

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Elwaine F. Pomeroy at  
Chairperson

10:00 a.m. ~~pm~~ on March 30, 1984 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar,  
Gaines, Hess, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Office of Revisor of Statutes  
Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Representative Robert Vancrum  
John Brookens, Kansas Bar Association  
Todd Sherlock, Kansas Association of Realtors  
George Logan, Kansas Association of Broadcasters  
Kathleen Sebelius, Kansas Trial Lawyers Association  
Jerry Slaughter, Kansas Medical Society  
Tom Whitaker, Kansas Motor Carriers Association  
Chad Milton, Media Professional Insurance, Inc.

House Bill 2876 - Insurance coverage of punitive damages.

Representative Robert Vancrum, the sponsor of the bill, testified the legislature should be specific on the subject. A copy of his remarks is attached (See Attachment No. 1). He explained the bill would merely reverse the 1980 Supreme Court ruling in the Guarantee Abstract Case, in which the Supreme Court of Kansas stated that the public policy of Kansas does not permit an insurance company to reimburse an employer for punitive damages assessed against the employer due to the intentional acts of employees or agents, even if the employer had no prior knowledge of the acts and had no way to prevent the same.

John Brookens testified in support of the bill. He stated his organization believes the better public policy is that the employer should be permitted to acquire insurance protection against this type of loss, which may be catastrophic. A copy of his remarks and a copy of a syllabus of the Guarantee Abstract and Title Company, Inc. v. Interstate Fire and Casualty Company, Inc., are attached (See Attachments No. 2).

Todd Sherlock testified in support of the bill. He stated this legislation is in the best interest of the employer as well as the public that such legislation may ultimately affect. A copy of his remarks is attached (See Attachment No. 3).

George Logan testified the passage of this bill would provide relief for Kansas broadcasters from the uncertainty that surrounds libel suits and requests for punitive damages. A copy of his statement is attached (See Attachment No. 4).

Kathleen Sebelius testified her organization endorses the concept of the bill. She stated this is permissive language and no one is forced to sell insurance and this will allow people who want to buy may do so. It will protect the employer.

Jerry Slaughter testified the organization he represents supports this bill.

Tom Whitaker testified his organization does support the bill.

Chad Milton testified his organization is in support of the bill and stated this bill would bring Kansas in line with the vast majority of states that allow insurance for punitive damages. A copy of his remarks is attached (See Attachment No. 5).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 ~~a.m.~~ <sup>p.m.</sup> on March 30, 1984

House Bill 2876 continued

Following the testimony on the bill, Senator Gaar moved to report the bill favorably; Senator Mulich seconded the motion, and the motion carried.

House Bill 2931 - Proceedings in aid of execution.

The chairman reviewed the bill, and staff explained the new compromise amendment that was drafted. Senator Werts moved to reconsider the previous amendment made to the bill; Senator Winter seconded the motion, and the motion carried. Senator Werts moved to amend the bill as was explained by staff; Senator Winter seconded the motion, and the motion carried. Senator Werts moved to report the bill favorably as amended; Senator Winter seconded the motion. Senator Gaar made a motion to amend the bill in line 83 on page 3 after "have", by inserting "income or"; Senator Winter seconded the motion, and the motion carried. Senator Werts moved to report the bill favorably as amended; Senator Winter seconded the motion, and the motion carried.

House Bill 2055 - Increased court fees for Sedgwick county law library.

The chairman reviewed the bill. Senator Burke moved to reconsider action on the bill; Senator Winter seconded the motion, and the motion carried. Senator Winter then moved to further amend the bill by including the contents of Senate Bill 786 in this bill; Senator Gaar seconded the motion, and the motion carried. Senator Winter moved to report the bill favorably as amended; Senator Burke seconded the motion, and the motion carried.

House Bill 2182 - Changing age of minor under gifts to minors act.

Committee discussion was held on the bill. No action was taken.

House Bill 2301 - Small claims procedure does not include claims for recovery of real estate.

The chairman reviewed the bill. No action was taken.

House Bill 3021 - Warning for mechanic lien on residential property; time limit.

Senator Werts moved to amend the bill in line 84, by striking "except for" and all of lines 85 through 89, and in line 90, striking all before the period. Senator Feleciano seconded the motion, and the motion carried. Senator Burke moved to amend the bill in line 59 after "mailed" and inserting "by restricted mail"; Senator Steineger seconded the motion, and the motion carried. Senator Gaines moved to report the bill favorably as amended; Senator Werts seconded the motion, and the motion carried.

