MARCH 2011

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# INSIDE ALEC

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

SPECIAL ISSUE
**CIVIL JUSTICE**

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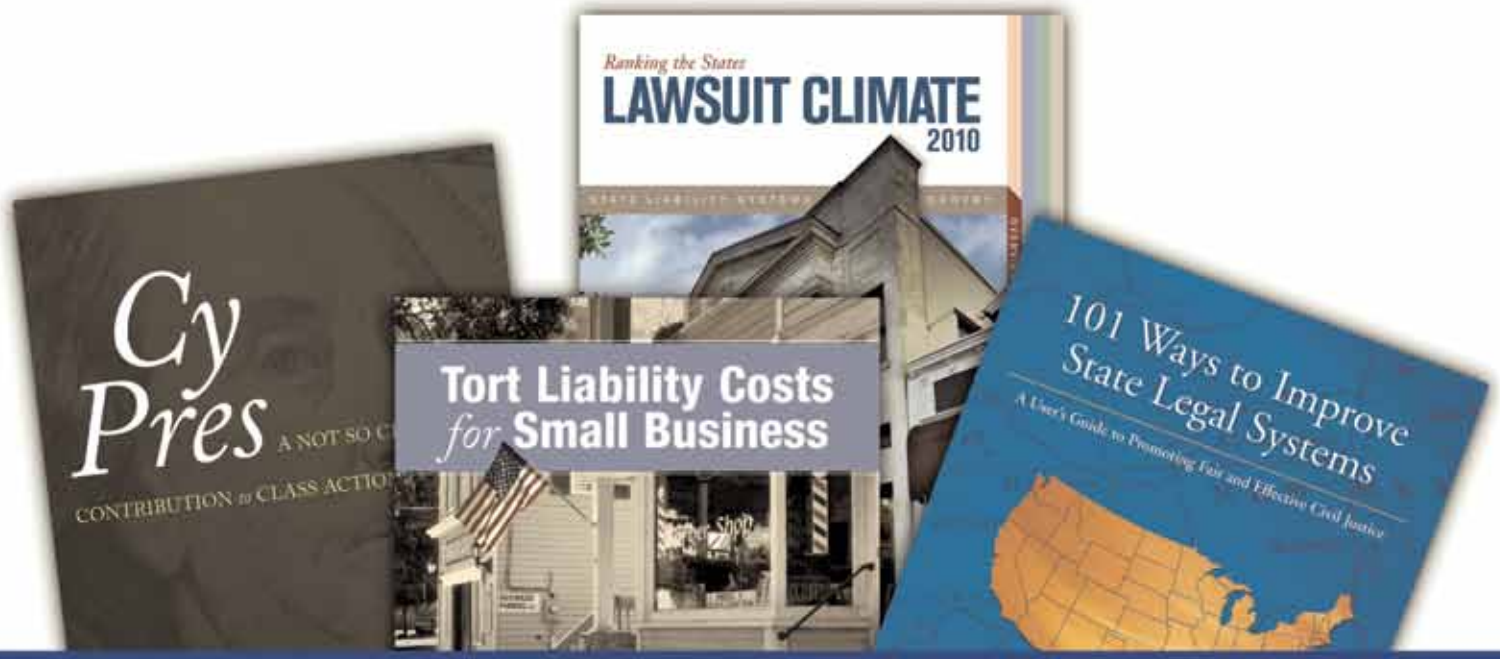


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## SPECIAL REPORTS



## ALEC POLICY FORUM

# Protecting Against the Abuse of Taxpayer Dollars in State Private Attorney Contracts

In the mid-1990s, a group of law firms from around the nation were given contracts to represent the State of Florida in the largest lawsuit in Florida history. That landmark suit against the tobacco industry resulted in an $11.4 billion judgment for the state and a jaw dropping $2.5 billion (that's right, with a "B") dollar windfall for the 11 contracted law firms. The firms then had the audacity to sue the state for an additional billion in fees and, in the end, took $3.4 billion—a third of the total settlement.

If one generously assumes that each firm on the case worked 24 hours a day for all 42 months of the case, the hourly rate breaks down to about $95,000 per hour, a rate one state judged call "shocking to the conscience of the court"—a rate no taxpayer would find acceptable.

Florida taxpayers have been fortunate in recent years to have Attorneys General who made transparency a priority. Other states have not been so lucky. In several states, "pay-to-sue" scandals erupted as campaign donors were awarded no-bid, contingency fee-based contracts that often awarded attorneys the right to sue on dubious grounds for very high contingency fee rates.

As legislative representatives in Florida, we believe our taxpayers should not be burdened with policing shadowy legal agreements. During the 2010 legislative session, we sponsored and passed a bill that requires transparency in private attorney contracting (TiPAC for short). The bill recognizes the taxpayers' right to see where their money is going, why the expense is necessary, and who is being paid. As a result, it has also been commonly called "Sunshine for Lawyers." ALEC has a model bill with the same goals called the *Private Attorney Retention Sunshine Act.*

To protect taxpayers, Florida's "Sunshine for Lawyers" law caps contingency fees at $50 million above legal costs and expenses, requires the Attorney General to demonstrate a need for hiring outside council, and requires that such outside contracts be competitively bid. To ensure transparency, contingency agreements must be posted on the Attorney General's website for public inspection.

Even the most common-sense policy changes are met with opposition, however, and Sunshine for Lawyers was no different. We often heard the following arguments:

**Argument #1: "TiPAC sets artificial price limits and is anti-free market."**
**Our Response:** TiPAC does not require contingency limits for private suits, only for law firms representing the People of Florida. No firm is required to contract with the state, and TiPAC simply says that if a law firm wants to work for the State of Florida, it must accept a cap of $50 million on after-expense fees.

**Argument #2: "TiPAC binds the hands of elected officials."**
**Our Response:** Transparency in private attorney contracts does not "bind the hands of the elected officials," but rather liberates elected officials to work in the sunshine and with the confidence of the people. Besides, the People of Florida are the clients in this case, and as their elected representatives, it is our duty to make sure that they don't overpay when they hire outside lawyers.

