



THE STATE LEGISLATOR'S GUIDE

# TORT REFORM BOOT CAMP

AMERICAN LEGISLATIVE EXCHANGE COUNCIL  
*ALEC*

*The State Legislator's Guide: Tort Reform Boot Camp*

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Published by  
American Legislative Exchange Council  
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The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, voluntary membership association of state legislators, with nearly 2,000 members across the nation. ALEC's mission is to promote free markets, limited government, individual liberty, and federalism through its model legislation in the states.

The Civil Justice Task Force promotes systematic fairness in the courts through model legislation that discourages frivolous lawsuits, fairly balances judicial and legislative authority, treats defendants in a consistent manner, and installs transparency and accountability in the trial system.



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## About ALEC

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan individual membership association of state legislators, with nearly 2,000 state legislators across the nation and 101 alumni members in Congress. ALEC's mission is to promote free markets, individual liberty, limited government and federalism through its model legislation in the states.

For more than 35 years, ALEC has been the ideal means of creating and delivering public policy ideas aimed at protecting and expanding our free society. Thanks to ALEC's legislators, Jeffersonian principles advise and inform legislative action across the country. Literally hundreds of dedicated ALEC members have worked together to create, develop, introduce and guide to enactment many of the cutting-edge policies that have now become the law in the states. The knowledge and training ALEC members have received over the years has been integral to these victories.

ALEC's Civil Justice Task Force and its members are at the forefront of efforts to restore fairness and predictability to state civil justice systems. The Task Force aims to promote systematic fairness in the courts through model legislation that discourages frivolous lawsuits, that fairly balances judicial and legislative authority, that treats defendants in a consistent manner, and that installs transparency and accountability in the system. Since 1999, forty-three states have enacted legislation based on ALEC Civil Justice Task Force legislation.



## About the Author

Amy Kjose is the Director of the Civil Justice Task Force for the American Legislative Exchange Council (ALEC), the nation's largest nonpartisan membership organization of state legislators.

As Task Force Director, Amy manages the Disorder in the Court Project, which educates hundreds of lawmakers on the necessity of civil justice reform and the consequences of an overly-litigious society. She serves as a liaison for legal reform groups nationwide and interfaces with legislators, the private sector, coalition groups, and the media to promote legal reform efforts. Amy has been quoted and published in a number of media outlets, including *The Washington Examiner* and *The Washington Post*. She has testified before numerous state legislative committees to provide insight into reforms that would improve state legal systems.

Amy graduated from The Johns Hopkins University with a degree in International Politics. Prior to becoming ALEC's Civil Justice Task Force Director, she worked with ALEC on energy and legal reform.



# ALEC Model Legislation on Legal Reform

## ***Class Actions Improvement Act***

The *Class Actions Improvement Act* presents five ways to reform existing statutes governing class action lawsuits.

## ***Full and Fair Non-Economic Damages Act***

The *Full and Fair Non-Economic Damages Act* prevents the use of evidence relevant to punitive damages in determining non-economic damages, maintaining the distinction between compensation for loss and punishment of the defendant. It also enhances the opportunity for judicial review in the awarding of non-economic damages to ensure fair and reasonable awards.

## ***Intrastate Forum Shopping Abuse Reform Act***

The *Intrastate Forum Shopping Abuse Act* ensures that civil actions are brought where the plaintiff resides, where the events of the claim occurred, or where the defendant's principal office in the state is located.

## ***Joint and Several Liability Act***

ALEC's model *Joint and Several Liability Act* provides that each defendant is liable only for damages in direct proportion to that defendant's fault.

## ***Jury Patriotism Act***

The *Jury Patriotism Act* protects the strength and diversity of the American jury system by eliminating the burdens that deter jury service.

## ***Non-Economic Damages Awards Act***

The *Non-Economic Damages Awards Act* provides that an award for non-economic damages shall not exceed \$250,000 or the amount awarded in economic damages, whichever amount is greater. Economic damages are fully compensated and are not subject to the limitation.

***Prejudgment and Post-judgment Act***

The model *Prejudgment and Post-judgment Interest Act* pegs statutory interest rates for both prejudgment and post-judgment interest to U.S. Treasury rates to minimize excessive interest.

***Private Attorney Retention Sunshine Act***

PARSA provides transparency to the practice of government agencies and state attorneys general hiring private attorneys on a contingency fee basis, requiring competitive bidding and legislative oversight.

***Private Enforcement of Consumer Protection Statutes Act***

This act structures the private rights of action under state consumer protection laws to reflect sound public policy and prevent abuse of loopholes in these acts.

***Constitutional Guidelines for Punitive Damages Act***

The *Constitutional Guidelines for Punitive Damages Act* establishes a standard for liability for punitive damages, raises the burden of proof to award punitive damages, and limits the amount of punitive damages award to one time, nine times or 15 times the amount of compensatory damages, depending on the specifics of the case.

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

The *Reliability in Expert Testimony Standards Act* keeps state courts from being flooded with “junk science” cases that cannot pass muster in federal courts.

***Transparency in Lawsuits Protection Act***

This act prohibits courts from creating new rights to sue by finding them “implied” in their interpretation of statutes. It requires legislation seeking to create new causes of action or duties of care to do so explicitly.

***Trespasser Responsibility Act***

The *Trespasser Responsibility Act* codifies existing common law in a state to preserve the widely accepted principle that property owners owe no duty of care to trespassers except in certain exceptional circumstances.



# What is Tort Reform?

There has been much talk on both the national and state levels about tort reform, but there has been much less discussion about the particular policies included under this category. Many recognize that the legal system needs to be reformed but few know how to go about doing this. In fact, a poll conducted in the midst of the health-care debate found that over 80 percent of people think some form of legal reform is needed.<sup>1</sup>

This Guide is intended to give policy makers an overview of tort reform and some of the specific reforms helpful to the end goal of tempering excess in the legal system and efficiently delivering justice.

In short, tort reform is policy aiming to reform state tort systems, the legal systems created to provide justice to the wrongly injured. The commonly heralded reform of caps on non-economic damages is a type of tort reform but is not the only tort reform. Enclosed in this book are discourses on numerous meaningful tort reforms, some more traditional and some more innovative and transparency-based.

## **Tort Reform and Health Care**

Tort reform gets discussed so often in the health-care debate because of its particular relevance to doctors. Doctors face medical malpractice lawsuits, lawsuits involving injury supposedly due to the negligence of the medical professional. Often, these cases are brought for legitimate reasons. But occasionally, these cases are abusive. A 2006 study done by researchers at the Harvard School of Public Health and Brigham and Women's Hospital estimated that 37 percent of medical malpractice claims lack sufficient evidence of wrongdoing and are likely meritless. Certainly, not all of these claims are won, but litigating cases without merit uses valuable resources and bloats medical malpractice insurance rates. The same study found that the average expenses of litigating a case fall around \$52,000.<sup>2</sup> That's just for the legal fees and defense costs without giving anything to the patient. \$52,000 times the 37 percent of cases supposedly without merit is a large number. Here, the current tort system inefficiently transfers funds from the injurer to the injured. ALEC model legislation is aimed at improving such inefficiency.

Another argument for tort reform as a part of health-care reform lies with the practice of defensive medicine—the ordering and performing of unnecessary tests, procedures, and referrals by doctors out of fear of litigation. PriceWaterhouseCoopers estimated that the



practice of defensive medicine increased health-care expenditures by 10 percent or \$210 billion in 2006.<sup>3</sup> Ninety-three percent and 83 percent of doctors in Pennsylvania and Massachusetts, respectively, admitted to practicing defensive medicine.<sup>4</sup> Thirty-eight percent of Massachusetts doctors even admitted to limiting the number of high-risk procedures for fear of litigation.<sup>5</sup> The practice of defensive medicine is adversely affecting both cost and quality of care. And reforms to state legal systems will be effective in alleviating the concerns that beget the practice of defensive medicine.

### Tort Reform and the Economy

In addition to being part of the fix for strained health-care systems, tort reform should be included in “jobs packages” to encourage economic health. It offers a rational and fair way to restore confidence for businesses as the economy struggles to recover, boosting predictability in the business climate where currently there is little. In a recent study, businesses confirmed their consideration of a state’s legal system when making such important business decisions as where to locate or do business.<sup>6</sup> States with predictable legal systems that discourage abuse will be more competitive, and ALEC model legislation is crafted with such a purpose. Fostering reliable justice will in turn promote a fair business climate and pave the way for job creation.

In tort cases, an average of 50 cents of each dollar spent is actually returned to the victim, with the rest being spent on the costs of litigation.<sup>7</sup> The excessive expense of this inefficient system often gets sprung on defendants who are forced to pay awards and expenses inflated by high administrative costs. By enhancing the efficiency of the system, this burden can be lessened and fewer funds will be detoured from jobs, research and development.

