

ALEC EXPOSED

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

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

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

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

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The Consumer Compensation Fund Act

Did you know that global pharmaceutical company Bayer Healthcare was the corporate co-chair in 2011?

Summary

The civil justice section of The 1987-88 Source Book addresses the acute shortage of adequate liability insurance and the powerful need for state tort reform. The proposals set forth in the civil justice section confirm that the basic tenets of the judicial system should be fair compensation of victims, deterrence of wrongdoing and targeting of liability to responsible parties. Absent reform, today's civil justice system is crippled by frivolous lawsuits, long delays, exorbitant awards and unpredictable outcomes. In our litigious society, professionals must be ever-mindful of the threat of malpractice actions against them.

The Consumer Compensation Fund Act creates an alternative system whereby injured customers receive fair compensation and professionals receive protection from unpredictable, often excessive noneconomic damage awards.

The Act includes the following elements:

- (1) the establishment of a Consumer Compensation Fund, made up of contributions from professionals practicing in the state, which is used to fund malpractice awards in excess of a professional's personal liability per incident, as established in the Act;
- (2) full recovery of actual economic damages and a cap of \$250,000 for noneconomic damages.
- (3) an ad damnum clause provision which prohibits a plaintiff from using a specific dollar amount in his prayer for damages;
- (4) A statute of limitation which requires claims to be brought within two years from the date of the alleged act;
- (5) protection for an individual professional from personal liability for noneconomic damages in excess of \$100,000;
- (6) a provision which limits attorney's fees to 15% of the recovery from the Consumer Compensation Fund;
- (7) A Professional Review Panel whose consideration of an alleged malpractice act is a prerequisite to bringing suit against professionals covered under the Act.

This Act is modeled after Indiana's Medical Malpractice Act, P.L. 146 (1975).

Model Legislation

(Title, enacting clause, etc.)

Section 1. [Short title.] This Act may be cited as the Consumer Compensation Fund Act.

Section 2. [Definitions.] The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

- "Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.
- "Authority" means the Residual Malpractice Insurance Authority established under [appropriate residual malpractice insurance authority].
- "Commissioner" means the Commissioner of Insurance in this state.
- "Consumers" refers to individuals who use, maintain, and dispose of services rendered.
- "Injury" refers to pain and suffering, bodily injury, and mental diseases.

(F) "Insurer" means the authority or an insurance company engaged in making this state malpractice liability insurance pursuant to [cite applicable state insurance regulation].

(G) "Malpractice" means any tort or breach of contract based on professional services rendered, or which should have been rendered, by a professional, to or for a consumer.

(H) "Noneconomic damages" means subjective, nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory such as fear of loss, illness, or injury:

(I) "Nonprofit" refers to an organization which meets the following qualifications:

(1) a group organized for purposes other than generating profit, such as a charitable, scientific, or literary organization;

(2) an organization which, for purposes of federal income taxation, may be an exempt organization if it is organized and operated exclusively for one of more of the following purposes:

(a) religious,

(b) charitable,

(c) scientific,

(d) testing for public safety,

(e) literary,

(f) educational,

(g) prevention of cruelty to children or animals, or

(h) to foster national or international sports; and

(3) an organization that meets any other qualifications necessary to file for a tax exemption under Section 501 (C)(3) of the Internal Revenue Code.

(J) "Profession" refers to a vocation or an occupation, whether nonprofit or for profit, which requires special, usually advanced, education and skill.

(K) "Professional" means a person licensed by this state to provide services respective to his or her professions.

(L) "Representative" means the spouse, parent, guardian, trustee, attorney, or other legal agent of the consumer.

(M) "Risk" means any professional which shall apply for malpractice liability insurance coverage under [cite applicable state provisions].

(N) "Risk Manager" means an insurance company admitted to make malpractice liability insurance and actively engaging in making malpractice liability insurance, which company is appointed by the Commissioner to manage the Authority.

(O) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

Section 3. [Qualifications required for professional.] A professional who fails to qualify under this statute is not covered by its provisions and is subject to liability under the law without regard to the provisions of this Act. If a professional does not so qualify, the consumer's remedy will not be affected the terms and provisions of this Act.

