

## AMERICA’S WORST TOP MODEL: ALEC’s Model Civil Justice Legislation

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Corporate influence is everywhere these days. Some of this is obvious. Some, not so much.

The American Legislative Exchange Council (ALEC) is an influential organization that inserts the agenda of corporate America and the political right into state legislative activities. One of its chief endeavors is drafting model legislation, which it shops to state legislatures across the country. ALEC’s membership, who work together to draft bills, consists of conservative state legislators, who pay little to join, and corporations who pay hefty membership fees - up to \$25,000 or more to participate in ALEC’s issue-focused “task forces.” This report specifically focuses on the work of ALEC’s Civil Justice Task Force.

Since ALEC’s actions and policies are generally known only to its own members, finding out information about ALEC and its legislative priorities, let alone examples of model bills, is not easy. CJ&D is certainly not the only public interest group that has uncovered information about ALEC. The American Association for Justice published an enlightening report earlier this year called *ALEC: Ghostwriting the Law for Corporate America*, which explores who is behind ALEC’s anti-civil justice activities.<sup>2</sup> We recommend this report for more background on how ALEC’s anti-civil justice agenda is connected to some of this country’s dirtiest industries.

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<sup>1</sup> Big thanks to Jacob Agron for his research assistance.

<sup>2</sup> [http://www.justice.org/cps/rde/xbcr/justice/ALEC\\_Report.pdf](http://www.justice.org/cps/rde/xbcr/justice/ALEC_Report.pdf)

Sourcewatch provides additional history and background as well.<sup>3</sup>

In follow up to these efforts, this CJ&D White Paper digs further into the work of ALEC's Civil Justice Task Force. We examine specifically the organization's civil justice priorities over the last three years, uncover sample model bills that it has shopped to state legislatures and unearth some of its legal strategy to try to protect such legislation from constitutional challenge.

## ALEC: FOR AND AGAINST

ALEC's agenda is vast even within the civil justice issue area. Before examining model ALEC bills, it is worth mentioning some pro-consumer legislation that ALEC is actively working to block.

### AGAINST

**Wrongful Death Laws.** In a 2008 article called "The 2008 Trial Bar Business Plan: Expanding Liability through the Legislature," the director of ALEC's Civil Justice Task Force, Amy Kjose, discusses their "new battlefield" – fighting efforts to strengthen liability laws to benefit injured victims. It includes wrongful death laws that would prevent families of those wrongfully killed from being fully compensated. ALEC specifically "opposes legislation that would expand the availability of subjective non-economic compensatory damages under a wrongful death act or unreasonably expand the class of persons who may recover in the event of a wrongful death rights and labor union reforms."

In the 2008 article, Ms. Kjose seems particularly annoyed by a bill introduced in New Jersey and other states that would "allow for compensation for the loss of companionship in cases involving adulterated pet food," which she argues will kill your pet – the legislation, not the contaminated food, that is. The tainted pet food scandal in 2008 involved imported ingredients from China that ended up killing up to 1,500 pets in the United States.<sup>4</sup> Amy's logic goes something like this:

If one could recover loss of companionship from the death of a pet, veterinarian costs would likely rise because of the increased liability that veterinarians would face and the increased insurance costs that would accompany the liability. With the significant increase in expense to the pet owner, many pets would either have to go without care *or be put to sleep*.

(Emphasis added.)

**Drug Industry Liability.** Another big concern for ALEC, according to Amy Kjose, is the ongoing attempt in Michigan to repeal the 1995 law that immunizes drug companies for marketing dangerous government-approved drugs that injure or kill people. This is

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<sup>3</sup> <http://sourcewatch.org/index.php?title=ALEC>

<sup>4</sup> See, e.g., <http://www.petfoodsettlement.com/>

particularly troublesome for ALEC since one of its legislative priorities is for every state to enact some version of Michigan's immunity statute, the only state in the country with such a law. Their efforts have been stepped up since 2009, when the U.S. Supreme Court ruled in *Wyeth v. Levine* that state tort remedies for those injured by dangerous drugs are not preempted by the federal government.

**Insurance Bad Faith.** Insurance bad faith laws, which penalize insurance companies for wrongly denying claims, are also on ALEC's rotten list. At their annual meeting in Atlanta last year, ALEC's Task Force passed a resolution to "strongly oppose" insurance bad faith laws.<sup>5</sup> This was apparently in response to insurance industry fears that "consumers' economic concerns and increased Democratic majorities in state capitols could lead to more bad faith legislation that would open the door for increased lawsuits and damages awards."