### Goals of Tort Reform Proposals

With the high cost of even litigating cases, tort reform proposals should focus in part on filtering out meritless cases before they get to trial and rack up significant legal expenses. Helpful reforms will fairly raise the standards to bring suits and lessen the incentives to bring weakly supported cases. Enclosed in this publication are numerous such reforms.

Reforms should also consider removing loopholes in areas of the law that beget excessive lawsuits and that are noticeably abused. ALEC’s Civil Justice Task Force works to spot these inefficiencies and craft legal reforms to mend state laws.

The Tort Reform Boot Camp Guide is intended to provide legislators with the basic training needed to understand and work on tort reform. Take advantage of ALEC’s model legislation and resources for further guidance.

#### ENDNOTES

- 1 Clarus Research Group, *Healthcare Reform and the Legal System 2009*, September 10, 2009.
- 2 Frank A. Sloan and Lindsey M. Chepke, *Medical Malpractice, Massachusetts Institute of Technology* (2008).
- 3 PricewaterhouseCoopers, *The Factors Fueling Rising Healthcare Costs 2006* (2006), <http://www.ahip.org/redirect/PwCCostOfHC2006.pdf>.
- 4 David M. Studdert ET AL., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. of the Am. Med. Ass’n. 2609, 2609-17 (2005), available at <http://jama.amaassn.org/cgi/content/full/293/21/2609>
- 5 Massachusetts Medical Society, *Investigation of Defensive Medicine in Massachusetts*. (November 2008), available at [http://www.massmed.org/AM/Template.cfm?Section=Research\\_Reports\\_and\\_Studies2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27797](http://www.massmed.org/AM/Template.cfm?Section=Research_Reports_and_Studies2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27797)
- 6 U.S. Chamber Institute for Legal Reform, *Ranking the States: Lawsuit Climate 2010*.
- 7 Lawrence J. McQuillan ET AL., *Jackpot Justice*, Pacific Research Institute (2007).



# Damages Reform

## Understanding Damages to Understand How to Moderate Them

To be able to understand the case for tempering damages (whether through caps, rules, etc.), one must understand the categories of damages awarded and the purposes of those damages.

Relevant  
Types of  
Damages

ECONOMIC	NON-ECONOMIC	PUNITIVE
<p>These compensatory damages are intended to reimburse economic loss. This can include reimbursing for categories like medical expenses, loss of past and future pay, and property damage repair. Economic damages represent measurable monetary loss.</p>	<p>Non-economic damages (also a type of compensatory damage) are aimed at providing monetary relief for more subjective aspects of loss and harm. They can include such categories of damages as emotional distress, pain and suffering, physical distress, loss of companionship, disfigurement, loss of enjoyment of life, and many more.</p>	<p>Punitive damages are non-compensatory damages awarded against a defendant whose conduct was particularly egregious. These damages are used to punish the defendant and to deter future similar activity. Punitive damages are often awarded when the defendant is proven to have acted in willful, wanton or reckless disregard.</p>

In the United States, the tort system costs us about two percent of GDP, while in most developed nations, that number falls around one percent, a gap that cost the U.S. economy around \$140 billion in 2009. That \$140 billion represents a significant inefficiency in the tort system at accomplishing its core function, transferring funds from the injurer to the injured. These costs not only fall to businesses that are forced to pay excessive awards for damages, but they are passed to individuals and businesses alike in the form of higher rates of insurance against liability. Moreover, absent standards to guide awarding of damages, jury verdicts can be highly random, varying case to case and district to district. When a particular tortious act earns a much higher penalty in one district than in another, or similar victims are compensated differently in one district than in another, state civil justice systems lack the critical characteristics of predictability and fairness.

## The Problem: An Expensive and Inefficient Justice System

### Caps on Non-Economic Damages

Placing caps on the amount that can be recovered for non-economic losses can be an effective way of rationing damages to avoid excessive awards. A cap on recoverable non-economic damages helps to place value on inherently subjective awards and provides guidance for awards aiming to make whole those found to have experienced extreme non-economic harm. From this, caps serve to normalize an inherently random system.

Additionally, among tort reforms, caps are arguably easier to measure for their positive effect on the tort system. Businesses looking to open facilities in a particular state and insurance companies looking to set insurance prices based on liability risks will respond accordingly to this rationalization. And caps upheld over the long run can have the affect of tempering insurance premiums and encouraging economic activity.

ALEC's *Non-Economic Damages Awards Act* would cap non-economic damages at \$250,000.

## What You Can Do

### Punitive Multipliers and Standards

Punitive damages can be rationalized by fitting them within a ratio of compensatory damages (economic and non-economic combined). For example, the Supreme Court has recognized a 9 to 1 ratio of punitive to compensatory, and in some cases smaller ratios. ALEC's *Constitutional Guidelines for Punitive Damages Act* suggests maximum ratios to reflect the guidance of the U.S. Supreme Court: 15 to 1 for small claims, 9 to 1 generally, and 1 to 1 for verdicts over \$10 million. The model bill also allows for the review of punitive damage awards as a fundamental right, providing an important protection against excessive awards. Lastly, the legislation provides

guidance for consideration when allotting punitive damages and for determining whether rendered punitive damages are excessive.

### **Full and Fair Non-Economic Damages**

ALEC developed its *Full and Fair Non-Economic Damages Act* to aid in rationalizing non-economic damages in those states where caps may be impracticable or may face constitutional concerns. This model bill would ensure that only evidence relevant to non-economic loss is used in determining the amount of the non-economic damages award. Non-economic damages are purely compensatory in nature, but often plaintiffs' lawyers attempt to use evidence regarding the extent of wrong-doing and the intent of the defendant—which are relevant separately to punitive damages—in order to increase the size of the non-economic award. And such an increase in awarded non-economic damages can multiply any excess in awarded punitive damages. The bill maintains the important distinction between evidence relevant to punitive damages and evidence relevant to non-economic damages and enhances the opportunity for judicial review of awards.

## Talking Points

### **Caps on non-economic damages restore fairness while preserving the right of victims to be compensated**

ALEC's model does not attempt to deprive true victims of their right to be compensated fully for any monetary loss. Rather, it provides reasonable direction for damages that seek to place a monetary value on subjective non-economic loss, allowing for predictability and fairness for both plaintiffs and defendants.

### **Excessive awards for damages affect more than just the parties to a lawsuit.**

Those who have never been involved in major litigation may struggle to sense the impact on the public interest of certain businesses and individuals paying large awards. But excess tort costs create economic inefficiencies that impact private investment and insurance costs, and in turn impact citizens at-large.

### **Damages reform delivers economic results.**

As citizens of states like Texas have witnessed, curbing rising damages and rising liability insurances costs can have a significant result for the business climate in a state and the lives of its citizens. Whereas rural Texans once worried about the decreasing presence of adequate medical professionals, liability reform has returned them to the state in large numbers to fill a critical economic need.

Opponents of capping damages will state that the cap is inherently arbitrary and may be unfair to some plaintiffs. Important to keep in mind is that caps are rarely placed on economic damages. Any amount of definable economic loss is recoverable when caps are placed on non-economic damages. And the caps are merely providing guidance and normalization to awards that are inherently subjective—non-economic damages. Such guidance may be needed to encourage fair and equitable recovery. Without this guidance, juries may award damages largely outside the norm for similar injuries.

## Gauging Your Opposition

Caps may not be viable option in all states. In lieu of this option, states may consider the *Full and Fair Non-Economic Damages Act* mentioned above.

Additionally, various aspects of punitive damages reform may be useful. The standards for awarding punitive damages in some states can use reform. Some states may benefit from incrementally tempered punitive to compensatory damages ratios. States with a 30 to 1 ratio would be better served under a 15 to 1 ratio.

## Steps in the Right Direction



# Liability Apportionment

## Only Pay Your Fair Share

### The Problem: Penalizing Deep Pockets

In a lawsuit with multiple defendants, fault is usually divided among them. One defendant may have contributed 20 percent to an injury, while another defendant contributed 50 percent, and a third defendant contributed 30 percent. Logic would tell us that Defendant 1 would owe 20 percent of whatever the jury awards to the plaintiff, Defendant 2 would owe 50 percent, and Defendant 3 would owe 30 percent. This, however, is often not the case.

In eight states, the rule of joint liability applies: a defendant one percent at fault could have to cover up to 100 percent of the damages if the other defendants lack the financial wherewithal. That's right, the defendant with a deep enough pocket may have to cover the entire bill, in large part because they can.

In 30 states, some form of joint and several liability is on the books. Joint and several liability creates a threshold of fault over which a defendant may be responsible for full damages. For example, in Illinois, defendants more than 25 percent at fault may have to cover 100 percent of damages. In Iowa, that threshold falls at 50 percent. Once again, defendants may have to cover the fault of other individuals and businesses in the market, an unfair shift of responsibility onto businesses with ample funds.

### What You Can Do

#### **Several Liability Laws: Pay Based on Your Responsibility**

In 12 states, pure several liability law is in place. Under several liability, each defendant pays what his fault dictates. Here, a defendant will pay what the judge and jury rule he deserves to pay and no more. A defendant 20 percent at fault would be responsible for 20 percent of the damages awarded in a case.

