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CASENOTE

Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages In Toxic Tort Litigation

David Lafferty

I. Introduction

Punitive damages are awarded against a defendant whose tortious conduct has been proved to be outrageous.¹ Unlike compensatory damages, punitive damages are imposed to punish the defendant for wrongful conduct and to deter similar conduct by the defendant and others in the future.² "Awards for punitive damages have long been the subject of considerable debate and controversy."³ Although their continued existence is criticized as contributing to the civil liability crisis,⁴ supporters of punitive damages contend that they often provide the necessary incentive for injured parties to seek justice.⁵ However, claims for punitive damages in the

1. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

2. *Id.* § 908(1) & comment a.

3. *An Overview of Punitive Damages in Toxic Tort Litigation*, 3 *Toxics L. Rep.* (BNA) 650 (Oct. 19, 1988).

4. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 *VA. L. REV.* 139 (1986).

5. *See, e.g., Leonen v. Johns-Manville Corp.*, 717 *F. Supp.* 272, 284 (D.N.J. 1989).

toxic tort context present courts with additional problems, since their effects can be devastating.⁶

Toxic tort defendants, typically facing numerous punitive damage claims based on a single wrong,⁷ have begun to raise constitutional objections to repetitive punitive damage liability. In *Juzwin v. Amtorg Trading Corp.*,⁸ the federal district court for New Jersey held that the imposition of multiple punitive damages violated the defendants' due process rights under the fourteenth amendment to the United States Constitution.⁹ However, the *Juzwin* court considered itself powerless to shape an adequate remedy and, therefore, the repetitive assessment of punitive damages was permitted despite the violation of the defendants' due process rights.¹⁰ This note will review the court's decision, the barriers that prevented the court from enforcing its conclusion, the court's proposal for legislative reform, and the decision's significance with regard to mass toxic tort litigation.

The *Leonen* court noted that the availability of punitive damages is an incentive to both the injured plaintiff and the manufacturer defendant. For the plaintiff, punitive damages often recoup the "skyrocketing" cost of litigation, and thereby encourage injured parties to sue when compensatory damages for the harm would be offset by attorney's fees and costs. With respect to manufacturers, the existence of punitive damages prevents a manufacturer from marketing a dangerous product when a cost-benefit analysis using compensatory awards only would otherwise permit the product to be marketed. *Id.*

6. *An Overview of Punitive Damages in Toxic Tort Litigation*, 3 *Toxics L. Rep.* (BNA) 650 (Oct. 19, 1988).

7. One large asbestos company, Raymark Industries, had 41,000 cases pending against it as of 1988 stemming from Raymark's production, sale and distribution of asbestos-containing products. *Raytech Corp. Seeks Bankruptcy Protection To Resolve Successor Liability Issues*, 3 *Toxics L. Rep.* (BNA) 1,387 (April 5, 1989).

8. 718 F. Supp. 1233 (D.N.J. 1989)[hereinafter *Juzwin II*], *vacating* 705 F. Supp. 1053 (D.N.J. 1989)[hereinafter *Juzwin I*].

9. *Juzwin II*, 718 F. Supp. at 1236; U.S. CONST. amend. XIV, § 1 provides "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens for the United States; nor shall any State deprive any person of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the equal protection of the laws" [emphasis added].

10. *Juzwin II*, 718 F. Supp. at 1236.

II. Background

A. *The Asbestos Problem*

Asbestos is a mined fibrous mineral which is resistant to fire, heat, and corrosion.¹¹ It has been used as an insulation product in millions of buildings in the United States and in hundreds of millions of automobiles.¹² As an insulant and fire retardant, asbestos performed almost flawlessly.¹³ However, by the middle of the twentieth century, asbestos industry leaders became aware of the link between their product and certain lung diseases, including cancer.¹⁴ Despite this awareness, top industry executives chose not to warn the public of these dangers.¹⁵ One estimate is that since 1941, twenty-one million workers in the United States have been exposed to dangerous levels of asbestos.¹⁶ Latency periods, the time between exposure to asbestos and manifestation of an asbestos-related disease,¹⁷ vary from fifteen to forty years.¹⁸ By the end of 1987, more than twenty thousand asbestos-related suits were pending in federal courts,¹⁹ and at least that many were pending in state courts.²⁰ Estimates indicate that there could be as many as two hundred thousand additional asbestos claims filed by the year 2015.²¹

Almost all asbestos plaintiffs seek punitive damages.²²

11. J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM, & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (RAND Institute for Civil Justice 1984) at 3 [hereinafter ASBESTOS COMPENSATION].