## FOR

The following is a list of titles of model ALEC bills that weaken the civil justice system for consumers and patients. If an (\*) precedes the bill, it indicates that a representative of or advisor to ALEC's Civil Justice Task Force has noted this bill to be a current priority in writings within the last three years. While the titles are listed publicly by ALEC, the actual model bills generally are not. However, CJ&D has found a number of them. (*See Appendix for ALEC Model Bills*) These bills are often introduced at the state level with the same titles so they can be found in state legislative bill searches:

### **Alternative Dispute Resolution**

Alternative Dispute Resolution Act

### **Asbestos Reform**

\*Asbestos and Silica Claims Priorities Act

\*Successor Asbestos-Related Liability Fairness Act

Asbestos Claims Transparency Act

### **Curtailing Unreasonable Expansion of Liability**

\*Resolution In Support Of Preserving Reasonable Limits On Wrongful Death Actions

Resolution In Support Of Statutes Of Limitations That Promote Certainty And Fairness In Civil Litigation

Fairness in Statute of Limitation Reopeners Resolution

\*Resolution on Animal Liability and Guardianship

Resolution on Protective Orders

\*Private Enforcement of Consumer Protection Statutes

\*Resolution Opposing Unfair and Unbalanced Insurance "Bad Faith" Legislation

### **Damages Reform**

\*Full & Fair Non-Economic Damages Act

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<sup>5</sup> "Insurance Group Backs Lawmakers' Call for Blocking 'Bad Faith' Bills," *BestWire*, July 22, 2009.

Constitutional Guidelines for Punitive Damages Act  
Non-Economic Damages Awards Act  
Periodic Payment of Judgments Act  
Prejudgment and Post-Judgment Act  
Punitive Damages Standards Act  
Truth in Damages Act  
Limits on Multiple Punitive Damages Resolution

### **Fault**

Assumption of Risk Act  
Comparative Fault Act  
\*Joint and Several Liability Act

### **Fighting Frivolous Lawsuits**

Accuracy in Pleading Act  
Litigation Accountability Act  
Offer Of Settlement Act  
Quality Education and Teacher and Principal Protection Act

### **Good Samaritan Laws**

Landowners' Liability Act  
Volunteer Immunity and Charitable Organization Liability Limit  
Whistleblower Immunity Act

### **Limitations on Bringing Claims**

Statute of Limitation Reduction Act  
Ten-Year Statute of Repose Act

### **Medical Malpractice Reform**

Expedited Medical Review Panel Act  
\*Resolution on Quality Managed Care in a Litigious Health Care Marketplace

### **Openness and Transparency**

\*Private Attorney Retention Sunshine Act (*See Appendix for ALEC Model Bill*)  
\*Resolution On Transparency In State Attorney General Conduct  
\*The Honesty in Lawyering Act  
\*Transparency in Lawsuits Protection Act

### **Procedural Reforms**

Appeal Bond Waiver Act (*See Appendix for ALEC Model Bill*)  
Civil Procedure Rule Equity Resolution  
\*Class Actions Improvements Act (*See Appendix for ALEC Model Bill*)  
Forum Non Conveniens Act  
Intrastate Forum Shopping Abuse Reform Act  
\*Jury Patriotism Act  
\*Model Rules Governing Discovery of Electronically Stored Information and  
Limitations on Waiver of Attorney-Client Privilege and Work Product  
\*Regulatory Class Action Reform Act

\*Reliability in Expert Testimony Standards Act  
Summary Judgment Procedure Act

### **Product Liability Reform**

Product Liability Act  
Product Safety Analysis Incentive Act  
\*Regulatory Compliance Congruity with Liability Act (*See Appendix for ALEC Model Bill*)  
Product Liability Resolution  
Resolution in Support of Uniformity in Prescription Drug Labeling  
Resolution on Congressional Mandates & Defective-Product Liability Protection  
Notice & Opportunity to Repair Act

### **Separation of Powers and Federalism**

Fair Notice and Market Stability Act  
Separation of Powers: Prevention of Retroactive Judicial Lawmaking  
Adoption of the Common Law Act  
Resolution on the Federal Consent Decree Fairness Act

### **Workers' Compensation**

Workers' Compensation Fraud Warning Act

### **Miscellaneous /Other**

Admissibility in Civil Actions of Nonuse of a Seat Belt Act  
Drug and Alcohol Defense Act  
Legal Consumer's Bill of Rights Act  
Pre-Complaint Notice Act  
Resolution in Support of Efforts to Promote Impartial, Independent, and Highly-  
Qualified State Judiciaries  
Resolution Opposing Anti-Indemnity And Anti-Additional Insured Legislation

## **2009/2010 Priorities**

In its January 2009 newsletter, *Inside ALEC*, the group listed its 2009 civil justice affirmative priorities as follows (the descriptions provided are ALEC's own words – not ours):

- Private Attorney Retention Sunshine Act and Resolution on Transparency in State Attorney General Conduct: These bills promote transparency and accountability in relations between state officials and private outside counsel. (*See Appendix for Model Bill*)
- Private Enforcement of Consumer Protection Statutes Act: This act seeks to minimize abuse of state Consumer Protection Acts. The legislation would help to ensure that these state laws are used appropriately and effectively, and that the requirements to bring a consumer protection case are clear and fair.