**Argument #3: "A $50 million cap is insufficient to attract qualified counsel in complex legal suits."**
**Our Response:** Opponents selectively ignore that the contingency fee is payment in addition to the contractor's expenses. The notion that qualified law firms will not want to represent the State of Florida for $50 million simply doesn't pass the blush test. Additionally, legislatures always have the authority to change the laws and may choose to do so in the instance of an unforeseen case.

**Argument #4: "If there are no 'pay-to-sue' scandals in Florida, then TiPAC is a solution in search of a problem."**
**Our Response:** Yes, we have been fortunate here in Florida that there have been no "pay-to-sue" scandals. However, the mere appearance of impropriety in government can be just as devastating to the people's trust. An Attorney General has no legitimate reason to conceal the details of a contract for legal representation from the taxpayers.

**Rep. Eisnaugle** (left) was elected to the Florida House of Representatives in 2008 and lives in Orlando. **Sen. John Thrasher** (right) was elected to the Florida Senate in 2009 and previously served four terms in the Florida House. He lives in Jacksonville.

In sponsoring Sunshine for Lawyers, we added to the transparency of private attorney contracts. We became familiar with the well-documented history of "pay-to-sue" and runaway contingency fee contracts in many states. There are numerous *Wall Street Journal* and academic articles that cover the subject. Understanding the controversies and loss of confidence in other states helped us defend the Sunshine for Lawyers bill from its many foes and helped us make better policy for our constituents.

Floridians learned a hard lesson during the 1990s tobacco lawsuits. It is incumbent upon us as their elected servants to learn from our experiences and the experiences of others to ensure we keep government accountable and transparent. All Americans, not just Floridians, deserve confidence that the contracts their respective Attorneys General make with private attorneys are in the public's best interest—and only the public's interest.

"The coal industry and the electric power industry have a vision of the ability to use coal with near-zero emissions. And we're on a path to get there."

Dan should know. He's part of an international effort working toward the successful capture and storage of $CO_2$ on a large commercial scale. The technology, called carbon capture and storage (CCS), will allow us to continue using coal, one of our most abundant and affordable fuels, in an even more environmentally responsible way. And power plants using natural gas will also need to employ CCS to meet stringent $CO_2$-reduction goals.

As Dan is quick to point out, we are making progress toward that goal.

"We have technologies today that can capture $CO_2$, and we have coal-fired power plants that already capture and store $CO_2$ emissions. We can store carbon dioxide underground and do it in a safe way.

"I am confident, based on the number of scientists and engineers around the world working on this solution, that we can get there. That is what my job is all about."

Dan agrees that driving down the cost of capturing and storing $CO_2$ on a widespread basis is the next task. And with people like Dan leading the way, we will succeed.

To learn more about Dan and his work on building a clean and affordable energy future, visit americaspower.org.

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Daniel Connell
Engineer/Project Manager
CONSOL Energy - Pittsburgh, Pennsylvania

# Reigning in New Ways to Sue Where Lawmakers Never Intended

BY CHRISTOPHER E. APPEL

It may surprise some legislators to know that when courts develop the state common law of torts they routinely look to a document developed by a private group called the American Law Institute (ALI). The ALI represents the elite of the legal community, and is composed of law professors, judges, and distinguished public and private sector lawyers from around the country. The document to which courts refer is called the Restatement of Torts, and its content is supposed to reflect the most sound liability rules and public policy derived from judicial decisions.

The first Restatement of Torts was developed in the 1930s, the second in the 1960s and 1970s, and the third began in the 1990s and continues to this day. The latest part is called the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. Much of this new Restatement presents fair liability rules, but some parts, unfortunately, seek rather dramatic departures in the law.

The principal author or "Reporter" of the new Restatement, Professor Michael Green,[1] has recently acknowledged as much when teaming up with former plaintiffs' lawyer and President of the Association of Trial Lawyers of America (now called the American Association for Justice) Larry Stewart for an article in *Trial*, the monthly publication of the trial lawyer group. In the article, titled "The New Restatement's Top 10 Tort Tools," the two authors discuss their most prized changes in the recently finalized Restatement, and the potential of this "powerful new tool" to create or enhance tort liability in unprecedented ways.[2]

One of the "top ten" changes discussed is to call upon state judges to take provisions from enacted legislation and create new ways to sue people, even where the legislature never stated or intended such a result. Following the adoption of the new Restatement by the ALI, ALEC revised its model *Transparency in Lawsuits Protection Act* (Act) specifically to address this major change.

> "...the new Restatement has the potential to **radically transform tort liability and wreak legal chaos**..."

The original ALEC model Act targeted what are called "implied causes of action." Implied causes of action are court-created causes of action. When interpreting a statute or regulation a court injects its opinion on what it thinks the legislature intended, and recognizes a new basis in which to bring a private lawsuit. Because the existence of a private cause of action is highly amorphous and often unpredictable, it can result in judicial activism. ALEC's model Act addresses this problem by requiring that any law establishing a new private right to sue must expressly state such legislative intent, and that courts may not "second-guess" the will of the legislature. Thus, the model Act effectively eliminates this avenue for judicial activism.

The new Restatement, however, sponsors an entirely new way to use legislation to create an avenue to sue. It invites judges to recognize what are known as affirmative duties of care, which, when breached, will, as a practical matter, result in the same new and unexpected liability. The model Act was amended to prevent courts from circumventing the core objective of the Act by simply implying an affirmative duty based upon a statute when not permitted to imply a private cause of action under that statute.

A touchstone of American legal tradition is that a person or entity generally owes no duty to rescue or render assistance to another. Affirmative duties represent an exception to this basic rule and require a person or entity to act to rescue or reduce risks of harm to another. Traditionally, affirmative duties are narrowly drawn. They may exist by virtue of the relationship of the parties (e.g. employers owe a duty to protect employees) or by certain actions undertaken by a defendant, such as beginning a rescue attempt.