House Bill 3029 - Forwarding of fingerprints to FBI.

Committee discussion was held on the bill. No action was taken.

House Bill 3049 - Access to certain records relating to juvenile offenders.

The chairman reviewed the bill. Senator Gaar moved to report the bill adversely and stated, we believe the law is sufficient as it is, and it does not require separate order for everyone involved. Following committee discussion, Senator Gaar withdrew his motion. Senator Gaar then moved to amend the bill to conform it to Senate Bill 677, with the notation in the minutes that House Bill 3049 was not necessary because a separate order is not needed in every case. Senator Steineger seconded the motion, and the motion carried. Senator Gaar moved to report the bill favorably as amended; Senator Werts seconded the motion, and the motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m. ~~p.m.~~ on March 30, 1984

House Bill 3082 - Computer crimes and theft.

Senator Gaar moved to report the bill adversely; Senator Mulich seconded the motion, and the motion carried.

House Bill 2598 - Sale of tobacco products to persons under 18 unlawful.

Senator Mulich moved to report the bill adversely; Senator Feleciano seconded the motion. With a show of hands of our voting in favor of the motion and five in opposition the motion failed. There was no other motion on the bill.

Senate Bill 863 - Wills probated outside state; amendment not to effect existing litigation.

Senator Burke moved to report the bill favorably; Senator Gaines seconded the motion. Following committee discussion, Senator Burke withdrew his motion.

The meeting adjourned.

GUESTS

SENATE JUDICIARY COMMITTEE

NAME

ADDRESS

ORGANIZATION

NAME	ADDRESS	ORGANIZATION
Willie Brooks	Topeka	Kan Bar Assn
Paul Harris	CHUTE	Kan. PRESS
James Rastner	Topeka	Ks Food Dealers Assn
Margie Von Buren	Topeka	OJA
Ed Mullins	"	Budget
Bill Johnson	Gurwano	Sen. Hecker
Ed Cobb Skelton	Topeka	Ks. Assoc. of Realtors
Jenny Chalkley	Frank	GMU
Tom Whitaker	Topeka	Ks Motor Carrier Assn
Jerry L. Tourneau	Topeka	Attorney
Glenn E. Miller	Leawood	Med. / Professional Un.
George Logan	Topeka	Ks. Association of Broadcasters
Harriet Lantz	Topeka	" " "
Ann Allen	"	KCDAA
William S. Sledge	"	ICTLA
D. J. Miller	"	AP
John Miller	"	KU
Marion C. Chubb	"	KUCC
Bob Corbett	Topeka	KCCI



TOPEKA

HOUSE OF  
REPRESENTATIVES

BOB VANCURUM

REPRESENTATIVE, TWENTY-NINTH DISTRICT  
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OVERLAND PARK, KANSAS 66212  
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3-30-84  
Attach. #1

COMMITTEE ASSIGNMENTS

VICE-CHAIRMAN FEDERAL AND STATE AFFAIRS  
MEMBER: ASSESSMENT AND TAXATION  
JUDICIARY

TESTIMONY OF ROBERT J. VANCURUM

ON HB 2876 - THE VICARIOUS LIABILITY FOR PUNITIVE DAMAGES BILL

Thank you Mr. Chairman and members of the Committee for giving me an opportunity to appear here today. HB 2876 for those of you who were on the committee last year is merely the provisions of HB 2062 with the amendment which you added in committee at my suggestion. I appreciate your action in amending and reporting this bill favorably last year. The purpose of having a new bill is to not confuse persons who see the bill with rather substantial changes in it.

For those of you who were not on the committee last year, the purpose of HB 2876 is rather simple. The bill would merely reverse the 1980 Supreme Court ruling in the Guarantee Abstract Case, in which the Supreme Court of Kansas stated that the public policy of Kansas does not permit an insurance company to reimburse an employer for punitive damages assessed against the employer due to the intentional acts of his employees or agents, even if he had no prior knowledge of the acts and had no way to prevent the same. I want to emphasize that nothing in this bill requires insurance companies to write this coverage and requires employers to carry coverage. It merely states that if insurance companies choose to write the coverage, they will have to pay off in accordance with policy terms.