ALEC's *Joint and Several Liability Act* suggests the implementation of pure several liability over joint liability and joint and several liability.

**Legislates fairness.** Joint liability and joint and several liability fail to equitably distribute liability. They force defendants to pay more than their fair share.

## Talking Points

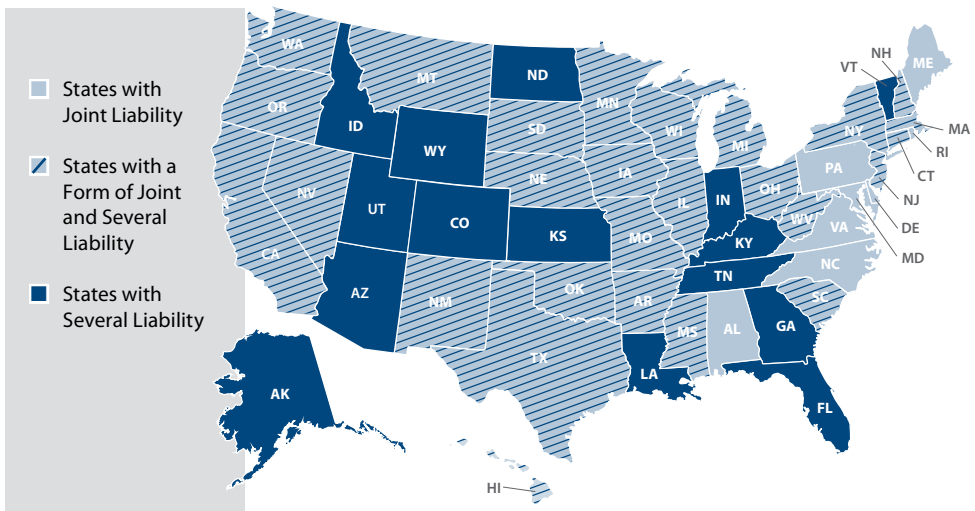
**Avoids stifling economic activity.** States with liability rules that place undue burden on responsible businesses will feel the strain. Businesses choosing where to locate take liability systems into account (in a 2008 survey, 67 percent of corporate general counsel said a state's legal system is likely to impact important business decisions, including where to do business), and this particular issue is a top consideration among businesses small and large.

**Avoids heightened insurance rates.** When setting rates, insurance companies most certainly consider the legal climate in which any potential future claims would be handled. If there is a risk of a business (and their insurance company) covering the legal awards associated with the fault of other companies and individuals, there is no doubt that rates will need to be higher to accommodate for the increased risk.

Plaintiffs attorneys claim that joint liability and joint and several liability ensure that plaintiffs are fully compensated in case of a defendant without ample resources. This focuses on the need to pay without caring who pays. And it fails to consider the hardship imposed by these laws on individual and business defendants that are forced to pay damages beyond their share. The tort system was

## Gauging Your Opposition

### Liability Apportionment Rules by State



created to make the injured whole at the expense of the injurer, and should avoid creating a new class of victims—those paying more than their fair share.

Steps in  
the Right  
Direction

ALEC thinks several liability is the fairest approach to allotting liability, but there are many steps to take in the right direction. Instituting joint and severable liability with a high threshold in a state currently upholding pure joint liability would be an improvement, as would implementing a higher threshold for joint and several liability in a state with a low threshold.





# Venue Reform

## Filing Lawsuits in the Proper County

Those unfamiliar with the procedures of filing lawsuits will likely be equally unfamiliar with the venue options plaintiffs have. In filing a case, a plaintiff can choose the court to host his case, based on guidelines that are sometimes vague. At times the choice is dependant upon convenience variables like the location of the plaintiff or the location of the tortious incident. Sometimes, however, plaintiffs' attorneys may use their experiential knowledge of the tendencies, rules, and judges in particular counties to choose the venue most likely to return them a favorable outcome, a practice called forum shopping. Plaintiffs' attorneys themselves have called these magic jurisdictions, a phrase coined by tort baron Dickie Scruggs. He elaborated, "It's almost impossible to get a fair trial if you're a defendant in some of these places... These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial."

Bill Wagner, a super lawyer in Tampa, Florida adds, "I used to be able to sue the Seaboard Airline Railroad any place I wanted to where they had a railroad station, and therefore I would go to the place where the jury would likely give me the most money." Some counties may have juries with less favorable views of defendants, and some may have more lenient evidence rules. Many factors go into creating these "magic jurisdictions."

Particularly troubling in these situations is that cases flock to areas supposedly more lenient to the plaintiff, clogging the court systems in these regions and burdening the local economy with the paycheck for the court costs and legal services of nonresidents. This has been most aptly described by Victor Schwartz, tort reform scholar and ALEC Civil Justice Task Force Co-Chair, as Litigation Tourism.

## The Problem: Shopping for the Magic Court Jurisdiction

*"It's almost impossible to get a fair trial if you're a defendant in some of these places... These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial."*

## What You Can Do

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ALEC developed its *Intrastate Forum Shopping Abuse Reform Act* to ensure that lawsuits are brought in jurisdictions with which they have a tangible connection. The legislation allows cases to be brought in either the residence county of the plaintiff, the place in which the incident occurred, or the county in which the defendant or its principle in-state office resides. For cases with multiple plaintiffs, each plaintiff would have to show a relationship with the venue county or that bringing the case in the particular venue is convenient for the case and does not impede justice.

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## Talking Points

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**Prevents forum shopping and instills logic and fairness in the system.** Plaintiffs will no longer be able to cherry pick their venues and favor those districts that have been termed “magic jurisdictions.” The model bill creates a system based on logic in that it requires a standard relationship between the parties of a lawsuit and the jurisdiction in which their case is heard.

**Encourages delivery of speedier justice and more fairly spreads court caseloads.** With fewer excess cases brought in “jackpot jurisdictions,” these jurisdictions will have more time to spend on resident legal matters. Encouraging a spatial relationship between cases and the counties in which they are brought will serve to normalize case loads in relation to residents.

**Preserves tax-dollar-funded court expenses for the benefit of local taxpayers.** With proper venue reform rules in place, taxpayers in “jackpot jurisdictions” won’t be saddled with the court expenses associated with supporting the legal claims of nonresidents.

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## Gauging Your Opposition

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As you can imagine, attorneys who are likely to win more cases where forum shopping remains an option aren’t eager to give this up. However, some attorneys—particularly those in states where venue rules have been tightened—have admitted the unfairness of overly flexible venue laws. Bill Wagner, the major plaintiffs’ attorney mentioned previously, notes that “the law was changed. Everybody recognized that was unfair. I now have to sue them where the accident happened or at their home place of business. Those are my two choices.”

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## Steps in the Right Direction

Any step toward tightening the venue requirements in states will be beneficial. The model bill should be adapted to a state’s particular needs with the intent of minimizing the ability of case filers to cherry pick favorable jurisdictions.



# Expert Evidence Reform

## Keeping Junk Science out of State Courts

Most civil trials involve the hearing of witness and expert witness testimony. Expert witnesses are brought in to explain complex scientific issues that can have strong bearing on the outcome of a case. They are often asked to provide professional opinion as well as fact. Expert witness testimony has powerful sway in front of a jury. If courts don't take ample time to thoroughly vet expert witnesses prior to their sitting on the stand, witnesses unqualified to offer professional insight and opinions may be allowed to do so to the detriment of the case. Uncertain and unproven science could parade as fact, experts may attempt to advise outside their areas of expertise, and juries may be led by weakly science-based opinions to unsubstantiated decisions. When unreliable expert testimony is admitted, the fair delivery of justice is at stake. Juries may impose liability on innocent defendants, and the side affects of undue liability may follow: spiked insurance rates, stalled innovation, and more dollars moving from research and development to legal costs.

### The Problem: Science by Jury

The U.S. Supreme Court recognized the importance of evaluating expert witnesses prior to their arrival in front of the jury. In 1993, they came out with a decision charging judges with gate-keeping responsibility (*Daubert v. Merrell Dow Pharmaceuticals*). Judges on the federal level have since held pretrial hearings, termed Daubert hearings, to ensure that expert testimony is based on accepted methodology and that the experts providing the testimony are truly experts in their fields. Some states have embraced this standard, but others have yet to do so.

ALEC developed the *Reliability in Expert Testimony Standards Act* to help states align themselves with the fairer federal standard and to keep junk science from bringing about poor verdicts in state courts. The legislation requires courts to hold the pretrial hearings used on the federal level to ascertain the reliability of an expert, and it provides courts with a nonexclusive list of factors to consider

### What You Can Do

in determining reliability. Experts must show sufficient qualifications and those qualifications must directly relate to the subject matter to be covered. For example, a doctor may not testify on any area of medicine; testimony should relate to the area of expertise. Further, any opinions provided by the expert must be supported by accepted scientific methodologies, and the testimony must uphold a logical relationship between the data, the events of the case, and the conclusion given by the expert.