Section 4. [Claims - Filing complaint.] A consumer or his representative having a claim under this Act for injury on account of malpractice may file a complaint in any court of law having requisite jurisdiction and demand right of trial by jury. No dollar amount or figure shall be included in the demand is any malpractice complaint, but the prayer shall be for such damages as are reasonable in the premises.

Section 5. [Limitation of recovery - Exemptions.]

(A) A claim based on an occurrence of malpractice against a governmental entity or an employee of a governmental agency, shall be governed exclusively by the provisions of this Act if the governmental entity or employee is qualified under the provisions of this Act.

(B) The following are exempt from the provisions of this Act:

(1) technical contractual personnel and services retained by the Commissioner for protecting and administering the Consumer Compensation Fund (established in Section 12 of this Act); and

(2) purchasing of annuities for structuring settlements from the Fund or in combination with the fund and the professional's insurer.

Section 6. [Limitation of recovery – Qualifications.]

(A) To be qualified under the provisions of this Act, a professional or the professional's insurance carrier shall:

(1) file with the Commissioner proof of financial responsibility as provided by this Act in the amount of \$100,000 or more; and

(2) pay the surcharge assessed by this Act on all professions according to Section 12 of this Act.

(B) The officers, agents or employees of a professional, while acting in the course and scope of his employment may be qualified under the provisions of this Act if he is individually named, or is a member of a named class, in the proof of financial responsibility filed by the professional under Section 9 and if the surcharge assessed under Section 12 of this Act is paid.

Section 7. [Recovery of damages.]

(A) In any malpractice action, the prevailing plaintiff may be awarded:

(1) compensation for actual economic damages suffered by the injured plaintiff; and

(2) compensation for the noneconomic damages suffered by the injured plaintiff not to exceed \$250,000.

(B) A professional qualified under this Act is not liable for noneconomic damages in excess of \$100,000 for a claim of malpractice. Any award for noneconomic damages which is in excess of the combined liability per incident of all liable professionals, shall be paid from the Consumer Compensation Fund pursuant to Section 12.

(C) In the event of a professional qualified under this Act admits liability or is adjudicated liable solely by reason of the conduct of another professional who is an officer, agent, or employee of the professional acting in the course and scope of his employment and qualified under this section, the total amount which shall be paid to the claimant on behalf of the officer, agent or employee and the professional, by such professional or its insurer, shall be all actual economic damages and the first \$100,000 of any noneconomic damages awarded. The balance of any adjudicated sum to which the claimant is entitled, if any, shall be paid by other liable professionals and/or the Consumer Compensation Fund.

Section 8. [Admission of liability and advance payments.]

(A) Any advance payment made by a professional or his insurer to or for the plaintiff, or any other person, may not be construed as an admission of liability for injuries or damages suffered by the plaintiff or anyone else in an action brought for malpractice.

(B) Evidence of an advance payment is not admissible until there is a final judgment in favor of the plaintiff, in which event the court shall reduce the plaintiff's judgment to the extent of the advance payment. The advance payment shall ensure the exclusive benefit of the defendant or his insurer who is making the payment.

(C) A consumer's claim for compensation under this Act is not assignable.

Section 9. [Proof of responsibility.] Financial responsibility of a professional and its officers, agents, and employees while acting in the course and scope of his employment with such professionals may be established.

Section 10. [Statute of limitations – Time for filing a claim.]

(A) No claim, whether in contract or tort, may be brought against a professional based upon professional services that have been rendered or that should have been rendered unless filed within two years of the time that the injury, disease, disability, or death is or, in the exercise of reasonable diligence, should have been discovered by the plaintiff. This section applies to all persons regardless of minority or other legal disability, except as provided in subsection (B).

(B) In the case of a consumer who meets the criteria stated in the Section 25(B)(2)(c) the applicable limitations period is equal to the period that would otherwise apply to the consumer under subsection (A) plus 180 days.

Section 11. [Statute of limitations – Prior action.] A claim made by a minor or other person under legal disability against a professional stemming from professional services rendered, whether in contract or tort, based on alleged injury, disease, disability, or death, which occurred prior to [effective date of this Act], shall be brought only within the longer of:

(A) two years of the effective date of this Act; or

(B) the period described in Section 10 of this Act.

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Section 12. [Establishment of a Consumer Compensation Fund.] This Section will address the creation, levy of annual surcharge and disposition of funds in establishing a Consumer compensation Fund.