Attach. 1

Testimony  
of Rep. Robert J. Vancrum  
February 22, 1984  
Page 2

Let me give you a brief example of instances in which this provision comes into play. Suppose a trucking company employs a driver for several years who then by his negligence causes an accident which causes serious injuries to the motorist. If a jury finds negligence, both he and the company are obligated to pay damages. The company of course did not authorize him to drive negligently, but they can at least obtain insurance to cover this liability. However, if the jury is sufficiently impressed that the driver's actions were in reckless disregard of the law or rights of other motorists or if they find that he intentionally assaulted another individual, a jury might be permitted to award not only actual but punitive damages intended to "punish" the wrongdoer against the trucking company. In such a case the trucking company still did not authorize the actions and in fact may not have even been aware of them but in such a situation the Kansas Supreme Court ruling states that we are not going to permit insurance companies to reimburse the company, even if they have written an insurance policy which claims to cover punitive damages.

The overwhelming majority of states permit the reimbursement of punitive damages to the innocent employer. The 1980 Kansas decision is so far out of the main stream of usual case law that most policies written by national companies on their face appear to provide coverage in this situation. Nevertheless,

# 1

Testimony  
of Rep. Robert J. Vancrum  
February 22, 1984  
Page 3

When faced with such claims, the insurance companies routinely deny coverage for such damages in Kansas.

The situation is even more critical with regard to the owners of commercial real estate who employ security guards and other personnel to enforce reasonable rules of behavior upon the public using these premises. The case is also severe in the case of medical groups where each member may be personally liable for punitive damages arising out of alleged malpractice by other members even though some of them did not authorize or even know of the acts.

You are going to hear this afternoon from the realtors, the motor carriers and the Kansas Medical Society, each of whom I believe will express support for the concepts in this bill.

I would be happy to answer any of your questions concerning the workings of this bill.



## KANSAS BAR ASSOCIATION

March 30, 1984

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To: Senate Committee on Judiciary

Subject: HB 2876, Insurance coverage for vicarious punitive damage liability.

From: Kansas Bar Association.

HB 2876 does not create new liability as to damages; it does not change existing law of damages. Damages are of two kinds: 1) actual, 2) punitive (sometimes called exemplary).

In an employer-employee relationship, liability of the employee for actual damages almost always creates liability on the part of the employer under the legal doctrine of respondeat superior. This is an insurable risk as to both employee and employer.

Punitive damages may be awarded only if actual damages are first awarded. The theory of actual damages is to compensate the wronged party. The theory of punitive damages is to punish the wrongdoer. In order to have a cause of action for punitive damages, the person committing the wrong must not only have inflicted a wrong, but must have acted maliciously, wilfully, intentionally, or with reckless disregard to the rights of others--amounting to an intentional wrong.

It is public policy, and we think properly so, that one who commits an act for which punitive damages may be recovered should not be permitted to insure against pay-out of punitive damages.

But, if the employer had no knowledge of and did not acquiesce in the employee's act which was malicious, wilful, intentional, or in reckless disregard of the rights of others -- the employer may still, under the doctrine of respondeat superior become vicariously liable in punitive damages for the act of the employee. We see no logic in law or reason why the employer, under these circumstances, should not be able to protect himself against this type of punitive damages. The employer is not the actual wrong-doer, he did not have knowledge of the wrong, he did not acquiesce in the wrong.

We believe the better public policy is that the employer should be permitted to acquire insurance protection against this type of loss, which may be catastrophic. This does not force an insurance company



Senate Committee on Judiciary  
March 30, 1984  
Page 2

to write or sell the insurance; but if an insurance company wants to enter this type of insurance coverage, it should not be prohibited.

We favor HB 2876. We think it states proper public policy.

Respectfully submitted,



John W. Brookens  
Legislative Counsel

#2

PIK 9.44 PATTERN INSTRUCTIONS FOR KANSAS 2d

PIK 9.44 PUNITIVE DAMAGES

If you find that plaintiff is entitled to recover, [and you also find that the conduct of the defendant was (wilful) (wanton) (malicious) or (constituted fraud),] then in addition to the actual damages to which you find plaintiff entitled, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter others from like conduct.

Notes on Use

The material in brackets should be omitted when the conduct described in parenthesis must be established for the recovery of actual damages, such as in actions for assault, malicious prosecution, or those based on wantonness or fraud. See Chapter 14.00 Intentional Torts. In cases in which punitive damages are only recoverable where one of the types of conduct described occurs, then such phrase should be used.

