffs who suffer from delayed onset asbestos-related injuries are therefore guaranteed to receive less in punitive damage awards than would have been possible in prior years.

This fairly recent addition to Kansas tort law<sup>2</sup> is not unique to Kansas plaintiffs. In a recent asbestos case, *Owens-Corning Fiberglas Corp. v. Malone*,<sup>3</sup> the petitioner sought to mitigate punitive damages with evidence of prior punitive damage awards. Petitioner claimed that, because it had already been punished for the relevant acts through prior judicial action, further punishment would not serve the purpose behind punitive damage awards.<sup>4</sup> The Texas Supreme Court defined the purpose by stating:

Punitive damages are not designed or intended to compensate or enrich

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1. KAN. STAT. ANN. § 60-3701(b)(7) (1994).

2. Kansas Statutes Annotated section 60-3701 went into effect July 1, 1987.

3. 972 S.W.2d 35 (Tex. 1998).

4. *Id.* at 38-39.

individual victims. Instead, the purpose of punitive damages is to punish a party for its "outrageous, malicious, or otherwise morally culpable conduct" and to deter it and others from committing the same or similar acts in the future.<sup>5</sup>

Previously, courts had awarded \$51,710,200 in punitive damage judgments against the petitioner; however, petitioner had paid only \$3,000,000.<sup>6</sup> The court agreed with the petitioner, holding "that evidence . . . about any settlement amounts for punitive damages or prior punitive damages awards that the defendant has actually paid for the same course of conduct is admissible when the defendant offers it in mitigation of punitive damages."<sup>7</sup>

This essay addresses the potential impact of mitigation of punitive damages with evidence of prior punitive damage awards. Part I addresses the issue in the context of asbestos litigation, and how such litigation is likely to become more pervasive in the very near future. Part II considers how other jurisdictions have dealt with mitigation in asbestos cases. Part III addresses how Kansas courts are likely to interpret section 60-3701 of the Kansas Statutes Annotated while offering possible trial strategies that may be employed by plaintiffs' attorneys to minimize the detrimental impact mitigation will have on future punitive damage awards. At the article's conclusion, it is the author's belief that section 60-3701(b)(7) should not interfere with the dispensing of justice in Kansas courtrooms. In fact, if dealt with properly, the statute may actually enhance certain recoveries.

## I. ASBESTOS LITIGATION AND WHAT TO EXPECT IN THE NEAR FUTURE

### A. *Brief History of Asbestos Litigation Throughout the United States*

[T]he health hazards of asbestos exposure were generally not recognized until this century. In 1898, pulmonary scarring and eventual death from respiratory failure was observed in asbestos workers from French and English asbestos textile mills. However, the cause of the pulmonary fibrosis remained uncertain, because tuberculosis and other respiratory infections were often epidemic among poor laborers. In 1930, the causal association between asbestos and asbestosis was firmly established by

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5. *Id.* at 39-40 (citation omitted). *See also* *Mohr v. State Bank of Stanley*, 734 P.2d 1071, 1082 (Kan. 1987) ("Punitive damages are awarded not because of any special merit in the injured party's case, but are imposed to punish the wrongdoer because of the grossness of his or her conduct, the purpose being to restrain and deter others from the commission of like wrongs."); *Moore v. State Bank of Burden*, 729 P.2d 1205, 1212 (Kan. 1986) ("[P]unitive damages are imposed to punish a wrongdoer for malicious, vindictive, or willful and wanton invasion of the plaintiff's rights, with the purpose being to restrain and deter others from the commission of like wrongs."); *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1061 (Kan. 1984) (explaining that the purpose of punitive damages is to deter).

6. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 39 (Tex. 1998).

7. *Id.*

Merewether and Price at the London Chest Hospital. After limits were set on allowable industrial levels of asbestos exposure in England, many thought the asbestos problem had been solved. However, case reports of lung cancer in patients with asbestosis appeared as early as 1935.<sup>8</sup>

Thus, manufacturers of asbestos products were aware of the danger posed by asbestos-based products as early as 1935.<sup>9</sup> As a result of this knowledge, most (if not all) asbestos manufacturers that continued to manufacture asbestos after 1935 have been embroiled in asbestos litigation for much of the past three decades.