The legislation also allows for thorough review of a court's decision to admit expert testimony. Such a precaution is necessary to ensure experts are adequately vetted prior to appearance in front of the jury, the point after which testimony may already begin to have an impact on the outcome of a case.

## Talking Points

**Keeps junk science cases from being brought in state courts.** With pretrial hearings for the admission of expert witnesses, judges will be able to screen out those witnesses that may encourage decisions unsupported by accepted science.

**Reduces excessive litigation.** Attorneys encouraged by relaxed expert witness standards may bring unmerited cases, but those faced with the stronger standards enclosed in ALEC's model legislation will be encouraged to bring only those cases with unequivocal viability.

**Discourages forum shopping.** If state rules for the admission of expert testimony are at least as strong as those on the federal level, attorneys will be unable to move cases based on weak evidence to state courts with more lax standards.

## Gauging Your Opposition

Opponents may argue that expert witness standards shouldn't be so strong as to keep out innovative science. Part of this rests on a belief that the legal system should be a venue for industry-activity regulation, which ALEC views as detrimental to economic activity and problematic for state legislators looking to legislate rational regulations. Furthermore, the court room is not the appropriate place to test novel science, and judges and jurors aren't the scientific experts able to do so.

## Steps in the Right Direction

Some states may currently rely on the *Frye* standard, the predecessor to the *Daubert* standard. These states may benefit by moving to the *Daubert* standard and embracing a portion of the ALEC model bill. For those states adhering to the *Daubert* standard, the ALEC model has additional reforms to further improve state expert testimony laws.



# Class Action Reform

## Keeping the Class Action Mechanism on Point

Class action lawsuits were originally created to group together claimants whose cases have clear similarities—perhaps with injuries caused by the same defendant, from the same event, using the same evidence—in an effort to streamline justice and allow particularly those with small claims to share litigation costs. However, in recent years, class actions have been used to do much more.

Most adults at some point in their lives have been party to—whether knowingly or unknowingly—a class action lawsuit. Attorneys will find one plaintiff with a case against a deep-pocketed defendant and will pull together a class action lawsuit with an often not-present class of hundreds, thousands, or hundreds of thousands of victims. These victims may never have asked to bring a lawsuit but are party to one, and they may stand to recover a minimal award, perhaps merely coupons, while the attorneys stand to recover millions in legal fees.

Class action cases have been a tool for “regulation through litigation,” the use of the legal system to coerce industries to regulate themselves for fear of litigation. Class actions, as mass conglomerates of cases and their liability risks, have the potency of the many cases they represent combined. Any verdict coming down on a class action will have more overarching affect on liability for a company than a single case. And the class action will be much more expensive to litigate, providing a powerful incentive for companies to settle sometimes despite facts to their advantage. Thus, class actions should be carefully considered before certification. Such strength needs to be checked.

The Problem:  
Class Actions  
for the Sake  
of Influence

ALEC developed the *Class Actions Improvements Act* to reign in the abuse of the class action mechanism and to encourage class actions to serve their proper function. The ALEC model focuses on five reforms that will go a long way toward keeping class actions from being overused and abused.

What You  
Can Do

Prior to a class action being considered in court, the judge must first agree to certify a class action. Under the ALEC model, the conditions under which a class can be certified are strengthened. In a class action suit a jury simultaneously provides a single answer to respond to the many claims of the combined cases. The rules governing certification should reflect the difficulty this requirement imposes on juries. Rather than allow classes of cases with mere similarities to move forward as class actions, the ALEC model would ensure that certified cases can be decided en masse without having to hear hundreds of varying facts and circumstances.

Additionally, the legislation would allow for the review of a class certification before moving to the next stage of litigation. The certification of a class action represents more than just access to court; it empowers the plaintiffs' attorneys and can move defendants to settle as the risk of losing hundreds or thousands of lawsuits is much more concerning than the risk of losing a single case. The certification of a class action, therefore, is a meaningful stepping stone and should only be done when appropriate.

The ALEC model also limits class participants to residents of the state in order to both discourage attorneys from cherry picking the state with the friendliest laws for the class action filing and to ensure that state legal systems are serving state taxpayers. See the section on Venue Reform for more information on this.

Furthermore, the model bill creates "maturity" requirements for the filing of class actions. This reflects the need for there to be a legitimate class of injured individuals for a class action to be merited. Under the bill, classes would not be certifiable until enough individual claims have come forward to justify a class lawsuit. The last major provision of the ALEC model would encourage courts to consider whether administrative remedies are already in place to render justice for potential class members before certifying a possibly unnecessary class action.

## Talking Points

**Reigns in the abuse of the class action mechanism.** By codifying prerequisites for bringing a class action claim and allowing for screening in the form of appellate review of class certification, fewer abusive class action cases and settlements will be allowed to move forward.

**Encourages class actions to serve their proper function.** By providing requirements for the certification of class actions and adding additional screening mechanisms like the maturity requirement, class actions will be less likely to be abused as instigators of regulatory change and more likely to be used for the original purpose of expediting justice for similar claims.

**Deters the use of class actions where individual claims are appropriate.** Class actions hold more force against defendants than do individual lawsuits, so it shouldn't be surprising that attorneys looking for the highest possible recovery may seek class action certification where individual claims may suffice. The ALEC model codifies rules with the awareness that the class action mechanism was developed to foster speedy and less costly justice, not to boost bargaining power in settlement discussions.

Opponents of class action reform argue that classes give voice and legal assistance to the masses who might not otherwise participate in the legal system. Under the ALEC model, legitimate class action cases still move forward and serve cost-sharing purposes. What is less likely under the bill is the allowance of class action cases with few related injuries that may be more appropriate as individual cases.

## Gauging Your Opposition

The ALEC model legislation was designed as a combination of reforms to enable interested state legislators to tailor reforms to their particular states and to pick reforms that may be most beneficial. In developing legislation, legislators should consider the many policies embodied in the *Class Actions Improvements Act* and take into account the needs of the state and the viability of specific reforms.

One simple reform that may be particularly helpful in keeping unwarranted class actions from moving forward is allowing for the immediate appeal of the class certification.

## Steps in the Right Direction



# Judgment Interest

## Rationalizing the Interest Charged on Lawsuit Awards

### The Problem: Filing Lawsuits Shouldn't Be Considered an Investment

As litigation often takes years to come to conclusion, there has been discussion about whether the damages awarded should accrue interest, both from the time of incident or the time of case filing and from the judgment onward particularly when the defendant makes payments over time. Historically, the common law did not allow for the charging of interest between the time the incident occurred and the time the case concluded. However, numerous states have adopted rules or statutes that allow for this awarding of prejudgment interest. Many prejudgment and post-judgment interest laws, however, set interest rates well above standard interest rates. For this reason, defendants can be required to pay significantly more than the jury awarded, and arguably more than necessary to offset inflation. Set interest rates of 10 percent, for example, significantly over compensate the victim injured while U.S. Treasury rates are 2 percent. Particularly with the multi-million dollar judgments that were much less common in the 1970's and 1980's when many of these statutes were put into law, defendants get saddled with inflated verdicts.

### What You Can Do

ALEC suggests common-sense reform that does allow for the recovery of interest on damages awarded, even prejudgment interest. Rather than fixing these rates to numbers that may under and over value awards depending on the economic cycle, the model *Prejudgment and Post-Judgment Act* aligns the interest rate with that of the U.S. Treasury.

The model also allows for a 6-month grace period for interest accrual, acknowledging that litigation takes time to no fault of the plaintiff or defendant. Additionally, in part to counter any concern that lower interest rates would decrease incentives to settle, the model bill provides for lower interest if the plaintiff refuses a defendant-suggested settlement that turns out to be fair and provides for higher interest if the defendant refuses a plaintiff-suggested settlement that proves fair on judgment.



Furthermore, the model legislation would limit prejudgment interest to accrual on interest for economic damages from the past, not for punitive and non-economic damages nor for damages to compensate the plaintiff for future economic loss.

**Ensures that plaintiffs are accurately compensated and avoids incentivizing prolonged litigation.** By fixing the interest rate to that of the U.S. Treasury, the plaintiff will be fairly compensated for the difference in value of their loss had no injury occurred. Furthermore, by setting a fair interest rate and by incentivizing settlement, the plaintiff won't be tempted to prolong litigation to boost returns and the defendant won't unnecessarily prolong litigation on awards with interest accrual.

## Talking Points

**Avoids punishing the defendant for mounting a defense.** Defendants should have the right to both follow cases through to trial they believe lack any merit and appeal verdicts they believe are unfair and unjust without fear of additional retribution. Excessively high interest rates may punish defendants for exercising these rights to trial.