See PIK 3.02 Wanton Conduct Defined, PIK 3.03 Wilful Conduct Defined, and PIK 3.04 Malice Defined.

Comment

An instruction substantially in the language of PIK 9.44 was approved in *Dold v Sherow*, 220 Kan 350, 552 P2d 945 (1976).

Before exemplary damages may be awarded there must be a right to recover actual damages, *Watkins v Layton*, 182 Kan 702, 324 P2d 130 (1958); *Dicker v Smith*, 215 Kan 212, 523 P2d 371 (1974); *Dotson v McLaughlin*, 216 Kan 201, 531 P2d 1 (1975); *Dold v Sherow*, 220 Kan 350, 552 P2d 945 (1976); *McDonald v Bauman*, 199 Kan 628, 636, 433 P2d 437 (1967).

The nature and enormity of the wrong together with mitigating circumstances should be considered in assessing punitive damages. *Will v Hughes*, 172 Kan 45, 238 P2d 478 (1951).

Contributory negligence, if it exists, is not a defense to wanton injury. *Frazier v Cities Service Oil Co.*, 159 Kan 655, 157 P2d 822 (1945); *Kniffen v Hercules Powder Co.*, 164 Kan 196, 188 P2d 980 (1948); *Long v Foley*, 180 Kan 83, 299 P2d 63 (1956); *Horn v Chicago, R. I. & P. R. Co.*, 187 Kan 423, 357 P2d 815 (1960).

# 2

Generally, damages for breach of contract are limited to pecuniary losses sustained, and exemplary or punitive damages are not recoverable, in absence of an independent tort or wrong causing additional injury. *Mabery v Western Casualty & Surety Co.*, 173 Kan 586, 250 P2d 824 (1952).

For what constitutes wantonness such as will justify an instruction on punitive damages in motor vehicle collision cases see: *Kniffen v Hercules Powder Co.*, 164 Kan 196, 188 P2d 980 (1948); *Knoblock v Morris*, 169 Kan 540, 220 P2d 171 (1950); *Elliott v McKenzie*, 180 Kan 344, 304 P2d 550 (1956); *Hickert v Wright*, 182 Kan 100, 319 P2d 152 (1957); *Allman v Bird*, 186 Kan 802, 353 P2d 216 (1960); *Partch v Hubele*, 188 Kan 86, 360 P2d 1104 (1961).

Authority for the instruction in other types of cases may be found in *Will v Hughes*, 172 Kan 45, 238 P2d 478 (1951) (willful and malicious acts); *Hammargren v Montgomery Ward & Co.*, 172 Kan 484, 241 P2d 1192 (1952) (false imprisonment with malice); *Watkins v Layton*, 182 Kan 702, 324 P2d 130 (1958) (reckless indifference to rights of others in conversion of personal property); *McCarthy v Tetyak*, 184 Kan 126, 334 P2d 379 (1959) (willful misrepresentation); *Corwine v Maracaibo Oil Exploration Corp.*, 184 Kan 151, 334 P2d 419 (1959) (violation of law evincing a reckless disregard of rights of others); *Jensen v Sierra Petroleum Co.*, 189 Kan 472, 370 P2d 425 (1962) (knowingly permitting oil and refuse to escape and drain into water supply of plaintiff's cattle); *Kohler v Kansas Power & Light Co.*, 192 Kan 226, 387 P2d 149 (1963) (wrongfully disconnecting electric current causing meat in freezer to spoil); *Ford v Guarantee Abstract & Title Co.*, 220 Kan 244, 553 P2d 254 (1976) (punitive damages may be awarded for breach of fiduciary duty—conduct does not necessarily have to be intentional—sufficient if it is such gross neglect as to evince reckless indifference of rights of others); *Monroe v Darr*, 221 Kan 281, 559 P2d 322 (1977) (invasion of privacy).

**Research References**

*ALR Annotations:*

Attorneys' fees or other expenses of litigation as element in measuring exemplary or punitive damages. 30 ALR3d 1443.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages. 9 ALR3d 692.

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Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.

No. 51,199

GUARANTEE ABSTRACT AND TITLE COMPANY, INC., *Appellee and Cross-Appellant*, v. INTERSTATE FIRE AND CASUALTY COMPANY, INC., *Appellant and Cross-Appellee*.