Under the new Restatement, courts may "imply" an affirmative duty based upon their reading of any statute or other law.[3] They are permitted to determine the scope of any new affirmative duty they create, and recognize such a duty regardless of the actual intent of the state legislature when the law was enacted.[4] The new Restatement

[1] The Restatement (Third) of Torts: Liability for Physical and Emotional Harm *project has had a series of Reporters. The original project Reporter, Professor Gary Schwartz, passed away in 2001. He was succeeded by Texas School of Law Dean William C. Powers and Wake Forest University School of Law Professor Michael Green. Dean Powers became the President of the University of Texas in 2006, placing the principal drafting responsibilities of the Restatement project with Professor Green.*

[2] *Michael D. Green & Larry S. Stewart, The New Restatement's Top 10 Tort Tools,* Trial, *April 2010, at 44.*

[3] *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm, *§ 38 (Final Proposed Draft No. 1, April 6, 2005).*

[4] *See id.*

provides a very broad rule in which courts need only find that an affirmative duty is not "inconsistent with" any statute requiring an actor to act for the protection of another for a new duty to be created under the common law of the state.[5] The effect of this new "black letter" rule presents both a highly ambiguous and remarkable proposition for courts; judges are empowered to recognize affirmative duties where they have never before existed and where there is no case law or other authority to support them. While affirmative duties have been narrowly circumscribed for centuries, the new Restatement has the potential to radically transform tort liability and wreak legal chaos in a state adopting the rule.

For example, a court could read a common law affirmative duty into almost any law related to protective services, custody, control, or oversight authority. Judge Richard Posner of the 7th Circuit Court of Appeals has also cautioned that under such a rule "every statute that specified a standard of care would be automatically enforceable by tort suits for damages—every statute in effect would create an implied private right of action."[6]

Equally as disconcerting as the potentially sweeping scope of the new rule (i.e. any statute, regulation, local ordinance, or other law is fair game) and the lack of clear standards for courts to apply the rule is the utter lack of legal authority supporting the rule. The traditional purpose of the ALI's Restatement of Law project is to "restate" what the law actually is in a clear manner. The part of the new Restatement addressing affirmative duties seemingly abandons this neutral and objective approach, and instead adopts rules that are not mentioned in any prior restatements and that do not exist under any state's law.

Such a lack of authority is especially problematic because, although not bearing the force of law, restatements are viewed as a supremely objective tool for judicial education;[7] not a "reformist" proposal of a law professor. Rather than establishing clear, balanced liability rules, this part of the new Restatement, ironically, is far more likely to increase judicial confusion and lead activist courts down a slippery slope of recognizing new affirmative duties in ways never before imagined.

The ALEC model *Transparency in Lawsuits Protection Act* prevents courts from engaging in an open-ended exercise with regard to recognizing affirmative duties. It provides a common sense way of infusing greater clarity in the legislative process by requiring that state legislatures be explicit when creating new affirmative duties of care just as the legislature should be when creating any new private statutory cause of action. The model Act further instructs courts not to read into a statute a common law duty of care or private cause of action unless one is expressly provided.

The model Act recognizes that whether a law creates a new private cause of action or an affirmative duty of care is a significant public policy decision that should be reached by the legislature after close consideration and deliberation. By requiring such action to be done in a clear and transparent manner, the Act would eliminate confusion in the courts, needless and wasteful litigation over the possible meaning of a statute, inconsistent results, and unfair surprise for both plaintiffs and defendants.

It is also important to note that the model Act does not otherwise impact courts' inherent authority to develop state common law; the model Act only states that a court cannot use a statute to do so unless it is stated in the statute. Thus, the overall effect of the model Act is simple: the legislature must clearly state how law is to be enforced, and it is not the role of the judiciary to step in the legislature's shoes to make that policy judgment.

With the published volume of the new Restatement part on affirmative duties coming out this year, many state courts are likely to soon be confronted with claims seeking to expand common law duty rules. ALEC members should be aware of this effort to upend and reshape the traditional limits of affirmative duties, and understand how the *Transparency in Lawsuits Protection Act* can provide a vital safeguard against such expansion of tort liability.

Georgia, for example, enacted a version of the model Act last year. Texas Gov. Rick Perry is also pursuing passage of the Act, as are other states appreciative of the urgency and potential consequences of the new Restatement's approach. The new *Restatement* is indeed a "powerful new tool" for creating tort liability, and legislation is needed to curb its excesses.

"...the legislature must clearly state how law is to be enforced, and it is **not the role of the judiciary to step in the legislature's shoes** to make that policy judgment."

Christopher E. Appel is an attorney in the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon, L.L.P., and serves as an advisor to ALEC's Civil Justice Task Force.

[5] Restatement (Third) of Torts: Liability for Physical and Emotional Harm, *§ 38 cmt. e.*

[6] *Cuyler v. United States, 362 F.3d 949, 952 (7th Cir. 2004).*

[7] *The ALI's purpose is "educational" and includes "promot[ing] the clarification and simplification of the law and its better adaptation to social needs." The Am. Law Inst., Bylaw §1.01, reprinted in 74 A.L.I. Proc. 521 (1997).*