**Minimizes responsibility on defendants for delays in litigation they may not have caused.** Defendants, plaintiffs, and standard court congestion may cause delays in the adjudication of a case. It is unfair to place this financial burden solely on the defendant. Minimizing interest rates will help to alleviate this burden.

Opponents of floating interest rates will argue that higher interest rates encourage early settlement. ALEC believes that fair interest rates pegged to U.S. Treasury rates adequately incentivize settlements while avoiding overcompensation. Furthermore, while a higher interest may encourage a defendant to resolve cases quickly, the plaintiff may have the opposite incentive to prolong litigation to accumulate more interest. Provisions in the ALEC model help to normalize incentives and encourage settlement where appropriate.

## Gauging Your Opposition

Moving to a floating interest rate is the most important and beneficial provision in the model bill. Such a policy change will preserve fair judgment interest rates over the long term. If moving to a floating interest rate doesn't quite seem viable, lowering excessively high fixed rates will provide some benefit. Particularly in the current economic environment, judgment interest rates may far exceed average investment returns and Treasury rates.

## Steps in the Right Direction



# Consumer Protection Statute Reform

## Promoting Fairness in Consumer Protection and Business Practices

### The Problem: Crippling Fair Businesses Under Bloated Consumer Protection Acts

*In the case of the well-known \$54 million lawsuit against Washington, D.C. drycleaners Jin and Soo Chung, they faced severe financial strain because of an aberrant consumer, a standard satisfaction guaranteed sign, and a faulty consumer protection act.*

State consumer protection acts (sometimes called Deceptive Trade Practices Acts or Consumer Fraud statutes) are intended to, as their name implies, protect consumers from businesses taking advantage of them. Such a goal is fair and important. However, many state consumer protection acts go beyond their intended use. With few proof requirements and lenient standards for claims, consumer protection acts are being used to punish law-abiding businesses. The problem with some state consumer protection acts can be most closely likened to a metal detector with too strong a signal that picks up not just weapons and dangerous items but earrings and metal buttons. In the case of the well-known \$54 million lawsuit against Washington, D.C. drycleaners Jin and Soo Chung, they faced severe financial strain because of an aberrant consumer, a standard satisfaction guaranteed sign, and a faulty consumer protection act.

The problems with state consumer protection acts arise out of the history of their development. The Federal Trade Commission was established in 1914 to handle consumer protection claims on the federal level. And states soon followed with their own versions. Over the years, however, states have enabled private rights of action (individual lawsuits) under state consumer protection acts, something the FTC has repeatedly opted not to do. When the states created these new rights for the individual to sue, they often failed to include the proof requirements necessary to avoid abusive claims. Tort claims lacking the proof and reliance standards required in the tort system could be tried under the guise of consumer protection claims. What is more, many of these statutes provide for automatic attorneys fees. Kansas' consumer protection act has even seen medical malpractice cases brought under its code.

Reforming state consumer protection acts is perhaps one of the more important things state legislators can do to protect small businesses from the feared frivolous lawsuit.

ALEC developed the *Private Enforcement of Consumer Protection Statutes Act* to help state legislators tailor their consumer protection acts to reflect sound public policy and protect them from abusive use. In order to keep weak tort claims from being repurposed into consumer protection claims and to keep businesses from becoming victims of unwarranted consumer protection lawsuits, the model legislation institutes requirements of proof and reliance. It uses the same requirements that would be needed to prove fraud under the tort system: proof of a false statement, an intent to deceive, reliance on the false statement, and, of course, actual harm.

The ALEC model also limits recovery to out-of-pocket losses to avoid awards that far outstretch the consumer protection act violation. The model bill would, however, allow for additional defined damages against willful, egregious, or repeat violations to serve as a deterrent to problematic behavior. The model bill specifically does not offer automatic attorneys fees as this can strongly encourage tort claims to be renamed consumer protection claims and weak claims to be brought by ambitious attorneys, but it does allow the discretion of the judge to award attorneys fees to the either the prevailing party, plaintiff or defendant. And lastly, the bill has language to avoid overlap in regulation and liability.

## What You Can Do

**Ensures that consumer protection claims protect consumers without hurting businesses.** By requiring the widely accepted standards of proof and reliance used to prove fraud claims under the tort system, the ALEC model bill safeguards against abuse of the consumer protection act to the detriment of the local economy. Consumers with legitimate claims are still able to recover appropriately under the ALEC language.

## Talking Points

**Keeps merit-light tort claims from being repurposed as consumer protection claims.** By instituting those same standards required to bring tort claims, attorneys will be less likely to repackage a tort claim as a consumer protection claim. And without automatic attorneys fees, there will be even less incentive to move lawsuits from their appropriate venues.

**Avoids excessive consumer protection awards for small infractions.** Awards for consumer protection claimants under the language in the ALEC model bill will give full compensation for injuries but will stop short of over-penalizing businesses for minor offenses. The saying goes, “an eye for an eye,” not “a head for an eye.”

Gauging Your  
Opposition

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Opponents of reforming consumer protection claims may argue that consumer protection acts are intentionally vague to ensure all viable claims can be rendered justice. Proponents of reform should recall the example of a metal detector turned up too high. There is a fine line between legislation that would provide justice to injured consumers and legislation that can wreak havoc on state economies and local businesses. The ALEC model bill codifies that fine line.

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Steps in  
the Right  
Direction

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Efforts to improve consumer protection acts are largely state-specific. The nuances of each state statute are different and so require different fixes. State legislators will want to keep in mind the goal of a consumer protection act that punishes wrongdoers and protects fair business practices. For more information on how to reform your state consumer protection statute, contact ALEC.



# Jury Reform

## Protecting the Representative Jury

Serving jury duty should be considered an important civic duty. However, the difficulties associated with serving this duty too often render it an annoyance. Individuals may lose salary, hourly wages and productivity. Businesses, particularly small businesses, may feel the loss in productivity when employees are out to serve jury duty.

These difficulties have discouraged potential jurors from serving and have made jury pools less representative of the whole. For example, if small business owners are allowed to opt out of jury service, the perspective of small business owners will be underrepresented. If teachers are allowed to opt out of jury service, the same could be said for the perspective of teachers.

The Problem:  
Insufficiently  
Diversified  
and Overly  
Peeved

ALEC has created its *Jury Patriotism Act* to remove some of the barriers to jury service and to promote diversity in jury pools. Included in the model bill are multiple reforms with these goals. The bill removes exceptions for jury service. Over the years, multiple professions and groups of individuals have been exempted from service in various states. For example, teachers, nurses, doctors, and state legislators are all groups that have been exempted from jury service in some states. The bill would restore jury service requirements for these individuals.

What You  
Can Do

The legislation also instills a one-day, one-trial system. Rather than require prospective jurors to spend numerous days in court waiting to be assigned a trial, this system would give jurors one day at the courthouse to be assigned to a trial. If at the end of that one day, no trial has been assigned, the juror may go home having fulfilled jury duty.

The bill also creates a lengthy trial fund for jurors chosen to serve on long cases to reimburse the individual for lost wages. This fund adds a minimal fee to existing filing fees and enables jurors who may have had financial difficulty serving 10- and 20-day trials to do so. Under the model bill, jurors are also allowed to reschedule service

once for any reason, and small businesses can avoid productivity strain by keeping more than one employee from serving jury duty at any one time.

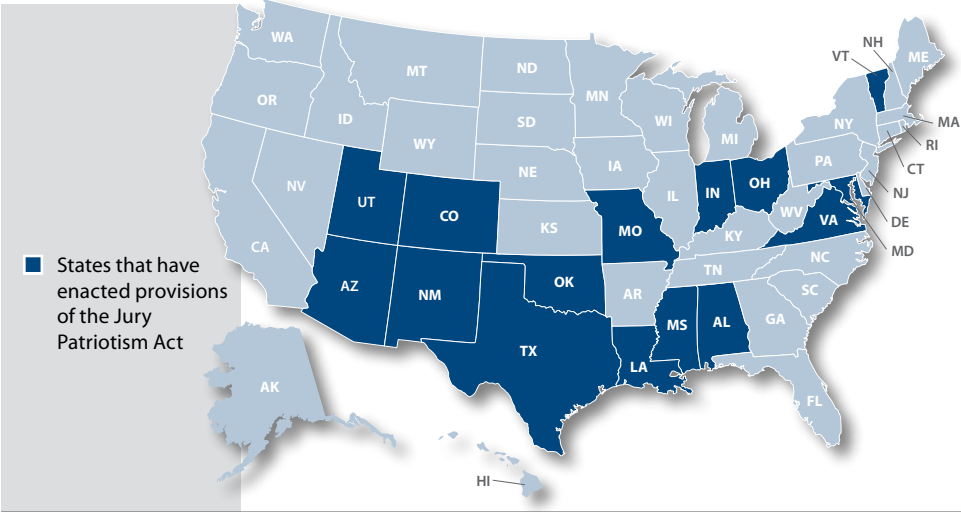
**Talking Points** **Provides more flexibility in jury service.** By allowing individuals one postponement of jury service and instituting a one-day, one-trial system to minimize unused juror time, the model bill would alleviate inconvenience and boost flexibility in a system often perceived as rigid and wasteful.

