

**HOUSE . . . . . No. 3055**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

***Paul K. Frost, (BY REQUEST)***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to tort claims.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Paul Nordberg</i>	<i>3 Overhill Drive Auburn, MA 01501</i>	<i>1/20/2017</i>

**HOUSE . . . . . No. 3055**

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By Mr. Frost of Auburn (by request), a petition (accompanied by bill, House, No. 3055) of Paul Nordberg relative to claims and indemnity procedures. The Judiciary.

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**The Commonwealth of Massachusetts**

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**In the One Hundred and Ninetieth General Court  
(2017-2018)**  
\_\_\_\_\_

An Act relative to tort claims.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Chapter 258 of the General Laws, as appearing in the 2014 Official  
2 Edition, is hereby amended by striking out said chapter, in its entirety, and inserting in place  
3 thereof the following language:-

4           Section 1. As used in this chapter the following words shall have the following  
5 meanings:-

6           "Acting within the scope of his office or employment", shall include but not be limited to  
7 acting in the performance of any lawfully ordered military duty, in the case of an officer or  
8 soldier of the military forces of the commonwealth.

9           "Abuse of Discretion," occurs when a public employer and/or its authorized employee  
10 selects a discretionary course of action, or decides to take no action, when the option selected  
11 lacked sufficient merit as to warrant or justify serious consideration. Whether Abuse of  
12 Discretion has occurred shall be a question of fact, to be determined by the trier or triers of fact.

13 A "Cause for Action," for purposes of the applicable statute-of-limitations, arises either  
14 when: The claimant/plaintiff has knowledge of sufficient facts as to give rise to the alleged  
15 course-of-action; OR a reasonable person should have become aware of the facts giving rise to  
16 the alleged cause of action.

17 The question of when a reasonable person should have become aware of the facts giving  
18 rise to the alleged cause-of-action bill shall be a question of fact, to be determined by the trier or  
19 triers of fact.

20 "Cause of Action Based on Illegal Conduct"- In any instance in which the conduct of the  
21 public employer and/or one or more of its authorized employees both: Was illegal under-then-  
22 existing law; and led to injury or death or financial damages to the claimant/plaintiff.

23 The Combination of these two factors shall create a prima-facie case to the effect that a  
24 tort has occurred for which the claimant/plaintiff is entitled to recover damages.

25 "Executive officer of a public employer", the secretary of an executive office of the  
26 commonwealth, or in the case of an agency not within the executive office, the attorney general;  
27 the adjutant general of the military forces of the commonwealth; the county commissioners of a  
28 county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or  
29 as designated by the charter of the town; and the board, directors, or committee of a district in the  
30 case of the public employers of a district, in the case of the Massachusetts Bay Transportation  
31 Authority, its general manager and rail and transit administrator, and, in the case of any other  
32 public employer, the nominal chief executive officer or board.

33 "Public attorney", the attorney who shall defend all civil actions brought against a public  
34 employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney

35 general; in the case of any county he shall be the district attorney as designated in sections  
36 twelve and thirteen of chapter twelve; in the case of a city or town he shall be the city solicitor or  
37 town counsel, or, if the town has no such counsel, an attorney employed for the purpose by the  
38 selectmen; in the case of a district he shall be an attorney legally employed by the district for that  
39 purpose; and, in the case of the Massachusetts Bay Transportation Authority, the attorney shall  
40 be the general counsel. A public attorney may also be an attorney furnished by an insurer  
41 obligated under the terms of a policy of insurance to defend the public employer against claims  
42 brought pursuant thereto.

43 "Public employee", elected or appointed, officers or employees of any public employer,  
44 whether serving full or part-time, temporary or permanent, compensated or uncompensated, and  
45 officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the  
46 term "public employee" shall include an approved or licensed foster caregiver with respect to  
47 claims against such caregiver by a child in the temporary custody and care of such caregiver or  
48 an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver;  
49 provided, however, that such conduct was not intentional, or wanton and willful, or grossly  
50 negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other  
51 individual, who is under contract with an adult foster care provider as defined and certified by  
52 the division of medical assistance.

