

## 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  
**Punitive Damages Standards Act**

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

### Summary

The Punitive Damages Standards Act establishes a standard for liability for punitive damages, raises the burden of proof to clear and convincing evidence, allows a bifurcated trial on the question of whether the defendant is liable for punitive damages, limits the amount of a punitive damages award to twice the amount of compensatory damages, and establishes an FDA defense to punitive damages for over-the-counter and prescription drugs, medical devices, and foods. 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.

### Model Legislation

{Title, enacting clause, etc.}

**Section 1. {Title.}** This Act shall be known and may be cited as the Punitive Damages Standards 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) reasonable and fair standards will promote predictability in the award of punitive damages in a manner fully consistent with the objective of deterrence;
- (C) private enterprise 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;
- (D) punitive damages are private punishments in the nature of fines awarded in civil cases;
- (E) when warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;
- (F) current procedures for the award of punitive damages do not properly protect those accused of serious wrongdoing nor provide sufficient guidance for the imposition of these penalties; and
- (G) it is in the public interest to strike a balance between deterring egregious misconduct and encouraging reasonable activity.

**Section 3. {Definitions.}** For the purposes of this Act, the meaning of the terms specified shall be as follows:

- (A) "Clear and convincing evidence" means evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.
- (B) "Compensatory damages" means damages intended to make good the loss of an injured party and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.
- (C) "Defendant" means any party against whom punitive damages are sought.
- (D) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury.
- (E) "Nominal damages" are damages that are not designed to compensate a plaintiff and are less than \$500.

(F) "Plaintiff" means any plaintiff claiming punitive damages.

(G) "Punitive damages" includes exemplary or vindictive damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

(H) "Drug," "device," "food," and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

#### **Section 4. {Pleading Punitive Damages; Pre-Suit Notice}**

(A) An award of punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff must specifically plead either:

(1) that at least 30 days in advance of filing the complaint, that the plaintiff has given notice of seeking damages pursuant to this Act and that in good faith a reasonable settlement could not be reached; or

(2) that such 30 days notice under this section could not be given because of exigent circumstances.

(C) The plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action.

(D) The prayer for punitive damages shall be stricken prior to trial by the court, unless the plaintiff presents prima facie evidence sufficient to sustain an award of punitive damages under this Act to the court at least 30 days prior to trial.

#### **Section 5. {Procedure for Award of 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.

(E) Evidence of a defendant's financial condition or net worth is not admissible in the proceedings on punitive damages.

(F) In determining the amount of punitive damages, the trier of fact shall consider all relevant evidence, including:

(1) The severity of the harm caused by the defendant;

(2) The extent to which the plaintiff's own conduct contributed to the harm;

(3) The duration of the conduct, the defendant's awareness, and any concealment by the defendant;

(4) The profitability of the conduct to the defendant;

(5) Awards of compensatory and punitive damages to persons similarly situated to the plaintiff;

(6) Prospective awards of compensatory damages to persons similarly situated to the plaintiff;

(7) Any criminal penalties imposed on the defendant as a result of the conduct complained of by the plaintiff; and

(8) The amount of any civil fines assessed against the defendant as a result of the conduct complained of by the plaintiff.

(G) In determining the amount of punitive damages, the trier of fact shall not consider the wealth or financial condition of the defendant, but such evidence may be considered by the trial and appellate courts in determining whether the award is excessive.

(H) If a verdict is rendered awarding punitive damages, the trial court shall carefully review the decision of the trier of fact, considering all relevant evidence, including the factors identified in subsection (F), to ensure that the award does not exceed an amount necessary for the sake of example and to punish the defendant. Trial courts are to reflect in the record their reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness

of damages.

(I) The amount of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of this state. In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

**Section 6. {Proof Required for Award of Punitive Damages.}** Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that his or her harm was the result of actual malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

**Section 7. {Ceiling for Punitive Damages Award.}** No award of punitive damages shall exceed two times the amount of the plaintiff's compensatory damages award or \$250,000, whichever is greater. If the defendant is an individual or a business with 50 or fewer full-time employees, no award of punitive damages shall exceed two times the amount of the plaintiff's compensatory damages or \$250,000, whichever is less.

**Section 8. {Availability of Punitive Damages.}** Nothing contained in this Act is to be construed as creating any claim for punitive damages which is not now present under the law of this state.

**Section 9. {FDA defense.}**

(A) Punitive damages shall not be awarded if a drug or device or combination device or food or food additive which caused the claimant's harm:

(1) Was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat.1040, 21 U.S.C.Sec.301 et seq. or the "Public Health Service Act," 58 Stat.682, 42 U.S.C.Sec.201 et seq. and was approved or licensed; or

(2) Is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(B) This exception shall not apply where the plaintiff proves by clear and convincing evidence that the product manufacturer:

(1) Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or

(2) Made an illegal payment to an official of the federal Food and Drug Administration for the purpose of securing approval of the product.

**Section 10. {Severability Clause.}**

**Section 11. {Repealer Clause.}**

Were your laws repealed?

**Section 12. {Effective Date.}** This Act shall be effective as to any civil suit for damages commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

*ALEC's Sourcebook of American State Legislation 1995*

**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 limits the ability of a plaintiff to be awarded punitive damages, the payments awarded in a settlement that go above-and-beyond actual damages with the intent of sending a strong message to the defendant that their conduct is unacceptable. The intent is to limit judgments against corporate defendants.

Wisconsin Governor Scott Walker created a similar punitive damage cap in 2011 Wis Act 2, which created Sect 895.043(6).