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OA/ID Number: 21805
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Folder Title:
Mississippi

Stack:	Row:	Section:	Shelf:	Position:
G	34	6	5	7

~~Jim Stokes, Beaumont Chamber~~

Calvin Spindor, President Parkdale Bank

Chairman Beaumont Chamber

Evelyn Lord, Mayor, City of Beaumont

Sat
next
to UP

Dear —,

Thank you for your help putting together
the roundtable discussion of civil justice reform
yesterday. It was a great group - and the stories
they told ~~really built~~ show we need to change the system.
Keep in touch

Document Originally
Attached to
Following Page

SUBJECT: Civil Justice Reform in Mississippi

Mississippi has been identified as a state "ripe" for our civil justice reform efforts. We have worked with the Mississippi State Chamber of Commerce and numerous legal reform coalitions to design the Gulfport Civil Justice Reform Roundtable to capitalize on this opportunity.

This session a comprehensive six-bill reform package has been introduced. On Tuesday, March 3, the Senate and House Judiciary Committees held a joint hearing on product liability. We have learned that the hearing went well and the bill is likely to be reported favorably. The coalitions also believe that there is a chance to pass punitive damages reform.

Our best bet for assisting this effort is for the Vice President to visit with the Governor and Lt. Governor to underscore the Administration's commitment to civil justice reform. [Whitney has 5 minutes for a private holding room meeting. The event host, Bob Pittman, should not be included.] The Vice President should stress product liability and punitives.

Governor Fordice was elected with a campaign that included tort reform. He plans a series of tort reform "roundtables" throughout the state and should be considered a very strong ally. On the other hand, Lt. Governor Briggs is a former trial lawyer who was elected as a Republican after switching his party affiliation.

The private holding room meeting is very important. The Lt. Governor is the pivotal player in the Mississippi reform effort. He favors punitive damages reform and has changed his position on product liability from negative to neutral. Because the Lt. Governor controls the Senate's agenda, it is important that he know that state civil justice reform is very important to the Administration.

We have also invited several of the state legislators who may be of assistance.

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MEMORANDUM

TO: Mr. John Howard
Counsel to Vice President of the United States

FROM: Victor Schwartz *VS*

DATE: March 2, 1992

RE: Vice President's Judicial Reform trip to Mississippi

During the Vice President's trip, it would be very helpful if he could speak with the Lt. Governor, Eddie Briggs, about two topics. First, to support a punitive damage bill, which is very similar to the Vice President's. The proposal is now pending in both the Mississippi Senate and House. Second, to support a products liability bill, which contains a number of elements that are in the Federal Products Liability Federal Act, S. 640 and H.B. 3030.

We have found through experience that it is much easier to obtain support of Senators and House Members at the Federal level if a state has enacted legislative products liability law. Senator Lott of Mississippi has been a co-sponsor of S. 640, but has not been that enthusiastic, and Senator Cochran has still not supported the Federal bill.

The passage of the Mississippi products liability legislation will help us with those Senators and also with the Mississippi House members.

If you need to call me, I can be reached at the law firm of Watkins & Eager, (601) 948-6470.

*State effort - yes - stabilize law
Federal is answer
make rules*

THE PRODUCT LIABILITY TASK FORCE OF MISSISSIPPI
Information for Prospective Members

Mississippi's tort system is currently considered among the most pro-plaintiff in the country. For example, Mississippi plaintiffs are permitted, under the "pure" comparative fault doctrine, to recover damages even when they are 99% responsible for their own injury. Likewise, it appears that Mississippi courts may be headed towards enlarging the scope of design defect liability and abolishing the assumption-of-risk defense. Already, they impose virtually no restrictions on the award of punitive damages.

The Product Liability Task Force of Mississippi is a non-profit corporation formed to promote fair and equitable product liability laws in Mississippi. The Task Force made a substantial effort to achieve passage of product liability legislation in the 1990 Session of the Mississippi Legislature. The effort stalled in the last days of the Session, however. A similar bill was introduced but not actively pursued in the 1991 election-year Session of the Legislature.

The 1992 Session brings a significant improvement in the general climate for reform. A substantial number of both House and Senate members were elected with the endorsement of the Mississippi Business and Industry Political Education Committee (BIPEC). Moreover, the newly-elected Republican Governor is an advocate of product liability and tort reform legislation.

Local Mississippi business and industrial interests are therefore planning a major civil justice reform effort in 1992. Product liability and punitive damages reforms are priorities. National support of this effort is timely and the Task Force provides an excellent vehicle for that support.

Legislation supported by the Task Force has been carefully reviewed by experienced products defense counsel in Mississippi. The proposals seek to ensure that Mississippi affords a level playing field for the defense in product liability cases. Among other measures, the proposals would:

- (1) Enumerate the exclusive grounds of liability in products cases and require the plaintiff to show exactly what was wrong with the product (a manufacturing, warning, or design defect) as a condition for imposing such liability;
- (2) Codify the consumer expectations test for determining whether a product is defective and unreasonably dangerous;
- (3) Establish state-of-the art defenses in design and failure to warn cases;
- (4) Require a plaintiff to prove a feasible design alternative in design cases;
- (5) Codify the "learned intermediary" doctrine for prescription drugs and other products utilized only under the supervision of a licensed professional;
- (6) Make clear that a plaintiff cannot recover for a defect that is open and obvious;
- (7) Codify the assumption-of-risk defense; and
- (8) Make clear that retailers and distributors are not liable if they did not participate in the manufacturing process and had no knowledge of the defect or dangerous condition of the product.

An additional set of proposals supported by the Task Force would enact meaningful punitive damages reform. The proposals would:

- (1) Establish a standard of liability for punitive damages of malice or conscious, flagrant disregard for the safety of others;
- (2) Codify a higher burden of proof ("clear and convincing evidence") for punitive damages than the "preponderance of evidence" standard used for compensatory damages;
- (3) Establish a defense to punitive damages for products that comply with mandatory government standards;
- (4) Permit the defendant to request "bifurcated" proceedings in which liability for compensatory damages is determined before the issue of punitive damages is considered;
- (5) Prohibit consideration of a defendant's financial condition in determining the amount of a punitive damages award;
- (6) Limit the number and size of a punitive damages award -- one award for a single course of conduct, limited to the greater of \$250,000 or two times the compensatory damages.

If you believe that these proposals have merit, your company may wish to consider joining the Task Force. A minimum corporate contribution of \$500 is suggested. Larger contributions would, of course, be gratefully received.

To learn more about becoming a member of the Task Force, please contact:

Mr. Steven A. Dickson
Corporate Relations Management
216 East Center Street
Canton, Mississippi 39046
Telephone: (601) 859-6871
Telecopier: (601) 859-1330

To learn more about the proposed legislation, please
contact:

Mr. P.N. (Nick) Harkins, III
Mr. John G. Corlew
Watkins & Eager
The Emporium Building
Suite 300
400 East Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 948-6470
Telecopier: (601) 354-3623

Thank you for your consideration. With your help,
fair and equitable tort laws can be enacted in Mississippi.

February 26, 1992

MEMORANDUM

TO: John L. Howard
FROM: Neal M. Cohen
RE: Mississippi, Texas and Pennsylvania

Mississippi

Lt. Governor Briggs is very willing to go to Biloxi to meet with the Vice President next Wednesday. My contacts assure me that a private conversation between the Vice President and Briggs about the need for H.B. 523 will be extremely valuable to the effort to pass a punitive damages and product liability reform bill this session.

You should know that there is some confusion about the Vice President's trip next week. Apparently, Senator Lott told business lobbyists that the Vice President was canceling his trip to Mississippi because it conflicted with another trip the same week by President Bush. Lt. Governor Briggs, who had agreed to go to Biloxi any day next week other than Thursday, now believes the trip is unnecessary.

If you tell me where Lt. Governor Briggs needs to be and at what time, I can make sure he is there.

CROWELL & MORING

1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2505

(202) 624-2500

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FACSIMILE (RADIO): 202-624-5116

W. U. I. (INTERNATIONAL) 64344

W. U. I. (DOMESTIC) 60-2440

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FACSIMILE COVER PAGE

FAX TELEPHONE NUMBER: (202) 628-5116

Date: 3/2/92TO: John Howard, CounselFirm: Office of the VPFacsimile Telephone Number: 456-7044Telephone number to confirm receipt: 456-2816Total Number of Pages (including cover sheet) 20FROM: Victor Schwartz, Esq.Originator's telephone number: 624-2540Re: Mississippi Product Liability ReformHard copy to follow: Yes ☐ No ☒

Please complete instruction page on reverse side.

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January 24, 1992

EXPLANATION OF PRODUCT LIABILITY BILL

Introduction

The product liability bill codifies and clarifies certain rules applicable to product liability actions in Mississippi. The bill does not seek to cover every facet of product liability law. Instead, it establishes certain outer perimeters of liability and clarifies areas that have been subject to confusion as a result of recent court decisions.

Exclusive Bases of Liability

Subsection 1(a) identifies the ways in which a product may be defective: manufacturing defect, warning defect, design defect, and breach of warranty. This provision reflects current Mississippi law. Subsection 1(a) also codifies the current Mississippi rule that the defect must make the product "unreasonably dangerous."

