

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.

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& MEETINGS

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Constitutional Guidelines for Punitive Damages Act

Summary

The Constitutional Guidelines for Punitive Damages Act is intended to help and assure that the courts of this state conform punitive damages awards to the requirements of the United States Constitution. The guidelines are directly based on punitive damages jurisprudence from the United States Supreme Court. Because the laws governing punitive damages vary so much among the states, a legislator planning to introduce a punitive damages bill should first obtain information about his or her state's laws governing punitive damages. These guidelines are supported by the Due Process Clause and the Supremacy Clause of the Constitution of the United States.

Model Legislation

{Title, enacting clause, etc.}

Section 1. {Title.} This Act shall be known and may be cited as the Constitutional Guidelines for Punitive Damages Act.

Section 2. {Legislative Finding.} The legislature finds and declares that:

(A) the specter of unlimited punitive damages encourages plaintiffs and defendants to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;

(B) the public interest has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate costs in higher prices and insurance costs;

(C) punitive damages are private punishments in the nature of fines awarded in civil cases;

(D) when warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;

(E) the Supreme Court of the United States has established that there are constitutional procedural and substantive limitations on punitive damages awards;

(F) it is in the public interest to assure that all persons in the state are aware of and conform to the constitutional procedural and substantive limitations on punitive damages awards; and

(G) it is in the public interest to establish guidelines for the review of constitutionality of punitive damages in accordance with binding jurisprudence.

Section 3. {Procedural Due Process Review Guidelines.}

(A) Appellate review of the constitutionality of a punitive damages award shall be available as a matter of right.

(B) On appeal, review of the constitutionality of a punitive damages award shall be done anew, as if the issue had not been heard before and as if no decision had been previously rendered.

Section 4. {Substantive Due Process Review Guidelines.}

(A) Generally. In determining whether a punitive damages award is grossly excessive so as to violate constitutional due process guarantees, the following guideposts shall be considered:

(1) the reprehensibility of the defendant's conduct;

(2) the ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

(3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

(B) Reprehensibility. In determining the reprehensibility of the defendant's conduct

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

under subsection (A)(1) of this Section, the court shall consider only evidence of the wrongful acts of the defendant directly against the plaintiff. Evidence of acts of general wrongdoing on the part of a defendant, and acts outside the jurisdiction involving other persons, shall not be considered in the reprehensibility analysis.

(C) Ratio. In considering the ratio between the plaintiff's harm and the punitive damages award under subsection (A)(2) of this Section, the following provisions apply:

(1) Punitive damages shall be proportionate to the compensatory damages awarded, but in no case, except as stated in subsection (2) below, shall the ratio of punitive to compensatory damages exceed a ratio of 9 to 1.

(2) In cases where the compensatory damages award is less than \$50,000, and for good cause shown, a larger ratio is permitted, but in no case shall the ratio of punitive to compensatory damages exceed a ratio of 15 to 1.

(D) Comparable Civil Penalties. In determining the comparable civil penalties for purposes of subsection A(3), the court shall consider only those statutory penalties imposed or awarded for acts comparable to the wrong done by the defendant to the plaintiff. The court shall not consider civil penalties for acts comparable to general wrongdoing by the defendant. The court shall not consider criminal penalties.

Section 5. {Severability Clause.}

Section 6. {Repealer Clause.}

Section 7. {Effective Date.} This Act shall be effective immediately upon its enactment. It shall apply to any review of the constitutionality of a punitive damages award pending or commenced on or after the date of enactment, regardless of whether the claim arose prior to the date of enactment.

SECTION BY SECTION ANALYSIS

The purpose of the Model Constitutional Guidelines for Punitive Damages is to assist state courts in conforming punitive damages awards to the requirements of the Constitution of the United States. As the United States Supreme Court has observed, punitive damages have "run wild" in this country. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). They have been arbitrary, erratic, and sometimes unfair in their application. Excessive punitive damages awards may not only be unfair to defendants. They can bankrupt defendants before injured persons receive compensatory damages.