12. *Id.*

13. T. WILLGING, TRENDS IN ASBESTOS LITIGATION 7 (1987).

14. ASBESTOS COMPENSATION, *supra* note 11, at 3.

15. See P. BRODEUR, OUTRAGEOUS CONDUCT: THE ASBESTOS INDUSTRY ON TRIAL ch. 4 (1985). Pretrial discovery during several major asbestos cases in the 1970's produced documents showing that some asbestos manufacturers knew of the dangers of exposure to their products at least as early as the 1930's. *Id.*

16. ASBESTOS COMPENSATION, *supra* note 11, at 9.

17. Selikoff, *Asbestos Disease in the United States, TOXIC TORTS: TORT ACTIONS FOR CANCER AND LUNG DISEASE DUE TO ENVIRONMENTAL POLLUTION* 150 (1977).

18. ASBESTOS COMPENSATION, *supra* note 11, at 3.

19. GAO says Backlog of Cases Growing, 20,000 Claims Pending in Federal Courts, 3 Toxics L. Rep. (BNA) No. 6, at 172 (July 6, 1988).

20. ASBESTOS COMPENSATION, *supra* note 11, at 7.

21. *Id.* at 4.

22. Szuch & Shelley, *Time to Eliminate Punitive Damages?*, Nat'l L. J., Feb. 28,

Plaintiffs in the typical asbestos action base their claim for punitive damages on the asbestos manufacturer's failure to disclose to the public known health hazards associated with its product.²³ Most courts have held that these repeated failures to warn, despite spanning several decades, constitute only one course of conduct.²⁴ Therefore, given the large number of asbestos suits and the relatively small number of asbestos manufacturers, a plaintiff brings suit for a wrong that has been the basis of previous litigation against the same defendant. Defendants such as these find themselves subject to multiple claims for punitive damages for a wrong that is meant to be fully punished by a single award of punitive damages. Mandatory class actions would force all claims for punitive damages to be litigated together, and thereby avoid this dilemma; however, these actions are generally unavailable in the toxic tort context.²⁵

B. *History of the Issue*

Judicial concern over the multiple assessment of punitive damages for a single wrong was first addressed in *Roginsky v. Richardson-Merrell*.²⁶ In *Roginsky*, the manufacturer of the drug "MER/29," an anti-cholesterol drug which was proven later to cause cataracts, faced the possibility of hundreds of punitive damage awards over a period of time.²⁷ Lacking precedent to deny the plaintiff's claim, the court permitted an

1983, at 13, col. 1. See also, *An Overview of Punitive Damages in Toxic Tort Litigation*, 3 Toxics L. Rep. (BNA) 650 (Oct. 19, 1988).

23. E.g. See *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 282 (D.N.J. 1989).

24. See *In re School Asbestos Litig.*, 789 F.2d 996, 1004-05 (3d Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *In re Bendectin Prod. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio 1984). But see *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1022-23 (D. Mont. 1989); *Neal v. Carey Canadian Mines Ltd.*, 548 F. Supp. 357, 377-78 (E.D. Pa. 1982) *aff'd sub nom. Van Buskirk v. Carey Canadian Mines Ltd.*, 760 F.2d 481 (3d Cir. 1985).

25. See *In re School Asbestos Litig.*, 789 F.2d 996, 1006 (3d Cir. 1986); *In re Temple*, 851 F.2d 1269, 1273 (11th Cir. 1988); *In re Dalkon Shield IUD Prod. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal. 1981), *cert. denied*, 459 U.S. 1171 (1983), *vacated*, 693 F.2d 847 (9th Cir. 1982).

26. 378 F.2d 832 (2d Cir. 1967).

27. *Id.* at 834.

award of punitive damages against the defendant.²⁸ However, the court had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation [could] be so administered as to avoid overkill."²⁹ The court considered the consequences of multiple punitive damage awards in the mass toxic tort context to be so serious as to require special scrutiny of the proof needed to establish the necessary element of recklessness on the part of the manufacturer.³⁰

In the decade following *Roginsky*, the concerns expressed by that court seemed moot, as there were only three cases in which punitive damages were upheld against the manufacturers of defective products.³¹ However, with the implications surrounding the increase in mass toxic tort litigation,³² defendants, facing staggering punitive damage claims,³³ have begun to raise constitutional arguments against the repetitive assessment of punitive damages for a single wrong.³⁴

III. *Juzwin v. Amtorg Trading Corp.*

A. *Facts and the Court's Initial Decision*

Steven Juzwin was a sixty-eight-year-old former employee of the Johns-Manville Corporation who was diagnosed

28. *Id.* at 839.

29. *Id.*

30. *Id.* at 841-42.

