**South Carolina General Assembly**

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**S. 350**

**STATUS INFORMATION**

General Bill

Sponsors: Senators L. Martin, Cleary, Alexander, Bryant, Campbell, Davis, Fair, Mulvaney, O'Dell, Peeler, Ryberg, Shoopman, Verdin and Grooms

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Summary: Civil Fairness in Civil Justice Act

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

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1/29/2009 Senate Referred to Committee on **Judiciary** [SJ](file:///h:\SJ%20Archive\2009\01-29-09.docx)‑7

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**VERSIONS OF THIS BILL**

[1/29/2009](file:///p:\pprever\2009-10\350_20090129.docx)

**A** **BILL**

RELATING TO REFORM OF THE SOUTH CAROLINA CIVIL JUSTICE SYSTEM, BY PROVIDING FOR THE SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT, TO AMEND CHAPTER 32 OF TITLE 15 OF THE 1976 CODE, RELATING TO DAMAGES IN PERSONAL INJURY ACTIONS, TO PROVIDE LIMITS ON THE AWARD OF NONECONOMIC AND PUNITIVE DAMAGES IN ALL PERSONAL INJURY ACTIONS, AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; TO AMEND CHAPTER 7, TITLE 1 OF 1976 CODE, BY ADDING SECTION 1‑7‑750, TO PROVIDE THE PRIVATE ATTORNEY RETENTION SUNSHINE ACT, TO GOVERN THE RETENTION OF PRIVATE ATTORNEYS BY THE ATTORNEY GENERAL OR A SOLICITOR, TO PROVIDE TERMS AND CONDITIONS GOVERNING THE RETAINER AGREEMENT INCLUDING LIMITS ON THE COMPENSATION OF OUTSIDE COUNSEL IN CONTINGENCY FEE CASES; TO AMEND SECTION 15‑3‑670, RELATING TO LIMITATIONS ON ACTIONS BASED ON UNSAFE OR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY, TO PROVIDE THAT THE VIOLATION OF A BUILDING CODE DOES NOT CONSTITUTE PER SE FRAUD, GROSS NEGLIGENCE, OR RECKLESSNESS; TO AMEND ARTICLE 1, CHAPTER 5, TITLE 15 OF THE 1976 CODE, BY ADDING SECTION 15‑3‑160, TO PROVIDE A REBUTTABLE PRESUMPTION THAT A MANUFACTURER OR SELLER IS NOT LIABLE FOR A PRODUCT IF IT IS MANUFACTURED OR SOLD IN A MANNER APPROVED BY A GOVERNMENT AGENCY; TO AMEND CHAPTER 5, TITLE 15 OF THE 1976 CODE, BY ADDING SECTION 15‑5‑10, TO PROVIDE REQUIREMENTS AND PROCEDURES TO BRING, MAINTAIN, AND CERTIFY CLASS ACTIONS; TO AMEND SECTION 15‑73‑10 OF THE 1976 CODE, RELATING TO THE LIABILITY OF A SELLER FOR A DEFECTIVE PRODUCT, TO PROVIDE THAT THE SELLER IS NOT SUBJECT TO TORT LIABILITY FOR DAMAGE ONLY CAUSED TO THE PRODUCT ITSELF; TO AMEND SECTION 18‑9‑130 OF 1976 CODE, RELATING TO THE EFFECT OF A NOTICE OF APPEAL ON THE EXECUTION OF JUDGMENT, TO PROVIDE LIMITS FOR APPEAL BONDS; TO AMEND SECTIONS 33‑6‑220 AND 33‑44‑303, RELATING TO CORPORATIONS AND LIMITED LIABILITY COMPANIES, TO PROVIDE THAT A JUDGMENT AGAINST A CORPORATION OR LIMITED LIABILITY COMPANY IS A PREREQUISITE TO AN ALTER EGO CLAIM TO PIERCE THE CORPORATE VEIL; TO AMEND SECTION 39‑5‑20 OF THE 1976 CODE, RELATING TO UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES, TO PROVIDE ACTIONS OR TRANSACTIONS OTHERWISE PERMITTED OR REGULATED BY THE FEDERAL TRADE COMMISSION OR ANY OTHER REGULATORY BODY OR OFFICE ACTING UNDER STATUTORY AUTHORITY OF THIS STATE OR THE UNITED STATES ARE NOT COVERED BY THE ACT; TO AMEND SECTION 39‑5‑140, RELATING TO AN ACTION FOR DAMAGES ARISING OUT OF AND UNFAIR OR DECEPTIVE TRADE PRACTICE, TO PROVIDE THAT A PERSON SEEKING DAMAGES MUST SUFFER “OUT‑OF‑POCKET EXPENSES” AND TO DEFINE THIS TERM; AND TO AMEND SECTION 56‑5‑6540, RELATING TO THE PENALTIES FOR THE MANDATORY USE OF SEATBELTS, TO PROVIDE THAT A VIOLATION MAY BE CONSIDERED IN A CIVIL ACTION AS EVIDENCE OF COMPARATIVE NEGLIGENCE OR AS EVIDENCE OF FAILURE TO MITIGATE DAMAGES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act may be cited as the “South Carolina Civil Fairness in Civil Justice Act of 2009”.