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**LEGEND**

**ELECTIONS:** Judges are directly elected by the voters of the state.

▲ Non-Partisan

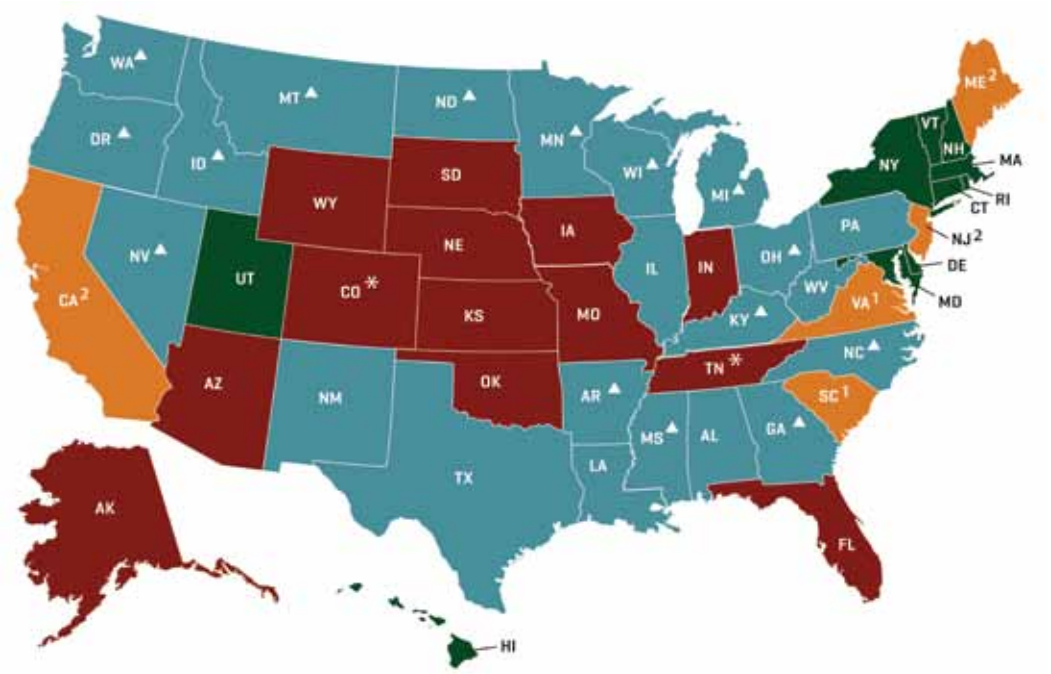
**DEMOCRATIC APPOINTMENT:** Judges are appointed directly by a democratic body, or appointed by the governor with the advice and consent of a democratic body. (Note: Democratic body = popularly-elected officials or judges nominated and confirmed by popularly-elected officials.

1) Legislative and 2) Gubernatorial

**MISSOURI PLAN:** Judges are appointed by the governor after nomination by a commission without confirmation by a democratic body.

* No bar-selected members on commission.

**HYBRID:** Judges are appointed by the governor after nomination by a commission and confirmed by a democratic body.




# How does your state select its judges?

BY BRIAN FITZPATRICK AND STEPHEN WARE

The fifty United States use a great variety of methods to select their judges. These methods can be broadly grouped into three categories: 1) elections, 2) democratic appointment, and 3) the Missouri Plan. Some states use hybrids of democratic appointment and the Missouri Plan.

The relative popularity of these selection methods has changed a great deal over the course of American history. The U.S. Constitution follows the democratic appointment model: federal judges are nominated by the president and confirmed by the U.S. Senate. Similarly, at the time of the founding of the United States, judges in all the states were selected by the democratic appointment model: they were either appointed by the governor and legislature or by the legislature alone. This began to change in the middle of the nineteenth century, when, in the wake of Andrew Jackson's presidency, states began replacing democratic appointment with judicial elections. By the time of the Civil War, the vast majority of states were selecting their judges much like other public officials in partisan elections. In the late nineteenth century, states began to replace their partisan judicial elections with nonpartisan elections.

During the Progressive Era of the early twentieth century, a new method was conceived whereby a nominating commission would play a powerful role in selecting judges; the commission would narrow down a pool of judicial applicants to a short list of finalists from which the governor would be required to choose. The commission was designed to include members selected by the bar, rather than by the people or popularly-elected officials. In 1940, Missouri was the first state to adopt a commission with a special role for the bar and the commission method has since been known as the Missouri Plan. Several states have adopted versions of the Missouri Plan with varying levels of power for the bar. Other states use hybrids of the Missouri Plan and democratic appointment in which a commission with a special role for the bar is combined with confirmation of judicial nominees by the senate or other popularly-elected body.

As things stand today, the most common method to select judges to the courts of last resort (e.g., state supreme courts) is still elections, although some election states use appointment to fill interim judicial vacancies. The second most common method is the Missouri Plan. Smaller numbers of states use a democratic appointment process or hybrids of the Missouri Plan and democratic appointment methods. The relative popularity of these selection methods is a bit different for lower appellate and trial courts, but the focus of this article is courts of last resort. Each of the selection systems is discussed in more detail on the following pages.

*Note: This article is an attempt to provide an objective summary analysis of the methods most commonly used to select state supreme court judges. The arguments set forth herein do not necessarily reflect the authors' views.*

## Elections

The plurality of states uses judicial elections to select their judges. Judicial elections are run much like elections for other public officials such as governors and state legislators: two or more candidates can run for a position, the public votes, and the candidate with the most votes wins. Many states currently use partisan elections for their judges where candidates are affiliated with a political party on the ballot, but many other states currently use nonpartisan elections where party affiliation is not listed on the ballot.

### ADVANTAGES

There are several commonly cited advantages of using elections to select judges:

#### Democratic accountability

It is often asserted that elections foster democratic accountability. Legal texts are often ambiguous and judges exercise a great deal of discretion over the content and direction of the law by interpreting those texts. When judicial elections are used to select judges, judges are likely to exercise their discretion in accordance with the preferences of a majority of the public. This is especially so when judges have short terms of office before facing re-election so the electorate can keep judges on a short leash.

#### Performance accountability

Judges that are corrupt, incompetent, or unfaithful to the law and the constitution can be removed more easily through elections than through some of the other methods of selection, such as uncontested retention referenda, which, as noted below, were designed to insulate judges from removal.

#### Independence from the other branches of government

One of the original motivations to elect judges was to give judges an independent base of political power so that they would not be beholden to the governor or the legislature. This independence furthers the ability of the judiciary to check and balance the executive and the legislature. On the other hand, to the extent judges need the support of the same political parties and interest groups influential in gubernatorial and legislative races, some people believe such independence is often overstated.

### DISADVANTAGES

There are also several commonly cited disadvantages to electing judges and especially to requiring sitting judges to win re-election in order to retain their jobs:

#### Threat to the rule of law

When the law is not ambiguous, there is a danger that judges who run for election will feel pressure to disregard clear laws in order to avoid making decisions that are controversial with various segments of the public. That is, sometimes we want judges who will not interpret the law in accordance with public preferences. The threat to rule-of-law values is especially acute in judicial elections because judicial decisions can be easy to caricature in television attack ads (e.g., this judge "cares more about corporations than injured people.") that often run in these elections. In turn, judges that are faithful to the law and the constitution can be removed more easily through elections than through some of the other methods of selection.