31. Jeffries, *supra* note 4, at 142; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1261 & n.12 (1978). These cases were: *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), and *Moore v. Jewell Tea Co.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970).

32. See *In re School Asbestos Litigation*, 789 F. Supp. 996, 1000 (3d Cir. 1986) (describing the rise of asbestos litigation as "an unparalleled situation in American tort law").

33. For example, prior to its filing for bankruptcy protection, the A.H. Robins Co. had paid out over thirteen million dollars in just seven lawsuits stemming from the Dalkon Shield IUD. The company had an additional 5,000 suits pending against it, most of which requested punitive damages. *In re A.H. Robins Co.*, 89 Bankr. 555, 557-58 (E.D. Va. 1988).

34. See *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986).

as having asbestos-related ailments.³⁵ Juzwin and his wife initiated an action against several companies which had supplied asbestos products to his former employer.³⁶ Juzwin's complaint contained a punitive damage claim which the defendants moved to strike. The asbestos suppliers argued that the repetitive assessment of punitive damages for a single wrong would violate their rights under the "double jeopardy,"³⁷ "excessive fines,"³⁸ and "due process"³⁹ clauses of the Constitution.

The defendants first argued that the multiple assessment of punitive damages violated their right to not "be twice put in jeopardy of life or limb."⁴⁰ The court held that the double jeopardy clause is "limited in application to proceedings which are criminal in nature," and that "[d]espite the close analogy between criminal sanctions and punitive damages, punitive damages are not a criminal sanction."⁴¹ The court concluded that multiple punitive damages for a single wrong were not sufficiently "criminal in nature" to be prohibited by the double jeopardy clause.⁴²

The defendants next argued, that if the court permitted each claimant to sue for punitive damages, the aggregate effect would violate the eighth amendment's proscription

35. *Juzwin v. Amtorg Trading Corp.*, No. 87-38764 Civ. (D.N.J. Feb. 28, 1989) (LEXIS, Genfed library, Dist file).

36. Asbestos plaintiffs typically do not sue their employers, who are generally protected from liability by their state workman's compensation laws. ASBESTOS COMPENSATION, *supra* note 11, at 3.

37. U.S. CONST. amend. V. The fifth amendment provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."

38. U.S. CONST. amend. VIII. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

39. U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

40. U.S. CONST. amend. V.

41. *Juzwin I*, 705 F. Supp. at 1058.

42. *Id.* at 1059. The court's holding on this issue was the same as the Supreme Court's subsequent decision in *United States v. Halper*, 490 U.S. 435 (1989). In *Halper*, the Court held that the "protections of the Double Jeopardy clause are not triggered by litigation between private parties." 490 U.S. at 451.

against "excessive fines."⁴³ The court disposed of this argument by concluding that the excessive fines clause had no application to civil awards.⁴⁴ Moreover, the court held that even if the clause did apply to civil awards, the defendants' motion was not yet ripe because a factual finding that any of the defendants had been subject to previous liability had not yet been made.⁴⁵

The court accepted the defendants' final argument. Alluding to the "fundamental fairness" requirement of the due process clause of the fourteenth amendment,⁴⁶ the court concluded that "multiple awards of punitive damages for a single course of conduct . . . can and do" violate due process.⁴⁷ Not-

43. U.S. CONST. amend. VIII.

44. *Juzwin I*, 705 F. Supp. at 1060. The Supreme Court has since endorsed this holding in *Browning-Ferris Indus. of Vermont v. Kelco Disposal*, 492 U.S. 257 (1989). In *Browning-Ferris*, the defendant was found liable for tortious interference with business relations based on predatory pricing in the waste collection business. The jury returned a verdict of \$51,146.00 in compensatory damages and six million dollars in punitive damages. On certiorari, the defendant argued that the punitive damages' gross discrepancy to the compensatory award amounted to an "excessive fine" within the meaning of the eighth amendment. In rejecting defendant's argument, the Supreme Court held that the excessive fines clause of the eighth amendment does not apply to punitive damage awards where the government has not prosecuted the case or cannot share in the recovery. 492 U.S. at 264.

45. *Juzwin I*, 705 F. Supp. at 1060.

46. *See, e.g., Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). In *Lassiter*, an imprisoned mother whose parental rights were terminated in an action brought by a state agency argued that the state's failure to provide her with an attorney during the termination proceeding violated her due process rights. In holding that *Lassiter's* due process rights had not been violated, the Court stated that due process is not a "technical" term, but rather "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Id.*

47. *Juzwin I*, 705 F. Supp. at 1061.