**Protects rights of employment.** The model bill would keep jurors from being penalized by their employers for serving jury duty, removing the barrier of fear of retribution for work absence.

**Reduces the burden of jury service on small businesses.** In that the model bill allows small businesses additional postponements in the case of more than one employee being called for jury service at one time, the legislation lessens the burden on businesses with few employees. It would maximize jury service while minimizing any obstacles to productivity.

**Minimizes risk of serving on a lengthy trial.** By instituting the lengthy trial fund to reimburse jurors for lost wages, the model bill would temper the financial burdens associated with jury service.

ALEC’s Jury Patriotism Act



**Increases the representativeness of the jury pool.** By removing exceptions to jury service and minimizing the financial burdens associated with jury service, more citizens with diverse backgrounds will be required to serve their civic duty. And by strengthening the penalties for avoiding jury service, fewer potential jurors will be able to avoid the court room. Juries will better reflect the communities around them and the role of the jury as a means for the citizenry to place a check on the judiciary will be preserved. Litigators frequently observe that if juries included a fair share of business owners, professionals, and working Americans, they would be more likely to reach well-reasoned decisions and there might be fewer excessive and bizarre verdicts.

Some point to the additional cost associated with the lengthy trial fund as an unnecessary barrier to filing a case. However, the additional cost to remove financial barriers to service is minimal. In Arizona upon enactment, the lengthy trial fund, which is very similar to if not more generous than the ALEC model, added a mere \$15 to the filing fee. This is a reasonable jury-usage fee.

Because the model bill removes superfluous exceptions to serving jury duty, there may be discussion over the maintenance of specific exceptions. This is a conversation that will vary by state, but minimizing these exceptions is key to encouraging diverse jury pools.

As the ALEC model bill is comprised of numerous reforms, one aspect of the model bill can be tackled without addressing some of the others. For example, removing excessive exemptions to jury service will go a long way toward boosting jury diversity. And the one-day, one-trial system will temper the burdens felt by potential jurors. The small business allowance is another way to ease burdens while encouraging participation.

## Gauging Your Opposition

## Steps in the Right Direction



# Private Attorney Contract Sunshine

## Transparency in the State's Hiring of Private Attorneys

### The Problem: Profits or Taxpayer Interests?

*In bringing litigation on behalf of the state, the far-reaching prosecutorial power of the AG office is combined with the profit-motivated rather than taxpayer-motivated incentives of a private attorney, creating the perfect storm of litigation.*

The last 15 years or so have seen a significant increase in the role of the attorney general and in the use of outside attorneys hired on contingency fee by state attorneys general. In 1999, settlements were reached by private attorneys who had contracted with many state attorney general offices in litigation on behalf of the state against tobacco companies. This became the textbook example of “regulation through litigation,” a term often used to describe the practice of using litigation to bypass the legislative process to regulate industries. In bringing litigation on behalf of the state, the far-reaching prosecutorial power of the AG office is combined with the profit-motivated rather than taxpayer-motivated incentives of a private attorney, creating the perfect storm of litigation.

Of particular concern is the lack of transparency in the hiring of these outside attorneys, leading citizens to question whether these deals are made in the best interest of the state or in the best interest of the politician and private-attorney pocket. In early 2010, the *Wall Street Journal* printed an article investigating the potential for quid pro quo between the AGs who often hire the private attorneys to bring state litigation and the private attorneys who often contribute significantly to AG campaigns. This is a troubling connection indeed, whether or not the quid pro quo confirmedly exists. An appearance of impropriety risks confidence in the office of the attorney general and in the legal system. The possibility of quid pro quo in state litigation exists in large part because of the lack of hiring practices instilling transparency and accountability in such situations.

### What You Can Do

Some states have ruled the hiring of outside counsel on contingency fee to be either unconstitutional or not in the best interest of the state. California's Supreme Court has upheld that the government cannot hire outside counsel on contingency fee because of the impropriety and blurring of incentives apparent in hiring private



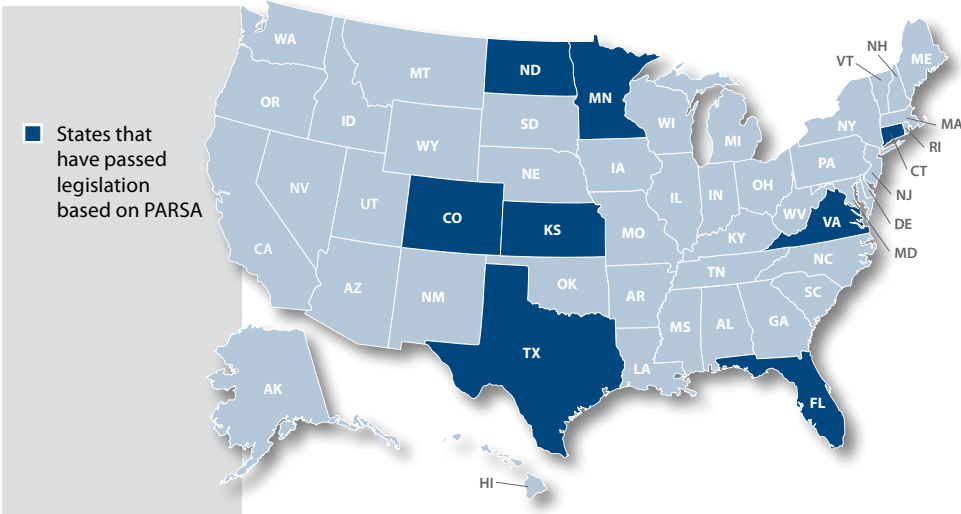
litigators incentivized by the money earned by a win to bring litigation that must remain in the best interest of the citizenry, win or lose. In Louisiana, the Attorney General is similarly not allowed to hire attorneys on contingency fee.

Short of taking a page out of California’s and Louisiana’s books, ALEC has a model bill that would shed light on the hiring of outside counsel on contingency fee in an effort to keep these contracts above ground and open to the legislature and the taxpayer. ALEC’s *Private Attorney Retention Sunshine Act (PARSA)* would require transparent competitive bidding and legislative oversight when outside counsel are to be hired on contingency fee. The model legislation also dictates a maximum calculated hourly fee to keep the state budget from being too heftily stripped of funds. In essence, following litigation the contracted attorney will calculate an “hourly rate” by dividing the awarded contingency fee by the hours spent on the case. The contingency fee would be reduced to reflect no more than \$1,000 an hour.

**Removes at least the appearance of impropriety.** If the hiring of contracted attorneys continues to occur behind closed doors away from the public’s eye, there will be at the very least an appearance of impropriety. PARSA legislation would boost citizen confidence in the Attorney General office by ensuring that contract deals occur in the open where media and citizens can serve a watchdog role.

Talking Points

ALEC’s Private Attorney Retention Sunshine Act (PARSA)



**Applies similar standards to the hiring of contract attorneys as applied to hiring other contract services.** Most states require a public bidding process if contract services are to be hired by the state. The hiring of attorneys, however, has eluded this precaution in many states. PARSA merely asks contracts with attorneys to go through the same scrutiny required of other government contracts to encourage the best deal for the state.

**Minimizes excessive payments to outside counsel.** By creating a ceiling for the deduced “hourly rate,” the government will pay those hired on contingency fee ample payment for legal services while maximizing funds returned to the state for the benefit of taxpayers at large rather than individual attorneys.

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## Gauging Your Opposition

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While those receiving contingency fee awards may be weary of this legislation for fear of healthy competition, any strong opposition on this issue would tend to focus on specifics, not over the concept as a whole. The Private Attorney Retention Sunshine Act truly is a good-government, transparency-centered model bill. There is occasionally pushback from government agencies that have a tendency to contract out to specific firms with which they have long-standing relationships. ALEC would remind policymakers looking at the issue that long-standing relationships do not always beget the best deal for the state.

Occasionally, hired attorneys may not wish to keep a log of time spent on cases in order to provide the deduced hourly rate. However, the need for transparency, the need for government officials and taxpayers to know on what their money is being spent, should trump any inconvenience logging time may create.

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## Steps in the Right Direction

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The most important aspect of this legislation is the transparency it instills in the process of hiring outside attorneys. Thus, legislation that uses alternative methods to boost transparency and accountability may also serve a beneficial purpose. In 2010, Florida passed its *Transparency in Private Attorney Contracts Act*. This legislation takes the approach of setting a tier of percentage contingency fees that contracted attorneys can charge to bring cases on behalf of the state (25 percent of recoveries up to \$10 million, 20 percent of recoveries between \$10 and \$15 million, and so on) and promotes the transparency encouraged by the PARSA legislation using disclosure requirements and written public requests to hire outside attorneys.



