FALL 2004

A NEWSLETTER FROM THE LAW OFFICES
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MJ notes

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TRIAL LAWYERS

Consumers may be signing away their rights

By Chris Olson

Increasingly, lenders, finance companies, credit card companies, and other business entities that deal with individuals in ordinary consumer transactions are inserting mandatory arbitration clauses in their contracts and application forms. These arbitration clauses threaten to deprive consumers of legal options that have previously been used to prevent unfair and abusive business practices. Arbitration clauses are often buried in the fine print of paperwork provided to consumers. Many consumers do not realize that they have signed an arbitration agreement when they enter into a simple transaction with a company, such as filling out a credit card application. Many more consumers do not realize what it would mean to their ability to enforce their rights if they are forced into arbitration.

Arbitration is an example of what is known as alternative dispute resolution. Arbitration is different from litigation in the court system in many respects. The most notable distinction is arbitrated disputes are not decided by juries. In most civil lawsuits, a jury of one's peers will determine the outcome if the case proceeds to trial. With arbitration, there are no juries, only an arbitrator or arbitration panel to determine the outcome. Another difference concerns the opportunity to participate in discovery to learn about the other side's contentions and evidence. In an ordinary lawsuit, the attorneys will use discovery procedures to find out what parties and witnesses may testify to at trial and to learn about the basis of a party's claims or defenses. With arbitration, there is often little or no chance to conduct fact-finding discovery. In many instances, there is no discovery and not even a hearing. The arbitrator may decide the dispute based upon written submissions of the attorneys without even hearing any witness testimony.

Additionally, with arbitration, the parties must pay the arbitrators' fees, administrative fees of the arbitration association, and the fees of their lawyers. Arbitrators' fees can be more than $200 per hour. Since arbitration clauses often deny consumers the right to join class actions, consumers with small claims lose their only realistic chance of pursuing those claims.

Business entities should not be permitted to include mandatory arbitration clauses in ordinary consumer transactions. Since most consumers' claims are often for less money than it would cost to pursue those claims in arbitration, many consumers are forced simply to write off those losses. Those losses, while relatively small for each consumer, can add up to huge additional, but unearned and unjustified, profits for the business entities committing unfair practices. The high costs of arbitration, the limitations on discovery, and the prohibition of class actions make mandatory arbitration clauses in ordinary consumer transactions unfair.

Arbitration was not meant to replace the court system and the right of parties to have disputes decided by a judge or a jury. Arbitration was not intended for disputes arising from ordinary consumer transactions involving parties with unequal bargaining power. When Congress passed the Federal Arbitration Act in 1925, it was intended that arbitrations would take place between companies with relatively equal bargaining power and financial resources. Nowadays, companies are including arbitration clauses in ordinary contracts, loan documents, and application forms their customers sign. The arbitration clauses that many companies are including in the paperwork often work to deny those customers the right to challenge the companies' business practices.

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The Domino Effect—Is Your State Next?

By Julia Dixon

Some people believe that the workers' compensation system was designed to protect workers, but in reality, the system was created in the early 1900s to shield businesses from lawsuits. Ohio enacted one of the first systems, which was negotiated by Samuel Prescott Bush, the great-grandfather of President George W. Bush. Injured workers are still under attack by big business that now supports workers' compensation reform aimed at limiting workers' rights.

States such as Florida, California, and Tennessee have passed laws that diminish the rights of workers. Lawmakers in Texas, Maryland, and Wisconsin, who are now pondering harmful reforms of their own, cite Florida and California as models. Such reforms reduce benefits paid to injured workers and limit their access to quality legal representation.

States under attack have much in common. First, the targeted states pay some of the highest maximum weekly benefits according to a Texas Department of Insurance research group. Maryland, Wisconsin, Florida, California and Tennessee are ranked in the top-25 for benefits paid, with North Carolina ranked 15th. Second, proponents of reform are predominantly Republicans. In every state under attack except Tennessee, Republicans control both branches of the state legislature and/or the governor's office.

Two groups pushing reform that would harm injured workers are the National Council on Compensation Insurance (NCCI) and the Workers' Compensation Research Institute (WCRI). Not surprisingly, insurance companies employ almost 75 percent of WCRI's Board of Directors. These groups are making their presence known in targeted states.