The United States Supreme Court has since held in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) that an award of punitive damages, despite being disproportionately greater than the award of compensatory damages, did not violate the defendant's due process rights. In this case, a single award of punitive damages was granted. In *Haslip*, the Court made it clear that the case was being decided on its own set of facts, since there could be no "mathematical bright line" between punitive damage awards that were and were not constitutional. *Id.* at 1043. By so stating, the court appeared to imply that there is some point where a defendant will be shielded from an award or awards of punitive damages. In upholding the award of punitive damages, the majority emphasized the historical availability of punitive damages at common law, while at the same time expressing concern about awards of punitive

ing the "thousands of asbestos-related claims for compensatory and punitive damages which have been filed throughout the country against the defendants,"⁴⁸ the court held that the due process clause limits the number of times a defendant may be subjected to punitive damages for a single course of conduct.⁴⁹ The court stated that due to the defendants' continued liability in other courts, the resolution of this issue could only be achieved through the enactment of national legislation. The court suggested that:

Such legislation must: (1) determine initially whether punitive damages should be allowed in mass tort cases, and if so; (2) establish standards for their imposition and for the amounts to be awarded; (3) determine if maximum limits should be imposed and whether they should be by fixed amount or some formula based upon the net worth of defendant; (4) provide procedures for dealing with successive claims; and (5) determine who shall be entitled to receive and participate in those awards.⁵⁰

The court concluded that those defendants who could demonstrate that punitive damages had already been imposed on them for the identical conduct as alleged in the plaintiffs' complaint would be relieved of further punitive liability.⁵¹

B. *The Rehearing*

Before the plaintiffs appealed the district court's denial of their punitive damage claim to the Court of Appeals for the Third Circuit, they asked for and received a rehearing of the case by the trial court.⁵²

damages which "run wild." *Id.* Particular weight was given to the procedural safeguards implemented at the state (Alabama) trial court level, including alerting the jury to "the existence of other civil awards against the defendant *for the same conduct* . . ." *Id.* at 1045 (emphasis supplied).

48. *Juzwin I*, 705 F. Supp. at 1061.

49. *Id.* at 1063.

50. *Id.* at 1065.

51. *Id.*

52. *Id.* Although plaintiffs brought their motion for rehearing under Fed. R. Civ. P. 60 (b)(1) (mistake, inadvertence, surprise, or excusable neglect), the court consid-

On rehearing, the court affirmed its belief that multiple assessments of punitive damages violated the defendants' due process rights under the fourteenth amendment.⁵³ However, the court vacated its original order and also permitted the plaintiffs' punitive damages claim to continue so long as certain conditions were met.⁵⁴ The court held that it would be unfair to the plaintiffs to implement its decision retroactively, and that its original ruling would not protect the defendants in suits filed in other jurisdictions.⁵⁵ The court then proposed a four part test which would be used to determine whether a future plaintiff's claim for punitive damages would be barred.⁵⁶ Under the proposed test, four conditions must be satisfied:

1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made;
2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damages claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct;
3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the company for its wrongful conduct;
4. Such other conditions as will assure a full, fair, and complete presentation of all the relevant evidence in support of and in opposition to the claim.⁵⁷

ered the motion to be more appropriately brought under Rule 12 of the General Rules of the court (matters the court overlooked), because the previous ruling was not a final judgment, but interlocutory in nature. *Id.*

53. *Juzwin II*, 718 F. Supp. at 1234.

54. *Id.* at 1234-5.

55. *Id.*

56. *Id.* at 1235.

57. *Id.*

Having promulgated this test, the court then concluded that none of the criteria had been satisfied in any of the previous litigation between the parties.⁵⁸ Furthermore, the court felt powerless to enforce its prior ruling, because the same defendants could still be subject to punitive damage claims in other jurisdictions. Secondly, the court felt that even for defendants within the jurisdiction, given the various ways that punitive damages are calculated around the country, it would be "impossible for this court to ensure that the 'one and only' prior award contemplated the 'full' damage caused by a defendant's wrongful conduct."⁵⁹ The court further acknowledged that a second award of punitive damages, based on a wrong that was the subject of an earlier award, would not necessarily violate due process "if the first award was not intended by the jury to constitute full punishment for the defendant's wrongful conduct."⁶⁰ The court stated that it would be unfair to bar the *Juzwin* plaintiffs' claim for punitive damages based on the conduct of other litigants in other jurisdictions.⁶¹ The court then renewed its previous recommendation that a national law