53 "Public employer", the commonwealth and any county, city, town, educational  
54 collaborative, or district, including the Massachusetts Department of Transportation, the  
55 Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and  
56 the Massachusetts Turnpike Authority and any public health district or joint district or regional  
57 health district or regional health board established pursuant to the provisions of section twenty-

58 seven A or twenty-seven B of chapter one hundred and eleven, and any department, office,  
59 commission, committee, council, board, division, bureau, institution, agency or authority thereof  
60 including a local water and sewer commission including a municipal gas or electric plant, a  
61 municipal lighting plant or cooperative which operates a telecommunications system pursuant to  
62 section 47E of chapter 164, department, board and commission, which exercises direction and  
63 control over the public employee, but not a private contractor with any such public employer, the  
64 Massachusetts Port Authority, or any other independent body politic and corporate. With respect  
65 to public employees of a school committee of a city or town, the public employer for the  
66 purposes of this chapter shall be deemed to be said respective city or town.

67 "Serious bodily injury", bodily injury which results in a permanent disfigurement, or loss  
68 or impairment of a bodily function, limb or organ, or death.

69 Section 2. Public employers shall be liable for personal injury, or financial injury or loss  
70 of property or personal injury or death caused by the negligent or wrongful act or omission of  
71 any public employee while acting within the scope of his office or employment, in the same  
72 manner and to the same extent as a private individual under like circumstances, except that  
73 public employers shall not be liable to levy of execution on any real and personal property to  
74 satisfy judgment, and generally be liable only for pre-judgment interest commencing from the  
75 date one year after the filing after the filing of an action under this statute. Public employers  
76 generally shall not be liable for interest prior to judgment or for punitive damages or for any  
77 amount in excess of \$500,000 per incident; provided, however, that all claims for serious bodily  
78 injury against the Massachusetts Bay Transportation Authority shall not be subject to a \$100,000  
79 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive  
80 of any other civil action or proceeding by reason of the same subject matter, in any separate

81 proceeding, against the public employer or, the public employee or his estate whose negligent or  
82 wrongful act or omission gave rise to such claim, and no such public employee or the estate of  
83 such public employee shall be liable for any injury or loss of property or personal injury or death  
84 caused by his simply negligent or unintentional non-malicious wrongful act or omission while  
85 acting within the scope of his office or employment; provided, however, that a public employee  
86 shall provide reasonable cooperation to the public employer in the defense of any action brought  
87 under this chapter. Public employers shall be liable in instances of Abuse of Discretion and/or  
88 gross negligence. Public employers shall be jointly and severally liable, along with the involved  
89 public employee(s) in instances of intentional or malicious tortious conduct. Failure to provide  
90 such reasonable cooperation on the part of a public employee shall cause the public employee to  
91 be jointly liable with the public employer, to the extent that the failure to provide reasonable  
92 cooperation prejudiced the defense of the action. Information obtained from the public employee  
93 in providing such reasonable cooperation may not be used as evidence in any disciplinary action  
94 against the employee. Final judgment in an action brought against a public employer under this  
95 chapter shall constitute a complete bar to any action by a party to such judgment against such  
96 public employer or public employee, in separate litigation by reason of the same subject matter.

97         Notwithstanding that a public employee shall not be liable for negligent or unintentional  
98 and non-malicious wrongful acts as described in the preceding paragraph, if a cause of action is  
99 improperly commenced against a public employee of the commonwealth alleging injury or loss  
100 of property or personal injury or death as the result of the negligent or wrongful act or omission  
101 of such employee, said employee may request representation by the public attorney of the  
102 commonwealth. The public attorney shall defend the public employee with respect to the cause  
103 of action at no cost to the public employee; provided, however, that the public attorney

104 determines that the public employee was acting within the scope of his office or employment at  
105 the time of the alleged loss, injury, or death, and, further, that said public employee provides  
106 reasonable cooperation to the public employer and public attorney in the defense of any action  
107 arising out of the same subject matter. If, in the opinion of the public attorney, representation of  
108 the public employee, under this paragraph would result in a conflict of interest, the public  
109 attorney shall not be required to represent the public employee. Under said circumstances, the  
110 commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the  
111 public employee in his defense of the cause of action; provided, however, that the same  
112 conditions exist which are required for representation of said employee by the public attorney  
113 under this paragraph.