# Transparency in Lawsuits

## No New Unintended Lawsuits

When legislation is silent or ambiguous on its enforcement, plaintiffs' attorneys may occasionally bring cases encouraging judges to find what are called implied causes of action. These causes of action are rights for the individual to bring a lawsuit and they are not articulated in legislation but rather decided upon based in large part on the perceived intent of the legislature at the time of enactment. To illustrate, a piece of legislation requires restaurants to post nutritional information for menu items in dining areas within 50 feet of all patrons and lacks clear enforcement policies. One restaurant posts this information 55 feet away from some diners. Should an individual seated 55 feet away from the posting be able to bring a lawsuit against the restaurant for failure to comply with the regulation whether they experienced injury as a result of the violation? Or should this regulation be enforced with appropriate fines? That is a policy-making question that should be up to the legislature. Courts weighing single cases in a vacuum without consideration of the policy implications of these kinds of decisions should not be the ones making these public-policy judgments.

As with many other aspects of the tort system and law-making, in this case ambiguity can beget abuse. Plaintiffs' attorneys take advantage of ambiguity in the law to argue over the intent of the legislature and push for a new right for the private individual to sue. Litigators spend valuable resources and time playing trial and error with the legal system in this manner.

The Problem:  
Lawsuits out  
of Unclear  
Legislation

ALEC developed the *Transparency in Lawsuits Protection Act* to keep litigators from toying with regulatory enforcement provisions, to safeguard legislative authority, and to protect consumers of the legal system from unintended and unexpected liability. The model bill simply states that without explicit language, the court cannot hold that the legislature intended to create a new right to sue. This bars courts from finding new rights to sue without clear legislative

What You  
Can Do

authorization, which the legislature is required to provide expressly. Effectively, it creates a standard to preserve legislative policy-making authority.

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## Talking Points

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### **Facilitates predictability and transparency in the legal system.**

With the enactment of the *Transparency in Lawsuits Protection Act*, plaintiffs would know where a lawsuit exists and defendants would know for what they can and cannot be held liable.

**Allows for the efficient use of resources.** The legislation helps to preserve the resources of courts no longer needing to consider cases alleging implied causes of action, thus helping to cut down the costs of state legal systems.

**Minimizes judicial and private speculation about legislative intent.** Under the model bill, legislators provide their intent and judges must take their intent at face value. The question that most judges consider before deciding on the creation of a new private cause of action is “What did the legislature intend to do?” Instead of requiring judges to interpret the legislature’s considerations, the *Transparency in Lawsuits Protection Act* would require legislators to answer the question themselves.

**Creates fairness in the court system and curtails inconsistent results.** This legislation would help ensure the fair and consistent application of the law. Removing judicial speculation would decrease the likelihood that differing interpretations of the law would be applied in courts.

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## Gauging Your Opposition

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Overall, the *Transparency in Lawsuits Protection Act* is a bill that can receive resounding bipartisan support. Occasionally, there will be speculation about the applicability of the legislation to unrelated aspects of the tort system. For example, some may speculate over the impact of the *Transparency in Lawsuits Protection Act* on tort claims and the ability to use statutes to show negligence or wrongful conduct (a relatively common practice). The model bill would not affect this ability. In fact, the ALEC model legislation has been amended to explicitly confirm that this is not the case.

Short of passing the *Transparency in Lawsuits Protection Act*, legislators can focus on legislating and enforcing with clarity. They can be specific in enforcement provisions and go so far as to insert language explicitly stating legislative intent as it relates to enforcement and the creation of new causes of action. ALEC's Civil Justice Task Force developed the *Transparency in Lawsuits Protection Act* when legislative members realized how often they had to include the same clarifying language in legislation: "nothing in this Act is intended to create a claim or remedy for a violation of a state law where the legislature did not establish a private right of action." The *Transparency in Lawsuits Protection Act* simplifies this requirement and sets a default standard, but just being precise in legislation could go a long way toward preserving clarity in enforcement and keeping unintended lawsuits from being filed.

## Steps in the Right Direction

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# Trespasser Responsibility

## Protect Property Owners from Trespasser Lawsuits

### The Problem: Paying Trespassers Under New Legal Theory

In most states, the common law has upheld that landowners owe no duty of care to trespassers and thus are not liable to them for civil damages except in certain specific situations. One wouldn't expect landowners to owe anything to those on their property without authorization.

However, there's an effort afoot to subject landowners to unprecedented liability for trespassers injured on their property. The American Law Institute, a council of legal academics, professionals and scholars that sporadically releases bodies of work called Restatements to guide judges in interpreting and applying the law, has released such a Restatement that veers significantly from accepted tort law on this issue. If judges choose to follow the Restatement, which they often do, landowners may now be subjected to civil liability for injuries to trespassers that occur on their land. The only exception given in the Restatement is one ill-defined and with potential to be quite weak in practice.

Landowners nationwide should be concerned about the potential shift in the common law, particularly those with unwatched properties. Vacation home owners, railroad companies, utility companies, factories, and farmers may all be at risk of liability for activities inherently out of their control.

If judges aren't guided by state statute to prevent them from deferring to the Restatement, an already expensive legal system will likely become more so.

### What You Can Do

To effectively freeze the law and preempt the use of the Restatement to subject landowners to newfangled liability, ALEC developed its Trespasser Responsibility Act. The model bill codifies what is generally accepted in common law: a property owner, occupier, or lessee owes no duty of care to a trespasser except in a few, traditional exceptions. Legislators considering work on this issue should take care to tailor the bill to their state. The intent is to codify the

common law in a particular state and to maintain the status quo as a preventive measure.

Trespasser liability is an issue to consider with urgency—the law needs to be solidified before the judiciary is tempted to turn it on its head.

**Keeps property insurance rates from skyrocketing under the proposed law change.** Imposing unwarranted liability on landowners for trespassers could unleash unpredictable and undue havoc that could result in higher insurance premiums.

**Preserves fundamental fairness in dealing with trespassers.** No property owner should be subject to liability for unintentional injuries of uninvited guests. As a matter of common-sense fairness, the model legislation would safeguard against such uncalled for liability.

**Keeps frivolous trespasser lawsuits from punishing law-abiding property owners.** Lawsuits alleging property-owner responsibility for trespasser injury that would not pass muster in state courts prior to the influence of the Restatement would be maintained as meritless were legislation to codify common law rules as intended.

## Talking Points

Some may hesitate to support legislation that may hinder judicial flexibility. The ALEC model legislation is intended to codify the rules judges currently consider when ruling on a trespasser case, so little change would be expected from the status quo.

Furthermore, some may be weary that the legislation may overlook established exceptions to the no-duty-owed-to-trespassers rule. It is ALEC's hope that any legislation drafted based on the model bill would take into account such exceptions.

## Gauging Your Opposition

Some states may already have laws on the books that in part address the duty owed to a trespasser. These laws may be specific to categories of property owners, like farmers or businesses. Thus, in some cases, a law with wide enough applicability to preempt judicial use of the Restatement may be achieved with tweaks of existing statutes.

## Steps in the Right Direction



# Regulatory Compliance Defense Reform

## Balancing Liability with Regulation

### The Problem: Sued If You Do, Sued If You Don't

Federal and state agencies are charged by legislators with the responsibility of regulating, and in many cases pre-approving, products and services on the market. In developing these regulations they must evaluate the risks and benefits of a product to its many and varied consumers, and come to a reasoned regulatory decision. To illustrate, if a pharmaceutical product provides significant health benefits to many but may elicit an adverse response from a very small number of patients, should the drug be allowed in the market place? This is something regulators take into consideration before making a judgment that will impact the many on whose behalf they regulate. Alternatively, when a lawsuit is brought based on the circumstances surrounding a specific situation, a judgment may be rendered that will remove a product from the market that would have benefitted many because of the reaction of often a very small few. In this way, the efforts of the regulatory system and the legal system collide... often with concerning, duplicative and even antithetical results.

Furthermore, companies that provide these products and services which are heavily regulated are often sued no matter what they do. If they don't adhere to regulation, they will most certainly be sued for violations. However, if they do adhere to regulation they will pay the high-dollar fee to get a product in compliance and they may still be sued. The proper incentives are not upheld when a company can ignore or follow regulations and likely have the same punishment. Whether this brings about lax compliance with regulations or removes valuable potential products from the market, it is a problem worth considering.

It is important for legislators to evaluate the interaction of regulation and liability and decide how best to get the two systems to work in harmony.



## What You Can Do

ALEC has developed the *Regulatory Compliance Congruity with Liability Act* to give legislators a better understanding of the problem and to provide options for congruity between regulatory and legal systems for state legislators' consideration. The model bill instructs courts on how to weigh a product's or service's compliance with regulation when deciding liability in a civil lawsuit. The legislation would allow the legal system to work with the regulatory system rather than oppose it, thereby maximizing the efficient use of government enforcement resources.