58. *Id.*

59. *Id.* The court gave examples of several jurisdictions that have enacted limits on punitive damages, which might have the effect of meeting the "previous punitive damage liability" of the first *Juzwin* decision without fully punishing a defendant for his culpable conduct. See, e.g., COLO. REV. STAT. § 13-21-102 (1987) (punitive damages are limited to an amount equal to actual damages except in certain cases of aggravated conduct); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.008 (Vernon Supp. 1991) (punitive damages are limited to four times the amount of actual damages or \$200,000, whichever is greater except in cases of malice or intentional torts where punitive damages are not limited). See also KAN. STAT. ANN. § 60-3701 (Supp. 1990) (punitive damages are limited to the amount of defendant's annual gross income or five million dollars whichever is less, unless the profitability of defendant's misconduct exceeds the limitation in which case the limit on punitive damages is an amount equal to one and one half times the amount of profit which the defendant gained or is expected to gain as a result of the misconduct); OKLA. STAT. ANN. tit. 23, § 9, 96 (West 1987) (punitive damages limited to the amount of compensatory unless plaintiff establishes his or her case by clear and convincing evidence, in which case there is no dollar limitation for punitives); FLA. STAT. ANN. § 768.73 (West Supp. 1991) (punitive damages are limited to three times the amount of compensatory damages unless the plaintiff demonstrates with "clear and convincing" evidence that the amount is not excessive in light of the facts and circumstances).

60. *Juzwin II*, 718 F. Supp. at 1235.

61. *Id.* at 1236.

be enacted to protect the defendants' due process rights.⁶² The court stated that only through a uniform national law or a Supreme Court decision would the outcome of a trial in one jurisdiction have an effect on a later trial in another jurisdiction.⁶³

IV. Analysis

The *Juzwin* court found that the defendants' due process rights had been violated.⁶⁴ Despite the doctrine that a federal court must provide a remedy for the violation of a constitutionally-protected right,⁶⁵ policy and practical considerations persuaded the court to permit multiple assessments of punitive damages against the defendant.⁶⁶ After considering the consequences of its earlier ruling, the court concluded that its decision to bar this and future plaintiffs' punitive damage claims was not appropriate.⁶⁷ The court reached this conclusion after balancing the procedural requirements announced in its earlier decision against the consequences of their application.⁶⁸ The court stated that the criteria that must be met in order to bar a punitive damage claim had not been met and, more importantly, under present law could never be met.⁶⁹ Under current law, no federal district court could ever instruct a jury that their award of punitive damages will be the only one against a given defendant, because such an order would not be binding outside the district in which it was given.⁷⁰ The court recognized that if such an instruction were given during a New Jersey trial, judges in other jurisdictions in which the defendants faced suit could ignore it.⁷¹

62. *Id.*; see *Juzwin I*, 705 F. Supp. at 1065.

63. *Juzwin II*, 718 F. Supp. at 1235.

64. *Id.* at 1234.

65. See, e.g., *Wade v. Mayo*, 334 U.S. 672, 691-92 (1948).

66. *Juzwin II*, 718 F. Supp. at 1235.

67. *Id.*

68. *Id.*

69. *Id.*

70. See, e.g., *Jaben v. United States*, 333 F.2d 535 (8th Cir.), *aff'd*, 381 U.S. 214 (1964)(the holding in another circuit stating what constitutes a valid complaint was not binding).

71. *Juzwin II*, 718 F. Supp. at 1235.

The court additionally based its decision on the practical difficulty in determining whether a defendant's previous punitive damage liability was meant to be the "full" punishment for its wrong.⁷² In its earlier order, the court had provided that if a defendant could prove previous punitive damage liability in any court, it would be relieved of all further punitive damage liability for the same course of conduct.⁷³ However, to the court, accepting evidence of previous punitive damage liability presented two problems. The first problem was in deciding whether the earlier punitive damage award was based on the full damage caused by the defendant or on damages which pertained only to the named plaintiff in that suit.⁷⁴ The second problem was in determining whether the previous punitive damages were awarded by the same standard used in New Jersey.⁷⁵ Recognizing the practical difficulty in accepting evidence of previous punitive damage liability, the court ruled as a matter of policy that it should not be considered.⁷⁶

The court also considered the fairness to the plaintiffs of excluding their punitive damage claim, based on the conduct of litigants in earlier trials.⁷⁷ The court thought it unfair to eliminate from these plaintiffs a right that would still exist for plaintiffs suing these defendants in other districts.⁷⁸

Juzwin is significant because, although it joins a growing trend of recent decisions that have denied toxic tort defendants relief from multiple assessments of punitive damages,⁷⁹ it is the first decision to recognize that such punishment can amount to a due process violation. Courts, in other jurisdictions deciding the same issue, have based their decisions on the public policy behind punitive damages and the difficulties in enforcing the conclusions reached in *Juzwin*.

72. *Id.*

73. *Juzwin I*, 705 F. Supp. at 1065.