Owens-Corning Fiberglas (OCF) was a major supplier of asbestos-based insulation products from 1953 to 1972.<sup>10</sup> Its experience with asbestos litigation reveals the phenomenal cost of marketing clearly dangerous products.<sup>11</sup> The primary asbestos product OCF manufactured and sold was Kaylo.<sup>12</sup> "The total revenues generated by the sale of Kaylo during this period were approximately \$142.7 million; net profit on Kaylo is variously estimated to have been between approximately one and 5.5 percent, or between \$1.4 million and \$7.8 million."<sup>13</sup> OCF's fairly modest reliance on asbestos revenues has resulted in huge legal liability for asbestos-related injuries:

Asbestos-related personal injury litigation against [OCF] has been ongoing against OCF for a number of years; nearly two hundred thousand primary claims have been filed. The cost of these claims is enormous: OCF and its insurers have already paid out approximately \$1.4 billion in asbestos personal injury claims; OCF has exhausted the \$400 million remaining in its insurance coverage in 1994, and expects to pay nearly \$1 billion of its present and future earnings in order to resolve the claims which will be filed by the end of 1999. Thus, the total to be paid by OCF by the end of this century in compensatory damage awards and settlements is estimated at \$2.8 billion, \$1 billion of which represents uninsured payments.<sup>14</sup>

Thus, uninsured payments represent approximately seven times the total revenue generated by Kaylo sales and at least 128 times estimated net profits of the product.<sup>15</sup> Further, "OCF has already had more than \$55.5 million in punitive damages awarded against it, and has to date paid out approximately \$3 million of these damages."<sup>16</sup>

Moreover, because of the size of other asbestos-related judgments, at least fifteen defendant corporations have been forced into bank-

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8. Karen H. Antman et al., *Benign and Malignant Mesothelioma*, in 2 *CANCER: PRINCIPLES & PRACTICES OF ONCOLOGY* 1489, 1489 (4th ed. 1993).

9. *See id.*

10. *See In re Asbestos Litigation Pusey Trial Group*, Civ. A. Nos. 90C-03-18, 90C-07-101, 86C-09-57, 1994 WL 553234 at \*3 (Del. Super. Ct. Sept. 19, 1994).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

ruptcy.<sup>17</sup> Clearly, asbestos litigation has taken a toll on the industry. What, however, has transpired to date is merely the first wave.

*B. The Next Wave of Asbestos-related Litigation Will Come in the Form of Malignant Mesothelioma*

“Malignant mesothelioma is a highly lethal neoplasm with median survival times [under] 12 months from initiation of therapy.”<sup>18</sup> Two epidemiological aspects of malignant mesothelioma, caused by asbestos exposure,<sup>19</sup> ensure that plaintiffs inflicted with the disease will flood the courts with personal injury claims in the very near future. First, “the time from exposure to the development of mesothelioma is long, usually 3 to 4 decades in most reported studies.”<sup>20</sup> Second, “[o]ccupations with highest risk appear to be insulators, asbestos producers and manufacturers, and the heating and construction tradespeople. The projected lifetime risk among these workers exposed from early adulthood is as high as 20%.”<sup>21</sup> Moreover,

[t]he annual incidence of malignant mesothelioma in the United States is approximately 2200 cases or about 12.1 per million white men, and the rate appears to be increasing. Asbestos is the predominate cause of pleural, peritoneal, and probably epididymal mesothelioma in humans. As many as 8 million living persons in the United States have been occupationally exposed to asbestos over the last 50 years during mining and milling of asbestos and diverse manufacturing processes that use the material.<sup>22</sup>

Therefore, the potential for extended time periods between exposure and manifestation of the disease, the high risk of future disease in some groups, and the substantial numbers predicted to develop mesothelioma ensure that asbestos litigation is not going away.<sup>23</sup>

17. *Id.* at \*2, n.5. “Asbestos manufacturers and suppliers which have filed for federal bankruptcy protection include the following: Johns-Manville Corporation, Eagle-Picher Industries, Celotex Corporation, Carey Canada, Raymark, H.K. Porter, Inc., Amatex, Forty-Eight Insulations, Huxley, Nicolet, Pacor, Standard Insulations, Unarco, Wallace & Gale, and Delaware Insulation.” *Id.* (citations omitted).