- **Transparency in Lawsuits Protection Act:** This legislation requires legislatures to expressly create new rights to sue if they want to so create. It bars courts from implying them where they do not exist.

In its March 2010 newsletter, ALEC’s Civil Justice Task Force head Amy Kjose articulated a more expanded version of these priorities – plus new and old ones - in an article called “States to the Rescue: Tort Reform Options that Congress Won’t Touch.” They are listed here in the order in which they appeared in the article. (Unless otherwise noted, quotations are directly from the article):

### **Reliability in Expert Testimony Standards Act**

This bill “is designed to ensure state courts follow the same guidelines for admitting expert opinions about scientific and technical matters as judges in the federal courts. The legislation provides courts with a nonexclusive list of factors they should consider in determining reliability, requires courts to hold pretrial hearings to ascertain the reliability of an expert, and encourages thorough appellate review of a trial courts and necessities.” Under this bill, “a proffered scientific opinion must have been developed in accordance with the scientific method. And by ensuring that the federal and state standards are similar, the model act prevents forum shopping while keeping state courts from being flooded with ‘junk science’ cases that cannot pass muster in federal courts.”

### **Discovery Rules**

ALEC’s model rules “incorporate court rules to govern the discovery of electronically-stored information and waiver of privilege in state court litigation. The legislation would reduce unexpected and unnecessary discovery costs and burdens by updating discovery definitions, ensuring requested information is relevant and reasonably accessible, allowing sanctions in the case of intentional or reckless violation, allowing flexibility in production form, and creating consistent standards for protection against the waiver of attorney-client privilege.”

### **Jury Patriotism Act**

This bill would “ensure that all able citizens, regardless of income or occupation, would be able and expected to serve.” (Note: The result ALEC would like is more business people and professionals on juries, who tend to be more conservative and anti-plaintiff.)

### **Class Action Improvements Act** (See Appendix for ALEC Model Bill)

The bill includes “instituting proof and administrative prerequisites for certification, limiting the scope of class-actions plaintiffs to home state residents, providing for the interlocutory (or immediate) appeal of a class-action certification, and encouraging courts to consider things like whether the expense and effort needed to litigate a case as a class is justified considering the recovery expected to be obtained by each class member.” This “ensures that only appropriate plaintiffs are joined in a class and that the power of settlement generally felt by attorneys representing class actions is not abused.”

### **Consumer Protection Reform**

According to ALEC, “The FTC has been given the authority to decide when unfair and deceptive trade practices occur and maintains that no private right to sue exists under its statutory authorization. However, all 50 states and the District of Columbia allow

consumers to bring private rights of action under their consumer protection laws.... [If] these private rights of action exist, it is in the best interest of the state to include provisions requiring the same standards that need to be met to prove a claim valid in the tort system: proof of a false statement, an intent to deceive, reliance on the statement, and, of course, actual harm.”

### **Restore Honesty in Lawyering Act**

The political impetus for this bill is what ALEC calls “the astonishingly high number of recent national incidents where leaders in the personal injury and mass tort bar have been caught in illegal schemes against clients, courts, and the general public.” Incredibly, ALEC states that “[t]he bill ... is based on the Code of Professional Conduct that the American Association for Justice enacted in response to the recent scandals among its members.” However, some of these provisions clearly are not. For example, this bill would require that if a case is successful, “the attorney must provide the client with a written accounting of time spent per attorney, total fee amount, hourly fee, and an itemized list of costs.” (Unlike defense lawyers who are paid by the hour, trial lawyers are outcome-focused, not time-focused. They do not keep time records or create the overhead and expenses that this would entail.) Also, “the bill would ... place a duty on all attorneys to disclose potential conflicts of interest, for example, financial relations with jurors or judges. Lastly, it would address lawyers’ duties to the public by subjecting them to consumer protection legislation, particularly as they advertise and make other representations to the public about their professional services hourly fee, and an itemized list of costs.”

### **Regulatory Compliance Congruity with Liability Act.** (See Appendix for ALEC Model Bill)

In a recent article in ALEC’s *State Factor* publication called “The Impact Of Federal & State Safety Regulations On Liability,” the authors recommend one of three approaches to provide drug company immunity, noting first that this statute “can be tailored to apply only to prescription drugs or other products approved by the FDA, an approach taken by some states.” Option 1 is “no liability,” *i.e.*, complete immunity (as in Michigan) for a drug manufacturer if the product or service complies with government standards. This would not extend to manufacturing defects or cases where misconduct has occurred in the approval process. Option 2 is “rebuttable presumption,” *i.e.*, it would assume immunity unless that plaintiff can overcome this or show that the regulations are inadequate. Option 3 is “no punitive or exemplary damages when compliant,” *i.e.*, if government standards are met, these types of damages are prohibited, provided there was no misconduct.