74. *Juzwin II*, 718 F. Supp. at 1235.

75. *Id.* See *supra* note 57 and accompanying text.

76. *Juzwin II*, 718 F. Supp. at 1236.

77. *Id.*

78. *Id.*

79. See *infra* notes 78-117 and accompanying text.

The court in *Man v. Raymark Industries*,⁸⁰ considered the same due process argument raised in *Juzwin* and reached the opposite conclusion.⁸¹ In rejecting the defendants' due process argument, the court held that the "public interest" could only be served by preserving the availability of punitive damages to *all* plaintiffs, not just the first to sue.⁸² The court further noted that eliminating all but the first assessment of punitive damages would restrict the "true deterrent effect of punitive damages."⁸³

The *Man* defendants also argued that public policy considerations would be thwarted, because multiple assessments of punitive damages would deplete the defendants' funds available to pay *compensatory* damages to future toxic tort plaintiffs.⁸⁴ The court, however, stated that it would be a greater harm to permit a defendant to escape punitive damage liability merely because it has injured a relatively large, as opposed to a more limited, number of persons.⁸⁵

In *Tetuan v. A.H. Robins Co.*,⁸⁶ the Supreme Court of Kansas rejected several arguments raised by a toxic tort defendant that multiple punitive damages should not be awarded. The defendant in *Tetuan* raised the same due process argument raised in *Juzwin*: that multiple punitive damage liability violated the "fundamental fairness" requirement of the fourteenth amendment.⁸⁷ However, unlike the court in *Juzwin*, the *Tetuan* court did not consider the defendant's conduct to be a "single" wrong, but rather a *series* of corporate actions.⁸⁸ Therefore, the court was able to avoid a finding of a due process violation because the defendant was not being punished repeatedly for a *single* wrong but for a *series* of

80. 728 F. Supp. 1461 (D. Haw. 1989). In *Man*, the plaintiffs sought damages for injures caused by exposure to the defendants' asbestos-containing products. *Id.* at 1463.

81. *Id.* at 1465-68.

82. *Id.* at 1466.

83. *Id.* at 1467.

84. *Id.*

85. *Id.* at 1467-68.

86. 241 Kan. 441, 738 P.2d 1210 (1987).

87. *Id.* at 492, 738 P.2d at 1245; *Juzwin II*, 718 F. Supp. at 1236.

88. *Tetuan*, 241 Kan. at 492, 738 P.2d at 1245.

wrongs.

The *Tetuan* court also rejected the defendant's policy argument that the "maximum deterrence was achieved long ago" from previous punitive damages awarded to previous plaintiffs.⁸⁹ The court held that even if this defendant were adequately deterred, the deterrent objective of punitive damages was not just to this defendant, but to others who would commit like wrongs.⁹⁰

In *Campbell v. ACandS, Inc.*,⁹¹ the federal district court for Montana held that punitive damages could be recovered against manufacturers and distributors of asbestos, notwithstanding that the defendants faced innumerable lawsuits nationwide.⁹² The *Campbell* court did not reach a conclusion as to the constitutionality of multiple punitive damages, but rather based its decision on the deterrent objectives that punitive damages seek to fulfill.⁹³ The court concluded, as did the *Tetuan* court, that even if the defendants had been adequately deterred by previous punitive damage assessments, future claims should not be barred.⁹⁴ The court noted that the deterrent objective of punitive damages "goes beyond the simple attempt of deterring *these* particular defendants from repeating the same tortious conduct, but extends to the public in general."⁹⁵ Referring to toxic tort defendants, the court added that "the desired effect is to deter all . . . entities . . . from placing the public at risk by engaging in similar conduct."⁹⁶

The court in *Kociemba v. G.D. Searle & Co.*,⁹⁷ upheld a seven million dollar punitive damage award against the manufacturer of the intrauterine device "Cu-7," despite the defendant's argument that there were five hundred related lawsuits

89. *Id.* at 493, 738 P.2d at 1246.

90. *Id.*

91. 704 F. Supp. 1020 (D. Mont. 1989).

92. *Id.* at 1021-23.

93. *Id.* at 1023.

94. *Id.*

95. *Id.* (emphasis added).