Both the NCCI and WCRI have been known to provide biased information to lawmakers. According to the AFL-CIO, in 2003 an NCCI spokesperson provided erroneous information about the life expectancy of coal miners to the state of Virginia in support of a request for a 56 percent rate increase for workers' compensation insurance premiums. The misinformation was discovered and Virginia reduced NCCI's rate hike request. The same NCCI spokesperson supported by an expert for WCRI, along with the insurance industry, pressured the state of Tennessee to cut permanent disability benefits to injured workers. The two groups claimed that a reduction in benefits would lead to reduced premiums and even implied that high premiums were to blame for the loss of 77,000 manufacturing jobs in the state. According to the AFL-CIO, WCRI is now focused on reform in Texas, Maryland and Wisconsin where it cites a flawed study that suggests workers who are assigned doctors by insurance companies are "more satisfied" with treatment than workers who select their own doctors.

No harmful reform bills were enacted during the last legislative sessions in North Carolina and Georgia, but there is concern that southern states will soon be targets for reform. WCRI has been analyzing and writing about North Carolina compensation laws since 1994, which is typically the first step in its reform efforts. The North Carolina Academy of Trial Lawyers, the Georgia Trial Lawyers Association, the Workplace Injury Litigation Group, and labor organizations are fighting to protect the rights of injured workers, but they have limited resources to perform research studies, educate legislators and counterbalance manipulated information provided by NCCI and WCRI. The best way to prevent harmful reform is to vote for individuals who are pro-labor. Educate yourself on candidates in your district and vote accordingly.

The truth, the whole truth and nothing but the truth

Lies about lawyers and the justice system exposed

By Elizabeth Todd

"The history of our race, and each individual's experience, are sown thick with evidence that a truth is not hard to kill and that a lie told well is immortal." Mark Twain, *Advice to Youth.*

One lie being "told well" in the current political campaigns involves "frivolous lawsuits," and the idea that the justice system cannot rid itself of bad lawsuits. The premise is fundamentally untrue.

Our court system provides many opportunities to dismiss cases having no merit. For example, if an attorney files a case like the infamous lawsuits against the fast-food industry, which blamed companies like McDonald's for making children and adults obese, the very first thing a lawyer for the restaurants can do is file a motion to dismiss the lawsuit. The lawyer may then ask a judge to consider the lawsuit and whether the client has any hope of recovering a verdict from a jury.

If a judge were to hear the restaurant's motion to dismiss the lawsuit and decide that the case has no merit (as the judge actually did in the fast-food case), he or she will dismiss the case entirely. Unless the judge gives permission, the lawsuit may not be refiled, and the case is over – forever.

During the course of the litigation, the defense lawyer may also file a "motion for summary judgment," which means a judge hears arguments from both sides and decides, again, whether there is any merit to the plaintiff's case. If the judge rules against the plaintiff on this motion, it is as though a jury had decided the issue. The case, or parts of the case, is dismissed. Finally, although rare, a judge may dismiss a case on his or her own initiative where the case is obviously contrary to the interests of justice.

The truth is anyone may file a lawsuit against anyone else for any (or no) reason. That is the price of a free society. The justice system is well-qualified and well-armed to deal with such lawsuits without the interference of the other branches of government, especially those ruled by politicians who receive vast sums of money from corporations like insurance companies.

The Fight Between Doctors, Lawyers and Insurance Companies

Why You Should Care

by Katie Bricio

By now, you are probably tired of hearing politicians talk about "tort reform" and the "medical malpractice insurance crisis." You have probably heard doctors and lawyers tell their different sides of the story so much that it is beginning to sound like whining.

But the proposals growing out of this debate tamper with nothing less than one of the most fundamental American rights. If we don't pay attention, this right will be taken away from American individuals in favor of — not doctors — but insurance companies.

It was insurance companies that raised doctors' malpractice insurance rates. And it is those rising rates that are making some doctors move from state to state or change the type of medicine they practice. The insurance companies have conveniently blamed lawsuits for the rising rates — without addressing their investment losses or their CEOs' salaries. They have called for "tort reform" to limit lawsuits in order to bring the rates down. But in states that have already enacted "tort reform" proposals, the insurance companies have not lowered their rates. Shouldn't we be taking a harder look at the profit motive that really drives insurance rates rather than altering an age-old American right?

"...a $250,000 cap would be great for insurance companies. They would have no motivation to encourage hospitals to be safer."

The right that is in jeopardy in the "tort reform" debate is an American's right to have a jury determine the value of his losses if he is injured. Whether a person is injured by his neighbor's dog, by a tractor-trailer, or by a doctor, his recourse is the same — tell it to a jury. The insurance companies would have you believe that lawyers are making numbers up out of the blue to value a victim's losses. But actually, it is a jury that decides that value. All a lawyer can do is help the victim tell his story to that jury. The insurance company has a lawyer (often several lawyers) in the same courtroom helping the dog-owner, the tractor-trailer driver, or the doctor, tell their stories to the jury.