(A) There is created a Consumer Compensation Fund to be collected and received by the Commissioner for exclusive use for the purposes stated in this Act. The Fund and any income from it shall be held in a trust, deposited in a segregated account, invested, and reinvested by the Commissioner and shall not become a part of the general fund of the state.

(B) To create the Fund, an annual surcharge shall be levied on all professionals in [state]. The surcharge shall be determined by the Commissioner based on actuarial principles and shall not exceed ten percent of the cost to each professional for maintenance of fiscal responsibility. The surcharge shall be collected on the same basis as premiums by each insurer, the risk manager and surplus lines agents.

(C) Such surcharge shall be due and payable within 30 days after the premiums for professional liability insurance have been received by the insurer, risk manager and surplus lines agents from the professionals in this state. Before the date of enactment, the Commissioner shall send to each insurer, the risk manager and lines agents a statement explaining the provisions of this Section together with any other information necessary for their compliance with this Section.

(D) If the annual premium surcharge is not paid within the time limited above, the certificate of authority of the insurer, risk manager, and surplus lines agents shall be suspended until the annual premium surcharge is paid.

(E) All expenses of collecting, protecting and administering the Fund shall be paid from the Fund.

(F) If the Fund exceeds the sum of \$15,000,000 at the end of any calendar year after the payment of all claims and expenses, the Commissioner shall reduce the surcharge provided in this Section in order to maintain the Fund at an approximate level of \$15,000,000.

(G) All claims from the Consumer Compensation Fund shall be computer on December 31 in the year of which the claim becomes final. All claims shall be pain on or before January 15 of the following year. If the Fund would be exhausted by payment in full of all claims allowed in a calendar year, then the amount paid to each claimant shall be prorated. Any amounts due and unpaid shall be paid in the following calendar year.

Section 13. [Payment from Consumer Compensation Fund after exhaustion of insurance coverage.] In the event of an annual aggregate for a professional qualified under this Act has been paid by or on behalf of any such professional, noneconomic damages which may thereafter become due and payable to a claimant arising out of an act of malpractice of such professional occurring during the year in which the annual aggregate was exhausted shall be paid from the Consumer Compensation Fund under the following terms and conditions:

(A) The professional whose annual aggregate has been exhausted shall have no right to object or refuse permission to settle any such claim.

(B) If the professional or the Insurance Commissioner and claimant agree on a settlement the following procedure must be followed.

(1) A petition shall be filed by the claimant with the court in which the action is pending against the professional or, if none is pending, in the circuit or superior court of [name of appropriate county] seeking approval of the agreed settlement.

(2) A copy of the petition shall be served on the Commissioner and the professional at least ten days before filing and shall contain sufficient information to inform the other parties about the nature of the claim and the amount of the proposed settlement.

(3) The Commissioner may agree to the settlement or may file written objections thereto. The agreement or objections shall be filed within 20 days after the petition is filed.

(4) The judge of the court in which the petition is filed shall set the petition for approval or, if objections have been filed for hearing, as soon as practicable. The court shall give notice of the hearing to the claimant, the professional and the Commissioner.

(5) At the hearing, the Commissioner, the claimant and the professional may introduce relevant evidence to enable the court to determine whether or not the petition should be approved if it is submitted on agreement without objections. If the commissioner and the claimant cannot agree on the amount, if any, to be paid out of the Consumer Compensation Fund, then the court shall determine the amount for which the Fund is liable and render a finding and judgment accordingly. In approving a settlement or determining the amount, if any, to be paid to the Consumer Compensation Fund, the court shall consider the liability of the professional as admitted and established.

(6) Any settlement approved by the court shall not be appealed. Any judgment of the court fixing damages recoverable in any such contested proceeding shall be

appealable pursuant to the rules governing appeals in any other civil case tried by the court. The Commissioner may promulgate rules and regulations implementing the provisions of this Section.

Section 14. [Claims process for Consumer Compensation Fund.] The auditor of this state shall issue a warrant in the amount of each claim submitted to him against the Fund on June 30 and December 31 of each year. The only claim against the Fund shall be a voucher or other appropriate request by the Commissioner after he receives:

- (A) a certified copy of a final judgment against a professional; or
- (B) a certified copy of a court-approved settlement against a professional.