### **“Tort Reform” Standards**

ALEC is also still pushing repeal of the collateral source rule, which has already been done in many states, and a severe modification to joint and several liability, so that, “a defendant must pay damages in proportion to its established liability. If considered 30 percent liable, the defendant must pay 30 percent of the verdict damages.”

## Earlier Priorities: 2006/2007

Mark Behrens, partner at the Shook, Hardy & Bacon corporate law firm and an advisor to ALEC's Civil Justice Task Force, frequently writes about ALEC's legislative agenda. The following was gleaned from two different articles of his in the last few years, which discuss additional legislative priorities for the organization:

**Asbestos.** The following is directly from Mark Behrens, "ALEC Model Legislation to Help Sick Asbestos and Silica Claimants, Curg Fraud, and Provide Liability Fairness to Innocent Successor Corporations," *State Factor* (February 2007):

**ALEC Model Successor Asbestos-Related Liability Fairness Act.** ALEC's model Successor Asbestos-Related Liability Fairness Act would restore fairness to successor liability by providing that plaintiffs allegedly harmed by the predecessor would be able to collect from the successor no less than the same amount they could have collected if no merger had occurred: the total gross asset value of that predecessor at the time of the merger. The successor would get credit for all the settlements or judgments it has paid or committed to pay since the merger. The successor's liability would cease when it has paid or committed to pay as much as the predecessor's gross assets would now be worth (adjusted upward for the passage of time). Any successor that independently commits a tort—whether before or after a merger—could still be held liable to the full extent of its own assets for any harm it causes.

### **ALEC's Model Asbestos and Silica Claims Priorities Act**

ALEC developed its model Asbestos and Silica Claims Priorities Act to provide legislators with a sound and fair model to improve the handling of asbestos and silica cases in state courts. The ALEC model bill seeks to address the problems outline above in a surgical and narrowly tailored manner.

**Medical criteria:** The core of the model Act provides for the adoption of procedures that require claimants to submit credible and objective evidence of physical impairment in order to bring or maintain an asbestos or silica claim. Discovery generally would be stayed until a claimant has presented prima facie evidence of impairment; this is to allow defendants to focus their resources on compensating the truly sick. Statutes of limitations would be tolled for presently unimpaired claimants so that these individuals may pursue a claim in the future should an impairing condition develop. To help ensure the reliability of claims, evidence relating to impairment would have to comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment established by the medical community. Evidence relating to impairment also must comply with applicable laws, regulations, licensing requirements, and medical codes of practice, and shall not be obtained under the condition that the claimant hire the attorney or law firm sponsoring the examination, test, or screening.

**Venue reform:** To address forum shopping abuse, the ALEC model requires asbestos and silica claims to be filed in the state and county where the plaintiff

lives or had the most substantial cumulative exposure to asbestos or silica.

Joinder reform: To stop the unfair and improper joinder of dissimilar claims, the ALEC model generally provides that asbestos or silica claims may only be consolidated for trial if all parties consent.

**Full & Fair Noneconomic Damages Act.** The following is from Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus on Arguments of the Past*, 31 *U. Dayton L. Rev.* 173 (2006):

The model Act would prohibit consideration of guilt evidence when a jury determines an award for pain and suffering. The jury would be instructed that the law requires them to consider only what it would take to compensate the plaintiff for pain and suffering. Jurors would be told that they are not to consider any alleged wrongdoing, misconduct, guilt, the defendant's wealth, or any other evidence that is offered for the purpose of punishment when they are determining noneconomic damages.

The Act also requires a trial court to closely review pain and suffering awards during the post-trial phase. First, the judge would consider whether the facts of the case or the arguments of counsel inflamed the passion or prejudice of the jury, including whether the jury improperly considered the wealth of the defendant. Next, the judge would consider the amount of the pain and suffering award relative to the severity of any physical injury and the amount of any economic loss. Finally, the judge would take into account whether the noneconomic damage award is in excess of verdicts involving comparable injuries to similarly situated plaintiffs. If so, the court could uphold the award if it finds extraordinary circumstances in the record to support an award in excess of the amount awarded in similar cases.

Finally, the Act requires appellate courts to engage in a *de novo* review of an appeal of a noneconomic damages award challenged on grounds of excessiveness. This means that the appellate court would independently consider the legality of the noneconomic damage award, rather than rely on the judgment of the trial court absent finding an abuse of discretion. This *de novo* standard is the same type of thorough review mandated by the United States Supreme Court for determining whether a punitive damage award is unconstitutionally excessive.