SECTION 2. Chapter 32, Title 15 of the 1976 Code is amended to read:

“CHAPTER 32

Article 1

~~[RESERVED]~~

Citation and Definitions

Section 15‑32‑100. This chapter may be cited as the ‘South Carolina Damage Awards Fairness Act’.

Section 15‑32‑110. As used in this chapter:

(1) ‘Claimant’ means the person suffering personal injury.

(2) ‘Compensatory damages’ includes both economic and noneconomic damages.

(3) ‘Economic damages’ means pecuniary damages arising from medical expenses and medical care, rehabilitation services, costs associated with education, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, a claim for loss of spousal services, loss of employment, loss of business or employment opportunities, loss of retirement income, and other monetary losses.

(4) ‘Drug,’ ‘device,’ ‘food,’ and ‘food additive’ have the meanings defined in the ‘Federal Food, Drug, and Cosmetic Act.’

(5) ‘Malice’ means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury.

(6) ‘Medical malpractice’ means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.

(7) ‘Noneconomic damages’ means 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 of damages including, but not limited to, fear of loss, illness, or injury.

(8) ‘Nominal damages’ means damages that are not designed to compensate a plaintiff and are less than five hundred dollars.

(9) ‘Personal injury’ means injuries to the person including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of services, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages.

(10) ‘Personal injury action’ means an action for personal injury, including a wrongful death action pursuant to Sections 15‑51‑10 through 15‑51‑60 and a survival action pursuant to Section 15‑5‑90, and including, but not limited to, an action on a medical malpractice claim.

(11) ‘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 discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

Section 56‑32‑120. The provisions of this article do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33.

Article 3

Noneconomic Damage Awards

~~Section 15‑32‑200.~~ ~~This article may be cited as the ‘South Carolina Noneconomic Damage Awards Act of 2005’~~.

~~Section 15‑32‑210.~~ ~~As used in this article, unless the context clearly requires otherwise:~~

~~(1)~~ ~~‘Ambulatory surgical facility’ means a licensed, distinct, freestanding, self‑contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers, for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.~~

~~(2)~~ ~~‘Claimant’ means the person suffering personal injury.~~

~~(3)~~ ~~‘Economic damages’ means pecuniary damages arising from medical expenses and medical care, rehabilitation services, costs associated with education, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, a claim for loss of spousal services, loss of employment, loss of business or employment opportunities, loss of retirement income, and other monetary losses.~~

~~(4)~~ ~~‘Health care institution’ means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.~~

~~(5)~~ ~~‘Health care provider’ means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.~~

~~(6)~~ ~~‘Hospital’ means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty‑four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.~~

~~(7)~~ ~~‘Institutional general infirmary’ means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents, or inmates with illness, injury, or infirmity for a period exceeding twenty‑four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical, and professional nursing care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.~~

~~(8)~~ ~~‘Medical malpractice’ means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.~~

~~(9)~~ ~~‘Noneconomic damages’ means 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 of damages including, but not limited to, fear of loss, illness, or injury.~~