Section 15. [Procedure upon failure of professional to pay agreed settlement.] If the professional, his surety or liability insurance carrier fails to pay any agreed settlement or final judgment within 90 days, the same shall be paid from the Consumer Compensation Fund. The Fund shall be subrogated to any and all of claimant's rights against said professional, his surety and/or liability insurance carrier with interest, reasonable costs and attorney's fees.

Section 16. [Consumer Compensation Fund - Procedure for excessive claims.] If a professional or its insurer has agreed to settle its liability on a claim for noneconomic damages by payment of its policy limits of \$100,000, and the claimant is demanding as amount in excess thereof, then the following procedure must be followed:

(A) A petition shall be filed by the claimant in the court named in the proposed complaint, or in the Circuit or Superior Court of [name of appropriate county] at the claimant's election, seeking:

(1) approval of an agreed settlement, if any, or

(2) demanding payment of noneconomic damages from the Consumer Compensation Fund.

(B) A copy of the petition with summons shall be served on the Commissioner, the professional and his insurer, at least ten days before filing and shall contain sufficient information to inform the other parties about the nature of the claim and the additional amount demanded.

(C) The Commissioner and either the professional or the insurer of the professional may agree to a settlement with the claimant from the Consumer Compensation Fund, or the Commissioner, the professional or the insurer of the professional may file written objections to the payment of the amount demanded. The agreement or objection to the payment demand shall be filed within 20 days after service of summons with a copy of the petition attached thereto.

(D) The judge of the court in which the petition is filed shall set the petition for approval or, if objections have been filed, for hearing, as soon as practicable. The court shall give notice of the hearing to the claimant, the professional, the insurer of the professional, and the Commissioner.

(E) At the hearing, the Commissioner, the claimant and the insurer of the professional may introduce relevant evidence to enable the court to determine whether or not the petition should be approved if it is submitted on agreement without objections. Of the Commissioner, the professional, the insurer of the professional and the claimant cannot agree on the amount, if any, to be paid out of the Consumer Compensation Fund, then the court, after hearing any relevant evidence on the issue of claimants damages, submitted by any of the parties described in this Section, shall determine the amount of claimant's noneconomic damages, if any, in excess of \$100,000 already paid by the insurer of the professional. The court shall determine the amount for which the Fund is liable and render a finding and judgment accordingly. In approving a settlement or determining the amount, if any, to be paid from the Consumer Compensation Fund, the court shall consider the liability of the professional as admitted and established.

(F) Any settlement approved by the court shall not be appealed. Any judgment of the court fixing damages recoverable in any such contest proceeding shall be appealable pursuant to the rules governing appeals in any other civil case tried by the court.

(G) A release executed between the parties shall not bar access to the Consumer Compensation Fund unless the release specifically provides otherwise.

Section 17. [Discharge of obligation to pay amount from Fund.] The obligation to pay an amount from the Consumer Compensation Fund may be discharged through:

(A) payment in one lump sum;

(B) an agreement requiring periodic payments from the Fund over a period of years;

(C) the purchase of an annuity payable to the consumer; or

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(D) any combination of subdivisions (A), (B), and (C).

The Commissioner may contract with approved insurers to ensure the ability of the Fund to make these periodic payments under subsection (B).

Section 18. [Attorney's fees.]

(A) When a plaintiff is represented by an attorney in the prosecution of his claim, the plaintiff's attorney fees from any award made from the Consumer's Compensation Fund may not exceed 15% of any recovery from the Fund.

(B) A consumer has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment.

Section 19. [Reporting of claims.] All malpractice claims settled or adjudicated to final judgment against a professional shall be reported to the Commissioner by the plaintiff's attorney and by the professional or his insurer or risk manager within 60 days following final disposition of the claim.

The report to the Commissioner shall state the following:

(A) nature of the claim;

(B) damages asserted and alleged injury;

(C) suspension of the professional's license for a determinate period; or

(D) revocation of the license.

Section 20. [Review of claims.] The Commissioner shall forward the name of every professional against whom a settlement is made or judgment is rendered under this Act to the [appropriate boards of professional registration and examination] for review of the fitness of the professional to practice his profession. In each case involving review of a professional's fitness to practice under this Act, the board shall have the power, in appropriate cases, to take the following disciplinary action:

(A) censure;

(B) imposition of probation for a determinate period;

(C) suspension of the professional's license for a determinate period; or

(D) revocation of the license.