## PROTECTING AGAINST COURT CHALLENGES

Charlie Ross, formerly of ALEC as a Mississippi state senator and member of the Mississippi House of Representatives, recently wrote his recommendations on how to ensure model ALEC bills withstand constitutional muster. The following is his list, all quoted directly from "Court Challenges to Tort Reform," *Inside ALEC* (March 2010):

**Specifically address often-litigated issues pertaining to the subject matter of the legislation.** (With statute of limitations legislation, for example, the tolling issue is critical.) Specify what, if anything, will allow or delay the start of the limitations period, or an interruption in the running of the limitations period. With non-economic caps, is the cap per plaintiff, or per defendant? With any tort reform measure, such issues exist. Gaps and ambiguities create the opportunity for mischief. So, take the time to identify these issues, and, to the extent possible, address them in the wording of the legislation.

**Include legislative intent in the legislation.** This is especially true since many state legislatures do not keep transcripts of committee hearings and floor debates. As an example, the Mississippi Tort Reform Legislation of 2004 immunized sellers of a good in strict liability products actions if the seller did not have “actual or constructive knowledge” of a defect in the good at the time of sale. “Actual or constructive knowledge” is a phrase arguably subject to varying interpretations. To ensure the courts would better understand what “actual or constructive knowledge” meant, the legislation also stated: “It is the intent of this section to immunize innocent sellers who are not negligent, but instead are mere conduits of a product.” See Miss. Code § 11-1-63(h).

**Include a severability provision.** In the bill, include a severability provision that states that if any part of the legislation is found invalid, the rest of the legislation remains valid. Further, to the extent possible, put distinct separate substantive provisions in separate subsections of the bill so severability will be easier.

**Phrase statutes in concepts that have traditionally been the prerogative of legislative enactment.** Doing so can often avoid the separation of powers argument often used to challenge tort reform measures. As examples, venue and jurisdiction (both personal and subject matters) are areas generally governed by statute. To illustrate, if a statute says “a court shall not have jurisdiction to adjudicate a medical malpractice action unless the pre-suit notice requirement is met,” it is much more difficult for a court to say the requirement is a just rule of procedure which is the court’s sole domain. Likewise, with damage caps, consider wording stating that “no court shall have jurisdiction to impose non-economic damages in excess of ...” An example of how venue was used effectively is the Mississippi effort to address mass tort lawsuits. Hundreds of plaintiffs were allowed to join in one lawsuit against multiple defendants, creating mass confusion and the opportunity for plaintiffs (often with meritless cases) to extort mass settlements. Many (probably most) plaintiffs were from out-of-state or in-state venues with no connection to the chosen venue. The Mississippi legislature could have tackled the issue head on by passing a statute addressing joinder of parties in litigation. But, that approach was fraught with constitutional concerns, given the holdings of the Mississippi Supreme Court stating that court practice and procedure matters were the sole province of the courts due to separation of powers. To avoid this problem, the legislature instead used venue language, stating that “each plaintiff shall independently establish venue; it is not sufficient that venue is proper for any other plaintiff in the civil action.” See

Miss. Code. § 11-11-3. In essence, the statute said that in addition to complying with the court's joinder rule (however interpreted), plaintiffs must also comply with a strict venue requirement. Thus, the goal was largely accomplished while side-stepping a constitutional challenge. Every state legislature and court system is unique.

What is a pitfall in Mississippi may not be in Missouri, and vice-versa. As such, it is critical to consult with legal counsel who understands both the state's courts and its legislature when drafting tort reform legislation. Doing so is the first step in implementing the above principles or others that may be germane. Careful drafting of tort reform legislation is only one part of a tort reform fight, but it is a critical one. Careful, strategic drafting greatly increases the chances of success in the later court challenges, which almost inevitably will come. Since the ultimate goal is legislation that withstands challenges and actually works, careful and strategic drafting should be an essential part of any tort reform strategy.

# APPENDIX A – SAMPLE MODEL ALEC CIVIL JUSTICE BILLS

## REGULATORY COMPLIANCE CONGRUITY WITH LIABILITY ACT

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### SECTION 1. {TITLE}

This Act may be known as the Regulatory Compliance Congruity With Liability Act.

### SECTION 2. {PURPOSE}

The purpose of this Act is to assure that a state’s civil justice system is congruent with applicable regulatory systems and that these two principal areas of law do not work at cross purposes.

### SECTION 3. {DEFINITIONS}

For the purpose of this Act:

- A. “Clear and convincing evidence” means a measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. This level of proof is greater than mere “preponderance of the evidence,” but less than proof “beyond a reasonable doubt.”
- B. “Government agency” means this State or the United States, or any agency of thereof, or any entity vested with the authority of this State or of the United States to issue rules, regulations, orders, or standards concerning the design, manufacture, packaging, labeling, or advertising of a product or provision of a service.
- C. “Manufacturer” means any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who: (1) designs, manufactures, or formulates the product (or component part of the product); or (2) has engaged another person to design, manufacture, or formulate the product (or component part of the product).
- D. “Product” means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.
- E. “Seller” means a person who in the course of a business conducted for that purpose: (1) sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product or service in the stream of commerce; or (2) installs, repairs, refurbishes, reconditions, or maintains a product.