~~(10)~~ ~~‘Nursing home’ means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty‑four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.~~

~~(11)~~ ~~‘Personal injury’ means injuries to the person including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of services, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages.~~

~~(12)~~ ~~‘Personal injury action’ means an action for personal injury, including a wrongful death action pursuant to Sections 15‑51‑10 through 15‑51‑60 and a survival action pursuant to Section 15‑5‑90.~~

~~(13)~~ ~~‘Renal dialysis facility’ means an outpatient facility which offers staff assisted dialysis or training and supported services for self‑dialysis to end‑stage renal disease patients.~~

~~(14)~~ ~~‘Skilled nursing services’ means services that:~~

~~(a)~~ ~~are ordered by a physician;~~

~~(b)~~ ~~require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and~~

~~(c)~~ ~~are furnished directly by, or under the supervision of such personnel.~~

Section 15‑32‑220. (A) In ~~an~~ a personal injury action ~~on a medical malpractice claim~~ when final judgment is rendered against a single ~~health care provider~~ defendant, the limit of civil liability for noneconomic damages of the ~~health care provider~~ defendant is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection ~~(E)~~(D).

~~(B)~~ ~~In an action on a medical malpractice claim when final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).~~

~~(C)~~(B) In ~~an~~ a personal injury action ~~on a medical malpractice claim~~ when final judgment is rendered against more than one ~~health care institution~~ defendant, ~~or more than one health care provider, or any combination thereof,~~ the limit of civil liability for noneconomic damages for each ~~health care institution and each health care provider~~ defendant is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, and the limit of civil liability for noneconomic damages for all ~~health care institutions and health care providers~~ defendants is limited to an amount not to exceed one million fifty thousand dollars for each claimant, except as provided in subsection ~~(E)~~ (D).

~~(D)~~(C)~~(1)~~ The provisions of this section do not limit the amount of compensation for economic damages suffered by each claimant in a ~~medical malpractice claim~~ personal injury action.

~~(2)~~ ~~The provisions of this section do not limit the amount of punitive damages in cases where the plaintiff is able to prove an entitlement to an award of punitive damages as required by law.~~

~~(E)~~(D) The limitations for noneconomic damages rendered against any ~~health care provider~~ defendant do not apply if the jury or court determines that the defendant was grossly negligent, wilful, wanton, or reckless, and such conduct was the proximate cause of the claimant’s noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed ~~medical~~ records with the purpose of avoiding a claim or liability to the claimant.

~~(F)~~(E) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December 31 of the previous year, and the limitation on compensation for noneconomic damages pursuant to subsection (A)~~,~~ and (B)~~, or (C)~~ must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised limitation on compensation to the State Register for publication pursuant to Section 1‑23‑40(2), and the revised limitation becomes effective upon publication in the State Register. For purposes of this subsection, ‘Consumer Price Index’ means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics. For the calendar year in which this at takes effect, the adjusted limits in effect as provided by Act 32 of 2005 shall be the limits when this act takes effect and shall be adjusted accordingly in subsequent calendar years as provided by this subsection.

Section 15‑32‑230. (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.

(B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient’s discharge from the emergency department or obstetrical or surgical suite.

~~Section 15‑32‑240.~~ ~~The provisions of this article do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33.~~

Article 5

Punitive Damages

Section 15‑32‑250. (A) A claim for punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff must specifically plead either:

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

(2) that thirty 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 punitive damages are sought in the action.

(D) The prayer for punitive damages must 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 chapter to the court at a pretrial hearing held at least thirty days prior to trial.

Section 15‑32‑260. (A) All actions tried before a jury involving punitive damages must, if requested by any defendant, be conducted in a bifurcated manner 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 or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage.

(C) Punitive damages may be considered 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) Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that his harm was the result of actual malice. This burden of proof may not be satisfied by proof of any degree of negligence, including gross negligence.

(E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages. In determining the amount of punitive damages, the jury shall consider all relevant evidence, including:

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

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

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

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

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

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

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

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

(F) Evidence of a defendant’s financial condition or net worth is not admissible during the punitive damage phase of the trial, although this evidence may be considered by the trial and appellate courts in determining whether the award is excessive.