18. Dean Bajorin et al., *Phase II Trial of Mitomycin in Malignant Mesothelioma*, 71 *CANCER TREAT. REP.* 857, 857 (1987).

19. See generally J. Riback and I.J. Selikoff, *Survival of Asbestos Insulation Workers with Mesothelioma*, 10 *BR. J. IND. MED.* 732 (1992).

20. Antman et al., *supra* note 8, at 1490. “Clinicians considering the diagnosis of malignant mesothelioma should take a detailed exposure history, emphasizing the period between 20 and 50 years before diagnosis and including possible household contact exposure.” *Id.* at 1491 (emphasis added).

21. *Id.* at 1491.

22. *Id.* at 1489 (citations omitted).

23. The mean latency period for mesothelioma is 30 to 40 years between first exposure and diagnosis, therefore, the incidence of the disease will likely continue to increase well into the next century. Dorothy Bonn, *Asbestos: The Legacy Lives On*, 353 *THE LANCET* 1336 (1999).

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## II. MITIGATION OF DAMAGES WITH EVIDENCE OF PRIOR AWARDS IN ASBESTOS LITIGATION

The first wave of asbestos litigation did not flood Kansas courts as it did in many other jurisdictions. Hence, it is appropriate to review how other states have dealt with punitive damage awards in asbestos cases and, consequently, mitigation of punitive damages with evidence of prior punitive damage awards. First, courts are in agreement on the purpose of punitive damage awards in the context of asbestos litigation: "The punitive damage award, and in particular the amount of such an award, affords a jury the unique opportunity to express the community's outrage at the particular conduct being penalized."<sup>24</sup> Thus, the public policy behind punitive damage awards demands that asbestos defendants pay for "conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others."<sup>25</sup>

Although punitive damages fulfill a valuable public policy, at least in the context of mass tort injuries, some perceive them as posing a threat, rather than benefiting, the public. Those opposing punitive damages warn

of the likelihood of "overkill" brought about by multiple punitive damage awards against a single defendant for the same course of conduct . . . [I]n the context of asbestos litigation, the interests of punishment and deterrence are not advanced by the continued imposition of punitive damages. It contends that multiple awards of exemplary damages will lead to asset depletion threatening the solvency of corporations, and, ultimately, will result in the unavailability of even compensatory damages for future claimants.<sup>26</sup>

Consequently, many jurisdictions now mitigate punitive damages with evidence of prior punitive damage awards. The Florida Court of Appeals held that, although "punitive damages are appropriate in asbestos litigation, . . . [prior punitive damages are] an issue of mitigation to be considered by the trier of fact."<sup>27</sup> Moreover, "it is appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future."<sup>28</sup>

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24. *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1054 (D.N.J. 1989).

25. *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994).

26. *Id.* at 504.

27. *United States Mineral Prod. Co. v. Waters*, 610 So. 2d 20, 22 (Fla. Dist. Ct. App. 1992) (per curiam). In Kansas, the court, not the trier of fact, mitigates punitive damages with evidence of prior punitive awards. See KAN. STAT. ANN. § 60-3701(b)(7) (1994).

28. *Pickering v. Owens-Corning Fiberglas Corp.*, 638 N.E.2d 1127, 1142 (Ill. App. Ct. 1994). See also *Stevens v. Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525, 535 (Cal. Ct. App. 1996) ("Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards also may be considered, although it is entitled to considerably less weight.").

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### III. DEALING WITH THE MITIGATION ISSUE IN KANSAS

In *McDermott v. Kansas Public Service Co.*,<sup>29</sup> the Kansas Supreme Court held that “[p]unitive damages are allowed not because of any special merit in the injured party’s case, but are imposed to punish the wrongdoer for malicious, vindictive or willful and wanton invasion of the injured party’s rights, the purpose being to restrain and deter others from the commission of like wrongs.”<sup>30</sup> Thus, the public policy behind punitive damages in Kansas is to punish heinous conduct, which is identical to the public policy in the aforementioned jurisdictions.<sup>31</sup>

Unlike most jurisdictions, however, Kansas courts are not forced to mold and shape common law to meet the aforesaid public policy. Instead, the Kansas Legislature enacted section 60-3701 to establish a consistent formula to deal with punitive damage awards. The statute identifies the process Kansas courts must follow when assessing punitive damages.