114           Section 3. All civil actions brought against a public employer on a claim for damages  
115 cognizable under this chapter shall be brought in the county where the claimant resides or in the  
116 county where such public employer is situated, except that in the case of the commonwealth such  
117 civil actions shall be brought in the county where the claimant resides or in Suffolk county. The  
118 superior court shall have jurisdiction of all civil actions brought against a public employer. The  
119 district court and housing court shall have jurisdiction of actions brought against housing  
120 authorities pursuant to sections twenty-one to twenty-five, inclusive, of chapter two hundred and  
121 eighteen.

122           Section 4. A civil action shall not be instituted against a public employer on a claim for  
123 damages under this chapter unless the claimant shall have first presented his claim in writing to  
124 the executive officer of such public employer within two years after the date upon which the  
125 cause of action arose, and such claim shall have been finally denied by such executive officer in  
126 writing and sent by certified or registered mail, or as otherwise provided by this section;

127 provided, however, that a civil action against a public employer which relates to the sexual abuse  
128 of a minor, as provided in section 4C of chapter 260, shall be governed by section 4C1/2 of said  
129 chapter 260 and shall not require presentment of such claim pursuant to this section. The failure  
130 of the executive officer to deny such claim in writing within six months after the date upon  
131 which it is presented, or the failure to reach final arbitration, settlement or compromise of such  
132 claim according to the provisions of section five, shall be deemed a final denial of such claim.  
133 No civil action shall be brought more than three years after the date upon which such cause of  
134 action accrued; provided, however, that an action which relates to the sexual abuse of a minor, as  
135 defined in said section 4C of said chapter 260, shall be governed by said section 4C1/2 of said  
136 chapter 260. Disposition of any claim by the executive officer of a public employer shall not be  
137 competent evidence of liability or amount of damages.

138         Notwithstanding the provisions of the preceding paragraph, in the case of a city or town,  
139 presentment of a claim pursuant to this section shall be deemed sufficient if presented to any of  
140 the following: mayor, city manager, town manager, corporation counsel, city solicitor, town  
141 counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the  
142 board of selectmen; provided, however, that in the case of the commonwealth, or any  
143 department, office, commission, committee, council, board, division, bureau, institution, agency  
144 or authority thereof, presentment of a claim pursuant to this section shall be deemed sufficient if  
145 presented to the attorney general.

146         The provisions of this section shall not apply to such claims as may be asserted by third-  
147 party complaint, cross claim, or counter-claim, or to small claims brought against housing  
148 authorities pursuant to sections twenty-one to twenty-five, inclusive, of chapter two hundred and

149 eighteen; provided however, that no small claim shall be brought against a housing authority  
150 more than three years after the date upon which the cause of action arose.

151         Section 5. The executive officer of a public employer may arbitrate, compromise or  
152 settle any claim for damages under this chapter; provided, that any award, compromise or  
153 settlement in excess of two thousand five hundred dollars shall be made only with the prior  
154 approval of the public attorney for such public employer; provided further, however, that in any  
155 case where the public employer is the commonwealth, any award, compromise or settlement in  
156 excess of twenty thousand dollars shall be made only with the prior approval of the secretary of  
157 administration and finance. The executive officer shall not arbitrate, compromise or settle any  
158 such claim before it has been presented to him in writing or after six months have passed from  
159 the date upon which such claim was presented to him.

