

## ALEC EXPOSED

"ALEC" has long been a secretive collaboration between Big Business and "conservative" politicians. Behind closed doors, they ghostwrite "model" bills to be introduced in state capitols across the country. This agenda--underwritten by global corporations--includes major tax loopholes for big industries and the super rich, proposals to offshore U.S. jobs and gut minimum wage, and efforts to weaken public health, safety, and environmental protections. Although many of these bills have become law, until now, their origin has been largely unknown. With **ALEC EXPOSED**, the Center for Media and Democracy hopes more Americans will study the bills to understand the depth and breadth of how big corporations are changing the legal rules and undermining democracy across the nation.

### ALEC's Corporate Board --in recent past or present

- AT&T Services, Inc.
- centerpoint360
- UPS
- Bayer Corporation
- GlaxoSmithKline
- Energy Future Holdings
- Johnson & Johnson
- Coca-Cola Company
- PhRMA
- Kraft Foods, Inc.
- Coca-Cola Co.
- Pfizer Inc.
- Reed Elsevier, Inc.
- DIAGEO
- Peabody Energy
- Intuit, Inc.
- Koch Industries, Inc.
- ExxonMobil
- Verizon
- Reynolds American Inc.
- Wal-Mart Stores, Inc.
- Salt River Project
- Altria Client Services, Inc.
- American Bail Coalition
- State Farm Insurance

For more on these corporations, search at [www.SourceWatch.org](http://www.SourceWatch.org).

**DID YOU KNOW?** Corporations VOTED to adopt this. Through ALEC, global companies work as "equals" in "unison" with politicians to write laws to govern your life. Big Business has "a VOICE and a VOTE," according to newly exposed documents. **DO YOU?**

Home → Model Legislation → Civil Justice  
**Full & Fair Noneconomic Damages Act**

Did you know that Victor Schwartz--a lawyer who represents companies in product litigation--was the corporate co-chair in 2011?

### Summary

Pain and suffering awards are intended to compensate an injured plaintiff for the pain and suffering resulting from an injury caused by the defendant.<sup>1</sup> They are not intended as punishment for the defendant or to deter future misconduct.<sup>2</sup>

Constitutional and statutory controls increasingly have been placed on punitive damages, but few legal guideposts exist to help jurors fix the amount of pain and suffering awards. As a result, there is an incentive for some to seek to drive up the amount of pain and suffering awards by focusing on the defendant's alleged misconduct.<sup>3</sup> Jurors calculating the amount of these awards may be excessively influenced by the presentations of the parties at trial. Pain and suffering awards may therefore be improperly influenced by bias, passion, or prejudice. ALEC's model Full and Fair Noneconomic Damages Act would preclude the improper use of "bad act" evidence in the calculation of pain and suffering damages. It also seeks to enhance the opportunities for meaningful judicial review of such awards.

### Section 1. Title.

This Act shall be called and may be cited as the "Full and Fair Noneconomic Damages Act."

### Section 2. Findings

(a) The purpose of this Act is to ensure that individuals receive full and fair compensatory damages, including damages for pain and suffering.

(b) Pain and suffering awards are intended to provide an injured person with compensation for the pain and suffering resulting from the injury at issue in a particular lawsuit.

(c) Punitive damages are intended to punish a defendant for wrongful conduct. Punitive damages are subject to certain statutory requirements, must be based on the appropriate evidence, and must be in accordance with the constitutional jurisprudence of the Supreme Court of the United States.

(d) Pain and suffering awards are distinct from punitive damages. Pain and suffering awards are intended to compensate a person for his or her loss. They are not intended to punish a defendant for wrongful conduct.

(e) For that reason, evidence that juries may consider in awarding pain and suffering damages is different from evidence courts may consider for punitive damages. For example, the amount of a plaintiff's pain and suffering is not relevant to a decision on wrongdoing, and the degree of the defendant's wrongdoing is not relevant to the amount of pain and suffering.

(f) The size of noneconomic damage awards, which includes pain and suffering, has increased dramatically in recent years. While pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.

(g) Inflated damage awards create an improper resolution of civil justice claims. The increased and improper costs of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.

(h) Therefore, courts should provide juries with clear instructions about the purpose of pain and suffering damages. Courts should instruct juries that evidence of misconduct is not to be considered in deciding compensation for noneconomic damages. Rather, it is to be considered solely for the purpose of deciding punitive damage awards.