Section 21. [Malpractice coverage.]

(A) Only while malpractice liability insurance remains in force are the professional and his insurer liable to a consumer, or his representative, for malpractice to the extent and in the manner specified in this Act.

(B) The filing of proof of financial responsibility with the Commissioner shall constitute, on the part of the insurer, a conclusive and unqualified acceptance of the provisions of this Act.

(C) Any provision in a policy attempting to limit or modify the liability of the insurer contrary to the provisions of this Act is void.

(D) Every policy issued under this Act is deemed to include the following provisions, and any change which may be occasioned by legislation adopted by the general assembly of this state as fully as if it were written therein:

(1) the insurer assumes all obligations to pay an award imposed against its insured under the provisions of this Act; and

(2) any termination of this policy by cancellation is not effective as to consumers claiming against the insurer covered hereby, unless at least 30 days before the taking effect of the cancellation, a written notice giving the date upon which termination becomes effective has been received by the insured and the Commissioner at their offices.

(E) If an insurer fails or refuses to pay a final judgment, except during the pending of an appeal, or fails, or refuses to comply with any provision of this Act, in addition to any other legal remedy, the Commissioner may also revoke approval of its policy form until the insurer pays the award or judgment or has complied with the violated provisions of this Act and resubmitted its policy form and received approval of the Commissioner.

Section 22. [Risk manager - Authority.] The purpose of this Act is to make malpractice liability insurance available to risks as defined in this Act.

(A) There is created the Residual Malpractice Insurance Authority. The state Department of Insurance is designated as the authority for the purpose of this Act.

(B) The Commissioner shall appoint a risk manager for the authority. The

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separate, personal or independent assets of the risk manager shall not be liable for or subject to use or expenditure for the purpose of providing insurance by the authority.

(C) In the administration and provision for malpractice liability insurance by the authority, the risk manager shall:

(1) be subject to all laws and regulations of the state which apply to malpractice liability insurance;

(2) prepare and file appropriate forms with the state Department of Insurance;

(3) prepare and file premium rates with the state Department of Insurance,

(4) perform the underwriting function;

(5) dispose of all claims and litigations arising out of insurance policies;

(6) maintain adequate books and records;

(7) obtain private reinsurance for the authority, if necessary;

(8) prepare and file for approval of the Commissioner a schedule of agent's compensation; and

(9) prepare and file a plan of operations with the Commissioner for approval.

(D) The risk manager shall receive as compensation for its services, a percentage of all premiums received by it under the terms of this Section, as determined by the Commissioner. The compensation by be adjusted by the Commissioner.

(E) If a risk, after diligent effort has been declined by at least two insurers, the risk may, together with evidence of the two declinations, forward his application to the risk manager.

(F) If the risk manager declines to accept the risk, notice of declination, together with the reasons, shall be sent to the applicant and the Commissioner. The applicant shall have ten days from the date of notice to file an appeal for review by the Commissioner. On appeal, the Commissioner shall review the decision of the risk manager and enter an appropriate order.

(G) All sums appropriated by this state, and any surplus of premiums over losses and expenses received by the authority shall be placed in a segregated fund and shall be invested and reinvested by the Commissioner, and investment income generated shall remain in the Fund.

Section 23. [Professional Review Panel - Filing of proposed complaints, tolling statute of limitations, and requests for formation of Panel.]

(A) Provision is made for the establishment of a Professional Review Panel to review all proposed malpractice complaints against professionals covered by this Act.

(B) The filing of a proposed complaint tolls the applicable statute of limitations to and including a period of 90 days following the receipt of the opinion of the Professional Review Panel by the complainant. A proposed complaint under this Section shall be deemed filed when a copy of the proposed complaint is delivered or mailed by registered or certified mail a copy to each professional named as a defendant as his last and usual place of residence or his office.

(C) Not earlier than 20 days after the filing of a proposed complaint, either party may request the formation of a Professional review Panel by serving a request by registered or certified mail upon all parties and the Commissioner.

Section 24. [Professional Review Panel - Prerequisite to suit.]