160         The acceptance by the claimant of any such award, compromise or settlement shall be in  
161 writing and shall, except when procured by fraud, be final and conclusive on the claimant, and  
162 shall constitute a complete release of any claim against the public employer or against the public  
163 employee whose negligent or wrongful act or omission gave rise to such a claim, and a complete  
164 bar to any action by the claimant against such public employer or public employee, by reason of  
165 the same subject matter.

166         Section 6. The public attorney shall defend all civil actions brought against a public  
167 employer or public employee of the commonwealth pursuant to this chapter. Service of process  
168 for such civil action shall be made upon the public attorney or, where no such public attorney has  
169 been employed for such purpose at the time service is made, service shall be made upon the  
170 executive officer of such public employer.

171           Section 7. Any award, compromise or settlement of a civil action brought under this  
172 chapter in excess of twenty thousand dollars which has been approved by a public attorney for a  
173 public employer, or, in the case where the public employer is the commonwealth, approved by  
174 the secretary of administration and finance, shall be made final only after approval of same by a  
175 judge of the superior court having jurisdiction over the action.

176           The acceptance by the claimant of any such award, compromise or settlement shall be in  
177 writing and shall, except when procured by fraud, be final and conclusive on the claimant, and  
178 shall constitute a complete release of any claim against the public employer or against the public  
179 employee whose negligent or wrongful act or omission gave rise to such claim, and a complete  
180 bar to any action by the claimant against such public employer or public employee, by reason of  
181 the same subject matter.

182           Section 8. A public employer may procure insurance for payment of damages incurred  
183 pursuant to this chapter. In the event that the public employer has in place insurance coverage for  
184 damages incurred pursuant to this chapter, and the amount of coverage by the insurer exceeds the  
185 damage limitations set forth in this chapter, the amount of liability shall be capped or limited to  
186 the larger amount.

187           Section 9. Public employers shall indemnify public employees, and the commonwealth  
188 shall indemnify persons holding office under the constitution, from personal financial loss, all  
189 damages and expenses, including legal fees and costs, if any, in an amount not to exceed  
190 \$1,000,000 arising out of any claim, action, award, compromise, settlement or judgment by  
191 reason of an intentional tort, or by reason of any act or omission which constitutes a violation of  
192 the civil rights of any person under any federal or state law, if such employee or official or

193 holder of office under the constitution at the time of such intentional tort or such act or omission  
194 was acting within the scope of his official duties or employment. No such employee or official,  
195 other than a person holding office under the constitution acting within the scope of his official  
196 duties or employment, shall be indemnified under this section for violation of any such civil  
197 rights if he acted in a grossly negligent, willful or malicious manner.-but the public employer  
198 shall be directly liable to the complainant/plaintiff for any amount(s) awarded (or agreed to by  
199 settlement-as to which the public employer shall have the right of approval or disapproval) for  
200 claims based on gross negligence or willful or malicious conduct.

201 For purposes of this section, persons employed by a joint health district, regional health  
202 district or regional board of health, as defined by sections twenty-seven A and twenty-seven B of  
203 chapter one hundred and eleven, shall be considered employees of the city or town in which said  
204 incident, claim, suit, or judgment is brought pursuant to the provisions of this chapter.

205 Section 9A. If, in the event a suit is commenced against a member of the state police or  
206 an employee represented by state bargaining unit five, by reason of a claim for damages resulting  
207 from an alleged intentional tort or by reason of an alleged act or failure to act which constitutes a  
208 violation of the civil rights of any person under federal or state law, the commonwealth, at the  
209 request of the affected police officer, shall provide for the legal representation of said police  
210 officer.

211 The commonwealth shall indemnify members of the state police or an employee  
212 represented by state bargaining unit five, respectively, from all personal financial loss and  
213 expenses, including but not limited to legal fees and costs, if any, in an amount not to exceed one  
214 million dollars arising out of any claim, action, award, compromise, settlement or judgment

215 resulting from any alleged intentional tort or by reason of an alleged act or failure to act which  
216 constitutes a violation of the civil rights of any person under federal or state law; provided,  
217 however, that this section shall apply only where such alleged intentional tort or alleged act or  
218 failure to act occurred within the scope of the official duties of such police officer.