The model bill would establish either a standard of no punitive damages when a company's product or service is fully and fairly in compliance with regulations, no liability when fully compliant, or something called a rebuttable presumption of no liability when compliant. The model bill provides all the proper exceptions to limiting liability: the limited liability standards don't apply if there has been misrepresentation, fraud, illegal activity, and other such improper activity.

ALEC took the many laws already in existence in various states to give the courts guidance in deciding how much deference should be given to regulations when assessing liability:

**No liability When Compliant** – In Michigan, if a pharmaceutical product is approved by the FDA (a process that takes 10 years and over \$800 million dollars on average), the pharmaceutical company is protected from liability for that product. ALEC took a similar approach based on the understanding that when a company has committed significant resources to adhering to the law and when the regulatory agencies have struck a balance in evaluating the pros and cons of their product, the agencies' well thought out regulation should not have interference from the judiciary assessing liability based on individual cases and facts rather than on the affect on consumers as a whole.

**Rebuttable Presumption of No Liability** – At least five states establish a rebuttable presumption of no liability when products are compliant with regulations. (A rebuttable presumption is basically an assumption that remains until proven otherwise.) This option operates under the idea that if liability is to exist in these cases, plaintiffs should have to overcome a barrier significant enough to give the regulation meaning. If liability is to be placed on the compliant company, more than just a singular case should be taken into consideration in such cases that affect regulation and public policy. Therefore, under the rebuttable presumption option in the ALEC model, plaintiffs may only recover awards if they are able to show that the regulations are wholly inadequate to protect the public beyond the facts of the particular case.

**No Punitive Damages** – Five states have rules that do not allow punitive damages when some products comply with regulations. These laws, and the ALEC model, assess that a company should not be punished for following the law. Here plaintiffs may recover damages for economic or noneconomic loss, but they may not ask for damages whose purpose is to punish. Punitive damages, however, may be assessed if the defendant did not comply with the law, misrepresented products to the consumer or regulating industry, or falls under the exceptions mentioned before.

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## Talking Points

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**Encourages the regulatory and legal systems to work in harmony.** By tempering liability for companies whose products are in compliance with regulations, the regulatory system will be able to serve consumers and issue policy-reasoned regulations with minimal interference from extra-regulatory liability.

**Provides proper incentives for regulatory compliance.** By refocusing liability on those businesses whose products and services do not comply with the law, business that do in good faith comply will be rewarded for their efforts. Such an incentive structure is proper to preserve and encourage compliance.

**Upholds predictability for businesses.** Lawsuits that conflict with the orders, regulations, or approvals of government agencies result in unpredictability in the civil justice system and confusion among manufacturers and service providers about their legal obligations. With reform from ALEC's model bill, those obligations will be more clearly stated, allowing businesses to better plan and manage their risk. Furthermore, a predictable legal climate as supported by the model is a favorable condition businesses seek when deciding where to do business.

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## Gauging Your Opposition

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Some will say that the legal system is good way to regulate industry activity. The legal system is intended to compensate victims for losses that are the result of another's fault. Regulating industry activity based on the scenario of one or few consumers will not necessarily be in the best interest of the consumer group. For example, a drug that may have harmful side effects for very few could save the lives of many. Were such a product to be removed from the market because of an individual lawsuit, the larger consumer group would suffer.

The ALEC model *Regulatory Compliance Congruity with Liability Act* gives three options for legislators considering how to harmonize their regulatory and legal systems. If “no liability” is not a plausible option for your state, perhaps a “rebuttable presumption of no liability” may be a standard worth setting. Or, by codifying that no punitive damages are to be allotted where products are in line with regulation, businesses at least will not be directly punished when compliant.

Steps in  
the Right  
Direction

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## Additional Resources

### DAMAGES REFORM

Schwartz, Victor E. "Discussion of the Full and Fair Non-Economic Damages Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 33-34. Print.

Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881 (2009). Web. <<http://www.shb.com/attorneys/SchwartzVictor/TheSupremeCourtsCommonLawApproach2009.pdf>>.

### LIABILITY APPORTIONMENT

Sisk, Gregory C., *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, University of Puget Sound Law Review, Volume 16 (Fall 1992).

### VENUE REFORM

Tedesco, Rochelle. "Discussion of the Intrastate Forum Shopping Abuse Reform Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 57-58. Print.

Victor E. Schwartz & Rochelle Tedesco, *Stop the Venue Shopping Spree*, 1 Litig. Mgmt. 40 (2003)

### EXPERT EVIDENCE REFORM

Huber, Peter W. *Galileo's Revenge: Junk Science in the Courtroom*. New York: Basic, 1993. Print

Schwartz, Victor and Cary Silverman. "Discussion of the Reliability in Expert Testimony Standards Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 26-29. Print.

Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2006). Web. <[http://www.shb.com/attorneys/Schwartz-Victor/TheDrainingofDaubert\\_2006.pdf](http://www.shb.com/attorneys/Schwartz-Victor/TheDrainingofDaubert_2006.pdf)>.

Victor E. Schwartz & Cary Silverman, *The Urgent Need for Reliability in Expert Testimony*. The State Factor. American Legislative Exchange Council, Feb 2007.

### CLASS ACTION REFORM

Beisner, John H. "Discussion of the Class Actions Improvement Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 43-54. Print.

Beisner, John H., Jessica D. Miller, and Matthew M. Shors. *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*. Rep. 2003. Civil Justice Report. Manhattan Institute. Web. <[http://www.manhattan-institute.org/html/cjr\\_7.htm](http://www.manhattan-institute.org/html/cjr_7.htm)>.

### CONSUMER PROTECTION STATUTE REFORM

Kjose, Amy. "How to Avoid Future \$54 Million Pants Suits." *The Washington Examiner* 8 Jan. 2009. Web. <<http://www.alec.org/Content/NavigationMenu/ALECNEWS/ALECOPEds/PantsOpEd.pdf>>.

*Private Consumer Protection Lawsuit Abuse: When Claims Are Driven By Profit-driven Lawyers And Interest Group Agendas, Not The Benefit Of Consumers*. Rep. American Tort Reform Foundation, 2006. Print.

Silverman, Cary. "Discussion of the Private Enforcement of Consumer Protection Statutes Act. Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 104-105. Print.

Victor E. Schwartz, *Consumer Protection Acts are a Springboard for Lawsuit Abuse*, Executive Counsel, Mar. / Apr. 2007. Web. <[http://www.shb.com/attorneys/SchwartzVictor/ConsumerProtection-Acts\\_2007.pdf](http://www.shb.com/attorneys/SchwartzVictor/ConsumerProtection-Acts_2007.pdf)>.

### JURY REFORM

Cary Silverman & Kimberly D. Sandner, *Supporting Jury Service: It's Good for Business*, Leadership for Manufacturers: Official Magazine of the Nat'l Ass'n for Manuf., Spring 2004, at 5. Web. <[http://www.shb.com/attorneys/Silverman/SupportingJuryService\\_2004.pdf](http://www.shb.com/attorneys/Silverman/SupportingJuryService_2004.pdf)>.

*The Jury Patriotism Act: A Guide for State Legislative Sponsors*. Rep. American Legislative Exchange Council, 2004. Print.

Munsterman, G. Thomas, and Cary Silverman. "Jury Reforms in Arizona: The First Year." *The Judge's Journal* 45.1 (2006).

Silverman, Cary. "Discussion of the Jury Patriotism Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 19-21. Print.

Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizen*. The State Factor. American Legislative Exchange Council, April 2003. Web. <[http://www.shb.com/attorneys/Silverman/The-JuryPatriotismAct\\_2003.pdf](http://www.shb.com/attorneys/Silverman/The-JuryPatriotismAct_2003.pdf)>.

### PRIVATE ATTORNEY CONTRACT SUNSHINE

Lynch, Patrick, Thurbert Baker, and John Suthers. *Practical Considerations for Approaching Key Issues in the Office of the Attorney General - A Publication for New Attorneys General*. Rep. Print.

Maremont, Mark, Tom McGinty, and Nathan Koppel. "Trial Lawyers Contribute, Shareholder Suits Follow." *Wall Street Journal* 3 Feb. 2010. Print.

Silverman, Cary. "Discussion of the Private Attorney Retention Sunshine Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 123-26. Print.

Victor E. Schwartz, Kevin Underhill, Cary Silverman, & Christopher E. Appel, *Governments' Hiring of Contingent Fee Attorneys Contrary to Public Interest*, 23:34 Legal Backgrounder (Wash. Legal Found. Aug. 8, 2008).

### TRANSPARENCY IN LAWSUITS

Schwartz, Victor. "Discussion of the Transparency in Lawsuits Protection Act." Print. Rpt. in *Disorder in the Court: A Guide for State Legislators*. American Legislative Exchange Council, 2007. 128-129. Print.

### TRESPASSER RESPONSIBILITY

Behrens, Mark A. "No Trespassing: ALEC Model Legislation Would Promote Trespasser Responsibility and Prevent Activist Judges from Facilitating Lawsuits by Intruders." *Inside ALEC* Jan. 2011.





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