First, the plaintiff must prove that the defendant’s behavior warrants the imposition of punitive damages. As one court explains:

A finding of wanton, willful, fraudulent or malicious conduct is a prerequisite to an award of punitive damages under Kansas law and must be proved by clear and convincing evidence. On the spectrum of culpability, wanton behavior falls between mere negligence and willful misconduct, and is found when the wrongdoer realizes the imminence<sup>32</sup> of danger and recklessly disregards or is indifferent to the consequences.

Hence, in the context of asbestos litigation, punitive damages are justified when, subsequent to its awareness of the dangers of asbestos exposure,<sup>33</sup> a defendant recklessly disregarded or was indifferent to the consequences of continued exposure.

Second, the court must determine if the statutory cap provided for under sections 60-3701(e)(1) and (2) applies.

The Kansas statute provides that no punitive damage award shall exceed the lesser of the defendant’s annual gross income (or one half of the defendant’s net worth if the defendant’s annual gross income is determined to be a clearly inadequate penalty) or \$5,000,000. The defendant’s annual gross income is the defendant’s highest gross annual income earned for any one of the five<sup>34</sup> years immediately before the act for which such damages are awarded.

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29. 712 P.2d 1199 (Kan. 1986).

30. *Id.* at 1201 (quoting *Wooderson v. Ortho Pharm. Corp.*, 681 P.2d 1038, 1061 (Kan. 1984)). See also *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1239 (Kan. 1987) (quoting *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199 (Kan. 1986)).

31. See *Mitigation of Damages with Evidence of Prior Awards in Asbestos Litigation*, *supra* PART II.

32. *Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir. 1996) (citations omitted). See also *Harnett v. Parris*, 925 F. Supp. 1496, 1505 (D. Kan. 1996) (“[p]unitive damages are available ‘only if the defendant has acted in a sufficiently egregious manner’”) (quoting *Clark v. Associates Commercial Corp.*, 870 F. Supp. 1011, 1014 (D. Kan. 1994)).

33. See *Antman et al.*, *supra* note 8, at 1489.

34. *Scheufler v. General Host Corp.*, 915 F. Supp. 236, 240 (D. Kan. 1995) (citations omitted).

If, therefore, the defendant's annual gross income (or one half of the defendant's net worth) exceeds \$5,000,000, the statutory cap of \$5,000,000 applies.<sup>35</sup>

Finally, the court considers seven factors in determining the amount of punitive damages to be awarded. These factors include:

- (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) the degree of the defendant's awareness of that likelihood;
- (3) the profitability of the defendant's misconduct;
- (4) the duration of the misconduct and any intentional concealment of it;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct;
- (6) the financial condition of the defendant; and
- (7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.<sup>36</sup>

A cursory review of the above factors could elicit feelings that, if anything, Kansas courts are less likely than other jurisdictions to award multiple punitive damage awards. A more thorough reading of section 60-3701(b), however, reveals that the statute merely dictates that "the court *may* consider"<sup>37</sup> the factors contained therein.<sup>38</sup> Additionally, even though the list of factors appears complete, "[t]his list is not exclusive."<sup>39</sup> Hence, a Kansas court need not limit its analysis to the factors contained in section 60-3701(b).<sup>40</sup> Subsequent to such consideration, a court may award punitive damages based on other factors, even though such an award may conflict with the weight of statutory considerations.<sup>41</sup>

Although defendants facing multiple punitive damage awards will invariably draw a court's attention to section 60-3701(b)(7), the "statute does not prohibit multiple punitive damage awards for the same misconduct, and does not require one court to ignore relevant factors when they have been considered in a previous case."<sup>42</sup> The inclusion of past

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35. *Id.*

36. KAN. STAT. ANN. § 60-3701(b)(1)-(7) (1994).

37. KAN. STAT. ANN. § 60-3701(b) (emphasis added).

38. Nevertheless, Kansas courts consistently apply these factors in determining the amount of punitive damages to award. *See, e.g., Gillespie v. Seymour*, 877 P.2d 409 (Kan. 1994). *See generally* Paul W. Rebein, *A Primer on Punitive Damages in Kansas*, 64 J. KAN. B. ASS'N 22 (1995).