(A) Except as provided in subsection (B), no action against a professional may be commenced in any court of this state before the claimant's proposed complaint has been presented to a Professional Review Panel established pursuant to this Section and an opinion is rendered by the Panel.

(B) A claimant may commence an action in court for malpractice without the presentation of the claim to a Professional Review Panel if the claimant and all parties named as defendants in the action agree that the claim is not to be presented to a Professional Review Panel. The agreement must be in writing and must be signed by each party or an authorized agent of the party. The claimant must attach a copy of the agreement to the complaint filed with the court in which the court in which the action is commenced.

Section 25. [Professional Review Panel - Commencement of the action without submission of complaint to Panel.]

(A) Notwithstanding Section 24, a consumer may commence an action against a professional for malpractice without submitting a proposed complaint to the Professional Review Board if the consumer's pleadings include a declaration that the consumer seeks damages from the professional in an amount no greater than \$15,000.

(B) In an action commenced under this Section, the consumer is barred from recovering any amount greater than \$15,000, except:

(1) a consumer who commences an action with the reasonable belief that damages equal to or less than \$15,000 are adequate compensation for the injury, may move that the action be dismissed without prejudice and,

(a) upon dismissal of the action, the consumer may file a proposed complaint under Section 23 based upon the same allegations of malpractice as were asserted in the action dismissed under this Section; then

(b) in the second action commenced in court following the Professional Review Panel's proceeding on the proposed complaint, the consumer may recover an amount greater than \$15,000, so long as the consumer's motion for dismissal is filed within two years after the commencement of the original action; or

(2) in the case of the consumer who:

(a) commences an action under subsection (A);

(b) moves for dismissal of the action in accordance with subsection (B)(1);

(c) files a proposed complaint under Section 23 based upon the same allegations of malpractice as were asserted in the action dismissed under subsection (1); and

(d) commences a second action in court following the Professional Review Panel proceeding on the proposed complaint.

Section 26. [Professional Review Panel – Composition, selection and challenge.] The Professional Review Panel shall consist of one retired judge or magistrate and three professionals. The three professionals shall be licensed to practice in the state in the same discipline as the person or persons alleged to have been professionally negligent. The retired judge or magistrate shall act as chairman of the Panel and in an advisory capacity but shall have no vote. It is the duty of the chairman to expedite the selection of the other panel members, to convene the Panel, and to expedite the Panel's review of the proposed complaint. The chairman may establish a reasonable schedule for submission of evidence to the Professional Review Panel but must allow sufficient time for the parties to make full and adequate presentation or related facts and authorities. The Professional Review Panel shall be selected in the following manner:

(A) Within 15 days after filing the request for formation of a Professional Review Panel under Section 23, the party shall:

(1) select a Panel chairman by agreement, or

(2) if no agreement can be reached, either party may request the clerk of the Supreme Court to draw at random a list of five names of retired judges or magistrates who have adjudicated in the county of venue designated in the proposed complaint or in contiguous county. Prior to selecting the random list, the clerk shall collect a \$25 Professional Review Panel selection fee from the party making the request for the formation of the random list. The clerk shall notify the parties and the parties shall then strike names alternately with the plaintiff striking the first until one name remains, and that remaining judge or magistrate shall be the chairman of the Panel. After the striking, the plaintiff shall notify the chairman of his selection and inform all other parties of the name of the chairman. If a party does not strike a name within five days after receiving notice from the clerk:

(a) the opposing party shall, in writing, request the clerk to strike one for the party; and

(b) the clerk shall strike for that party. When one name remains, the clerk shall within five days notify the chairman of his selection and inform all other parties of the name of the chairman; the chairman shall, within 15 days after being notified by the clerk of his selection, send a written acknowledgment of his appointment to the clerk or shall show good cause for relief from serving as provided in subsection (D).

(B) All professionals in this state who hold a license to practice their profession in this state shall be available for selection as members of the Professional Review Panel. Each party to the action shall have the right to select one professional. The two professionals thus selected shall select the third panelist. When there are multiple plaintiffs or defendants, there shall only be one professional selected by the prosecution and one professional selected by the defense. If an individual defendant is a professional who specializes in a limited area, two of the panelists selected must be professionals who specialize in the same area as the defendant.