Consumer Expectations Test

Subsection 1(b) would codify the consumer expectations test that Mississippi courts have traditionally recognized as the exclusive test for determining whether a product is "unreasonably dangerous".^{1/} The test provides that a product is not unreasonably dangerous if it is no more dangerous than the ordinary consumer would expect. As to

^{1/} See, e.g., Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 384 (Miss. 1986); Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985).

drugs and medical devices, Subsection 1(b)(ii) would identify the qualified medical practitioner as the "consumer" whose expectations are to be considered.

The consumer expectations test is embodied in comment i to Section 402A of the Restatement (Second) of Torts, which the vast majority of courts follow in interpreting and applying the doctrine of strict products liability. The Mississippi Supreme Court adopted the Restatement's formulation of strict liability in 1966.^{2/} The Court held that strict liability applies only where the product is, at the time it left the seller's hands, in a condition not contemplated by the ultimate consumer.^{3/}

Codification of the consumer expectations test is necessary to resolve confusion that has arisen as a result of two recent decisions by the Mississippi Supreme Court.^{4/} These decisions mention in passing that a product's "utility" can be considered in determining whether it is "defective." This has led some observers to suggest that the Court has

^{2/} State Stove Manufacturing Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).

^{3/} Id. at 121.

^{4/} Whittley v. City of Meridian, 530 So. 2d 1341, 1347 (Miss. 1988) ("In determining whether a product is unreasonably dangerous, a reasonable person must conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product."); Hall v. Mississippi Chemical Express, Inc., 528 So. 2d 796, 799 (Miss. 1988) ("The proper focus in a strict liability case is upon the utility and safety of the product in view of its intended function rather than on the manufacturer's fault or lack thereof.").

abandoned its long-standing adherence to consumer expectations and has embraced the "risk-utility" test. Under this test, a product may be held defective if its "risks" outweigh its "utility."

In fact, there is nothing in these decisions to suggest such a radical change, and, as other courts have noted, it is unreasonable to assume that the Court would adopt a new rule of this importance in such an off-hand manner.^{5/} Subsection 1(b) will eliminate the confusion by codifying the Court's long-established consumer expectations test as the governing test.

The consumer expectations test is particularly appropriate because it is flexible enough to accommodate changes in consumers' expectations but leaves the final determination to the traditional arbiter of such issues, the jury. Juries are well suited to gauge the expectations of their peers, but have little basis upon which to weigh a product's utility and risks, especially when the risk-utility test gives them no guidance on how to do so.

^{5/} See, e.g., *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991) (Under Mississippi law, a product is unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."); *Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir. 1989) ("[W]e cannot conclude from this single sentence that Mississippi has adopted a new test for unreasonable dangerousness.").

Duty to Warn

Subsection 1(c) would codify the rule traditionally applied by Mississippi courts that a product manufacturer is required to provide a warning about a danger when the manufacturer has knowledge of the danger but product users are unlikely to be aware of it.^{5/} The rule is set forth in Section 388 of the Restatement (Second) of Torts.

Subsection 1(c) also adopts the warning standard embodied in Section 402A, comment i of the Restatement, which virtually all courts apply. Under this rule, courts instruct the jury to determine whether the manufacturer took the steps that a reasonable person would take under the circumstances to provide sufficient information about the product's risks to enable the consumer to use the product safely or to decide not to use the product.

For prescription drugs and medical devices the warning should be directed to prescribing doctors or other professionals. This "learned intermediary" doctrine assures that the warning is provided to the person trained to use the scientific and technical information contained in the warning. The Mississippi Supreme Court has adopted this widely-applied doctrine.^{2/}

^{5/} See, e.g., *American Heating & Plumbing Co. v. Grimes*, 4 So. 2d 890 (Miss. 1941).

^{2/} *Wyeth Laboratories, Inc. v. Fortenberry*, 530 So. 2d 688 (Miss. 1988); *Cather v. Catheter Technology Corp.*, 753 F. Supp. 634 (S.D. Miss. 1991).

By focusing on the question whether a warning could have been provided and was adequate as provided, the bill addresses the central issue in cases alleging failure to warn. Leading tort scholars, including Deans Wade and Prosser, have concluded that a reasonable person standard is the proper one for deciding whether a warning was needed and adequate.^{8/}

Section 1(c) provides that a manufacturer is not liable for failing to warn about risks that were unknowable at the time the product was manufactured. Liability for failing to warn of the unknowable is absolute liability. The few courts that have experimented with such liability^{9/} have abandoned it, either of their own volition or as a result of legislative intervention.^{10/} Liability for warning about the unknowable has the unfortunate effect of discouraging the introduction of new products, because such products may always create a risk that cannot be discovered with the scientific or technical knowledge available at the time the products were first introduced.

^{8/} See Prosser and Keeton on the Law of Torts, § 99 at 697 (5th ed. 1984); Wade, "On the Nature of Strict Tort Liability for Products," 44 Miss. L.J. 825, 826 (1973).

^{9/} See, e.g., Halphen v. Johns-Manville Sales Co., 484 So. 2d 110 (La. 1986); Beshada v. Johns-Manville Products Corp., 447 A.2d 539 (N.J. 1982).

^{10/} Louisiana Civ. Code Art. 2315; New Jersey Stat. Ann. § 2A:58C-4.

Design Defects

Subsection 1(d) would codify the traditional rule that a product is not defectively designed when no available alternative design would have prevented the harm. When harm is caused by a design feature of a product, under current Mississippi case law, the plaintiff must show either that the design fell below industry standards or that a feasible alternative design would have been less dangerous.^{11/} This Section would codify and clarify the contours of Mississippi's feasible alternative design doctrine.^{12/}

The feasible alternative design rule, which is recognized by courts across the country, encourages product safety by imposing liability when a manufacturer could have chosen a safer design alternative but did not. Because the rule requires proof that the danger was known or knowable and an alternative design was available, the rule does not impose absolute liability by judging older products in terms of new technologies that were not even available at the time of

^{11/} Toliver v. General Motors Corp., 482 So. 2d 213, 218 (Miss. 1986). See, also, Brown v. Williams, 504 So. 2d 1188 (Miss. 1987).

^{12/} For a discussion of the possibility that the Court's opinion in Toliver, supra, has engendered confusion about the role of the feasible alternative design doctrine, see Note, "Relevance of State of the Art Evidence in Design Defect Actions Under Section 402A: Toliver v. General Motors Corp.: A Portent of More Absolute Liability for Defendants in Mississippi," 56 Miss. L.J. 801 (1986).

manufacture. It is unfair to use today's knowledge to judge the reasonableness of design decisions made many years ago.

Recognized Risks

Subsection 1(e)(1) provides that a manufacturer is not liable if the risk posed by a product is known, or reasonably should have been known, to product users. This reflects current Mississippi law, which does not impose liability for design defects when the danger posed by a product is commonly known or is open and obvious to users of the product.^{13/} Likewise, Mississippi courts have recognized that when the danger is obvious to the casual observer, the product manufacturer has no duty to warn.^{14/} The rule that a manufacturer does not have to warn of obvious dangers avoids requiring warnings that are so detailed no one reads them. He who warns of everything warns of nothing.

^{13/} See, e.g., *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989) (no liability under Mississippi law when risk of moving auger was obvious and known to users of vehicle); *Gray v. Manitowoc Co., Inc.*, 771 F.2d 866 (5th Cir. 1985) (no liability under Mississippi law for design defect or negligence when existence of "blind spot" on operating crane was common knowledge in the construction industry); *Toney v. Kawasaki Heavy Industries, Ltd.*, 763 F. Supp. 1356 (S.D. Miss. 1991) (no liability when danger of motorcycle without leg protection is open and obvious); *Satcher v. Honda Motor Co., Ltd.*, 758 F. Supp. 393 (S.D. Miss. 1991) (question of fact whether danger posed by motorcycle is open and obvious, which by Mississippi law would prevent liability).

^{14/} See, e.g., *Brown v. Williams*, 504 So. 2d 1188 (Miss. 1987); *Harrist v. Spencer-Harris Tool Co.*, 140 So. 2d 558 (Miss. 1962) ("No duty rests upon a manufacturer or seller to warn a purchaser of a dangerous design which is obvious. If this were not true, a manufacturer could not design and sell a pocket knife, ax, planer or gun.").

Subsection 1(e)(11) codifies the doctrine of assumption of the risk as it has traditionally been applied by Mississippi courts in both negligence and strict liability actions.^{15/} The doctrine requires that the plaintiff have knowledge of the risk and an appreciation of the dangers and make a voluntary choice to assume the risk.^{16/}

The defense of assumption of the risk is based on the injured person's voluntary decision to encounter a known risk. It does not apply in situations where a person is required to take a risk.

Assumption of the risk is not based on a person's negligent failure to discover a risk or other faulty conduct that contributes to a person's injury. Mississippi courts have held that such negligence should be considered by the jury in reducing the plaintiff's award under the comparative fault rule.^{17/}

Mississippi courts have, however, long held that assumption of the risk is a separate and complete defense apart from comparative fault. The defense recognizes that individuals should be permitted to engage in risky activities if they wish, but should not later be allowed to shift the

^{15/} See, e.g., *Nichols v. Western Auto Supply Co.*, 477 So. 2d 261 (Miss. 1985); *Alley v. Praschak Machine Co.*, 366 So. 2d 661, 664 (Miss. 1979).