In a series of cases, the United States Supreme Court has set forth a number of guideposts for courts to follow in determining whether a punitive damages award is so "grossly excessive" that it furthers no legitimate purpose and constitutes an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (limiting reprehensibility review to harms with a specific nexus to the individual plaintiff; ruling that single-digit ratio of punitive to compensatory awards applies in most cases; and barring the use of irrelevant out-of-state conduct to support a punitive award); *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* appellate review of constitutionality of punitive damages awards); *BMW of N. America v. Gore*, 517 U.S. 559 (1996) (setting forth three guideposts for the analysis of the constitutionality of punitive awards under the Due Process Clause of the Fourteenth Amendment); *Honda Motor Company v. Oberg*, 512 U.S. 415 (1994) (emphasizing the common-law role of judicial review in assuring that punitive awards were not arbitrary or excessive); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (emphasizing that substantive due process limits the amount of punitive awards); *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (ruling that punitive damages are subject to Due Process Clause of the Fourteenth Amendment).

Unfortunately, some state courts have had difficulty in construing and applying the United States Supreme Court's rulings in these cases. Some courts have not followed the rules, possibly because the rules were not brought to the attention of the court. The net result has been excessive appeals, unnecessary legal costs, and confusion in the law as to the proper application of constitutional principles. This Model Act seeks to clarify defendants' rights with respect to state punishment through the award and enforcement of punitive damages, and will assist in implementing fundamental constitutional principles in the future.

Section 1

This Section sets forth the title of the Act.

Section 2

This Section sets forth legislative findings regarding the need for the Act.

Section 3

This Section establishes that appellate review of the constitutionality of a punitive damages award is available as a matter of right, rather than at the discretion of the appeals court.

This Section also establishes that appellate review of the constitutionality of a punitive damages award shall be *de novo*. In other words, the appeals court shall

give the issue a "thorough, independent review." *Cooper Industries Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 441 (2001). The appeals court should approach the issue anew, as if the issue had not been heard before and as if no decision had been previously rendered. This replaces the "abuse of discretion" standard of review available in some states, which helps assure that due process protections are enforced and that the law is appropriately developed and consistently applied. The United States Supreme Court has explained that *de novo* appellate review of the constitutionality of punitive damages awards is appropriate: "The question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, -- U.S. --, 123 S. Ct. 1513, 1521 (2003) ("*Cooper Industries* ... mandated appellate courts to conduct *de novo* review of a trial court's application of [the *Gore* guideposts] to the jury's award.").

Section 4

Section 4(A) codifies the factors announced by the United States Supreme Court in *BMW of N. America v. Gore*, 517 U.S. 559 (1996) for determining the constitutionality of punitive damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (citing *Gore*, 517 U.S. at 575).

Section 4(B) explains, in accordance with United States Supreme Court jurisprudence, that punitive damages should be tied to the specific harm to the plaintiff, and not based on a defendant's general misconduct or on acts toward other persons outside the jurisdiction. Courts may not consider such evidence in analyzing the reprehensibility guidepost. The United States Supreme Court explained in *Campbell*: "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." 123 S. Ct. at 1524. Moreover, as the Supreme Court explained, "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Id.* at 1523. In *Gore* and *Campbell*, the Supreme Court also emphasized that punitive damages cannot be used to punish extraterritorial conduct. In *Gore*, the court forbade punishment for extraterritorial misconduct that was lawful in the state where it occurred. See 517 U.S. at 572. In *Campbell*, the Court further stated that, as a general rule, a State does not have "a legitimate concern in imposing punitive damages to punish a defendant for *unlawful acts* committed outside of the State's jurisdiction." 123 S.Ct. at 1522 (emphasis added).