(1) Within 15 days after the chairman is selected, both parties shall select a professional and they shall notify the other party and the chairman of the selection. If a party fails to make a selection within the time provided, the chairman shall make the selection and notify both parties.

(2) Within ten days after any selection, written challenge without cause may be made to the Panel member. Upon challenge or excuse, the party whose appointee was challenged or dismissed shall select another panelist. If the challenged or dismissed Panel member was selected by the other two panel members, they shall make another selection.

(C) When the Professional Review Panel is formed, the chairman shall within five days notify the Commissioner and the parties by registered or certified mail of the

names and addresses of the Panel members and the date on which the last member was selected.

(D) A panelist selected as provided in subsections (A) or (B) shall serve unless the parties by agreement excuse him, or, for good cause shown, he may be excused as provided in this Section. To show good cause for relief from serving, the retired judge or magistrate selected as chairman must serve an affidavit upon the clerk of the Supreme Court. The affidavit shall set out the facts showing that service would constitute an unreasonable burden or undue hardship. The clerk may excuse the retired judge or magistrate from serving and the retired judge or magistrate shall notify all parties who shall then select a new chairman as provided in subsection (A). To show good cause for relief from serving, a professional Panel member must serve an affidavit upon the Panel chairman. The affidavit shall set out the facts showing that service would constitute an unreasonable burden or undue hardship. The chairman may excuse the member from serving and notifying all parties.

Section 27. [Professional Review Panel – Time limit for Panel to render opinion.]

(A) The Panel shall render its expert opinion within 180 days after of the selection of the last member.

(B) A party, attorney or panelist who fails, without good cause shown, to act as required by this Section is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint.

Section 28. [Professional Review Panel – Form of evidence, oath of Panel members and duties of chairman.]

(A) The evidence in written form to be considered by the Professional Review Panel shall promptly by the respective parties. The evidence may be consist of medical charts, x-rays, lab tests, excerpts of treatises, dispositions of witnesses including parties, and any other form of evidence allowable by the Professional Review Panel. The chairman shall ensure that before the Panel renders its expert opinion under Section 31 of this Act, each Panel member has the opportunity to review every item of evidence submitted by the parties.

(B) Before considering any evidence or deliberating with any other Panel members, each member of the Professional Review Panel shall take an oath in writing on a form provided by the Panel chairman, which must be read as follows:

“I (swear) (affirm) under penalties of perjury that I will well and truly consider the evidence submitted by the parties and that I will render my opinion without bias thereon; that I have not and will not communicate with any party or representative of a party before rendering my opinion, except as authorized law.”

Neither a party or a parties agent, a party’s attorney, nor a party’s insurance carrier may communicate with any member of the Panel, except as authorized by law, before the rendering of the Panel’s expert opinion under Section 31 of this Act.

Section 29. [Professional Review Panel – Questioning Panel’s decision.] Either party, after submission of all evidence and upon ten days notice to the other side, shall have the right to convene the Panel at any time and place agreeable to the members of the Panel. Either Party may question the Panel concerning any matters relevant to issues to be decided by the Panel before the issuance of their report. The chairman of the Panel shall preside at all meetings. Meetings shall be informal.

Section 30. [Professional Review Panel – Examination of reports.] The Panel shall have the right and duty to request all necessary information. The Panel may consult with any experts or authorities of the profession in question. The Panel may examine reports of such other professionals as are necessary to fully inform itself regarding the issue to be decided. Both parties shall have full access to any material submitted to the Panel.

Section 31. [Professional Review Board – Written opinion by Panel.] The Panel shall have the sole duty to express its expert opinion as to whether or not the evidence supports the conclusion the defendant or defendants acted or failed to act within the appropriate standards or care as charged in the complaint. After reviewing all evidence and after any examination of the Panel by counsel representing either party, the Panel shall, within 30 days, render one more of the following expert opinions which shall be in writing and signed by the panelists:

(A) the evidence supports the conclusion that defendant or defendants failed to meet the applicable standard of care as charged in the complaint;

(B) the evidence does not support the conclusion that defendant or defendants failed to meet the applicable standard of care as charged in the complaint;

(C) there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury; and

(D) the conduct complained was or was not a factor of the resultant damages. If so, whether the plaintiff suffered:

(1) any disability and the extend and duration of the disability,

(2) any permanent impairment and the percentage of the impairment,

(3) any injuries identified in Section 2 of this Act.