219 No member of the state police or an employee represented by state bargaining unit five  
220 shall be indemnified for any violation of federal or state law if such member or employee acted  
221 in a willful, wanton, or malicious manner.

222 Section 10. The provisions of sections one to eight shall be limited by the provisions set  
223 forth in the remainder of this Section 10:

224 (a) Any claim based upon an act or omission of a public employee when such employee  
225 is exercising due care in the execution of any statute or any regulation of a public employer, or  
226 any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law  
227 is valid;

228 (b) Neither public employers nor their employee shall be liable for most claims based  
229 upon the exercise or performance or the failure to exercise or perform a discretionary function or  
230 duty on the part of a public employer or public employee, acting within the scope of his office or  
231 employment. The exception shall be that claims based on Abuse of Discretion shall be decided  
232 on their merits.

233 (c) Public employers shall presumptively be jointly and severally liable with the involved  
234 public employee in claims arising out of intentional tort, including assault, battery, false  
235 imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of  
236 process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with

237 advantageous relations or interference with contractual relations, and willful or malicious  
238 tortious conduct.

239           Public employers may avoid liability in such instances by demonstrating, by clear and  
240 convincing evidence, which neither the adequate training, nor adequate supervision, nor adequate  
241 internal controls, would likely have resulted in the tort(s) not occurring. Decisions on the merits  
242 of such defense(s) shall be viewed as issues of fact and decided by the trier or triers of fact.

243           (d) Neither public employers nor their employee shall be liable for damaged based on any  
244 claim arising in respect of the assessment or collection of any tax, or the lawful detention of any  
245 goods or merchandise by any law enforcement officer;

246           (e) Neither public employers nor their employee shall be liable for damages based on any  
247 claim based upon individual decisions made as to the issuance, denial, suspension or revocation  
248 or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval,  
249 order or similar authorization; Conduct which is determined to be repetitive and having the likely  
250 effect of undermining a system of licensure or similar control shall be actionable.

251           (f) Neither public employers nor their shall be liable for damages based on any claim  
252 based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real  
253 or personal, to determine whether the property complies with or violates any law, regulation,  
254 ordinance or code, or contains a hazard to health or safety, except as otherwise provided in  
255 clause (1) of subparagraph (j).

256           (g) Neither public employers nor their shall be liable for damages based on any claim  
257 based upon the failure to establish a fire department or a particular fire protection service, or if  
258 fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any

259 acts or omissions in the suppression or containment of a fire, but not including claims based  
260 upon the negligent operation of motor vehicles or as otherwise provided in clause (1) of  
261 subparagraph (j).

262 (h) Neither public employers nor their shall be liable for damages based on any claim  
263 based upon the failure to establish a police department or a particular police protection service,  
264 or if police protection is provided, for failure to provide adequate police protection, prevent the  
265 commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or  
266 suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the  
267 negligent operation of motor vehicles, negligent protection, supervision or care of persons in  
268 custody, or as otherwise provided in clause (1) of subparagraph (j).

269 (i) Neither public employers nor their shall be liable for damages based on any claim  
270 based upon the release, parole, furlough or escape of any person, including but not limited to a  
271 prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or  
272 employer or their agents, unless gross negligence is shown in allowing such release, parole,  
273 furlough or escape.