Some courts already have applied the reprehensibility analysis set down by the Supreme Court. In *Diamond Woodworks, Inc. v. Argonaut Insurance Company*, 2003 WL 21361143 (Cal. App. June 13, 2003), the court ruled a \$5.5 million punitive damages award to be unconstitutional. The action was brought by Diamond Woodworks, the client of an employee leasing company against the company and its workers' compensation insurer, Argonaut, to recover for breach of contract, bad faith, and fraud in connection with denial of benefits for a leased employee injured during the employee's first day of employment. Diamond Woodworks argued that Argonaut's reprehensibility should be measured by Argonaut's conduct toward the world at large, rather than as directed at Diamond alone. *Id.* at *18. Diamond argued that Argonaut lied to government agencies including the state's Workers' Compensation Insurance Bureau; it used unlicensed agents to write insurance in violation of state law; it denied other claims, in the same way it denied Diamond's; it treated all client companies as one insured under the policy; and it engaged in other conduct that was part and parcel of "the exact transaction and circumstances of fraud perpetrated on the plaintiff." *Id.* The California court noted that while Diamond's conduct toward the plaintiff was reprehensible and justified an award of some punitive damages, the *Campbell* case made clear that conduct toward the world at large could not provide support for the punitive damages award. *Id.*

Section 4(C) explains to courts how to apply the United States Supreme Court's "ratio" guidepost for the review of the due process implications of a punitive award, which was set forth in *Gore* and further interpreted in *Campbell*. The Supreme Court has declined to impose a "bright-line" ratio which a punitive damages award cannot exceed, although it has previously indicated that a 4-to-1 ratio is close to the line, see *Haslip*, 499 U.S. at 23-24, and *Gore*, 517 U.S. at 581. The Supreme Court also has referred to traditional sanctions of double, treble and quadruple damages. *Id.*, see also *Campbell*, 123 S. Ct. at 1524. Now, though, the jurisprudence and the principles established by the Court "demonstrate ... that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

The 9-to-1 ratio set forth in Section 4(C)(1) reflects the United States Supreme Court's concern that "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in ranges of 500 to 1, or, in this case, of 145 to 1." *Id.* The 15-to-1 ratio set forth in Section 4(C)(2) is included to address the unusual situation in

which a small amount of compensatory damages may be awarded but egregiously reprehensive misconduct by the defendant merits a larger punitive award. See *Gore*, 517 U.S. at 582 (positing that a higher ratio than 4-to-1 *might* be necessary where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine”). Courts should appreciate that the converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Campbell*, 123 S. Ct. at 1524.

Section 4(D) explains how to apply the third *Gore* factor, the “comparable civil penalties” guidepost. Lower courts have had particular difficulty applying this factor, possibly because it requires courts to go beyond the particular facts of the case in considering whether an award is excessive. Some courts have sought to apply legislative penalty schemes appropriate for wide-ranging misconduct, rather than the specific misconduct at issue in the case. Some courts have gone beyond legislative determinations regarding appropriate sanctions for the behavior in question, and compared the punitive damages award with jury verdicts in civil cases. Comparing a punitive damages award to other jury verdicts divorces this factor from its connection to the policy judgments of the legislature. Also, jury verdicts are retroactive judgments based on the specific facts in a case. As such, they are less appropriate for comparison than statutory penalties, which are intended to apply to a broad range of situations.

Section 5

This Section provides a severability clause.

Section 6

This Section provides a repealer clause.

Section 7

This Section provides that the provisions of the Act apply to all cases in which appellate review is pending on the date of enactment, as well as all future cases, regardless of when the circumstances giving rise to the claim occurred.

*Adopted by ALEC's Civil Justice Task Force at the Annual Meeting July 31, 2003.
Approved by full ALEC Board of Directors August, 2003.*

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Center for Media and Democracy's quick summary

This bill incorporates U.S. Supreme Court punitive award analysis into state law. Whereas state courts typically interpret U.S. Supreme Court decisions and apply them in state cases, this bill would circumvent that process by giving the legislature interpretive authority and limiting the state judiciary's discretion. It codifies a certain method of punitive damage analysis in order to limit defendants' financial liability.