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A Voice

AGAINST TORT “REFORM”

Joanne Doroshov, founder and executive director of the Center for Justice & Democracy and an adjunct professor at New York Law School, has spent most of her career as a civil justice advocate.



Joanne Doroshow at New York Law School, where she teaches a Civil Justice and National Advocacy course.

Doroshow talked to *Trial* about why she is committed to standing up for people's access to the courts and what we can accomplish by banding together.

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How did you become involved in advocating for the civil justice system?

It dates back to when I graduated from law school and was living in Harrisburg, Pa. A few months earlier, the Three Mile Island nuclear plant, located just south of the city, had a partial meltdown. I ended up taking over the litigation

political topics, and I understood legal contracts. All those skills were completely transferable to documentary production. I had a pretty successful documentary film career—I produced “The Panama Deception” in 1992 and it won an Oscar—and then I ended up doing some television with Michael Moore, who was a friend of mine. We

had worked in Ralph’s office together, and then he became a successful documentary filmmaker in his own right.

I produced for about seven years, until I decided to change gears. I went back to Washington and did a nine-month stint as Public Citizen’s civil justice lobbyist. It became obvious that having a national consumer rights

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against restarting the plant. That litigation lasted about five years, and I learned—much to my dismay—that corporations had a lot of power over administrative agencies and, ultimately, the courts. During that period, I got to know Ralph Nader and his staff. In 1986, I started working in Ralph’s office in Washington, D.C. Together, we fought what became known as tort reform and developed some of the first education materials in the country to advocate against it.

What led you to create the Center for Justice & Democracy?

After working in Ralph’s office for a few years, I decided to take a break from Washington. I moved to Los Angeles and ended up producing a political documentary film. I knew nothing about film, but I understood media, I knew how to fundraise, I could research



organization dedicated to fighting tort reform on a nationwide basis—with an identity separate and independent from any specific profession—was essential to any lobbying effort. So in 1998, I created such an organization. At the time it had a different name, but it became the Center for Justice & Democracy (CJ&D). It was the first and, I think, still is the only national consumer organization with the exclusive mission to halt and reverse tort reform.

You also cofounded Americans for Insurance Reform. What does it do?

Americans for Insurance Reform (AIR) is a project of CJ&D that came about in 2002, when the country was experiencing very high insurance rates. Historically, these are periods when the civil justice system is very vulnerable to attacks, because proponents of tort restrictions argue that the only way to bring down rates is to take away people's right to go to court.

So myself and Bob Hunter—the director of insurance at the Consumer Federation of America who is a brilliant, longtime consumer advocate—decided that we needed a coalition separate from our organizations, focused on supporting efforts to reform the property casualty insurance industry and to control the skyrocketing insurance rates in the country at that time. We formed AIR, which is now a coalition of about 100 organizations around the country.

What efforts has CJ&D undertaken to hold corporations accountable and protect the Seventh Amendment?

Judges and juries need to be left alone to do their jobs. Politicians and lawmakers need to stay out of the process as much as possible. It is our job to make sure things don't change through legislation. It's often hard to quantify our success, because it is measured largely

by how little changes. But whatever we do, we always work in coalitions with others, and we know that we have prevented some very bad federal laws from passing. Medical negligence is one area. In the early 2000s, when insurance rates were really hitting doctors, there was enormous pressure from President Bush and Republicans in Congress to enact federal tort limits, including severe caps on noneconomic damages and other limits.

At the beginning of that fight, we brought patients and their families from all around the country to the Hill. We helped them lobby, and they did a lot of media. Ultimately, working with many others, including the American Association for Justice, we were able to stop bills that kept being introduced in Congress. We were successful there. The patients were very effective advocates. These were people who had already litigated their cases—they weren't going to benefit from or be hurt at all by any change in the law, but they were very committed to ensuring that other people would be properly compensated for their injuries.

You mentioned medical negligence cases. You've written that caps on noneconomic damages in these types of cases disproportionately harm certain groups. How so?

Noneconomic damages are for injuries such as disfigurement, permanent disability, blindness, trauma, damage to someone's reproductive system—they are quality-of-life injuries. There's a discriminatory effect because the other kind of damages people receive are economic, such as lost wages, and you're going to disproportionately harm people who have relatively smaller wage losses: children, the elderly, women who work inside the home, and people with low incomes.