^{16/} *Nichols, supra*, at 264.

^{17/} See, e.g., *Hill v. Dunaway*, 487 So. 2d 807 (1986).

responsibility for the consequences of their choice to someone else. In effect, assumption of the risk says that people should not be permitted to create their own lawsuits.

Innocent Retailers and Wholesalers

Subsection 1(f) would codify the protection that Mississippi courts have traditionally provided to a retailer or wholesaler who is a "mere conduit of the product."^{18/} A recent case, in which the Court imposed strict liability upon a bottling company for a defect in a product that it did not manufacture, has effectively precluded courts from dismissing non-negligent retailers.^{19/}

Section 1(f) would affirm the longstanding Mississippi rule that a retailer or wholesaler is not liable for latent defects unless the product seller was also the product manufacturer. According to a recent survey, twenty two states have now enacted statutes that limit the liability of product sellers when their negligence did not cause the injury.

The practice of suing innocent sellers arose when the contract doctrine known as "privity" prevented most consumers from suing the manufacturer. With the abolition of the privity rule, consumers no longer need to sue innocent retailers or wholesalers in order to obtain a recovery.

^{18/} Shainberg Co. v. Barlow, 258 So. 2d 242 (Miss. 1972).

^{19/} Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374 (Miss. 1986).

Section 1(f) would allow product sellers, many of whom are small businesses that cannot afford the defense costs and adverse publicity of a prolonged lawsuit, to be dismissed at an early stage in the suit. The section would encourage product safety by ensuring that the responsible manufacturer who designs and makes the product must assume liability for his mistakes.

Effective Date

Section 2 would clarify that the rules established in Section 1 apply to all actions filed on or after July 1, 1992, regardless of when the incident giving rise to the cause of action occurred.

1/14/92

MISSISSIPPI LEGISLATURE

REGULAR SESSION 1992

BY:

[SENATE] [HOUSE] BILL NO. _____

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF
MISSISSIPPI:

SECTION 1. In any action for damages caused by a
product except commercial damages to the product itself:

(a)(i) The manufacturer or seller of the product
shall not be liable if the claimant does not prove by the
preponderance of the evidence that at the time the product
left the control of the manufacturer or seller --

(A) the product was defective because it
deviated in a material way from the manufacturer's
specifications or from otherwise identical units manufactured
to the same manufacturing specifications, or

(B) the product was defective because it failed
to contain adequate warnings or instructions, or

(C) the product was designed in a defective
manner, or

(D) the product breached an express warranty or
failed to conform to other express factual representations
upon which the claimant justifiably relied in electing to use
the product, and

(ii) the defective condition rendered the product
unreasonably dangerous to the user or consumer, and

(iii) the defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b)(1) A product shall be considered to be unreasonably dangerous for purposes of paragraph (a)(ii) only if the product is dangerous to an extent beyond that which would be contemplated by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community as to its characteristics.

(ii) A prescription drug, medical device, or other product that is intended to be used or consumed only under the supervision of a physician or other licensed professional person shall be considered to be unreasonably dangerous to the user or consumer only if it is dangerous to an extent beyond that which would be contemplated by the ordinary physician or other licensed professional who prescribes the drug, device or other product having the knowledge, training, and experience required of such persons.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)(B), the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that

caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(11) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the ordinary consumer who purchases the product, or in the case of a prescription drug, medical device, or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)(C), the manufacturer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought; and

(ii) the product failed to function as expected and there existed a feasible design alternative that would have prevented the harm. A feasible design alternative is a design that would have prevented the harm without impairing the usefulness, practicality, or desirability of the product to users or consumers.

(e) In any action alleging that a product is defective pursuant to (a)(1)(A), (B), (C) or (D), the manufacturer or seller shall not be liable if:

(i) the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product; or

(ii) the user or consumer of the product was aware, or must have been aware, that there was a risk of personal injury and voluntarily exposed himself to such risk.

(f) The seller of a product other than the manufacturer shall not be liable unless the seller exercised substantial control over the design, testing, manufacture, packaging or labeling of the product; or the seller had actual knowledge of the defective condition of the product at the time he supplied same.

(g) Nothing in this statute shall be construed to eliminate common law defenses to actions for damages caused by a product.

SECTION 2. This Act shall take effect on July 1, 1992 and shall apply to all actions filed on or after that date.

From Bob Veltman
(601) 969-0022

CIVIL JUSTICE REFORMS ENACTED IN MISSISSIPPI IN 1988-89

1. Reduce general statute of limitations from 6 to 3 years
2. Barred lawsuits from out-of-state plaintiffs when the action is time barred in the state where the cause of action arose
3. Modified joint and several liability to provide that, where there are multiple defendants, a defendant less than 50 percent at fault would be liable for not more than 50 percent of damages

~~xXXXXxx~~

4. Penalties for the filing of frivolous lawsuits or proceedings
5. Removal of exemption from jury duty for physicians and lawyers
6. Exemption from liability for volunteers (~~xxxxxxx~~ (summer baseball ~~xxxx~~ coaches, managers, volunteer firemen, etc) unless willfully negligent

CIVIL JUSTICE REFORMS INTRODUCED IN 1992 MISSISSIPPI LEGISLATIVE SESSION
AND BEING SUPPORT BY MISSISSIPPI ECONOMIC COUNCIL AND TORT REFORM
COALITION

1. Set standards for awarding of punitive damages
(U.S. Supreme Court Justice O'Connor said in haslip case, Mississippi's present law, lacking standards for awarding of punitive damages, may be unconstitutional)
2. Set standards for products liability
3. Reduce damages awarded to Plaintiff by ~~xxx~~ amount of collateral source reimbursements
4. Repeal statute which requires ~~xxxx~~ state Supreme ~~xxx~~ Court to render judgment ~~xxxxxxx~~ 15 percent penalty against appellant when judgment of lower court is affirmed
5. Authorize awarding of attorneys' fees to the prevailing party in civil suits

TAKE ACTION NOW

Mississippi--The Product Liability Task Force has introduced a comprehensive six-bill package in a climate favorable to tort reform (see Watch 5). HB 1150 (Garriga) and SB 2846 (Graham) would set stricter standards for the award of punitive damages. HB 1231 (Hines) and SB 2954 (Wicker) are comprehensive product liability reform bills. HB 1298 (Williams) would introduce a "loser pays" rule for attorneys fees. HB 1300 (Williams) would allow evidence of collateral source payments. All of the house bills listed above are in the House Judiciary A Committee and all of the Senate bills are in the Senate Judiciary Committee.

Act now to help make these comprehensive reforms a reality. On March 3, the Senate and House Judiciary Committees will hold a joint hearing on the subject of product liability. ATRA will be testifying at this hearing. For more information on how you may assist in this effort for Mississippi tort reform, contact Bob Pittman of Mississippi Economic Council at (601) 969-0022 or Steve Dickson of the Task Force at (601) 859-6871.

Alabama--An eagerly-awaited punitive damage reform bill was introduced in the Alabama Senate this week, SB 280 (Owens). Early drafts indicated that SB 280 would eliminate vicarious liability under specific conditions (see Watch 2). On February 26, the Senate Small Business Committee was scheduled to hear SB 280. Your immediate support is needed to help this bill pass the Senate. Contact your State Senators today. Letters should be addressed to: The Honorable _____, State House, Montgomery, AL 36130.

In the House, Representative Higgenbotham is expected to introduce a companion bill in the next few days which is likely to be sent to the Committee on Commerce, Utilities and Transportation. Both of these measures are supported by the Alabama Civil Justice Reform Committee. To find out how you may assist in this important effort in Alabama contact J.B. Brand, Coalition Chair, at (205) 322-2404.

Minnesota--Coalition-supported joint and several liability reform bills need your help in Minnesota. SF 592 (Stumpf) and HF 396 (Simoneau) provide for a 30% threshold for the application for joint and several liability. Any defendant 30% or less at fault would be liable only for his or her share of the damages. On February 25, the Civil Law Subcommittee of the House Judiciary Committee heard HF 396 and it is hoped that the Senate Judiciary Committee will vote on SF 591 in the next few weeks.

The opposition has countered with SF 1745 and HF 1705 (Carruthers), which would bar a plaintiff's claim if his or her fault is greater than all of the defendants as a group. Currently, a plaintiff's claim is barred if his or her fault is greater than any one of the individual defendants. These bills must be stopped now. HF 1705 is in the House Judiciary Committee and SF 1745 (Cohen) is in the Senate Judiciary Committee.

Voice your support for HF 396 and SF 591 and your opposition to HF 1705 and SF 1745 by calling your State Senators and Representatives. The State House switchboard number is (612) 296-6013.