(618 P.2d 1195)

SYLLABUS BY THE COURT

1. INSURANCE—*Punitive Damages—Public Policy Requires Payment by Insured Not Insurer*. Public policy requires that payment of punitive damages rests on the party who committed the wrong, rather than his insurance company. Following *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973). We interpret that rule to include any person who has incurred such liability regardless of whether the liability resulted from the insured's own acts or those of his employee, servant or agent.
2. SAME—*Insurer's Duty to Appeal on Behalf of Insured—Test*. The test to determine whether an insurer has a duty to appeal a case on behalf of its insured is one of good faith and fair dealing on the part of the insurer, balancing the rights of both the insurance company and the insured.
3. CIVIL PROCEDURE—*Directed Verdict Motion—Trial Court's Determination—Appellate Review*. In ruling on a motion for directed verdict pursuant to K.S.A. 60-250, the court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought, and where the evidence is such that reasonable minds could reach different conclusions thereon, the motion must be denied and the matter submitted to the jury. The same basic rule governs appellate review of a motion for a directed verdict. Following *Frevele v. McAloon*, 222 Kan. 295, Syl. ¶ 5, 564 P.2d 508 (1977).
4. INSURANCE—*Punitive Damages—Insurance Coverage against Public Policy—Attorney Fees—Directed Verdict Error—Promissory Note Constituted Indemnity Payment—Insurer's Duty to Appeal on Behalf of Insured*. In a civil case, the record is examined and it is held the trial court erred in: 1) allowing coverage for punitive damages; 2) awarding attorney fees to Guarantee; 3) directing a verdict in favor of Interstate on the question of Interstate's duty to settle the case. The trial court did not err in: 1) finding Guarantee's promissory note to Chicago Title to be enforceable; and 2) finding Interstate had a duty to appeal on behalf of Guarantee in *Ford* and awarding costs of the appeal.

Appeal from Wyandotte district court, division No. 2; WILLIAM M. COOK, judge. Opinion filed November 1, 1980. Reversed and remanded for new trial.

*Retd F. Holbrook*, of Steineger and Holbrook, P.A. of Kansas City, and *Ronald D. Garrison*, of the same firm, argued the cause and were on the brief for the appellant/cross-appellee.

*George Mater, Jr.*, of Weeks, Thomas, Lysaught and Mustain, Chartered, of Kansas City, and *Edward H. Powers, Sr.*, of Kansas City, argued the cause and were on the brief for the appellee/cross-appellant.

The opinion of the court was delivered by

HERD, J.: This case arose out of *Ford v. Guarantee Abstract &*



3-22-84  
KANSAS ASSOCIATION OF REALTORS®

Executive Offices:  
3644 S. W. Burlingame Road  
Topeka, Kansas 66611  
Telephone 913/267-3610

Attach. # 3

SENATE JUDICIARY COMMITTEE

Mr. Chairman and members of the Committee, my name is Todd Sherlock and I represent the Kansas Association of REALTORS. My association very much supports House Bill 2876, a bill concerning coverage of liability for certain punitive or exemplary damages.

Many commercial Realtors strongly favor such a proposal. The bill will allow for the employer to obtain insurance in the event that he is held liable for punitive damages assessed against him because of the intentional or reckless conduct of his employees, without the prior knowledge of the employer. Without such insurance protection, the employer is left wide open to acts done without his knowledge by his agent. The Kansas Association of REALTORS feels the employer ought to have the right to purchase and benefit from such insurance coverage.

This legislation is in the best interest of the employer as well as the public that such legislation may ultimately affect. In addition, we understand that insurance companies offering punitive liability insurance coverage to employers are under no obligation to fulfill their obligations when a claim is made, based on the decision of Guarantee Abstract and Title Co. v. Interstate Fire and Casualty Co., 228 Kan. 532 (1980). To permit the sale of punitive liability insurance without a means for an employer to collect on that insurance makes very little sense.

The Kansas Association of REALTORS urges your support of House Bill 2876.

Atch. 3

3-30-84



818 Merchants Nat'l Bank Bldg., Topeka, Kansas 66612 913/235-1307

Attach. #4

March 30, 1984

Testimony before the Senate Judiciary Committee / HB 2876

Mr. Chairman, members of the committee, my name is George Logan; I am general manager of WIBW TV and president of the Kansas Association of Broadcasters.