F. “Service” means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved, or licensed by a government agency. Services include, but are not limited to financial services and the provision of insurance.

#### **SECTION 4. {EFFECT OF REGULATORY COMPLIANCE ON CIVIL LIABILITY}**

##### **Option 1 – No Liability**

A. A manufacturer or seller is not subject to liability as a matter of law, if:

1. The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or
2. The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance. The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency. This paragraph shall not extend to a product that departs from its intended design due to a flaw created during the manufacturing process, even though the product manufacturer or seller has complied with all applicable state and federal standards or regulations.

B. This section does not apply if the claimant establishes that the manufacturer or seller at any time before the event that allegedly caused the harm did any of the following:

1. Sold the product or service after the effective date of an order of a government agency to remove the product or service from the market, to withdraw its approval, or to substantially alter its terms of approval in a manner that would have avoided the claimant’s alleged injury;
2. Intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the claimant allegedly suffered; or
3. Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product or service.

##### **Option 2 – Rebuttable Presumption**

A. There shall be a rebuttable presumption that a manufacturer or seller is not subject to

liability as a matter of law, if:

1. The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or
2. The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.
3. The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

This paragraph shall not extend to a product that departs from its intended design due to a flaw created during the manufacturing process, even though the product manufacturer or seller has complied with all applicable state and federal standards or regulations.

B. The claimant may rebut the presumption in Subsection A by establishing through clear and convincing evidence that:

1. The government standards or regulations applicable to the product or service were wholly inadequate to protect the public from unreasonable risks of injury or damage; or
2. The manufacturer or seller of the product or service, either before or after placing the product or service in the stream of commerce, intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the claimant allegedly suffered; or
3. The manufacturer or seller made an illegal payment to an official or employee of the government agency for the purpose of securing or maintaining approval of the product or service.

### **Option 3 – No Punitive or Exemplary Damages When Compliant**

A. A manufacturer or seller shall not be liable for exemplary or punitive damages if:

1. The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or
2. The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

3. The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

B. This section shall not apply if the claimant establishes that the manufacturer or seller at any time before the event that allegedly caused the harm did any of the following:

1. Sold the product or service after the effective date of an order of a government agency to remove the product from the market, to withdraw its approval of the product or service, or to substantially alter its terms of approval of the product or service in a manner that would have avoided in the claimant's alleged injury; or

2. Intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the claimant allegedly suffered; or

3. Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product or service.

#### **SECTION 4. {RULES OF CONSTRUCTION}**

Nothing in this Act shall be construed to:

A. Expand the authority of any state agency or state agent to adopt or promulgate standards or regulations where no such authority previously existed; or

B. Reduce the scope of any limitation on liability based on compliance with the rules or regulations of a government agency applicable to a specific act, transaction, person, or industry.

C. Affect the liability of a service provider based on rates filed with and reviewed or approved by a government agency.

**{Severability Clause}**

**{Repealer Clause}**

**{Effective Date}**

## PRIVATE ATTORNEY RETENTION SUNSHINE ACT

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### **Section 1. {Title}**

This act may be known as the Private Attorney Retention Sunshine Act.

### **Section 2. {Definitions}**

For the purposes of this Act, a contract in excess of \$1,000,000 is one in which the fee paid to an attorney or group of attorneys, either in the form of a flat, hourly, or contingent fee, and their expenses, exceeds or can be reasonably expected to exceed \$1,000,000.

### **Section 3. {Procurement}**

Any state agency or state agent that wishes to retain a lawyer or law firm to perform legal services on behalf of this state shall not do so until an open and competitive bidding process has been undertaken.

### **Section 4. {Oversight}**

No state agency or state agent shall enter into a contract for legal services exceeding one million dollars (\$1,000,000) without the opportunity for at least one hearing in the legislature on the terms of the legal contract in accordance with Section 5.

### **Section 5. {Implementation}**

A. Per the requirement of {Section 4}, any state agency or state agent entering into a contract for legal services in excess of \$1,000,000 shall file a copy of said proposed contract with the clerk of the House of Representatives, who, with the approval of the President of the Senate and the Speaker of the House of Representatives, shall refer such contract to the appropriate committee.

B. Within 30 days after such referral, said committee may hold a public hearing on said proposed contract and shall issue a report to the referring state agency or agent. Said report shall include any proposed changes to the proposed contract voted upon by the committee. The state agency or state agent shall review said report and adopt a final contract as deemed appropriate in view of said report and shall file with the clerk of the House of Representatives its final contract.