96. *Id.*

97. 707 F. Supp. 1517 (D. Minn. 1989).

pending against it nationwide.⁹⁸ The *Kociemba* defendant did not argue that awarding multiple punitive damages was unconstitutional, but instead argued that repetitive punitive damage liability would force it out of business and thereby preclude recovery of compensatory damages by future plaintiffs.⁹⁹ Although the court rejected this argument, it had "grave reservations about the punitive damage award's potential effects on future plaintiffs."¹⁰⁰ The court acknowledged that the Minnesota Legislature's purported resolution of this problem¹⁰¹ was inadequate.¹⁰² The *Kociemba* court, like the court in *Juzwin*, strongly urged that the method in which punitive damages are awarded in mass toxic tort suits be revised by Congress.¹⁰³ The court suggested that courts be empowered to reduce or eliminate punitive damage awards based on the existence of other punitive damage claims against the defendants, even though those claims were not presented as evidence to the jury.¹⁰⁴

The court in *Neal v. Carey Canadian Mines*¹⁰⁵ held that multiple punitive damage awards could be assessed against the defendants, asbestos manufacturers and distributors, despite numerous punitive damage claims pending.¹⁰⁶ The court rejected the defendants' argument that multiple punitive damages would bankrupt them and stressed the deterrent objectives punitive damages accomplish.¹⁰⁷ The court added that it would be unfair to allow the first plaintiff in a mass toxic tort litigation to recover punitive damages but then to

98. *Id.* at 1538.

99. *Id.* at 1537.

100. *Id.* at 1538 n.22.

101. MINN. STAT. ANN. § 549.20 subd. 3 (West 1988 & Supp. 1991) permits a defendant to present evidence to the jury of total potential punitive damage liability, and therefore the jury will consider future liability in determining the award. The court called this approach "flawed" because defendants are reluctant to admit evidence of other lawsuits out of fear that the information would prejudice the jury into imposing liability. 707 F. Supp. at 1538 n.22.

102. 707 F. Supp. at 1538 n.22.

103. *Id.*

104. *Id.*

105. 548 F. Supp. 357 (E.D. Pa. 1982).

106. *Id.* at 376-78.

107. *Id.* at 376.

deny punitive damages to all subsequent plaintiffs.¹⁰⁸

One of the assumptions made by the *Neal* court was that the defendants' conduct in failing to warn of the known dangers of asbestos was separate and distinct with respect to each plaintiff.¹⁰⁹ This assumption permitted the court to reject the defendants' argument that multiple punitive damages would be onerous.¹¹⁰ The court held that "[t]he twin goals of punishment and deterrence are served by separate awards of punitive damages because of a jury's finding that the tortfeasor engaged in 'outrageous conduct' with respect to each individual plaintiff."¹¹¹ However, the Third Circuit subsequently ruled that the repeated decisions by a manufacturer to suppress the known dangers of its product was a *single* wrong, despite spanning several decades.¹¹² This holding by the Third Circuit was used by the *Juzwin* court to find that due process requires a limit on the number of times a defendant could be punished for the same act.¹¹³

Much of the analysis used by the *Juzwin* court to reach its conclusion was comparable to that used in *Leonen v. Johns-Manville Corp.*¹¹⁴ In *Leonen*, another judge in the same district in which *Juzwin* was decided held that there was no constitutional protection from multiple assessments of punitive damages for a single wrong.¹¹⁵ *Leonen* involved facts similar to *Juzwin* and was decided after the *Juzwin* court had determined a due process violation, but before it vacated its order and allowed the plaintiff to recover punitive damages. In *Leonen*, the court acknowledged that due process requires some limits to be placed on the amount of punitive damages which can be assessed against a manufacturer.¹¹⁶ However, the

108. *Id.* at 376-77.

109. *Id.* at 390.

110. *Id.*

111. *Id.*

112. *School Dist. of Lancaster v. Lake Asbestos of Quebec (In re School Asbestos Litigation)*, 789 F.2d 996, 1003 (3d Cir. 1986).

113. *Juzwin I*, 705 F. Supp. at 1056, 1062-4.

114. 717 F. Supp. 272 (D.N.J. 1989).

115. *Id.* at 288.

116. *Id.* at 283.

court rejected *Juzwin's* "easy solution"¹¹⁷ of having the first litigant who wins punitive damages preclude all others.¹¹⁸ The court characterized such a rule as producing a "harsh and inequitable result."¹¹⁹ Furthermore, the court called the approach taken in the first *Juzwin* decision "impracticable as well as arbitrary"¹²⁰ because it assumed that the first jury to award punitive damages will base its figure on the *overall* harm caused to all present and potential plaintiffs.¹²¹ In New Jersey state courts, as well as federal courts sitting in diversity, a jury's award of punitive damages must be based on the plaintiff's *actual* injury.¹²² Even if the "actual injury" standard was disregarded and the award was based on the overall harm, the *Leonen* court questioned whether the first plaintiff should be entitled to a punitive damage award that is based on a harm greater than that which he suffered.¹²³

In reversing its earlier order, the *Juzwin* court did not address the criticisms raised by the court in *Leonen*. The court's decision was not based on the "correctness" of its earlier rule, but rather on the difficulty in effectuating it. If the earlier order had stood, it would only protect defendants sued in New Jersey. If an asbestos manufacturer was assessed punitive damages in New Jersey, the earlier decision could not have prevented another plaintiff from seeking punitive damages in another jurisdiction because of the jurisdictional limits of the *Juzwin* order.