(G) If punitive damages are awarded, the trial court shall carefully review the jury’s decision, considering all relevant evidence, including the factors identified in subsection (D), to ensure that the award is not excessive or the result of passion or prejudice.

(H) In any action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 15‑32‑270. No award of punitive damages may exceed three times the amount of the plaintiff’s compensatory damages award or $250,000, whichever is greater. If the defendant is an individual or a business with fifty or fewer employees, no award of punitive damages may exceed three times the amount of the plaintiff’s compensatory damages or $250,000, whichever is less.

Section 15‑32‑280. (A) Punitive damages shall not be awarded if a drug or device or combination device or food or food additive which caused the harm:

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

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

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

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

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

SECTION 3. Chapter 7, Title 1 of the 1976 Code is amended by adding:

“Section 1‑7‑750. (A) This section may be cited as the ‘Private Attorney Retention Sunshine Act’.

(B) Any time the Attorney General or any solicitor retains, engages, associates, hires, or otherwise obtains a private attorney, attorneys, or law firm as outside counsel for any reason, the outside counsel shall be required to enter into a contract that is governed by the following terms, provisions, or conditions:

(1) The Attorney General or solicitor at his sole discretion has the right to appoint a designated assistant, who must be an assistant attorney general or solicitor, to oversee the litigation or other matter for which outside counsel has been retained, which appointment the Attorney General or solicitor may modify at will.

(2) The Attorney General or solicitor may provide attorneys and other staff members to assist outside counsel with the litigation. The identity and responsibilities of any personnel assigned to assist must be determined solely by the Attorney General or solicitor. All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the Attorney General or solicitor or his designated assistant.

(3) Outside counsel shall coordinate the provision of legal services with the Attorney General or solicitor or his designated assistant, other personnel of the Office of the Attorney General or solicitor, and any other person the Attorney General or solicitor may appoint as outside counsel. All pleadings, motions, briefs, and other material which may be filed with the court must first be approved by the Attorney General or solicitor and provided to his office in draft form in a reasonable and timely manner for review.

(4) Outside counsel will render services as an independent contractor. Neither outside counsel nor any employee of outside counsel shall be regarded as employed by, or as an employee of, the Attorney General or solicitor or the State. An attorney‑client relationship shall exist between the Attorney General or solicitor and outside counsel.

(5) Detailed time and cost records reflecting all work must be maintained by outside counsel and presented monthly to the Attorney General or solicitor.

(6) The Attorney General or solicitor or his designated assistant must approve in advance all aspects of the litigation or other matter for which outside counsel has been retained and shall be included in any settlement discussions. Outside counsel agrees that any settlement must receive the Attorney General’s or solicitor’s express prior approval in writing.

(7) Any material, data, files, discs, or documents created, produced, or gathered by outside counsel, or in outside counsel’s possession in furtherance of the litigation or other matter for which outside counsel has been retained, or which fulfills an obligation of the appointment, is considered the exclusive property of the State. Outside counsel agrees to adhere to the South Carolina Freedom of Information Act, Section 30‑4‑10 et. seq., and maintain all public records concerning the matter in accordance with state law; provided, however, that outside counsel shall consult with, and obtain the approval of, the Attorney General or solicitor before responding to any public records request. The contract of retention that satisfies this section is considered a public document. At the conclusion of the litigation or other matter for which outside counsel has been retained, all time records and monthly statements maintained or presented by outside counsel are public documents.

(8) In contingent fee cases, outside counsel must not receive compensation for any services rendered unless the State receives a settlement or damage award in connection with the litigation. If the State receives an award, outside counsel will be compensated as follows:

(a) Outside counsel must be paid, not including punitive or exemplary damages, the following percentages corresponding to the amount of the judgment or settlement:

(i) up to $5,000,000 ‑ twenty‑three percent;

(ii) more than $5,000,000 but less than $10,000,000 ‑ nineteen percent;

(iii) more than $10,000,000 but less than $25,000,000 ‑ fifteen percent;

(iv) more than $25,000,000 but less than $50,000,000 ‑ eleven percent;

(v) more than $50,000,000 but less than $100,000,000 ‑ seven percent;

(vi) in excess of $100,000,000 ‑ four percent.