C. If the proposed contract does not contain the changes proposed by said committee, the referring state agency or agent shall send a letter to said clerk accompanying the final contract stating the reasons why such proposed changes were not adopted. Said clerk shall refer such letter and final regulations to the appropriate committee. Not earlier than 45 days after the filing of such letter and

final contract with said committee, the state agency or agent shall enter into the final contract.

D. If no proposed changes to the proposed contract are made to the state agency or agent within 60 days of the initial filing of the proposed regulation or any amendment or repeal of such regulation with the clerk of the House of Representatives, the state agency or agent may enter into the contract.

E. Nothing in this Act shall be construed to expand the authority of any state agency or agent to enter into contracts where no such authority previously existed.

F. In the event that the legislature is not in session and the attorney general wishes to execute a contract for legal services, the Governor with the unanimous consent of the Speaker of the House, and the President of the Senate, may establish a five-member interim committee consisting of five state legislators, one each to be appointed by the Governor, the Speaker of the House, the President of the Senate, and the minority leader in each house of the legislature to execute the oversight duties as set forth in paragraphs B-E of this section.

i. identical deadlines and reporting responsibilities shall apply to the Attorney General and this interim committee as would apply to a standing committee of the legislature executing its duties set forth in paragraphs B-E.

#### **Section 6. {Contingent Fees}**

A. At the conclusion of any legal proceeding for which a state agency or agent retained outside counsel on a contingent fee basis, the state shall receive from counsel a statement of the hours worked on the case, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate, based on hours worked divided into fee recovered, less expenses.

B. In no case shall the state incur fees and expenses in excess of \$1,000 per hour for legal services. In cases where a disclosure submitted in accordance with paragraph (a) of this section indicates an hourly rate in excess of \$1,000 per hour, the fee amount shall be reduced to an amount equivalent to \$1,000 per hour.

**{Severability Clause}**

**{Repealer Clause}**

**{Effective Date}**

## **MODEL APPEAL BOND WAIVER ACT**

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### **Section I. Appeal Bond Waived**

(a) If a plaintiff in a civil action obtains a judgment for punitive or exemplary damages, the state supersedeas bond requirements shall be waived as to that portion of the punitive or exemplary damages that exceeds \$1,000,000 if the party or parties found liable seek a stay of enforcement of the judgment during the appeal.

(b) If the party seeking the appeal is a small business organized and doing business under the laws of this state, the state supersedeas bond requirements shall be waived as to that portion of the punitive or exemplary damages that exceeds \$100,000 while any appeals are pending. A small business is [states should select one of the following alternatives]

Alternative 1: a business that has 50 or fewer employees and annual revenues of \$5,000,000 or less.

Alternative 2: cite to definition under other section of state law or draft new definition.

(c) If plaintiff proves by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond requirement has been waived, is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts, waiver shall be rescinded and the bond requirement shall be reinstated for the full amount of the judgment.

(d) A court may otherwise waive the filing of a supersedeas bond as to punitive or exemplary damages in a civil action for good cause shown.

### **Section II: Effective Date**

This Act shall take effect on its date of enactment and shall apply to any action which has not yet begun or which is pending on the date of enactment of this Act.

## SEPARATION OF POWERS ACT

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### Summary

The *Separation of Powers Act* clarifies that when legislatures adopted the common law of England and then delegated to the courts the power to develop that body of law in accord with the interests and public policy of the state, the legislative intent was to provide the courts with laws of reference until and unless the Legislature enacted rules to either complement or replace the common law. The Act reaffirms that, except for any causes of action that were specifically granted constitutional protection at the time of statehood, the Legislature may alter or abrogate any pre-statehood or post-statehood common law causes of action.

### Model Legislation

**Section 1. {Short Title}** This Act shall be known and titled as the *Separation of Powers Act*.

### Section 2. {Legislative Intent}

A. The Constitution of **{Insert State}** vests the Legislature with the sole authority to create laws in light of the public interest. [Cite applicable provision of state's constitution.] The Constitution enabled courts to adjudicate cases by applying the laws enacted by the Legislature to the facts of those cases. [Cite applicable provision of state's constitution.]

B. After the Constitution of [name of state] was adopted, the Legislature enacted [applicable code section] to provide the courts of [name of state] with the authority to refer to the common law in adjudicating cases. The common law consisted of case holdings rendered by English courts prior to the Revolution of 1776 or by the [colonial or territorial] courts before the Legislature was empowered to create the laws of the state or common law principles existing at the time a territory became a state]. The purpose of [applicable code section] was to permit the courts to continue to apply the common law that was in existence at the time of statehood and develop it in the interest of the public policy of the state unless it was abrogated or altered by the Legislature.

### Section 3. {Effect on Pending Action}

An action or proceeding commenced before this Act takes effect is not affected by this Act but all actions or proceedings commenced after that date shall conform to this Act.