V. Proposed Legislation

A common element running among the *Juzwin* opinions was the courts' recommendation that national legislation be enacted to regulate multiple punitive damage liability in the toxic tort context. The effectiveness of such legislation not-

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Levinson v. Prentice-Hall*, 868 F.2d 558, 564-65 (3d Cir. 1989); *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673, 512 A.2d 466, 482 (1986).

123. *Leonen*, 717 F. Supp. at 284.

withstanding, its enactment would be difficult. Any proposal to restrict or to remove the right of injured plaintiffs to sue in the courts for punitive damages would likely be met with strong opposition. The nation's trial bar as well as organized labor, two effective lobbying groups, are traditionally opposed to attempts to limit the right to sue.¹²⁴ Furthermore, employers, immune from tort liability under workers compensation laws, disfavor federal compensation plans that would likely shift asbestos liability from manufacturers to employers using asbestos.¹²⁵

Proposals similar to those suggested in *Juzwin* have not fared well in Congress in the past.¹²⁶ Although a recent congressional proposal, H.R. 1115,¹²⁷ might help some manufacturers exposed to multiple punitive damage claims,¹²⁸ a number of provisions of the bill, as introduced, effectively exclude many, if not most toxic tort actions from coverage.¹²⁹ Meaningful state action is unlikely because in order to completely protect a defendant's due process rights, all fifty states would have to enact virtually identical legislation. Absent simultaneous enactment, those states passing such laws would deprive their citizens of the opportunity to receive punitive damage awards while this opportunity would exist in states that did

124. Lauder, *Footing the Bill for Toxic Torts*, Nat'l L. J., Jan. 31, 1983, at 40, col. 2.

125. *Id.*

126. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *FORDHAM L. REV.* 37, 57 (1983).

127. The Uniform Product Safety Act of 1988, H.R. 1115, 100th Cong., 2d Sess. (1988).

128. *The Uniform Product Safety Act of 1988 and Toxic Tort Product Liability Actions*, 3 *TOXICS L. REP. (BNA)* 406, 407 (Aug. 24, 1988) [hereinafter, *Product Liability Actions*]. See also 1 M. S. MADDEN, *PRODUCTS LIABILITY* § 1.3 (2d ed. Supp. 1991) (subsection 207 (c)(6) of the bill requires triers of fact to consider past awards in assessing punitive damages).

129. *Product Liability Actions*, *supra* note 128. Several provisions of the act limit its applicability to toxic torts. Section 202(c)(7) states that the bill *does not* preempt state law causes of action to abate and recover damages for "pollution of the environment." Section 202(e) excludes "any product liability action . . . for harm caused by asbestos or asbestos products" from the bill's coverage. Section 214 (6)(B) removes "industrial waste" and "pollutants" from the definition of "product" and thus from the bill's reforms. *Id.*

not enact similar provisions.¹³⁰

VI. Conclusion

Realizing that, in the context of modern mass toxic torts, the original order would accomplish little more than imposing an unfair burden on an injured party, the *Juzwin* court's vacating its original order was proper. The *Juzwin* rulings demonstrate the present judicial debate over the purpose and effect that punitive damages should play in the modern realm of mass toxic tort litigation. The decision is significant in that it recognized a constitutional protection from multiple assessments of punitive damages, but nonetheless joined a series of recent decisions that have permitted them. The court's initial denial of multiple punitive damage claims for the same wrong was based on a belief that due process should limit the amount of civil punishment a court may impose on a defendant regardless of the scope or severity of that defendant's wrongful conduct. The denial of the punitive damage claim in this case would have had a chilling effect on future asbestos plaintiffs' opportunities to have access to court-awarded compensation. Although unlimited repetitive punitive damage liability might in fact result in overkill, the *Juzwin* decision does not insist that the *amount* of punitive damages be unlimited, only that the *availability* of punitive damages exist for all those injured by a toxic tort.

The problems encountered in *Juzwin* cry out for congressional action. Absent national legislation, few states or circuit courts would be willing to acknowledge a denial of due process, without possessing the power to enforce such a conclusion. With or without legislation, multiple claims for punitive damages based on a single wrong in toxic tort litigation are likely to continue to increase with the further development of products which may have dangerous effects on an unassuming public.

130. See *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 666-67, 512 A.2d 466, 478-79 (1986).