#### Instability

Because the results of partisan judicial elections can be influenced by party affiliation, the ideological composition of the judiciary can change significantly from one election to the next. To the extent judges render decisions consistently with their ideological dispositions, the content of the law can move sharply to the left or to the right after each election. This concern is especially acute when judges face short terms before re-election. When judges have longer terms of office (a "longer leash") the direction of the law changes more slowly.

#### Campaign atmospherics and fundraising

Some people believe that the atmospherics of political campaigns—speaking to voters, making statements about legal issues, and, especially, raising campaign money—undermine the legitimacy of the judiciary. Many times, judges raise money from lawyers or parties that might appear before them. If judges do not recuse themselves in these cases, it raises the specter that judges will make decisions based on campaign contributions. On the other hand, although there is some empirical evidence that campaign fundraising undermines the public's confidence in the courts, there is not much evidence that other campaign activities do. Moreover, there are possible solutions to the threats posed by fundraising, such as asking judges to recuse themselves from cases involving campaign donors, making campaign donations anonymous, and publicly financing judicial elections.

#### Voters do not know enough to select judges

While judging, especially at the supreme court level, does involve making law to fill out ambiguous legal texts, it also involves the technical, lawyerly tasks of applying law to facts and running a courtroom efficiently. In this regard, judges are more like the administrators of specialized government agencies (who are appointed by popularly-elected officials) than like the popularly-elected governors and legislators, who enact broad policies and rely on their appointees with the technical knowledge to implement them. Some people believe that the vast majority of voters—e.g., those who are not lawyers—are not sufficiently knowledgeable to assess whether a candidate for a judgeship possesses these technical, lawyerly skills. As a result, they believe voters select judges on arbitrary grounds such as whether they like a candidate's last name. Others are more optimistic about voters' abilities. In partisan election states, voters can rely on party affiliation to tell them about the likely beliefs of judicial candidates. Moreover, although assessing the qualifications of judges can be complex, some believe it is no more complex than assessing the qualifications of other public officials, such as governors or legislators, who are asked to write the very same laws that judges are asked to interpret. Empirical studies have not clearly shown that judges selected by elections are better or worse qualified than judges selected by other methods.

## Democratic Appointment

Several states use a method of selecting judges for their courts of last resort similar to the U.S. Constitution's method of selecting federal judges. In these states, the governor nominates judges but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly-elected body. Once confirmed, judges in most democratic appointment states serve a term of years, at which point they must be reappointed or retained in uncontested referenda through which voters can remove the judges from the bench.

### ADVANTAGES

There are several commonly cited advantages to selecting judges by democratic appointment:

#### Indirect democratic accountability

It is often thought that appointment will lead to judges who will exercise their discretion over the content and direction of the law in accordance with the preferences of a majority of the public. This is the case because the public officials who must appoint and confirm them where themselves elected by the majority of voters. This mechanism is less direct and less swift than it is in systems of judicial elections because public preferences take time to filter through governors and legislatures to reach and impact the judiciary. Some people like this delay because they believe it insulates judges somewhat from the prevailing political winds and increases stability in the law.

#### Public officials know enough to select judges

It is thought that public officials are better able to assess the qualifications of judges than are voters because they are themselves lawyers or can ask lawyers to vet judicial candidates. Empirical studies have not clearly shown that judges selected by democratic appointment are better or worse qualified than judges selected by other methods.

#### No campaign atmospherics

Because judges need not run for election or retention when they win their jobs through political appointment, they need not meet with voters, make campaign promises, or raise campaign money. Thus, there are not the same concerns as in other systems with the effect of campaign atmospherics have on judicial legitimacy. On the other hand, some people believe that judges in this system win their jobs through other sorts of politicking—such as lobbying public officials by making promises behind closed doors. To the extent people believe politicking of this sort exists and this sort of politicking threatens judicial legitimacy, it is unclear how much of an advantage political appointment offers on this point.

### DISADVANTAGES

There are also several commonly cited disadvantages to selecting judges by democratic appointment:

#### Lack of independence from the other branches

As noted above, one of the main reasons states moved away from appointment and toward elections for judges is because many people believe that judges who must win appointment and especially reappointment from the governor and legislature will not be independent from those entities. This is why the U.S. Constitution gives federal judges life tenure. Life tenure gives judges a substantial degree of independence from the branches that appointed them. For this reason, states with democratic appointment tend to give their judges long terms of office.

#### Cronyism

Some people believe that public officials use judicial appointments to reward their friends and campaign donors. On the other hand, requiring both the executive and the legislature to place a judge on the bench may mitigate this concern.

## The Missouri Plan

The Missouri Plan was conceived as one of several Progressive Era reforms to the judiciary. Like other Progressive Era reforms, the Missouri Plan was designed to remove government decision-making from the political process and place it instead in the hands of "experts." The "experts" identified by progressives to select judges were lawyers and, in particular, state bar associations. Bar associations were the primary advocates of this system when it was first conceived and remain the primary advocates today.

The Missouri Plan consists of two main design features. First, judges are appointed to the bench by the governor from a list of names submitted by a nominating commission. In most Missouri Plan states, lawyers are required by law to be well represented on the nominating commission. Moreover, in most Missouri Plan states, the bar fills most or all of the lawyer seats on the commissions, either by directly selecting members for the commission or by controlling the list of names from which elected officials must select members.

Second, at some point after appointment, judges come before the public in uncontested referenda through which voters can remove the judges from the bench. That is, judges have no opponents in these races and voters are asked only to answer "yes" or "no" on whether judges should be retained. Incumbent high-court judges are returned to the bench 99 percent of the time across the country when they run in retention referenda. As such, it is much more difficult to remove incumbents in Missouri Plan states than in states that use judicial elections.