Michigan--Bi-partisan medical liability reform continues to be the main focus in Michigan. HB 5434 (Niederstadt) and HB 5435 (Hickner), which are based on the fault-based administrative alternative recommended by the Physician's Insurance Association of America (PIAA), remain in the House Judiciary Committee. Urge your members, employees and contacts in Michigan to write their Representatives in support of HB 5434 and HB 5435. Letters should be addressed to: The Honorable _____, State Capitol, P.O. Box 30036, Lansing, MI 48909-7536. For more information on this package and other medical liability reform developments, contact Kevin Kelly of the Michigan Medical Liability Reform Coalition at (517) 337-1351.

Wisconsin--On February 25 the Senate heard AB 388 (Krug), a measure which would raise the limit on non-economic damages in wrongful death actions from \$50,000 to \$250,000. The controversy surrounding this bill involved the limit amount to be selected; the coalition-supported amount of \$100,000 or the opposition's figure of \$150,000 (see Watch 6).

The Senate selected the \$150,000 limit and AB 388 now goes back to the Assembly for consideration of the new limit amount. The coalition will offer a new amendment to set the limit amount at \$75,000, a figure based on the current damage limit and the consumer price index. The Assembly vote, which could occur at any time, is expected to be close. Your calls backing the coalition's new \$75,000 limit are urgently needed. The State House switchboard number is (608) 266-2211. To find out how you may assist the Wisconsin Coalition for Civil Justice, contact Nick George at (608) 258-3400.

COALITION PROGRESS

Maryland--HB 329 (Arnick), a bill which would establish criteria for the court to use in reviewing awards of punitive damages, is scheduled for a reading in the House as we go to press. Call your representatives

today, urging their support of this important piece of legislation. The State House switchboard number is (301) 841-3000. For more information on current efforts to obtain punitive damages reform in Maryland, contact George Manis of the Maryland Civil Justice Coalition at (301) 261-1212.

Vermont--HB 733, Governor Dean's Health Care package containing some tort reform provisions, is on the House floor as we go to press. As reported in Watch 2, the Governor has stated that there will be no health care reform without a medical malpractice provision. For more information on this and other medical liability reform bills pending in Vermont, contact Karen Meyer of the Vermont State Medical Society at (802) 223-7898.

OPPOSITION AT WORK

Louisiana--Act now! With the session beginning on March 30, now is the time to help the Louisiana coalition build a strong defense. As reported in last week's Watch, plaintiff lawyers now control key committees in both houses and have a majority in the Senate. Tort reform repeal efforts are therefore expected, as is legislation "importing" punitive damages. Currently Louisiana law prohibits punitive damage recoveries, except in very limited circumstance and then only when expressly authorized by statute, i.e., for negligent handling of toxic substances. Your help is needed now. If you can support the coalition financially or through grass roots assistance, contact Diane Swenson at ATRA.

Maine--Carry-over opposition bill LD 1593 (Stevens), which would make technical changes to the Maine Health Security Act and repeal the provision for screening panels in medical liability actions, is on the House floor as we go to press. The Joint Judiciary Committee has given LD 1593 an "ought to pass" recommendation. The coalition is supporting an alternate amendment to this bill which would allow the technical changes to the Health Security Act but would not repeal the provision for medical liability screening panels. For more information on this bill, contact Gordon Smith of the Maine Liability Crisis Alliance at (207) 662-3374.

California--Senator Lockyer's protective order bill, SB 711, is in the Assembly Judiciary Committee and could be scheduled for a vote at any time. Your members and contacts in California who oppose this legislation should be contacting their representatives in the Assembly now. Interested parties should contact John Sullivan of the Association for California Tort Reform at (916) 443-4900.

Pending Protective Order Legislation: **Alaska**--SB 411 (Rodey) was referred jointly to the Judiciary and Finance Committees, HB 483 was introduced on February 18; **California**--SB 711 (Lockyer) is in the Assembly Judiciary Committee; **Georgia**--SB 610 (Bishop) is in the Senate Judiciary Committee and may be the subject of a committee vote at any time; **Hawaii**--HB 122 (Metcalf) and HB 204 (Metcalf) carried over for consideration in the House Judiciary Committee; **Massachusetts**--On March 9, the Joint Judiciary Committee will hear SB 850 (Pines), HB 3202 (DiMasi) is in the Judiciary Committee; **Rhode Island**--HB 8736 (Teltz) is in the Judiciary Committee; **Washington**--On February 24, the Senate Law and Justice Committee heard HB 1320 (Meyers). This bill could be the subject of an executive session as we go to press; **Wisconsin**--SB 213 (Chvala) is in the Senate Judiciary and Consumer Affairs Committee.

GOOD NEWS

Indiana--Two defensive victories in Indiana! HB 1091 (Villalpando) would have allowed individuals other than dependents to file a wrongful death suit. The opposition tried to pass HB 1091 by attaching it to several other bills, but the coalition defeated this measure in the Senate--twice. SB 72 (Antich) would have removed the 10 year statute of limitations on product liability actions. The Forum was successful in stopping this bill before it could even get a committee hearing. Congratulations to the Indiana Forum for Fair Liability Laws!

Anne Allen, Editor (202) 682-1163



OFFICE OF THE VICE PRESIDENT

WASHINGTON

President's Council on Competitiveness
Fact Sheet on Product Liability Reform

July 24, 1991

"Product liability reform legislation is a top priority for this administration. Our present system is unfair and is a burden on America's ability to compete. It puts a drag on innovation and reduces incentives to develop new, safer products for the consumer. The cost to business is 15 to 20 times higher in the U.S than in Europe and Japan, which means fewer jobs for Americans. And, the system is unfair to victims who receive less than 50% of the money spent on liability cases. Now is the time for Congress to act to reform our product liability system."

Vice President Dan Quayle
July 24, 1991

"By reducing legal uncertainty, the enactment of balanced federal product liability reform will enhance the international competitiveness of American businesses. The legislative proposals now before the House and Senate are an excellent step in that direction."

Secretary of Commerce Robert Mosbacher
July 24, 1991

An Administration Priority.

The Administration is committed to the goal of restoring basic fairness and stability to the product liability laws in the United States. Such reform is essential to business innovation, U.S international competitiveness, and consumer safety and welfare.

- o President Bush, in his State of the Union address, called upon Congress to enact essential product liability reform legislation.
- o Secretary of Commerce Robert Mosbacher testified before the Senate Commerce Committee in 1990 in support of product liability reform legislation.
- o On November 30, 1989 Vice President Quayle announced the

Administration's product liability reform initiative developed by the Council on Competitiveness. The Administration strongly supports the Fairness in Product Liability Act of 1991 (S 640) and efforts to pass similar legislation in the House of Representatives. The Vice President has commended the efforts of Senators John Danforth, Robert Kasten, Jay Rockefeller and Representatives Roy Rowland, Norman Lent, Hamilton Fish, and John Dingell on behalf of such legislation.

Restore Basic Principles of Fairness.

The administration's reform initiative will restore basic principles of fairness to America's product liability system:

- o First, protection of an innocent person's legal right to fair compensation for medical expenses, lost wages, property damage, and other actual losses.
- o Second, elimination of "deep pocket" liability by making each party responsible for non-economic damages attributable to his or her own percentage of fault, so that a person who creates harm to others will know that he or she will be held accountable.
- o Third, cooperation and the prompt and fair settlement of differences should be encouraged through alternatives to costly and time-consuming litigation, which only reduces the compensation available to the injured party.

Strengthen U.S Competitiveness.

Our current product liability system -- with its excessive litigation costs -- is a self-inflicted burden on America's ability to compete. U.S product liability laws are more onerous than those of other major industrial countries, such as Japan and European nations. Product liability reform legislation can help strengthen U.S competitiveness by requiring clear and convincing evidence before punitive damages can be awarded.

- o The estimated cost of product liability suits in the U.S --\$80 billion per year -- equals the combined profits of the nation's 200 largest corporations.
- o Total U.S liability insurance costs are estimated to be 15 times higher than Japan's and on average 20 times higher than the European nations'. These costs are reflected in higher prices for U.S goods and hamper our ability to compete with foreign manufacturers.

Enhance Product Innovation.

Equally devastating is the chilling effect of the liability system on product innovation. The fear of potential lawsuits deters businesses, especially small and start-up businesses, from introducing new and safer products.

- o Many products are no longer being produced for American consumers -- single-engine aircraft, vaccines against deadly Japanese encephalitis, and gymnastic equipment are but a few examples.
- o Many companies decide against introducing new products. For example, Monsanto will not market an inexpensive, safe asbestos substitute and Genentech declined to go forward with a new hepatitis vaccine developed through biotechnology because of liability risks.
- o 36% of American businessmen in a recent survey state that they stopped some manufacturing as a result of product liability risks. 15% laid off workers and 8% closed plants.

Reform Advances Consumer Welfare and Safety.

Safety and health considerations, the principle rationale for continuing the current system, are undermined by the current product liability regime. Consumers are not always offered new, safer products (like vaccines and the Monsanto asbestos substitute). Also, the costs of excessive liability risks are reflected in higher prices for goods and services.

- o The cost of DPT vaccines rose from \$2.80 per dose to \$11.40 per dose to cover liability insurance costs.
- o In a February, 1990 Consumer News article, Bonnie Guiton, Special Advisor to the President for Consumer Affairs states "These are among the ways in which America's current product liability system works against consumers...Done properly, however, product liability reform can better consumers...."
- o A 1989 Rand Corporation study reveals that on average only 46% of total expenditures from tort lawsuits went to compensate injured parties. In some product liability cases, legal fees and expenses consume 70% of the total amount spent.