Provided, that the Attorney General or solicitor shall retain ten percent of outside counsel’s fees awarded pursuant to this subsection.

(b) The remaining net settlement or judgment proceeding, but not including punitive or exemplary damages, if any, must be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General or solicitor in his sole discretion.

(c) Outside counsel must be paid the following percentages corresponding to the amount of punitive or exemplary damages:

(i) up to $10,000,000 ‑ ten percent;

(ii) more than $10,000,000 but less than $100,000,000 ‑ five percent;

(iii) in excess of $100,000,000 ‑ three percent.

Provided, that the Attorney General or solicitor shall retain ten percent of outside counsel’s fees awarded pursuant to this subsection.

(d) The remaining amount of punitive and exemplary damages must be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General or solicitor in his sole discretion.

(e) All settlement or judgment proceeds shall be paid by or on behalf of any defendant to the Attorney General or solicitor’s office for distribution.

(f) The fee schedule required by this section applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non‑monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non‑monetary relief, such as injunctive relief, non‑monetary payment, the provision of goods or services or any other ‘in kind’ terms, or any combination of these, the Attorney General or solicitor shall determine the monetary value to the State.

(9) Outside counsel must be reimbursed solely from the gross recovery of the litigation or other matter for which outside counsel has been retained as approved by the Attorney General or solicitor for reasonable expenses and costs. Proper documentation by receipts or otherwise must be submitted with all invoices and all documentation must be retained by outside counsel for at least one year following the agreement’s termination. All expenses must be itemized and no reimbursement may be applied for or requested for ‘miscellaneous’ listings. The Attorney General or solicitor in his sole discretion may decline to reimburse outside Counsel for improperly documented, unnecessary, or unreasonable costs or expenses.

(a) Outside counsel must be reimbursed for the retention of experts, including fees and other reasonable costs, only when expressly authorized by the Attorney General or solicitor.

(b) For reimbursements of expenses for lodging, travel, or mileage, receipts are required and these expenses must be expressly authorized in advance by the Attorney General or solicitor.

(10) Outside counsel shall not speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated in the contract of retention without first obtaining approval of the Attorney General or solicitor. Outside counsel is specifically prohibited from speaking on behalf of the Attorney General or solicitor or the State of South Carolina to any representative of the news media.”

SECTION 4. Section 15‑3‑670 of the 1976 Code is amended to read:

“Section 15‑3‑670. The limitation provided by Sections 15‑3‑640 through 15‑3‑660 may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15‑3‑640 through 15‑3‑660 are not available as a defense to any person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to any person who conceals any such cause of action. For purposes of this section, the violation of a building code of any jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness. The limitation provided by Section 15‑3‑640 may not be asserted as a defense to any action for personal injury, including a personal injury resulting in death, or property damage which is (i) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence and (ii) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.”

SECTION 5. Article 1, Chapter 3, Title 15 of the 1976 Code is amended by adding:

“Section 15‑3‑160. (A) For the purpose of this section:

(1) ‘Government agency’ means this State or the United States, or any agency of thereof, or any entity vested with the authority of this State or of the United States to issue rules, regulations, orders, or standards concerning the design, manufacture, packaging, labeling, or advertising of a product or provision of a service.

(2) ‘Manufacturer’ means any person who is engaged in a business to produce, create, make, or construct any product or component part of a product and who: (1) designs, manufactures, or formulates the product or component part of the product; or (2) has engaged another person to design, manufacture, or formulate the product or component part of the product.

(3) ‘Product’ means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.

(4) ‘Seller’ means a person who in the course of a business conducted for that purpose: (1) sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product or service in the stream of commerce; or (2) installs, repairs, refurbishes, reconditions, or maintains a product.

(5) ‘Service’ means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved, or licensed by a government agency. Services include, but are not limited to, financial services and the provision of insurance.

(B) There is a rebuttable presumption that a manufacturer or seller is not subject to liability as a matter of law, if:

(1) the product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency;

(2) the product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, when the statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller; or

(3) the act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

This presumption shall not extend to a product that departs from its intended design due to a flaw created during the manufacturing process, even though the product manufacturer or seller has complied with all applicable state and federal standards or regulations.