274 (j) Neither public employers nor their shall be liable for damages based on any claim  
275 based on an act or failure to act to prevent or diminish the harmful consequences of a condition  
276 or situation, including the violent or tortious conduct of a third person, which is not originally  
277 caused by the public employer or any other person acting on behalf of the public employer. This  
278 exclusion shall not apply to:

279 (1) any claim based upon explicit and specific assurances of safety or assistance, beyond  
280 general representations that investigation or assistance will be or has been undertaken, made to

281 the direct victim or a member of his family or household by a public employee, provided that the  
282 injury resulted in part from reliance on those assurances. A permit, certificate or report of  
283 findings of an investigation or inspection shall not constitute such assurances of safety or  
284 assistance; and

285 (2) Any claim based upon the intervention of a public employee which causes injury to  
286 the victim or places the victim in a worse position than he was in before the intervention; and

287 (3) Any claim based on negligent maintenance of public property; (4) any claim by or on  
288 behalf of a patient for negligent medical or other therapeutic treatment received by the patient  
289 from a public employee.

290 Nothing in this section shall be construed to modify or repeal the applicability of any  
291 existing statute that limits, controls or affects the liability of public employers or entities

292 Section 11. If the judgment in any action brought under this chapter is in favor of the  
293 public employer, judgment for costs and execution thereon may issue in favor of the public  
294 employer, if the court finds the action brought by the claimant to have been frivolous or in bad  
295 faith, and final judgment on the action shall be a bar to any other or further action being brought  
296 on the same claim or subject matter.

297 Section 12. Claims against the commonwealth, except as otherwise expressly provided in  
298 this chapter or by any general or special provision of law, may be enforced in the superior court.

299 Section 13. Any city or town which accepted section one hundred I of chapter forty-one  
300 on or before July twentieth, nineteen hundred and seventy-eight, and any other city which  
301 accepts this section according to its charter, and any town which accepts this section in the

302 manner hereinafter provided in this section shall indemnify and save harmless municipal  
303 officers, elected or appointed from personal financial loss and expense including reasonable legal  
304 fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim,  
305 demand, suit or judgment by reason of any act or omission, except an intentional violation of  
306 civil rights of any person, if the official at the time of such act or omission was acting within the  
307 scope of his official duties or employment.

308         This act shall be submitted for acceptance to the voters of each town at an annual town  
309 meeting in the form of the following question which shall be placed on the official ballot to be  
310 used for the election of town officers at said meeting:?"Shall the town vote to accept the  
311 provisions of section thirteen of chapter two hundred and fifty-eight of the General Laws which  
312 provides that the town shall indemnify and save harmless municipal officers, elected or  
313 appointed, from personal financial loss and expense including reasonable legal fees and costs, if  
314 any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or  
315 judgment by reason of any act or omission except an intentional violation of civil rights of any  
316 person under any law, if the official at the time of such act or omission was acting within the  
317 scope of his official duties or employment?" If a majority of the votes in answer to said question  
318 is in the affirmative, said provisions shall thereupon take full effect, but not otherwise.

319         Section 14. For the purpose of satisfying liens for past due child support, securing  
320 repayment of public assistance benefits, and past taxes, a public employer shall comply with  
321 sections 24D, 24E, and 24F of chapter 175 and any regulations promulgated thereunder in the  
322 same manner as if it were a company authorized to issue policies of insurance pursuant to said  
323 chapter 175.

324           Section 15. Punitive Damages. In instances of gross negligence, abuse of discretion,  
325 intentional torts, or malicious or willful misconduct punitive damages, not to exceed 100% of the  
326 actual damages may be considered and awarded if reasonable.

327           Section 16. Consequences of failure of the public employer to make good faith efforts to  
328 settle. If the complainant/plaintiff under this statute prevails, to the extent of being awarded at  
329 least 50% of the damages claimed and, prior to the commencement of the trial the public  
330 employer never made a settlement offer in an amount equal to, or greater than the amount  
331 awarded- the complainant/plaintiff shall be entitled to a full pre-judgment interest, at an annual  
332 rate of 10% (compounded annually), from the date or dates of the tortious conduct until the date  
333 at which full payment of the award is made; and the complainant/plaintiff shall be awarded all  
334 reasonable costs incurred in successfully advancing his or her case, including but not limited to,  
335 all reasonable legal fees.