For more information please contact: 456-6614



Civil Justice
Reform Model
State Amendments



THE VICE PRESIDENT
WASHINGTON

February 1992

The Civil Justice Reform Model State Amendments incorporate reforms proposed by the President's Council on Competitiveness following an extensive study of the civil justice system in America. The President has stated that civil justice reform is absolutely essential to our country's well-being because it means a return to fairness. Reducing the cost and delay in the system will make it easier for all citizens to vindicate their legal rights.

Consistent with the principles of federalism, to which our Administration is committed, we believe civil justice reform initiatives should be adopted by each state's legislature. The Civil Justice Reform Model State Amendments will assist state policymakers in implementing the Council on Competitiveness' recommendations.

Table of Contents

Pre-Complaint Notice	3
Multi-Door Courthouse	11
Core Disclosure and Discovery	21
Offer of Settlement	31
Pretrial Settlement Conference	37
Facilitating Summary Judgment	43
Expert Testimony	49
Award of Attorney's Fees to Prevailing Party	55
Accuracy in Pleading	63
Legislation and Regulation Drafting	69

**MODEL STATE
PRE-COMPLAINT NOTICE ACT**

MODEL STATE PRE-COMPLAINT NOTICE ACT

Title

Section 1. This Act is entitled the "Pre-Complaint Notice Requirement Act."

Notice As A Prerequisite to Bringing Suit

Section 2. (a) At least thirty (30) days before filing suit, a claimant shall transmit written notice to the intended defendant(s) of the specific claims involved including the amount of actual damages and expenses. Claimant shall transmit such notice to the intended defendant(s) at an address reasonably calculated to provide actual notice to each such party.

(b) Any applicable statute of limitations which would expire during the period of notice shall expire on the thirtieth day from the date written notice was transmitted to the intended defendant or defendants.

Definitions

Section 3. For the purposes of this Act, the word "transmit" shall mean to mail by first-class mail, postage prepaid, or to contract for delivery by

PRE-COMPLAINT NOTICE

any company which physically delivers correspondence as a service to the public in its regular course of business.

Exceptions

Section 4. Pre-complaint notice is not required:

- (a) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;
- (b) where it is reasonable under the circumstances to believe that (i) the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation or destruction, or (ii) the defendant is subject to flight;
- (c) where a written notice prior to filing suit is otherwise required by law, or where the claimant has made a prior attempt in writing to settle the claim with the defendant;
- (d) in proceedings to enforce a civil investigative demand or an administrative summons;
- (e) in suits to foreclose liens; or

(f) in actions pertaining to temporary restraining orders, preliminary injunctive relief, or fraudulent conveyance of property.

Pleading Requirement

Section 5. (a) When notice is provided pursuant to subsection 2(a), a copy of such notice shall be filed as an appendix to the plaintiff's original complaint.

(b) When notice pursuant to subsection 2(a) is not provided, the complaint shall set forth the reason for such failure, referencing the relevant rationale under section 4.

Penalties

Section 6. If the court determines that the claimant failed to comply with the notice requirements set forth in this Act, and such defect is asserted by the defendant(s) within sixty (60) days of service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including attorney's fees, may be imposed upon the claimant. Whenever an action is dismissed under this section, the claimant may refile such claim within sixty (60) days after dismissal regardless of any statutory limitations period if, during the sixty days after dismissal, proper notice is effected and the original action was timely filed.

Severability

Section 7. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 8. This Act shall become effective ____ days after the date of enactment.

COMMENTARY ON MODEL STATE PRE-COMPLAINT NOTICE ACT

Requiring that notice be provided prior to initiating a lawsuit provides all parties with an opportunity to resolve the dispute at the earliest stages. Pre-suit notice can encourage parties to reach agreements and fashion appropriate remedies at lower costs.

Section 2 establishes the pre-suit notice requirements. The party alleging a cause of action must transmit notice of the grievance, stating the claim with enough specificity to allow meaningful settlement discussions, at least 30 days prior to filing a complaint.

Subsection 2(b) provides for a 30-day extension if the time allowed for filing the suit would have expired during the pre-suit notice period. This extension insures that there is an opportunity for the parties to resolve the dispute while not foreclosing resort to the court.

Section 3 specifies the requirements for delivery of the pre-suit notice.

Section 4 sets forth exceptions to the pre-suit notice requirement, which include *only* those circumstances that compel immediate resort to the courts. The exceptions may be added to or otherwise modified consistent with state law and practice by listing specific instances where pre-complaint notice would not be required.

Section 5 establishes the procedures for demonstrating compliance with the pre-suit notice requirements.

Section 6 provides that complaints filed without complying with the pre-suit notice requirements shall be dismissed but may be refiled under some circumstances.

Section 7 provides for the severability of any provision that may be held invalid.

Section 8 establishes the Act's effective date.

**MODEL STATE CIVIL
MULTI-DOOR COURTHOUSE ACT**

**MODEL STATE CIVIL
MULTI-DOOR COURTHOUSE ACT**

Title

Section 1. This Act is entitled the "Multi-Door Courthouse Act."

**Creation of Multi-Door Courthouses for Use
of Alternative Dispute Resolution Procedures**

Section 2. (a) (1) The Chief Justice shall establish within each court of general jurisdiction a Multi-Door Courthouse program not later than six months after the effective date of this Act. Such program shall include an alternative dispute resolution plan.

(2) The alternative dispute resolution plan shall include, but not be limited to--

(A) procedures for limited discovery;

(B) confidentiality of proceedings as to possible subsequent pretrial and trial actions; and

(C) the selection, use and payment of non-judicial personnel, also referred to as neutrals, mediators or arbitrators, who may conduct alternative dispute resolution procedures.

(3) The plan shall also establish standards for determining which cases are appropriate for alternative dispute resolution, considering such factors as whether factual issues predominate over legal issues, whether the case involves complex or novel legal issues requiring judicial action, and any other factors the court considers relevant.

(4) Each judge shall conduct a conference with counsel within 120 days after a complaint is filed to review voluntary alternative dispute resolution procedures that may be used in lieu of litigation to resolve the claims in controversy.

(5) Each plan shall authorize the parties, if they so choose, to utilize alternative dispute resolution procedures that may be used in lieu of litigation to resolve the claims in controversy.

(A) These voluntary alternative dispute resolution procedures shall include, but are not limited to, early neutral evaluation, mediation, outcome-

determinative mediation, minitrials, summary jury trials, and arbitration.

(B) Outcome-determinative mediation under this section means a procedure in which either a single mediator or a panel of three mediators selected by or under the direction of a court provides the parties with a dollar amount determination that the mediator(s) believe(s) would be awarded if the case were tried.

(6) The parties may choose to utilize the alternative dispute resolution procedures and neutrals made available by the court or may, if all parties and the court agree, utilize the services of other neutrals not designated in accordance with the court's alternative dispute resolution plan.

(7) Each plan shall also provide that if the parties choose outcome-determinative mediation and in the event a determination is reached--

(A) Any party may give notice that it intends to accept that determination, while the other parties remain free to reject the determination and continue with the litigation;

(B) A plaintiff, in an action seeking monetary relief, who rejects the determination and fails to obtain a final judgment that is at least ten percent greater than the determination, shall pay the defendant's reasonable costs and reasonable attorney's fees incurred after the rejection of the determination; and

(C) A defendant, in an action seeking monetary relief, who rejects the determination and fails to obtain a final judgment that is at least ten percent less than the determination, shall pay the plaintiff's reasonable costs and reasonable attorney's fees incurred after rejection of the determination.

(b) **Implementation.** In carrying out its plan, the Multi-Door Courthouse is authorized to utilize the volunteer services of non-judicial personnel (also known as neutrals, mediators or arbitrators) to conduct alternative dispute resolution procedures. The courts are also authorized to establish and pay the amount of compensation, if any, that each neutral shall receive for services rendered in each case.

Severability

Section 3. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 4. This Act shall become effective ____ days after the date of enactment.

COMMENTARY ON MODEL STATE MULTI-DOOR COURTHOUSE ACT

The Multi-Door Courthouse provides parties to a lawsuit with choices for resolving their disputes that save time and money, when compared to formal court proceedings, by encouraging alternative dispute resolution (ADR) procedures. Also, ADR procedures are often more flexible than trials.

Section 2(a)(1) requires that an ADR plan be established in each trial court of general jurisdiction through order of the Chief Justice of the highest court of the state.

Section 2(a)(2) sets forth the basic requirements for effective ADR -- limited discovery, confidential proceedings, and non-judicial assistance in evaluating the parties' claims. These are minimum requirements, however, and creativity is encouraged to develop procedures to suit the particular jurisdiction.

Section 2(a)(3) provides for standards to be established for determining which cases are appropriate for ADR.

Section 2(a)(4) establishes a mandatory conference for the parties to explore ADR options.