The KAB appreciates this opportunity to appear before you in support of House Bill 2876. Its passage would provide relief for Kansas broadcasters from the uncertainty that surrounds libel suits and requests for punitive damages.

Although the broadcast media in Kansas takes seriously its responsibility of accurate reporting and serving the "public interest, convenience and necessity", we all know that litigation will occur from time to time. And since many, if not most libel suits call for punitive damage awards, it would be beneficial to us to know that protection from such awards is available through insurance coverage.

Another factor that greatly concerns us, is that, since we cannot currently purchase insurance to protect us from suits for punitive damages, we must hire a separate lawyer to defend us against these, while our insurance company prepares our defense against any action for actual damages. This is a needless duplication of effort and expense.

For these reasons, the Kansas Association of Broadcasters asks for your favorable consideration of House Bill 2876.

Thank you for your attention.

**PRESIDENT**  
George Logan  
WIBW TV, Topeka

**SECRETARY-TREASURER**  
Steven Roesler  
KJCK AM-FM, Junction City

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KAB, Topeka

Lance Armer  
KLFQ FM, Lyons

Lynn Higbee  
KTPK FM, Topeka

Ed Hundley  
KLEY/KZED, Wellington

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KIUL AM, Garden City

Cliff Shank  
KSKU/KLEO  
Hutchinson/Wichita

Sam Elliott  
KULY AM, Ulysses  
KU, Lawrence

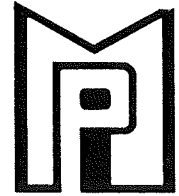
John Mileham  
KWCH TV, Wichita

Lowell Jack  
KMAN/KMKF, Manhattan

Atch. 4

# MEDIA / PROFESSIONAL INSURANCE, INC.

*Attach. # 5*



Chad E. Milton, Asst. Vice President/  
Asst. General Counsel

March 29, 1984

Hon. Elwaine F. Pomeroy  
Chairman, Senate Judiciary Committee  
State House  
Topeka, KS 66612

Dear Sen. Pomeroy:

This letter will supplement my testimony before your committee regarding House Bill No. 2876, concerning coverage of liability for punitive damages.

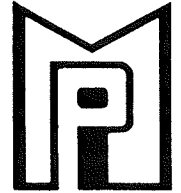
We support passage of this bill. Media/Professional is the country's largest underwriter of insurance for the media, and it is from that experience that we can attest for employers who are vicariously liable for the acts of employees or agents agents works a terrible hardship on the publishers and broadcasters of Kansas.

It is important to point out that the passage of House Bill No. 2876 would not result in an increase in premiums paid by Kansas broadcasters and publishers. Because we provide coverage for punitive damages in nearly every other state and because our rates are based upon national experience, there would be no reason for Kansas insureds to pay higher premiums.

In addition, please remember that this bill is a permissive bill, requiring no insurer to offer the coverage nor requiring the consumer to buy it. Should an insurance carrier in another line of insurance increase premiums, the consumer could choose to purchase the coverage from another carrier or choose not to buy it at all.

This bill would bring Kansas in line with the vast majority of states that allow insurance for punitive damages. Because the issue has not been faced squarely in every state, definite numbers aren't available. Nonetheless, our research finds only five other states that have even suggested a rule like Kansas and only one other that has ruled that way. Several more states (about ten) adopt the position proposed in House Bill No. 2876; the remainder either allow coverage for punitive damages in every case (even where directly imposed) or have taken no position.

*Atch. 5*



Hon. Elwaine F. Pomeroy  
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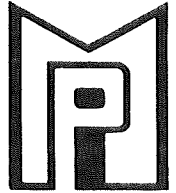
For Kansas publishers and broadcasters, coverage for punitive damages vicariously awarded would ease their greatest uncertainty, that of an enormous award of punitive damages. Virtually every lawsuit brought against a publisher or broadcaster includes a demand for substantial punitive damages. In our experience, awards for punitive damages have nearly always been disproportionately large in relation to the award for compensatory damages. Therefore, if vicarious punitive damages are not insured, the publisher or broadcaster would face significant theoretical exposure in nearly every case and devastating real exposure in many. Moreover, the uncertainty and ambiguity are increased by the creation of a conflict of interest between the insured and the insurer, each potentially trying to encourage an award in the bailiwick of the other.