Section 32. [Professional Review Panel – Admissibility of evidence.] Any report of the expert opinion reached by the Professional Review Panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the Professional Review Panel as a witness. If called, the witness shall be required to appear and testify. A panelist shall have absolute immunity from civil liability for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this Act.

Section 33. [Professional Review Panel – Compensation and fees.]

(A) Each professional member of the Professional Review Panel shall be paid up to \$150 per diem plus all reasonable travel expenses for work performed as a member of the Panel exclusive of time involved if called as a witness to testify in court.

(B) The chairman of the Panel shall be paid at the rate of \$200 per diem plus reasonable travel expenses. The record of expenses shall be submitted to the party or parties for payment with the Panel's support.

(C) Fees of the Panel including travel expenses and other expenses of the review shall be paid by the side against whom the majority opinion is written. If there is no majority opinion, then each side shall pay one-half the cost.

(D) The chairman shall submit a copy of the Panel's report to the Commissioner and all parties and attorneys by registered or certified mail within five days after the Panel renders its opinion.

Section 34. [Preliminary determination and discovery authorized.] A court having jurisdiction over the subject matter and the parties proposed complaint filed with the Commissioner under this Act may, upon the filing of the copy of the proposed complaint and a written motion under this Section:

(A) preliminarily determine any affirmative defense or issue of law or fact that may be preliminarily determined under the rules of civil procedure; or

(B) compel discovery in accordance with the rules of civil procedure; or

(C) both.

The court has no jurisdiction to rule preliminarily upon any affirmative defense or issue of law or fact reserved for written opinion by the Professional Review Panel under Section 31 of this Act. The court has jurisdiction to entertain any motion filed under this Section only during that period of time after a proposed complaint is filed with the Commissioner under this Act but before the Professional Review Panel renders its written opinion under Section 31 of this Act. The failure of any party to move for a preliminary determination or to compel discovery under this Act before the Professional Review Panel renders its written opinion under Section 31 of this Act shall not constitute the waiver of any affirmative defense or issue of law or fact.

Under this Act, the Commissioner or the chairman of any Professional Review Panel, if any, may invoke the jurisdiction of the court by paying the statutory filing fee to the clerk and filing a copy of the proposed complaint and motion with the clerk. The filing of a copy of the proposed complaint and motion with the clerk shall confer jurisdiction upon the court over the subject matter and the parties to the proceeding for the limited purposes stated in this Section, including the taxation and assessment of costs or the allowance of expenses, including reasonable attorney's fees, or both. The moving party or his attorney shall cause as many summonses as are necessary to be issued by the clerk and served on the Commissioner, each nonmoving party to the proceedings and the chairman of the Professional Review Panel, if any, unless the Commissioner or the chairman is the moving party, together with a copy of the proposed complaint and a copy of the motion pursuant to rules of this state which pertain to this matter.

Section 36. [Response, hearing, and ruling.] Each nonmoving party to the proceeding, including the Commissioner and the chairman of the Professional Review Panel, if any, shall have a period of 20 days after service, or a period of 23 days after service if the service is by mail, to appear and file and serve his written response to the motion, unless the court, for cause shown, orders the period enlarged. The court shall enter its ruling on the motion within 30 days after it is heard, or if no hearing is requested, granted or ordered, within 30 days after the date on which the last written response to the motion is filed, and shall order the clerk to serve a copy of its ruling on the motion by ordinary mail on the Commissioner, each party to the proceeding and the chairman of the Professional Review Panel, if any.

Section 37. [Stay pending ruling.] Upon the filing of a copy of the proposed complaint and motion with t



Exposed

By the Center for
Media and Democracy
www.prwatch.org

Center for Media and Democracy's quick summary

This far-reaching medical malpractice "tort reform" proposal caps non-economic damages at \$250,000, institutes a two year statute of limitations, limits medical practitioners' personal liability for non-economic damages, and establishes an extra-judicial Professional Review Panel which may limit individuals from filing medical malpractice claims. The proposal does, however, establish a Consumer Compensation Fund that helps ensure that victims of medical malpractice can collect the full amount of malpractice awards.