Section 2(a)(5) permits the parties to choose from a variety of alternative dispute mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial. Choice is an essential feature of the Multi-Door Courthouse. Although the parties may elect from an

assortment of ADR procedures, they are not required to do so. This voluntary approach avoids the danger of creating an additional, and costly, barrier to justice in those instances when ADR is inappropriate.

Section 2(a)(6) provides the parties maximum flexibility to tailor ADR procedures to best suit their case and circumstances.

Section 2(a)(7) allows parties to elect an ADR procedure which produces a determination that can serve to limit the costs of proceeding to trial. If one party rejects the proposed settlement, that party must pay its opponent's additional fees and costs should subsequent litigation fail to provide the party with at least a ten percent improvement over the proposed settlement.

Section 2(b) provides funding authority for hiring necessary personnel. Appropriations will be needed in accordance with state law.

Section 3 provides for the severability of any provision that may be held invalid.

Section 4 establishes the Act's effective date.

**MODEL STATE CORE
DISCLOSURE AND DISCOVERY
PROVISIONS**

MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

Disclosure

(A) Mandatory Disclosure. To assist in the development of the discovery plan in section (E) below, unless the court otherwise directs or the parties otherwise stipulate with the court's approval, a disclosure statement shall be filed (i) by a plaintiff within 15 days after service of an answer to its complaint; and (ii) by a defendant within 30 days after serving its answer to the complaint. Except in actions exempted by local rule or order, the disclosure statement shall include:

- (1) the names (and, if known, the addresses and telephone numbers) of all persons then known to have personal knowledge of any material fact directly relevant to the particularized allegations of the pleadings, including any claim or defense, briefly indicating (if not obvious from an identification of the person) the subjects to which such personal knowledge pertains; and
- (2) a general description of the location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are then known to be directly relevant to any claim or defense.

This requirement shall apply in all civil cases involving adverse parties, including multiple party suits, third party claims and counter and cross actions. Information subject to a claim of privilege need not be disclosed. However,

notice must be given to the opposing party that a privilege is asserted. If the court determines that a party has in bad faith failed to make adequate disclosure pursuant to this rule, the court shall bar a party from engaging in discovery absent a showing of good cause. The disclosure statement shall be accompanied by a certification by counsel that reasonable inquiry has been made and that the disclosures set forth in the disclosure statement will be supplemented promptly if additional information otherwise required to be disclosed becomes known to counsel.

Discovery Limits

(B) Limits on Discovery. Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall serve upon any other party, at any one time or cumulatively, more than fifteen (15) written interrogatories, including all parts and sub-parts.

Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall take more than ten (10) depositions, whether upon oral examination, upon written questions or pursuant to any other section.

Admissions

(C) Admissions. After a party has admitted a fact, by response to a request for admissions, by stipulation or in any other manner of record, discovery by the party that obtained the admission as to matters relevant to

establishment of that fact is barred absent an order of the court for good cause shown.

Discovery Requests

(D) Contents of Discovery Requests. Each separate discovery request shall designate the specific portion of the complaint, answer or other pleading to which the discovery request is directed and shall constitute a certification that the discovery request is reasonably calculated to be relevant to the subject matter of the designated pleading.

Discovery Plans

(E) Discovery Plans. After service of the disclosure statements pursuant to section (A), the parties shall meet to formulate a specific discovery plan. The discovery plan shall be consistent with the provisions of section (B), absent agreement by the parties, or an order of the court for good cause shown. The parties shall submit their proposed discovery plan to the court for approval. Absent agreement, the parties shall jointly move the court for a discovery conference and shall file each party's proposed discovery plan with the motion.

Discovery beyond that authorized under the plan approved by the court may be taken by a party only if that party agrees to pay the reasonable costs and reasonable attorney's fees of the person or party to whom the discovery is directed. An unconditional commitment to pay these reasonable costs and reasonable attorney's fees, signed by

counsel and by an authorized representative of the party, shall be forwarded with any such discovery request. The court may waive the requirement for payment for good cause shown.

Duty to Confer

(F) **Duty to Confer.** A party bringing or opposing a discovery-related motion must include, as a part of such motion, or opposition thereto, a written showing that after personal consultation with counsel for opposing parties and good faith attempts to resolve differences, counsel are unable to reach agreement as to the disclosure or discovery at issue. The showing shall recite, additionally, the date, time and, if not conducted by telephone, place of each such conference and the names of all persons participating in the conference. The party opposing the motion may expressly adopt the moving party's written showing pursuant to this section. Absent compliance with this section, the court shall decline to consider a disclosure or discovery-related motion, or opposition thereto, absent good cause shown.

Expenses of Motion

(G) **Award of Expenses of Motion.** If a contested motion pertaining to disclosure or discovery is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the

court finds that special circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that special circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court shall apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

COMMENTARY ON THE MODEL STATE CORE DISCLOSURE AND DISCOVERY PROVISIONS

Discovery is the stage of a lawsuit where the parties obtain information about the opponent's position for later use at trial. The current discovery rules permit parties to roam virtually unfettered through all their opponent's documents. Discovery should be reformed to enable the parties to proceed to the central issues without extraneous, costly, and unproductive practices. The proposed disclosure provisions are designed to facilitate exchange of limited basic information that will be useful in formulating a discovery plan. These provisions differ from the proposed changes to the Federal Rules of Civil Procedure (FRCP) recommended by the Advisory Committee on Civil Rules of the Judicial Conference of the United States.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the FRCP, reference should be made to FRCP 26 and 37 in order to place these provisions in context.

Section (A) requires early disclosure of "core information," such as the names of witnesses and locations of relevant documents then known, without requiring a specific request to the opponent or judicial intervention. Absent a court order, failure to disclose the core information will bar a party from pursuing any discovery.

The standards for relevance and personal knowledge are patterned after those found in the Federal Rules of Evidence. Disclosure of all persons known by the parties to have knowledge of any fact of consequence is required. The fact that a party does not intend to call a person as a witness is not grounds for failure to make disclosure.

Section (B) establishes reasonable presumptive numerical limits on the number of interrogatories and depositions. While the suggested limits may be waived by agreement of counsel or by the judge, the limits should not be superseded absent a good reason.

Section (C) confines discovery to matters that are actually in controversy, thereby helping to guard against discovery abuse.

Section (D) requires parties to explain the relevancy of requested materials through specific references to their pleadings.

Section (E) requires the parties to design a discovery plan consistent with the numerical limits imposed by Section B, absent agreement by the parties or a court order based on good cause. Additional discovery may be taken only if the requesting party incurs all of the opponent's reasonable costs (including attorney's fees) caused by the request.

Section (F) establishes a duty upon the parties to confer prior to seeking court intervention in a discovery dispute.

Section (G) provides that the "Fairness Rule" for attorney's fees will be applied in contested disclosure or discovery

disputes. Requiring the loser to pay the winner's fees and costs involved with seeking court intervention will encourage both sides to evaluate carefully their claims and defenses. The court retains authority to refuse to award attorney's fees when "special circumstances" make an award unjust.

**MODEL STATE
OFFER OF SETTLEMENT ACT**

MODEL STATE OFFER OF SETTLEMENT ACT

Title

Section 1. The Act is entitled the "Offer of Settlement Act."

Offer of Settlement Procedure

Section 2. At any time more than 20 days after the service of the summons and complaint on a party but not less than 30 days (or 20 days if it is a counter offer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this rule, to settle a claim for the money, property or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to

determine sanctions under this rule. When the complaint sets forth a claim for money, if the offeree rejects the offer and the judgment finally obtained by the offeree was not at least ten percent more favorable than the last offer, the offeree shall pay offeror's reasonable attorney's fees and reasonable costs incurred after the rejection of the last offer. When the complaint sets forth a claim for property or other non-monetary relief, if the offeree rejects the offer and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay offeror's reasonable costs and reasonable attorney's fees incurred after rejection of the last offer.

This rule shall not apply to class or derivative actions.

Severability

Section 3. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 4. This Act shall become effective ____ days after the date of enactment.

COMMENTARY ON THE MODEL STATE OFFER OF SETTLEMENT ACT

The offer of settlement mechanism encourages dispute resolution by creating incentives for reasonable settlement offers advanced prior to trial. It rewards careful evaluation of settlements by requiring that the party rejecting the compromise bear the opponent's additional cost of going to trial, including reasonable attorney's fees, unless the party obtains a judgment that exceeds the settlement offer by ten percent for a money claim or is more favorable than the rejected offer in other claims.

While the offer of settlement provision is presented here as a model act, state practice may instead require implementation by amendment to the state rules of civil procedure. To the extent that the state rules follow the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 68 in order to place these proposed changes in context.

Section 2 provides that either party may, before trial, serve on the opposing party an offer to settle the dispute. The section includes incentives for careful evaluation of an offer.

Section 3 provides for the severability of any provision that may be held invalid.

Section 4 establishes the Act's effective date.

**MODEL STATE PRETRIAL SETTLEMENT
CONFERENCE PROVISIONS**

MODEL STATE PRETRIAL SETTLEMENT CONFERENCE PROVISIONS

Encouraging Settlement Opportunities through Settlement Conferences

(A) **Pretrial Settlement Conferences.** In any action, as soon as practicable, but in no event more than 120 days after the filing of the complaint, the court shall direct the attorneys for the parties and any unrepresented parties to appear before the court, or a neutral third party appointed by the court, for conferences to discuss settlement and possible resort to alternative dispute resolution procedures.