39. *Scheufler*, 915 F. Supp. at 241 (citations omitted). *See also* *Citizens State Bank v. Shearson Lehman Bros.*, 874 F. Supp. 307, 310 (D. Kan. 1994) ("[I]t does bear noting that the statutory language which sets out those factors is precatory and not mandatory in nature. The Kansas Legislature has suggested that certain criteria be reviewed by indicating that the court at the punitive damage proceeding "may" consider those enumerated factors. *This court and others have determined that these considerations are not exclusive.*") (emphasis added).

40. *See* *Smith v. Printup*, 938 P.2d 1261, 1272 (Kan. 1997).

41. *Id.*

42. *Scheufler*, 915 F. Supp. at 241 (citing *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199

damage awards as a factor in determining the deterrent effect of possible present awards<sup>43</sup> does not prevent a court from either discarding evidence of prior punitive damage awards or awarding multiple punitive damage judgments for the same wanton behavior so long as "the decision was made with the statutory provisions in mind."<sup>44</sup> In sum, the key to any successful argument in favor of subsequent awards will be to minimize the impact of section 60-3701(b)(7) on the court's deliberations. It is apparent, therefore, that future asbestos claimants are not barred from receiving punitive damage awards merely because punitive damage awards were already levied against the defendant for the same conduct.

Moreover, section 60-3701(b)(7) requires courts to consider "compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or *may be subjected*."<sup>45</sup> By requiring courts to "carve out" punitive damages to which a defendant "may be subjected,"<sup>46</sup> section 60-3701(b)(7) functions to protect future interests in punitive damages.<sup>47</sup> Absent future litigants' success in accessing these funds, defendants will not pay the full price for their irresponsible behavior. Asbestos litigants should therefore be able to tap into these preserved damages to ensure that the entire punishment, in the form of prior awarded and future deferred punitive awards, is meted out against all defendants. To do otherwise would result in defendants avoiding the deferred portion of prior punitive judgments whereby justice would not be fully served.

Finally, "the vast majority of state and federal courts 'that have addressed the issue have declined to strike punitive damages merely because they constituted repetitive punishment for the same conduct.'"<sup>48</sup> Moreover, totally precluding future plaintiffs from recovering punitive damages because prior awards were adequate punishment is contrary to statewide public policy:

The solution to the problem which is most often suggested is the so-called "one-bite" or "first comer" theory of punitive damages whereby, in successive litigation arising from a continuing episode, the award of exemplary damages to one plaintiff would preclude the recovery of punitive damages for all subsequent plaintiffs. *This approach has been uniformly*

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(Kan. 1986)).

43. KAN. STAT. ANN. § 60-3701(b)(7) (1994).

44. *Smith*, 938 P.2d at 1272. See also *Citizens State Bank*, 874 F. Supp. at 311-13 (analyzing the seven factors and applying to instant facts); *Patton v. TIC United Corp.*, 859 F. Supp. 509, 513-15 (D. Kan. 1994) (analyzing the seven factors and applying to instant facts).

45. KAN. STAT. ANN. § 60-3701(b)(7) (emphasis added).

46. *Id.*

47. See *supra* note 24.

48. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865 (Iowa 1994) (quoting *Dunn v. Hovic*, 1 F.3d 1371, 1385-86 (3d Cir. 1993)).

*rejected.*<sup>49</sup>

Hence, all plaintiffs are entitled to a portion of punitive damages as long as the requirements of section 60-3701 are satisfied, regardless of whether such judgments have been awarded against the defendant in prior actions.

#### CONCLUSION

American courts have been bombarded with asbestos-related injury cases over the past three decades. Kansas courts have not seen the end of asbestos litigation. The Kansas bar must therefore prepare for the onslaught that is sure to follow. Principle among their considerations is mitigation of punitive damages with evidence of prior punitive damage awards. Under section 60-3701(b), defendants may mitigate future punitive damages with evidence of prior punitive damage awards. However, public policy (justice?) demands that plaintiffs retain the ability to tap into the “carved out” punitive awards to which they are entitled. Proper application of section 60-3701(b) and public policy arguments will ensure that future asbestos litigants will gain access to defendants’ assets which were preserved for them in prior judicial proceedings. Defendants will therefore be forced to pay the full price of their irresponsible behavior.

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49. *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994) (emphasis added).