(i) In cases in which punitive damages are requested, defendants should have the right to request bifurcation of a trial to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages.

(j) As an additional protection, trial and appellate courts should rigorously review pain and suffering awards to ensure that they properly serve compensatory purposes and are not excessive.

### Section 3. Noneconomic Damages; Defined.

(a) Noneconomic damages which are recoverable in tort actions include damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, and all other nonpecuniary losses other than exemplary or punitive damages.

(b) Pain and suffering is one type of noneconomic damage and means the actual physical pain and suffering that is the proximate result of a physical injury sustained by a person.

(c) 'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages.

#### Section 4. Noneconomic Damages; Determination.

(a) In determining noneconomic damages, the fact finder may not consider:

1. Evidence of a defendant's alleged wrongdoing, misconduct, or guilt.
2. Evidence of the defendant's wealth or financial resources.
3. Any other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

#### Section 5. Procedure for Trial of Compensatory & Punitive Damages.

(a) All actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial before the same jury.

(b) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

(c) Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(d) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages.

#### Section 6. Review of Noneconomic Damage Awards.

(a) Upon post-judgment motion, a trial court shall perform a rigorous analysis of the evidence supporting a noneconomic damages award challenged as excessive. Such analysis shall consider the following nonexclusive factors:

(1) whether the evidence presented or the arguments of counsel resulted in one or more of the following events in the determination of a noneconomic damage award:

- (i) inflamed the passion or prejudice of the trier of fact;
- (ii) improper consideration of the wealth of the defendant; or
- (iii) improper consideration of the misconduct of the defendant so as to punish the defendant in circumvention of [the limitation on punitive damage awards provided by REFERENCE STATE STATUTES FOR CAP/BURDEN OF PROOF, IF APPLICABLE or] constitutional standards applicable to punitive damage awards.

(2) whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs; and

(3) whether there were any extraordinary circumstances in the record to account for an award in excess of what was granted by courts to similarly situated plaintiffs, with consideration to the injury type, severity of injury, and the plaintiff's age.

(b) A trial court upholding a noneconomic damages award challenged as excessive shall set forth in writing its reasons for upholding the award.

(c) A reviewing court shall use a de novo standard of review when considering an appeal of a noneconomic damages award on the grounds of excessiveness.

#### Section 7. Effective Date **CMD: This gives no deference to the trial judge.**

The provisions of this Act shall take effect on the date of enactment and apply to all civil actions filed after such date.

#### Footnotes

1. See Restatement of Torts (Second), § 903 (1965).

2. See *American Law Institute, Reporter's Study, Enterprise Responsibility for Personal Injury*, at 199-200 (Philadelphia: American Law Institute, 1991) (observing that pain and suffering damages reflect concerns with a variety of types of non-monetary loss, including tangible physical pain suffered at the time of injury and during recuperation, the anguish and terror felt in the face of impending injury or death, the immediate emotional distress and long-term loss of love and companionship resulting from the injury or death of a close family member, and the lost pleasures of personal and social activities resulting from a permanent physical impairment).

3. For a more in depth discussion of the increasing use of pain and suffering awards to circumvent standards applicable to punitive damages, see generally Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47 (2002).

**About Us and ALEC EXPOSED.** The Center for Media and Democracy reports on corporate spin and government propaganda. We are located in Madison, Wisconsin, and publish [www.PRWatch.org](http://www.PRWatch.org), [www.SourceWatch.org](http://www.SourceWatch.org), and now [www.ALECexposed.org](http://www.ALECexposed.org). For more information contact: [editor@prwatch.org](mailto:editor@prwatch.org) or 608-260-9713.

### Center for Media and Democracy's quick summary

This bill provides that, in determining a pain-and-suffering award, evidence cannot be admitted of a defendant's bad acts, income, or other information that might lead the jury, judge, or arbitrator to increase the size of the award. Corporations may fear that if a jury has evidence of its past wrongdoing or annual earnings, the jury may be more willing to award a larger award to the injured plaintiff, either because the corporation deserves the increased "punishment" or because it can "afford it." The idea is to limit a defendant's financial liability.

From CMD: Additionally, this is one of several efforts to limit damages paid by corporations for pain and suffering and also limit punitive damages awards where a jury finds intentional misconduct by a corporations that caused the serious injury or death of an American. It would prevent a jury from hearing evidence relating only to punitive damages, until the very end of a trial, in the damages stage rather than the liability, denying the jury access to all relevant evidence during the entirety of its deliberations.