“**Section 4. {Study Commission}** The Legislature shall appoint a Commission to study which post-statehood common law causes of action are abrogated by this amendment and to make recommendations to the Legislature regarding those causes of action which the commission believes should be reincorporated in the **{Insert State}** law by way of statute.”

Historically, legislatures have had the right and duty to create and enact laws without any improper interference from the courts. The United States Constitution and state constitutions vest authority in the legislatures to make public policy because the legislative process involves public hearings at which all views are presented and debated. In contrast, courts only review the narrow arguments of the private parties before the court, which are necessarily restricted to the interests of those parties. Legislatures, not courts, are the appropriate forum for developing laws which involve broad policy issues, such as the creation of new legal causes of action.

**Section 5. {Effective Date}**

## SUGGESTED PROVISIONS TO THE CLASS ACTIONS IMPROVEMENT ACT

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[Title, enacting clause, etc.]

**Section 1. Title.** The following Act shall be known and may be cited as the Class Action Improvements Act.

**Section 2. Revisions to Class Action [Statute/Rule].** [Section/Rule \_\_\_\_ of the \_\_\_\_\_] shall be deleted and replaced in its entirety with the following:

**(a) Prerequisites to a Class Action.** One or more members of a class of [name of state] residents may sue as representative parties on behalf of all members of the class only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact as to which the court or jury could reasonably reach conclusions or findings applicable to all class members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) the class is defined so as to permit the identification of class members before any merits adjudications occur.

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party seeking to maintain the class action does not seek any monetary relief and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact as to which the court or jury could reasonably reach conclusions or findings applicable to all class members predominate over any questions affecting only individual members, (ii) that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought and of the defenses thereto is

substantially the same as to all class members, and (iii) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent, nature, and maturity of any litigation concerning the controversy already commenced by or against members of the class; (C) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action; (D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (E) the difficulties likely to be encountered in the management of a class action; and (F) the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies.

**(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment.**

(1) When practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. An order under this subsection may be altered, amended, or withdrawn at any time before the decision on the merits.

(2) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly on the basis of a written decision setting forth all reasons why the action may be so maintained and describing all evidence in support of the determination.

(3) A court shall not certify that an action may be maintained as a class action unless, on the basis of a full record on the relevant issues, the proponents proffer clear and convincing evidence that the action complies with all requirements for such certification. Any doubt as to whether this burden has been met shall be resolved in favor of denying class certification. The court shall decertify a class action upon any showing that an action has ceased to satisfy the applicable prerequisites for maintaining the case as a class action.

(4) There shall be a rebuttable presumption against the maintenance of a class action as to claims for which class members would have to prove knowledge, reliance, or causation on an individual basis.

(5) The determination that an action may be maintained as a class action shall not relieve any member of the class from the burden of proving all elements of the member's cause of action, including individual injury and the amount of damages.

(6) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall include:

(i) a general description of the action, including the relief sought, and the names of the representative parties;

(ii) a statement of the right of a member of the class to be excluded from the action by submitting an election to be excluded, including the manner and time for exercising the election;

(iii) a description of possible financial consequences for the class;

(iv) a general description of any counterclaim or notice of intent to assert a counterclaim by or against members of the class, including the relief sought;

(v) a statement that the judgment, whether favorable or not, will bind members of the class who are not excluded from the action;

(vi) a statement that any member of the class may intervene in the action and designate separate counsel;

(vii) the address of counsel to whom members of the proposed class may direct inquiries; and

(viii) other information that the court deems appropriate.

(7) The plaintiff shall bear the expense of the notification required by the foregoing subsection. The court may require other parties to the litigation to cooperate in securing the names and addresses of the persons within the class for the purpose of providing individual notice, but any costs incurred by the party in providing such cooperation shall be paid initially by the party claiming the class action. Upon termination of the action, the court may allow as taxable costs all or part of the expenses incurred by the prevailing party.

(8) The judgment in an action maintained as a class action under subsections (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

9) When appropriate, a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**e) Orders in Conduct of Actions.** In the conduct of actions to which this [section/rule] applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed entry of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on

intervenor; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

**(f) Dismissal or Compromise.**

(1) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(2) Before approving the dismissal or a compromise of an action that the court has determined may be maintained as a class action, the court shall hold a hearing to determine whether the terms of the proposed dismissal or compromise are fair, reasonable and adequate for the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard as the court may direct.

**(g) Discovery.** Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, but may be required by the court to submit to discovery procedures applicable to the representative parties and intervenors.

**(h) Appeals.** The courts of appeals shall hear appeals from orders of district courts granting or denying class action certification under this section if a notice of appeal is filed within ten days after entry of the order.”

**Section 3. [Severability clause.]**

**Section 4. [Repealer clause.]**

**Section 5. [Effective date.]**