Punitive damages themselves (insured or not) create uncertainty in media litigation. Unfortunately, under the state of the law today there is no way for anyone to predict the likelihood of size of punitive damages in a libel suit. There is no particular kind of conduct the courts have sought to discourage through punitive damages in libel cases. In fact, it is entirely possible under Kansas law for a public figure plaintiff to recover punitive damages on the same minimum evidence required for compensatory damages, namely reckless disregard for the truth. Hatred, spite, evil motive and other traditional indicia of punitive damages are, in most cases, irrelevant to the determination of liability and the assessment of compensatory and punitive damages. Therefore, it is clear that however well-intentioned the Kansas public policy regarding uninsurability of punitive damages may be, it is ineffective and inappropriate in a libel case.

It is a common observation of courts and commentators that punitive damages in libel suits are most often awarded arbitrarily, without reference to the actual culpability of the broadcaster or publisher. Quite naturally, this causes great concern among the media, a concern they seek to allay with insurance. Media insureds in Kansas pay a fair premium for media perils coverage. In return, they should receive all the protection they need and expect.

The present public policy has the ironic effect of weakening the state's ability to regulate insurance. First, one of the major media insurers is an off-shore company that boasts of being beyond the jurisdiction of the states' insurance departments, in particular making that claim with regard to punitive damages. Whether or not the boast is justified, it is believed by many insureds and consequently some of our business and Kansas regulation is lost to the off-shore company. Second, many Kansas insureds with offices and operations in a state where punitive damages are insurable choose to file insurance policies in that other state. Once again, the insurance department may lose its ability to regulate insurance that affects Kansas citizens.





Hon. Elwaine F. Pomeroy  
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I have attached to this letter a copy of a recent article in the Journal of Commerce, a national publication, which addresses some of these issues. In particular, it makes reference to the off-shore company's claimed ability to operate outside domestic insurance regulation. In addition, the article points out difficulties presented to broadcasters and publishers by the prospect of punitive damages awards.

Historically, the state of Kansas has been a pioneer in the communications industry and remains a leader today. The Kansas Supreme Court's 1908 ruling in Coleman v. McLennan, was the foundation for the United States Supreme Court's landmark opinion in New York Times v. Sullivan. Libel insurance itself is a Kansas creation, the first policies being written at the instigation of William Allen White. Repeatedly, the Kansas Supreme Court has reaffirmed the principle that the Kansas public deserves and relies on a "free and unfettered" press. If Kansas broadcasters and publishers, out of fear of uninsured awards of punitive damages, choose not to do the kind of reporting the Kansas Supreme Court has always encouraged, then the real losers will be the Kansas public.

Therefore, for the foregoing reasons, we enthusiastically endorse House Bill No. 1876 and encourage its passage.

Finally, we are eager to give any help you or any other member of the legislature may need. Please feel free to call on me or Mark Beshears, who we have retained as counsel for this legislative matter. His telephone number in Topeka is 232-0564.

Very truly yours,

Chad E. Milton

cc: Senate Judiciary Committee

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# The Journal of Commerce

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157TH YEAR

## Jury Hostility Sparks Rise in Libel Insurance, Cases

By LEAH R. YOUNG  
Journal of Commerce Staff

WASHINGTON — "Libel is the only constitutionally protected area of insurance," observes Larry Worrall, president and general counsel for Media Professional Insurance Corp.

As such, the layman might consider this type of business a piece of cake. After all, the courts have ruled that the Constitution clearly protects newspapers from challenges by any public figures unless actual malice can be proved.

The reality, however, has been very different. While appellate courts have been conscientious about overturning the large punitive damage awards being delivered by juries, the road to the overturning has been costly.

The real problem "is jury hostility toward the press," said Jack Landau, who directs the Reporters Committee for Freedom of the Press. Even where plaintiffs cannot show actual damages, juries are awarding punitive damages, he said. Newspapers have been winning eight out of 10 cases on appeal, but news organizations are racking up huge defense costs.

Mr. Worrall, like most insurers, will not discuss his premium rates. But he explains that

at this time there is a large lag between rates and losses because legal expense constitutes 80 percent of current losses.

If any of the million-dollar judgments now on the books in the lower courts are sustained, then, he said, premiums will definitely be "inadequate."

In the meantime, newspapers, radio stations and other media are seeking higher insurance coverage because they need to post a bond in order to proceed to an appellate court.