(C) A claimant may rebut the presumption provided in subsection (B) by establishing through clear and convincing evidence that:

(1) the government standards or regulations applicable to the product or service were wholly inadequate to protect the public from unreasonable risks of injury or damage;

(2) the manufacturer or seller of the product or service, either before or after placing the product or service in the stream of commerce, intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and the material information is relevant to the harm which the claimant allegedly suffered; or

(3) the manufacturer or seller secured or maintained approval of the product or service through fraud, bribery, or undue influence.”

SECTION 6. Chapter 5, Title 15 of the 1976 Code is amended by adding:

“Section 15‑5‑10. (A) Notwithstanding any other provision of law or rule to the contrary, one or more members of a class of state residents may sue as representative parties on behalf of all members of the class only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact that the court or jury could reasonably reach conclusions or findings applicable to all class members;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) the class is defined in a manner to permit the identification of class members before any adjudication on the merits occur; and

(6) in cases in which the relief sought is not injunctive or declaratory in regards to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

A nonresident may initiate a class action or join a class, only if the nonresident’s injury occurred in this State.

(B) An action may be maintained as a class action if the requirements of subsection (A) are met and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party seeking to maintain the class action does not seek any monetary relief and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds:

(a) that the questions of law or fact as to which the court or jury could reasonably reach conclusions or findings applicable to all class members predominate over any questions affecting only individual members;

(b) that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought and of the defenses to those are substantially similar to all class members; and

(c) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Factors to be considered are:

(i) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(ii) the extent, nature, and maturity of any litigation concerning the controversy already commenced by or against members of the class;

(iii) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify maintaining the case as a class action;

(iv) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(v) the difficulties likely to be encountered in the management of a class action; and

(vi) the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies.

(C)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after a hearing, determine by order whether it is to be maintained as a class action. An order issued pursuant to this subsection may be altered, amended, or withdrawn at any time before the decision on the merits. A court shall not certify that an action may be maintained as a class action unless the proponents proffer clear and convincing evidence that the action complies with all requirements for certification. Any doubt as to whether this burden has been met shall be resolved in favor of denying class certification. The court shall decertify a class action upon any showing that an action has ceased to satisfy the applicable requirements for maintaining the case as a class action.

(2) If the court finds that the action should be maintained as a class action, it shall certify the action by a written order setting forth the basis for the specific findings as to how the class action meets the requirements of this section.

(3) There shall be a rebuttable presumption against the maintenance of a class action as to claims for which class members would have to prove knowledge, reliance, or causation on an individual basis.

(4) The determination that an action may be maintained as a class action shall not relieve any member of the class from the burden of proving all elements of the member’s cause of action, including individual injury and the amount of damages.

(5) In any class action initiated pursuant to subsection (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall include:

(a) a general description of the action, including the relief sought, and the names of the representative parties;

(b) a statement of the right of a member of the class to be excluded from the action by submitting an election to be excluded, including the manner and time for exercising the election;

(c) a description of possible financial consequences for the class;

(d) a general description of any counterclaim or notice of intent to assert a counterclaim by or against members of the class, including the relief sought;

(e) a statement that the judgment, whether favorable or not, will bind members of the class who are not excluded from the action;

(f) a statement that any member of the class may intervene in the action and designate separate counsel;

(g) the address of counsel to whom members of the proposed class may direct inquiries; and

(h) any other information the court deems appropriate.

(6) The plaintiff shall bear the expense of the notification required by subsection (C)(5). The court may require other parties to the litigation to cooperate in securing the names and addresses of the persons within the class for the purpose of providing individual notice, but any costs incurred by the party in providing this cooperation shall be paid initially by the party claiming the class action. Upon termination of the action, the court may allow as taxable costs all or part of the expenses incurred by the prevailing party.

(7) The judgment in an action maintained as a class action under subsections (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (C)(5) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(8) When appropriate, a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(D) In the conduct of actions to which this section applies, the court may issue orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in a manner the court determines to some or all of the class members describing any step in the action, or of the proposed entry of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise join the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring the pleadings to be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; and

(5) addressing other procedural matters.