### ADVANTAGES

There are several commonly cited advantages of using the Missouri Plan to select judges:

#### Commissions, especially their lawyer members, know enough to select judges

Like the democratic appointment method, it is thought that the lawyers who sit on Missouri Plan commissions are better able to assess the qualifications of judges than are voters because they know

more about the law. Some people assert that Missouri Plan judges may be even better qualified than judges selected by democratic appointment because there will be no political cronyism in the selections. On the other hand, some people believe that the lawyers on the nominating commission could exercise their own brand of cronyism by nominating their friends for the bench. Empirical studies have not clearly shown that judges selected by Missouri Plan commissions are better or worse qualified than judges selected by other methods.

### Minimal campaign atmospherics

Because it is so difficult for judges to lose uncontested retention referenda, judges need not meet with voters, make campaign promises, or raise campaign money to the same extent they must in contested judicial elections. On the other hand, they are permitted to do these things in Missouri Plan states, and Missouri Plan judges have been criticized for taking campaign donations and giving campaign contributions to political candidates.

### Independence from the political branches and the public

Some people believe that Missouri Plan judges can stand up to the political branches and the public as required by the rule-of-law values because they are not much dependent on either group to win or keep their jobs. On the other hand, to the extent the bar has significant influence over Missouri Plan nominating commissions, it may be that judges are not as independent from the bar as they are in other selection systems.

### DISADVANTAGES

There are also several commonly cited disadvantages to using the Missouri Plan to select judges:

### Lawyer domination

One of the motivations behind the Missouri Plan was to shift power over judicial selection away from the electorate and toward the bar. Some people believe that members of the bar should have no more influence over the selection of important public officials like judges than other members of the public. Others have noted that lawyers are not representative of the public, and the judges they select will reflect the preferences of lawyers rather than the preferences of the public. To the extent that, as many people believe, lawyers are more liberal than the public at large is, judges selected with the Missouri Plan judges may issue more liberal opinions than if they had been selected with another system. Empirical studies have shown that Missouri Plan judicial nominees in some states are more liberal than the electorates in those states.

### Lack of democratic and performance accountability

Some people believe that the Missouri Plan leaves judges less accountable to democratic and other forces than either judicial elections or democratic appointment because judges are selected in large part by the bar rather than the public or elected officials and because it is so difficult to remove judges through the uncontested referendum device. On the other hand, as noted above, there are occasions when many people believe that judges should not interpret the law in accordance with public preferences.

### Cronyism

Some people believe that the lawyers on Missouri Plan commissions will nominate their friends for judgeships rather than people they do not know who may be more qualified. Although cronyism is arguably minimized in the democratic appointment model by requiring another branch of government to approve any nomination by the governor, there is not the same check on the Missouri Plan. Although the governor must sign off any Missouri Plan appointment, the governor is required under the Missouri Plan to pick one of the names sent to him by the commission. The governor cannot, therefore, keep rejecting nominations until the commission has a sent a name lacking cronyism as, for example, a state senate could under the democratic appointment method.

## Hybrid

As noted above, several other states use hybrids of the democratic appointment and Missouri Plan systems. These systems include a nominating commission, but with less power for the bar than in Missouri Plan states, plus confirmation of judicial nominees by the senate or similar popularly-elected body. The advantages and disadvantages of the systems in these states are largely the same as those described in the states that use democratic appointment or the Missouri Plan on their own.

## Conclusion

As the sweep of American history shows, there is not one obvious answer to the question of what is the best way to select judges. Each system has its own advantages and its own disadvantages. Which systems are better than others depend on the values and political philosophies that each of us brings to questions of public policy.

Brian Fitzpatrick is an Associate Professor of Law at Vanderbilt University in Nashville, TN, where his research focuses on judicial selection, complex litigation, and constitutional law.

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# State-Sponsored Global Warming Litigation is Weighing Down on American Business

BY PHIL GOLDBERG

The Supreme Court of the United States is about to hear one of four lawsuits filed over the past decade based on the premise that a handful of American companies can be held legally responsible for "global climate change." What makes the Supreme Court case, *Connecticut v. American Electric Power Co. (AEP)*, particularly of interest to state legislators is that it was brought on behalf of states. Eight state attorneys general, along with the City of New York and several land trusts are suing a handful of Midwestern power companies to require them to adhere to emissions caps that, while not yet created, would be judicially defined through this litigation.

The attorneys general and their allies have fully acknowledged that this litigation was born out of frustration with the political process and is their attempt to regulate emissions of carbon dioxide, methane and other so-called green house gases. In a 2005 symposium, for example, then Connecticut Attorney General and now U.S. Senator Richard Blumenthal said that the attorneys general filed the suit because the caps they sought were not "coming from the federal government." By filing this lawsuit, they either wanted the courts to impose caps directly on the defendants' emissions or to motivate the defendants through the threat of liability to agree to such caps voluntarily.

Prominent legal scholar Robert Reich, who served as Labor Secretary under President Clinton, created a term for lawsuits that have this kind of a regulatory purpose: "regulation through litigation." While initially favoring these suits as means of advancing a political agenda, Secretary Reich quickly realized their danger, concluding in a *Wall Street Journal* article that such lawsuits amount to "faux legislation, which sacrifices democracy."

In this instance, the claims filed by the state attorneys general strike at the heart of American energy policy. Since the Industrial Revolution, Congress and federal agencies have set American energy policy in responding to a variety of concerns, including demands on energy production, reducing dependency on foreign energy sources, worker safety, environmental impacts, and trade-offs among various energy sources. By contrast, these four lawsuits focus only on environmental allegations. If the caps sought by the attorneys general go into effect, therefore, residents in all states would undoubtedly see the price of their electricity, gas and other basic utilities skyrocket.

## The Four Global Warming Cases

Of the four "regulation through litigation" public nuisance cases filed since 2004, state attorneys general filed two of them. Matthew Pawa, the lead contingency fee lawyer in *Connecticut v. AEP*, said they chose the six power companies as the first targets in their litigation campaign "because, economically, [they were] the low-hanging fruit." California's then-attorney general Bill Lockyer also filed *California v. General Motors Corp.* to subject carmakers to liability for selling cars because they emit carbon dioxide exhaust.