Accelerating numbers of cases charging libel should be expected, said Robert S. Becker, managing editor of News Media & the Law, published by the Reporters Committee for Freedom of the Press.

"Libel is journalistic malpractice," Mr. Becker said, so it parallels the rise in legal malpractice cases. The cases are filed, he said, by the same lawyers who specialize in tort law.

Tort law is generally the law of damages and injury. Libel cases are brought by those who feel broadcast or publication has injured their reputation or business.

The companies most active in the libel area are Media Professional, Mutual of Bermuda,

Employers Reinsurance, Fireman's Fund and Chubb.

Arthur "Tim" Hanson, a director of the Mutual Insurance Company Group of Bermuda and its U.S. general counsel, indicated, "In the last seven years there has been an increase in the gross number of lawsuits brought" as well as a large increase in the number of media organizations seeking insurance.

His company insures affiliates of the American Newspaper Publishers Association. The company operates offshore, which allows it to get around strictures in laws of 17 jurisdictions, including New York and California, that prevent insurance of punitive damages.

Other companies deal with this problem by issuing a letter of intent indicating that punitive damages will be covered since punitive claims cannot be included in the policy's definition of damages.

"I've never seen a libel complaint without a claim that it was done knowingly," Mr. Worrall of Media Professional observed.

Mr. Hanson's company works through three-year insurance "treaties" reinsured through the London market. From Aug. 1, 1963, to July 31,

1966, Mutual started the treaty with coverage of 151 newspapers and ended the treaty with 421. There were 215 cases filed against clients in the three years.

In the 1972-1975 treaty, 1,134 organizations were insured by 1975, with 727 lawsuits. By the 1978-1981 treaty, there were 1,956 insureds in 1981, and 1,209 lawsuits during that three-year span. In 20 years of operation there have been 4,524 libel suits among his clients. There are 2,116 that have not been resolved.

Premiums were raised substantially on Aug. 1, 1981, and again in 1982, Mr. Hanson revealed.

Mr. Hanson noted that over the years reinsurers have reimbursed his company in excess of \$6 million, while Mutual has paid out \$32 million in costs. But gross premiums up to the end of last year only totaled \$14.5 million.

Mr. Landau said that the pattern of large awards being produced by jury verdicts followed by the overturning of decisions by appeals courts has created a situation in which newspapers are settling cases that could be won, but at high legal expense.

"It costs \$50,000 to just start a defense," Mr.

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## Libel Cases, Insurance on Rise

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Landau said. He believes that this has to create an environment where insurers pressure newspapers to settle for the nuisance value, although both Mr. Worrall and Mr. Hanson deny the charge.

Media insured by these companies, they both say, retain the right to hire their own attorneys who are media, rather than insurance specialists.

But not all cases have important first amendment value, and all admit that settling of nuisance cases has to go on.

Mr. Landau said that newspapers are killing valid stories "out of fear" that they will be forced to pay high defense costs.

A "Survey of Recent Media Verdicts" presented by James C. Goodale in June 1983 to a seminar of the Practising Law Institute noted that "very substantial damages are being

awarded to plaintiffs in media libel cases."

Mr. Goodale catalogued several studies and concluded that "a trend toward ever-larger verdicts appears to be developing."

Three cases before the Supreme Court this year will either fuel or calm the fear.

The most significant case involves whether appeals courts are exercising too much judgment in their review of libel cases. The case involves claims of libel by Bose Corp. on the grounds that a review of audio speakers in "Consumer Reports" was libelous.

The First Circuit Court of Appeals vacated the district court's \$200,000 judgment, and Bose appealed to the Supreme Court. Bose wants the high court to rule that appeals courts cannot review the conclusion that "actual malice" was involved, unless the findings are "clearly erroneous."

If Bose wins, the safety valve of appellate review of libel cases will be seriously endangered.

In the other two cases, the justices will determine whether out-of-state trial courts may hear cases alleging libel. One of these cases involves a suit against the National Enquirer in which entertainment broker Marty Ingels and his wife, actress Shirley Jones, sued in California. The case forced two reporters to appear out of state, because they were sued personally along with the publication.

The second case involves Kathy Keeton, senior vice president of "Penthouse" magazine in a lawsuit against "Hustler" magazine and its publisher Larry Flynt. She sued in New Hampshire, where neither are domiciled, since it was the only state in which the statute of limitations had not run its course, on the grounds that both magazines circulate there.