(E)(1) A class action shall not be dismissed or compromised without the court’s approval, and notice of the proposed dismissal or compromise shall be given to all members of the class in a manner determined by the court.

(2) Before approving the dismissal or a compromise of an action that the court has determined may be maintained as a class action, the court shall hold a hearing to determine whether the terms of the proposed dismissal or compromise are fair, reasonable, and adequate for the class. At the hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard as determined by the court.

(F) Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, but may be required by the court to submit to discovery procedures applicable to the representative parties and intervenors.

(G) An order granting, denying, or decertifying a class action pursuant to this section is immediately appealable upon the filing of a notice of appeal within ten days after entry of the order. The matter is stayed during the pendency of the appeal.”

SECTION 7. Section 15‑73‑10 of the 1976 Code is amended to read:

“Section 15‑73‑10. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to tort liability for physical harm caused to the ultimate user or consumer, ~~or to his property,~~ if

(a) ~~The~~ the seller is engaged in the business of selling such a product~~,~~; and

(b) ~~It~~ it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) One who sells any product in a defective condition is not subject to tort liability for physical harm or damage caused only to the product itself, regardless of whether the serious threat of physical bodily harm exists as a result of the defective product.

(3) The rule stated in subsection (1) shall apply although:

(a) ~~The~~ the seller has exercised all possible care in the preparation and sale of his product~~,~~; and

(b) ~~The~~ the user or consumer has not bought the product from or entered into any contractual relation with the seller.”

SECTION 8. Section 18‑9‑130(A)(1) of the 1976 Code is amended to read:

“(A)(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety must not exceed:

(a) the amount of the judgment or twenty‑five million dollars, whichever is less, for any business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; and

(b) the amount of the judgment or one million dollars, whichever is less, for all other entities or individuals.”

SECTION 9. Section 33‑6‑320 of the 1976 Code is amended to read:

“Section 33‑6‑220. (a) A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued (Section 33‑6‑210) or specified in the subscription agreement (Section 33‑6‑200).

(b) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.

(c) A judgment against a corporation is a prerequisite to an alter ego claim to pierce the corporate veil.”

SECTION 10. Section 33‑44‑303 of the 1976 Code is amended to read:

“Section 33‑44‑303. (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

(d) Subject to and except for the provisions of subsection (c), a judgment against a limited liability company is a prerequisite to an alter ego claim to pierce the corporate veil.”

SECTION 11. A. Section 39‑5‑20 of the 1976 Code is amended to read:

“Section 39‑5‑20. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) This chapter shall not apply to actions or transactions otherwise permitted or regulated by the Federal Trade Commission or any other regulatory body or office acting under statutory authority of this State or the United States.”

B. Section 39‑5‑140(a) of the 1976 Code is amended to read:

“(a) Any person who suffers any ~~ascertainable~~ out‑of‑pocket loss of money ~~or property, real or personal,~~ as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39‑5‑20 may bring an action individually, but not in a representative capacity, to recover actual damages. Any person seeking to recover damages under this section shall be required to prove that the unfair or deceptive method, act or practice caused him or her to enter into the transaction that resulted in his or her damages. No award of damages may be made without proof that the person seeking damages suffered an actual out‑of‑pocket loss. For purposes of this section, ‘out‑of‑pocket loss’ means an amount of money equal to the difference between the amount paid by the consumer for the good or service and the actual market value of the good or service that the consumer actually received. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39‑5‑20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney’s fees and costs.”

SECTION 12. Section 56‑5‑6540(C) of the 1976 Code is amended to read:

“(C) ~~A violation of this article is not negligence per se or contributory negligence, and is not admissible as evidence in a civil action.~~ A violation of this article is not negligence per se or contributory negligence as a matter of law, but may be considered in a civil action as evidence of comparative negligence or as evidence of failure to mitigate damages and may serve to reduce liability based upon an apportionment of damages to the extent the injury was caused or enhanced by the failure to wear a seat belt.”

SECTION 13. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 14. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 15. This act takes effect July 1, 2009, and applies to all causes of action arising on or after the effective date.

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