The other two global climate change cases resulted from specific weather events. *Comer v. Murphy Oil Co.* is a purported class action of property owners against three dozen companies associated with the production and use of energy products, such as oil, gas and electricity, for Hurricane Katrina-related property damage. The allegation is that the companies' emissions caused global warming, which caused the gulf to warm, which intensified the hurricane and caused the plaintiffs' injuries. *Native Village of Kivalina v. ExxonMobil Corp.* was brought against many of the same companies by a village in Alaska, alleging that climate change has caused the erosion of a sea ice barrier protecting the village from the Arctic Ocean.

Federal trial judges dismissed all four claims. They recognized that the lawsuits were attempts to enact a political agenda through the courts, rather than through the proper, political processes. As the Comer judge explained, the courts simply are "ill-equipped or unequipped" to make these decisions, which are more "appropriately left for determination by the executive or legislative branches." The litigation, said the judge in General Motors, "expose[s]

automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce."

In a decision that shocked the legal community, the Second Circuit Court of Appeals reinstated *Connecticut v. AEP* in September 2010, which led the Supreme Court to grant review. The Supreme Court is scheduled to hear the case in April 2011.

## Shortcoming of "Regulation through Litigation" Suits

The effort to sue all or parts of an industry under tort law for the purposes of regulating business practices is fairly new at the federal level, but at the state level, similar efforts have been tried and have largely failed for more than forty years. The tort most commonly used for these litigations, as with the global climate change suits, is the tort of public nuisance. Starting in the 1970s, environmental plaintiffs' lawyers identified public nuisance as a potential "catch-all" cause of action that could force businesses to clean up perceived environmental harms regardless of fault.

In order for public nuisance law to work for these purposes, courts would have to change the core elements of the tort. The most common change tried has been to remove any requirement from public nuisance law that the defendants engaged in wrongful conduct. Many of the cases also have sought to water down causation so that merely manufacturing a product or being in a particular industry would automatically create liability. Wrongful causation, though, has always been a linchpin of both public nuisance law and the American civil liability system as a whole.

The first test case for these changes was in the 1970s against scores of corporations that allegedly emitted gases, which when mixed together, contributed to smog in Los Angeles. The California court dismissed the case, recognizing that the plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court."

During the 1980s and 1990s, state attorneys general and municipal attorneys turned to these novel public nuisance theories when no other tort would work for their high-stakes, high-publicity lawsuits. They have had occasional successes, but all major attempts to morph public nuisance into a "super tort" have failed.

In asbestos litigation, for instance, courts rejected cases from municipalities and school districts asserting public nuisance claims against manufacturers to abate asbestos from public and private properties. In state attorney general litigation against tobacco manufacturers, the only court to address the public nuisance claim rejected it. Such claims were also unsuccessful in a variety of other contexts, such as harms caused by guns, lead paint and drunk driving.

In these cases, the courts broadly rejected arguments from state attorneys general and other plaintiffs that they should change the tort of public nuisance to fit their allegations. The courts recognized that these changes would, in effect, create a defenseless lawsuit. As one court wrote, the result would be a "monster that would devour in one gulp the entire law of tort."

## Political Lawsuits Usurp the Legislature's Authority

The same changes to public nuisance theory discussed above are being attempted in the climate change cases. As a result, if the case before the Supreme Court is permitted to proceed, state attorneys general would be able to convert almost any perceived environmental or social harm into a liability event. They also would have the ability to pick winners and losers within and among industries, as the attorneys general would get to choose which businesses to name in their lawsuits. Therefore, in addition to usurping state and federal legislative authority by setting their own "regulations," they also could selectively "tax" certain businesses, regardless of fault.

Future government tort actions, for example, could require select alcohol beverage manufacturers to pay for drunk driving costs, pharmaceutical companies for mental-health programs for prescription-drug abuse, and the food industry for health care costs related to obesity, tooth-decay and heart conditions. Because the defendants chosen for these lawsuits would have no idea what the standards of liability would be, there would be no way for them to avoid the lawsuits. This kind of political, autocratic litigation is not the American way.

Weighing the costs, benefits and social value of producing and using products and services is part of the delicate balancing for which only legislatures are suited. Legislatures can conduct public hearings, commission research, engage in meaningful discourse with all the stakeholders' interests and investigate the impact of their decisions. With respect to global climate change cases, Congress and the EPA should be the ones to determine whether emissions should be reduced, by how much and for which industries. Every hurricane, flood, drought, and heat-related condition should not spawn new climate change claims.

## Conclusion

State legislators who oppose regulation through litigation, particularly when brought by their attorneys general, should actively counter these lawsuits when brought in the name of their states. They can hold oversight hearings, either on the practice in general or in response to a specific lawsuit. They also can enact laws based on ALEC's *Private Attorney Retention Sunshine Act* to assure that state attorneys general are not improperly retaining private contingency fee counsel to bring these cases. The strong message state legislators should deliver is that the proper role for tort liability is to complement and enforce duly enacted laws and regulations, not to replace them.

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# ALEC Commends Gov. Walker for Decreasing Burdens on Businesses


BY RAEGAN WEBER, SENIOR DIRECTOR FOR PUBLIC AFFAIRS

Wisconsin Gov. Scott Walker (R-WI) signed into law on Jan. 27, 2011, Special Session Senate Bill 1, legislation aimed at reforming the state's civil justice system. The American Legislative Exchange Council (ALEC) commended newly-elected Gov. Walker and the new Wisconsin legislature for their leadership in responding quickly to their mandate to restore business confidence and for making tort reform one of their top priorities to achieve this goal.

"Wisconsin's legislature and Gov. Walker should be lauded for their immediate attention to reforming the state's legal system. They are the first of many states expected to consider such tort reforms as part of job creation packages in 2011," said Amy Kjose, ALEC's Civil Justice Task Force Director. "Reforming state legal systems is often a budget-neutral way, or sometimes even a budget-positive way, to restore confidence for businesses as the economy struggles to recover."