(B) **Sanctions.** If an unrepresented party or a party's attorney fails to obey an order of the court directing participation in a settlement conference, if an unrepresented party or a party's attorney is substantially unprepared to participate in the conference, or if an unrepresented party or a party's attorney fails to participate in good faith, the judge, upon motion of either party, or upon the judge's own initiative, may make such orders with regard thereto as are just and appropriate. Refusal to agree to any proposal made by any party, standing alone, shall not constitute failure to participate in good faith. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this section, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

COMMENTARY ON MODEL STATE SETTLEMENT CONFERENCE PROVISIONS

Pretrial settlement conferences provide an incentive for parties to evaluate their claims. These conferences promote earlier settlement because they require parties to review the dispute and focus on issues. Mandatory conferences may also overcome posturing by lawyers who perceive that initiating settlement discussions, even in the most appropriate cases, will be seen as a sign of weakness.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 16 in order to place these provisions in context.

Section (A) requires the court to direct the parties to meet before trial to discuss settlement. Similarly, the court is required to discuss with counsel (See Model State Civil Multi-Door Courthouse Act, page 9) the possibility of alternative dispute resolution under the Multi-Door Courthouse plan. The court must convene the settlement conference as soon as practicable but no later than 120 days after the filing of the complaint in order to encourage the earliest possible settlement. The court retains the flexibility to appoint a neutral third-party to conduct the pretrial.

Section (B) provides authority for sanctions, including attorney's fees, against parties or attorneys who refuse to participate in settlement conferences or who participate in bad faith. It is important to note, however, that simple

refusal to agree to a settlement proposal or resolution procedure, standing alone, does not constitute bad faith.

**MODEL STATE AMENDMENTS FOR
FACILITATING SUMMARY JUDGMENT**

MODEL STATE AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT

Summary Judgment

(A) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(B) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof.

(C) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. A motion for summary judgment must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. The district court's finding regarding

whether a genuine issue of material fact exists shall not be set aside unless clearly erroneous. Whenever a motion for summary judgment is rendered or denied, the court must set forth specific findings which support its ruling.

(D) Case Not Fully Adjudicated on Motion. If a motion for summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the adverse

party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth or as specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(F) When Affidavits Are Unavailable. Should it appear from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(G) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented are made in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

COMMENTARY ON STATE MODEL AMENDMENTS FOR FACILITATING SUMMARY JUDGMENT PROCEDURES

Summary judgment is a useful method for terminating litigation where there is no material issue of fact. Under the current federal or similar state rule, however, even when it is determined that there is no factual disagreement, the judge may refuse to dispose of the case. Requiring that judges make explicit findings of fact will help focus issues for trial even when summary judgment is not granted.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 56 in order to place these provisions in context.

Section (C) provides greater deference to the trial court's findings as to material facts by establishing a "clearly erroneous" standard for reversal on appeal. Section C also makes explicit the judge's duty to grant meritorious motions for summary judgment and to set forth the specific findings which support the ruling.

**MODEL STATE
EXPERT TESTIMONY PROVISIONS**

MODEL STATE EXPERT TESTIMONY PROVISIONS

Expert Evidence

(A) Qualification of Expert Testimony. If the court finds:

- (1) that scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue;
- (2) that a proffered witness is qualified as an expert in the field for which the expert is called to testify by knowledge, skill, experience, training, or education; and
- (3) that the proffered witness' testimony is based on a widely accepted explanatory theory;

then the witness may testify thereto in the form of an opinion or otherwise.

(B) Prohibition on Contingent Fee for Expert Witness.

A witness shall be qualified to testify as an expert witness only if the court finds that any compensation to the witness directly or indirectly will not vary as a result of any outcome of the case.

Expert Discovery

(C) **Interrogatories.** A party may, through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, to list the expert's formal training and the expert's publications and the cases in which the expert has testified or given a deposition, and to state the compensation fee for the expert.

(D) **Deposition.** A party may, without the necessity of a court order, depose each person the other party has given notice it may call as an expert witness at trial, at a reasonable time prior to trial as long as the party requesting the deposition pays the expert a reasonable fee for the time spent in the deposition, unless by motion a court determines the payment of such fees would result in manifest injustice, or the parties agree otherwise.

(E) **Document Requests.** A party may, without the necessity of a court order, request all documents upon which the expert relies or has reviewed in preparation for his testimony.

(F) **Additional Discovery.** Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, including fees and expenses, as the court may deem appropriate.

COMMENTARY ON MODEL STATE EXPERT TESTIMONY PROVISIONS

Unlike ordinary witnesses who may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Therefore, it is necessary that the expert's opinion testimony be supported by recognized professional practice or scientific knowledge. Because the expert's role as an impartial and objective witness is fundamental, contingency fee arrangements should be barred; an expert witness should not have any financial interest in the outcome of the trial.

These provisions may be implemented as a statute or as a change in state rules of evidence. If rules changes are pursued and the state rules are patterned after the federal rules, reference should be made to Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26, in order to place these provisions in context.

Section (A) states the requirements for testifying as an expert. Expert testimony may be admitted only if the witness is qualified in the "field for which the expert is called" and the testimony must be "based on a widely accepted explanatory theory." This requirement eliminates testimony that is far afield from current knowledge. Testimony would be permitted only when based upon respected, independently corroborated, theories. This requirement may be satisfied by expert testimony that is accepted by at least a substantial minority of experts in the relevant field.

Section (B) bars contingency fees for expert witnesses.

Section (C) permits a party to serve expert witness interrogatories to obtain information regarding the subject matter on which the expert is expected to testify, the substance of the expert's facts and opinions, a list of the expert's formal training, and a list of the expert's publications as well as the cases in which the expert has testified or given a deposition. Section C also requires a statement of the expert's compensation fee.

Section (D) allows a party to take an expert's deposition prior to trial without court order. The current practice in most states requires court approval.

Section (E) permits a more comprehensive inquiry of the expert's qualifications, publications, and expected testimony prior to trial.

Section (F) authorizes the court to order other discovery subject to restrictions including payment of fees and expenses.

**MODEL STATE
AWARD OF ATTORNEY'S FEES
TO PREVAILING PARTY ACT**

**MODEL STATE
AWARD OF ATTORNEY'S FEES
TO PREVAILING PARTY ACT**

Title

Section 1. This provision is entitled the "Award of Attorney's Fees to Prevailing Party Act."

Entitlement to Award of Attorney's Fees.

Section 2. (a) The prevailing party shall be entitled to attorney's fees from the non-prevailing party with respect to, and only to the extent that party prevails on, any claim advanced during the litigation, except that the sum of the entitled attorney's fees shall not exceed the attorney's fees of the non-prevailing party with regard to such claim. If the non-prevailing party received services under a contingent fee agreement, the sum of the entitled attorney's fees shall not exceed the reasonable value of those services.

(b) The court may, in its discretion, limit the fees recovered under paragraph (a) if such payment of fees is deemed unjust.

(c) Counsel of record in actions under this section shall maintain accurate, up-to-date records of hours worked on the matter regardless of the fee arrangement with his or her client.

(d) Nothing in this Act shall affect the right of a prevailing party to be awarded costs under applicable law.

Definitions

Section 3. For the purposes of this provision, the term "prevailing party" means a party to an action who obtains a final judgment (other than by settlement), exclusive of interest on all or a portion of the claims asserted during the litigation.

Severability

Section 4. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 5. This Act shall become effective ____ days after the date of enactment.

**COMMENTARY ON THE MODEL STATE
ATTORNEY FEES TO
PREVAILING PARTY ACT**

Under what is known as the "Fairness Rule" the loser pays the prevailing party's attorney's fees and costs. Also known as the "English Rule," the "Fairness Rule" is grounded in the equitable principle that a prevailing party -- either as plaintiff or defendant -- should be made whole. Where the rule operates, it also prompts more realistic case evaluation - the obligation to pay the winner's fees encourages litigants to evaluate carefully their cases before initiating a frivolous claim or adopting a spurious defense.

Subsection 2(a) provides that the prevailing party can be made whole through an award of attorney's fees. The attorney's fees to be awarded the winner is limited, however, by the amount expended by the losing party. If the losing party received services under a contingent fee agreement, the reasonable value of those services is the award limit. This provision prevents the prevailing party from penalizing the loser by incurring disproportionate expenses.

Subsection 2(b) specifies that the court, in the interest of justice, has discretion to limit the attorney's fees to be paid by the losing party.

Subsection 2(c) requires counsel to maintain an accurate accounting of time expended in litigation subject to the Fairness Rule. This recordkeeping is necessary for an equitable assessment of fees when representation has been obtained through a contingency fee agreement.

Subsection 2(d) specifies that the Act does not affect the right of a prevailing party to be awarded costs under applicable law.

Section 3 sets forth applicable definitions.

Section 4 provides for the severability of any provision that may be held invalid.

Section 5 establishes the Act's effective date.