Now, it is certainly a hard job the jury has before them. How do you value the life of a little girl misdiagnosed and dead at age 4? How do you tell her parents how much her life was worth? How do you value the ability of a child to walk? Whatever amount you give that child's mother, I promise you she would give every penny back if she could have her child's health instead. While it may be hard for a jury to put a dollar value on these things, isn't that a better system than having a politician arbitrarily value all such injuries at $250,000? What if it were your child?

A $250,000 cap would be great for insurance companies. They would have no motivation to encourage hospitals to be safer. And what would be next? Why should doctors be carved out as the one group whose victims don't get a jury to value their losses? What about drug companies or power plants? No need to make them safe if insurance companies can limit the jury's ability to punish.

There are many ways to get doctors' insurance rates under control that will not limit the American jury tradition (for example, reduce the number of medical mistakes, monitor insurance companies' investments, etc.). The battle between doctors and lawyers and insurance companies is not just about money. It is about the lives of the victims of medical errors.

Editorial Comment
from John Alan Jones

If you're reading this newsletter, you are likely a current or former client of Martin & Jones. Martin & Jones is a law firm that represents people in claims against insurance companies and major corporations. We are trial lawyers. You should ask yourself why public officials and candidates for office would attack lawyers who represent real people in cases against insurance companies and corporations. Sadly, there is a national effort underway to dramatically limit the rights of our clients. When you hear political candidates talk about "tort reform" and "greedy trial lawyers," you can be sure of two things — these candidates are being funded by the insurance industry and the real targets of these attacks are our clients.

When you hear elected officials and candidates talk about "tort reform," they are really talking about limiting the access of real people to the court system. These insurance companies and the politicians they have bought do not want to make it easier, cheaper, or quicker for someone who has been injured to be fairly compensated. No, their idea of "tort reform" simply means that they want to make it more difficult for real people to be treated fairly.

We cannot tell you how to vote, but we do ask that you consider this critical issue in deciding whether to support a candidate for office. Most of us go through life without being the victim of negligence, but bad things do happen to good people.

Hundreds of thousands of people have been crippled or killed by asbestos. This poison was sold by major corporations for profit long after they knew that it was deadly. Profits drove these corporations to sell this poison, and they quit selling asbestos only when juries began to compensate the victims of asbestos. Martin & Jones has been privileged to represent hundreds of these victims and their surviving family members, but so called "tort reformers" would deny the victims of asbestos disease their day in court.

Tens of thousands of young women were seriously injured or rendered infertile by a medical device known as the Dalkon Shield. The manufacturer knew that this device was dangerous, but continued to sell it for profit. That company stopped selling this product because juries began to compensate the victims. Martin & Jones has been privileged to represent hundreds of these women, but so-called "tort reformers" would have denied them a trial by jury.

There really are "bad doctors" out there. One gastroenterologist in eastern North Carolina was responsible for several deaths and numerous serious injuries to his patients. Many were injured during unnecessary procedures. Martin & Jones was privileged to represent seven people whose lives had been ruined by this doctor. He eventually fled North Carolina when it became apparent that he would have to face juries who would be told of his mistakes and misdeeds. So-called "tort reformers" would dramatically limit the right of victims of medical negligence to have their cases heard by juries.

Before deciding whom you will vote for, please consider the position of the candidates on the issue of "tort reform" or "liability reform." Please consider voting for the politicians who stand up for real people and support our jury system. Remember that someone who supports "tort reform" or "liability reform" wants to take away your right to have your case decided by real people and wants to give even more power to the insurance companies and the politicians that the insurance companies have bought and paid for.

Make your vote count

Martin & Jones has been protecting the rights of injured people and their families for more than 20 years. Our attorneys and staff believe in individual rights. All people everywhere should have equal access to the courts, to a trial by jury, whether or not they can afford it. Otherwise, we would have no rights, and only those with large wallets would be protected by the judicial system designed to protect us all.

It seems today that many of our rights are under attack from many directions. It is as critical now as ever to be aware of how and by who those attacks are being made. Let your voice be heard. Protect your rights. If you are not already a registered voter, there's still time. The deadline to register in many states, such as North Carolina and Georgia is October 8, though residents of certain states may have longer. Most states allow you to register by mail. Contact your state's election office, or check with your local library, post office, or Department of Motor Vehicles, who may be able to help you register to vote.

These materials have been prepared by Martin & Jones for informational purposes only and are not to be considered legal advice.

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