The bill comes at a critical time, when Gov. Walker called the legislature into special session for the express purpose of decreasing burdens on business and reigniting the state's sluggish economy. This bill is a strong piece of reform legislation that will have a significant impact on Wisconsin's legal climate and economic viability.

ALEC is deeply committed to the advancement of substantive civil justice reform in the states and supports this legislation, which includes numerous provisions that reflect the policy and model legislation of the ALEC Civil Justice Task Force.

Among other things, SB 1 will keep junk science from tampering with justice, will strengthen the standards for filing products liability cases against manufacturers, and will discourage inflated punitive damages awards where unwarranted.

The legislation brings together numerous such reforms with one overarching goal: providing predictability and fairness in the legal system in order to pave the way for job creation in Wisconsin.

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*Amy Kjose is director of ALEC's Civil Justice Task Force and educates lawmakers, drives model legislation, conducts research, builds coalition support, and heightens media awareness in support of state civil justice reform. Amy holds a B.S. in international studies from the Johns Hopkins University.*

# ALEC Launches its Tort Reform Boot Camp Project

BY AMY KJOSE, CIVIL JUSTICE TASK FORCE DIRECTOR

ALEC members across the country have taken up some form of tort reform or plan to this year. Proposals are being considered throughout the nation: from Oklahoma to Tennessee, Minnesota to Pennsylvania, and many more. The Wisconsin legislature sent meaningful legal reform to the governor's desk after less than a month in office, leading to Gov. Walker's signature on Jan. 27, 2011. Many other governors and state legislatures are expected to tackle the legal reforms most important in their states, taking strides to instill fairness and predictability for businesses seeking signs of stability.

With so many states considering tort reform and so many fresh faces in state houses following the November elections, ALEC is launching the Tort Reform Boot Camp Project. Through targeted, state-specific educational events and a user-friendly guide to state tort reform, ALEC aims to simplify and illuminate the often complex topics of tort reform.

The recently released *Tort Reform Boot Camp: The State Legislator's Guide* (Guide) is intended as a clear, concise, and easy-to-understand explanation of the policies that form the core of the Civil Justice Task Force's mission: restoring fairness and predictability to state civil justice systems in order to promote private enterprise and economic growth. The Guide simplifies the legalese, elaborates on the problems specific reforms seek to mend, and paints a picture of the discussions surrounding those reforms.

While tort reform is one of the more commonly discussed tools for improving economic environments, much of the conversation focuses only on the well-known reforms such as caps on damages. However, tort reform encompasses many more proposals that have an equally significant impact on private business. The Guide discusses legislation aimed at weeding out unmerited claims and legislation that closes loopholes in state legal systems that are more often abused. It highlights transparency-based reforms and reforms that constitute simple fairness and commonsense. ALEC hopes the Guide will be an approachable resource for those legislators seeking an understanding of tort reform or looking to widen their familiarity with tort reform proposals.

In addition to publishing and sharing this Guide, ALEC is hosting numerous Tort Reform Boot Camp events. These sessions, held in state capitals, bring legal reform experts to legislators to simplify common tort reforms, and to provide education specific to the host state to encourage reforms that address the needs of each state's legal system. ALEC members are encouraged to attend and to bring colleagues seeking a better understanding of the problems of and solutions for abused state legal systems.

In the words of an attendee at a former ALEC tort reform educational event, "legislators planning to do any work in the tort reform area, get to ALEC." The Guide will provide the first round of education. Look for your copy in the mail today.

And you may see us in your state for a Tort Reform Boot Camp. In the meantime, if you need any additional resources, don't hesitate to reach out to your Civil Justice Task Force staff members.

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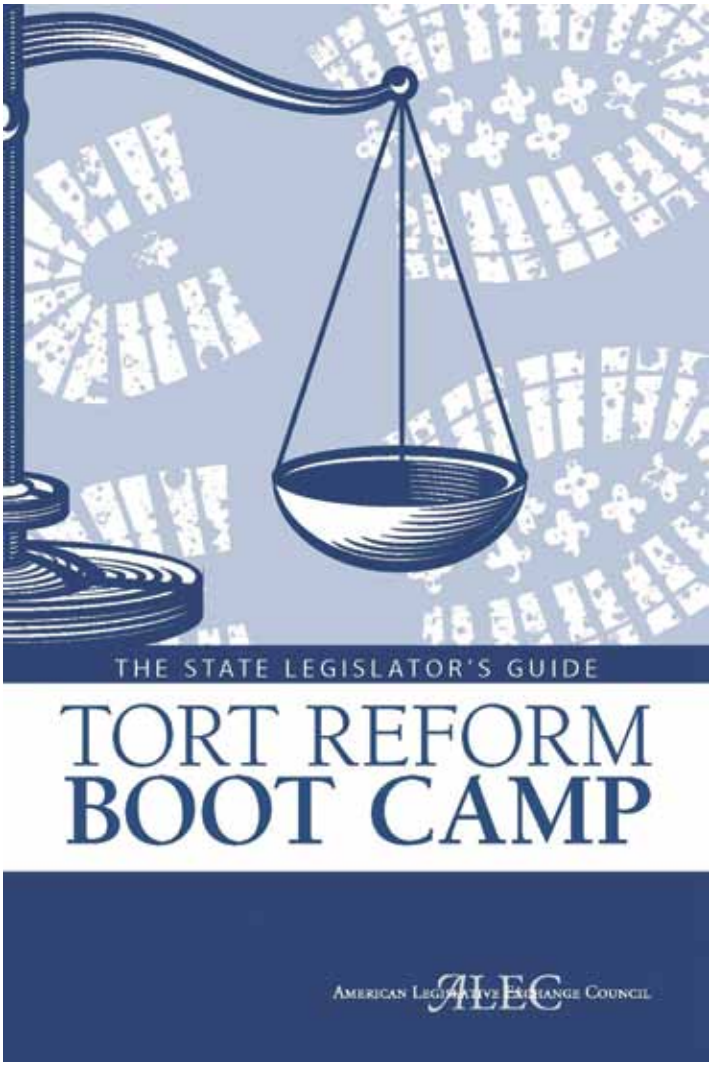

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