**MODEL STATE
ACCURACY IN PLEADING PROVISIONS**

MODEL STATE ACCURACY IN PLEADING PROVISIONS

Signing of Pleadings, Motions, and Other Papers; Sanctions

(A) **Incorrect or False Court Filings.** Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative,

shall impose upon the person who signed it, a represented party, or both, or any other attorney who is not a signatory but who is responsible for the veracity of the content of the pleading, motion, or other paper, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(B) Correction of Subsequently Detected False or Incorrect Statements. If after the filing of a document the attorney or party who signed pleadings, motions or other papers discovers or obtains knowledge, information, or belief that the document signed contains an error or falsehood, the party is obligated to provide corrected information within a reasonable period of time of learning of the error or falsehood.

COMMENTARY ON THE MODEL STATE ACCURACY IN PLEADING PROVISIONS

This provision is an important deterrent to litigants who would make filings with insufficient legal or factual support. The proposed rule, when applied uniformly, will lead to more disciplined and less wasteful litigation.

These provisions may be implemented as a statute or as a change in state rules of civil procedure. If rules changes are pursued and the state rules are patterned after the Federal Rules of Civil Procedure (FRCP), reference should be made to FRCP 11 in order to place these provisions in context.

Section (A) gives judges the power to penalize all those responsible for making unfounded assertions, not only the attorney who signed the document.

Section (B) requires the correction of any falsehoods or unfounded assertions upon learning of the inaccuracy.

**MODEL STATE
LEGISLATION AND REGULATION
DRAFTING ACT**

**MODEL STATE
LEGISLATION AND REGULATION
DRAFTING ACT**

**Principles to Enact Legislation and
Promulgate Regulations Which Do Not
Unduly Burden The Court System**

Title

Section 1. This Act is entitled the "Improved Legislation and Regulation Drafting Act."

**General Duty
to Review Legislation and Regulations**

Section 2. Each state agency that is promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

- (a) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity.
- (b) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a

general standard, and shall promote simplification and burden reduction.

Specific Issues for Review

Section 3. In conducting the reviews required by Section 2, each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(a) That all proposed legislation--

- (1) Specifies whether all causes of action arising under the law are subject to statutes of limitations;
- (2) Specifies in clear language the preemptive effect, if any, to be given to the law;
- (3) Specifies in clear language the effect on existing state law, if any, including all provisions repealed or modified;
- (4) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;
- (5) Specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief

provisions subject to constitutional requirements;

(6) Specifies whether the provisions of the law are constitutionally severable, if appropriate;

(7) Specifies in clear language the retroactive effect, if any, to be given to the law;

(8) Specifies in clear language the applicable burdens of proof;

(9) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(10) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative proceedings;

(11) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(12) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(13) Specifies whether the legislation applies to the State government and its agencies;

(14) Addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the [Attorney General or other applicable official under state law] after consultation with affected agencies, that are determined to be in accordance with the purposes of this order; and

(15) Provides for a date on which the legislation becomes effective; and

(b) That the regulations--

(1) Specify in clear language the preemptive effect, if any, to be given to the regulation;

(2) Specify in clear language the effect on existing state law or regulation, if any, including all provisions repealed or modified;

(3) Provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(4) Specify in clear language the retroactive effect, if any, to be given to the regulation;

(5) Specify whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(6) Define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(7) Address other important issues affecting clarity and general draftsmanship of regulations set forth by the [Attorney General or other applicable official under state law] after consultation with affected agencies, that are determined to be in accordance with the purpose of this Act.

**Certification of Compliance
for Agency Legislation or Regulations**

Section 4. When proposing legislation or regulations, a state agency must certify that:

(a) It has reviewed such draft legislation or regulation in light of this Act, and

(b) Either (i) the draft legislation or regulation meets the applicable standards provided in Sections 2 and 3 of this Act, or (ii) it is unreasonable to require the particular piece of

draft legislation or regulation to meet one or more of those standards.

Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Severability

Section 5. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 6. This Act shall become effective ____ days after the date of enactment.

COMMENTARY ON MODEL STATE LEGISLATION AND REGULATION DRAFTING ACT

Too frequently, poor legislative drafting leaves important areas in statutes or regulations unaddressed. These ambiguities and omissions often result in uncertainty and needless court challenges.

Section 2 requires that state agencies developing new regulations or legislation review the proposals to eliminate drafting errors. These agencies would also be required to provide clear and certain legal standards for affected conduct.

Section 3 provides a "litigation hazard" checklist intended to identify and remedy common drafting errors found in statutes and regulations.

Section 4 requires state agencies to certify compliance with the checklist and review process.

Section 5 provides for the severability of any provision that may be held invalid.

Section 6 establishes the Act's effective date.



Model State Punitive Damages Act



THE VICE PRESIDENT
WASHINGTON

February 1992

The Model State Punitive Damages Act incorporates reforms proposed by the President's Council on Competitiveness in its report "Agenda for Civil Justice Reform in America." The Council's recommendations result from an extensive study of the civil justice system in America. The President urges that punitive damages be reformed in order to eliminate randomness and unpredictability in the system, while continuing to punish egregious and intentional misconduct.

Consistent with the principles of federalism, to which our Administration is committed, we believe punitive damage reforms should be adopted by each state's legislature. The Model State Punitive Damages Act will assist state policymakers in implementing the Council on Competitiveness' recommendations.

Model State Punitive Damages Act

Title

Section 1. This statute is entitled "The Punitive Damages Act."

Preamble

Section 2. 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 cost 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.

Definitions

Section 3. 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 or intangible serious injury.

(e) "Nominal damages" are damages that are not designed to compensate a plaintiff and are less than \$500.

(f) "Plaintiff" means any party 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.

**Pleading Punitive Damages;
Pre-Suit Notice**

- Section 4. (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.

**Procedure for Award
of Punitive Damages**

- Section 5. (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) Where a jury decides that the defendant is liable for punitive damages, the court alone shall determine the amount of punitive damages.
- (f) In all cases involving an award of punitive damages, the court, in determining the amount of punitive damages, shall include in its consideration prior damage awards for the same

wrongful act, the effect on other potential claimants of a punitive damages award, the deterrent provided by compensatory damages in the case, and the potential or prior criminal and administrative penalties against the defendant for the same wrongful act.

(g) 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 a defendant, and each defendant is liable only for the amount of the award made against that defendant.

Proof Required for Award of Punitive Damages

Section 6. Before a plaintiff may recover punitive damages in any civil action, that plaintiff must establish, by clear and convincing evidence, all of the facts that are relied upon to support the recovery of punitive damages. The plaintiff must establish that the defendant's actions showed malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Ceiling for Punitive Damages Award

Section 7. No award of punitive damages shall exceed the amount of total compensatory damages awarded to the plaintiff in the action.

Availability of Punitive Damages

Section 8. 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.

Severability

Section 9. If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Effective Date

Section 10. This Act shall be effective as to any civil suit for damages commenced on or after 120 days from the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Commentary on Model State Punitive Damages Act

- Section 1. The title of the Act should conform to state practice.
- Section 2. The preamble is intended to be a guide to construction of the Act in accordance with its purpose to provide fair procedures for the award of punitive damages and to provide limits on such awards.
- Section 3. Section 3 contains definitions for the Act.
- Section 4. Section 4 is designed to ensure early resolution of cases seeking punitive damages through consultation by the parties prior to filing suit in all but the most extraordinary circumstances.
- The pleading requirements are also designed to avoid the inclusion of punitive damages merely for publicity and to ensure that punitive damages remain as a potential issue at trial only if there is sufficient evidence to support consideration of an award.
- Section 5. Section 5 provides for bifurcated trials at the defendant's motion. Upon motion for bifurcation, the jury shall determine if compensatory damages are to be awarded in the first stage of the trial. In the second stage of trial, if necessary, the jury shall determine whether punitive damages should be assessed.

Section 5(b) ensures that only evidence relevant to the first stage of a bifurcated trial will be used.

Section 5(c) permits an award of punitive damages only when the jury has returned a verdict awarding the plaintiff compensatory damages and the award exceeds nominal damages.

Section 5(f) provides guidance for courts in those cases in which other persons have sought or will likely seek punitive damages for the same wrongful act.

Section 5(g) provides guidance to make the statute consistent with the rules of contributory or comparative fault as well as the allocation of damages in multiple defendant cases.

Section 6. Section 6 requires that all proof submitted by the plaintiff on the issues for liability and amount of punitive damages be established by clear and convincing evidence.

Section 6 also clarifies the requisite action and mental state needed for an award of punitive damages.

Section 7. Section 7 limits punitive damages so that the maximum possible punitive damages award bears a direct relationship to the injury suffered, as measured by compensatory damages.

The punitive damages award may not exceed the award of compensatory damages. Thus, the maximum total damages available to a plaintiff when punitive damages are awarded is double the amount of compensatory damages awarded.

- Section 8. The Act provides guidance for the award of punitive damages. The Act does not, however, supply substantive authority for the award of punitive damages. The Act itself makes no additional actions subject to punitive damages beyond those actions for which punitive damages are available at the time of enactment of this Act.
- Section 9. Section 9 provides for the severability of any provision that may be held invalid.
- Section 10. Section 10 provides an effective date which will permit persons who possess claims to bring suit under the present legal standards for a reasonable period.