Proponents of damages caps often argue that they lower insurance premiums, but that hasn't materialized. What have studies shown about the effects of caps on insurance costs?

We're very lucky to work with Bob Hunter on AIR studies—he's an actuary with enormous credibility and the expertise to evaluate insurance data that most of us can't properly analyze. He and I have been examining data for a long time to see what has happened in states that have capped damages or enacted other kinds of tort restrictions.

Our studies all come to the same conclusion: When a state caps damages or enacts other tort reform, there's absolutely no impact on insurance rates. There's no correlation whatsoever between the laws in that state and the rate changes that take place.

In fact, our last study looked at medical malpractice limits enacted between 2002 and 2006, when rates were increasing. States that enacted any kind of tort reform in that period saw, on average, a 23 percent decrease in rates. But states that did nothing saw an even larger drop—29 percent. And if you're just looking at caps, states that enacted or lowered their caps saw rates drop 22 percent, but states that did not do that saw rates drop 29 percent. So it's certainly not true that controlling insurance rates is a reason to take away patients' rights. And rates have gone down everywhere since 2006.

What upcoming battles do you see for attorneys handling medical negligence cases?

Federally, we are very concerned about both H.R. 1215—a stand-alone medical malpractice bill—and Affordable Care Act (ACA) replacement bills, some of which contain medical malpractice tort limits. We have been very successful so far in keeping stand-alone medical

malpractice bills from passing, but we are now in a new fight over H.R. 1215. And we have yet to see what will happen on ACA replacement. States are still dealing with this issue as well, even though insurance rates for doctors are very low right now.

A common kind of proposal you see now—in states and federally—has to do with taking cases out of the court system altogether so that instead of neutral judges deciding cases, the

would apply to a broad range of health care lawsuits, including nursing homes and assisted living facilities.

Fighting against forced arbitration is one area that has made progress in the last few years. Given the current political climate, do you expect that to change?

When we worked on “Hot Coffee” [a documentary about the effect of tort reform on the civil justice system] in

there’s obviously going to be a big fight, and hopefully there will be other ways to help restore rights in some way.

Another big wild card here is the U.S. Supreme Court. The decisions that have upheld forced arbitration clauses have been close. If eventually we can flip the court so that it looks out for everyday people instead of corporations—which, unfortunately, seems to be where it has been lately—there may be even more hope in trying to outlaw these clauses. But that might take many years.

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decision-makers come from the medical or insurance industry. These alternative proposals are all about tilting the legal playing field against patients. We’re seeing proposals like this in some federal ACA replacement bills.

You mentioned H.R. 1215, dubbed the “Protecting Access to Care Act.” How harmful would this bill be to people across the country if it ultimately becomes law?

This bill would impose a federal \$250,000 noneconomic damages cap on any state that currently does not have a cap, and the cap applies to more types of claims than certain state caps. Among other things, it would impose a restrictive federal statute of limitations, repeal joint liability for economic and noneconomic loss, cap attorney fees, and ban health care providers from being brought into products liability cases involving unsafe drugs or devices. It

2011, very few people were aware that forced arbitration clauses were ending up in everything they were signing—or not even signing—including cellphone contracts and websites’ terms of use.

There’s been a lot more publicity about this in recent years. *The New York Times* did a huge series about it, and more outlets are covering it. The issue drew even more attention when news anchor Gretchen Carlson brought her sexual harassment suit against Fox, and it turned out there was an arbitration clause in her contract, which she fought.

So on one hand, there’s been good progress in raising awareness about the issue. On the other hand, the progress that federal agencies have made in this area really is at risk right now under the new Congress and new administration. There is concern that whatever progress was made to prohibit forced arbitration clauses or class action waivers will be undone. If Congress tries to do that,

Over the next few years, where should attorneys focus their efforts to protect their clients’ rights?

The most important thing is for attorneys to support AAJ and their local trial lawyers associations (TLAs). AAJ is very critical at the federal level, as are all the consumer groups and the public interest groups that work on these issues. TLAs are often the only lobbying power that exists to protect consumers and fight corporations in their states. There aren’t very many of us, and I think it’s safe to say we all need to support each other.

What lessons have you learned from your work as an advocate for public safety?

A small group of really smart, committed people can accomplish an enormous amount, especially when you have truth on your side, and even if you don’t have much money. We are up against some of the largest lobbying groups in the country—the largest being the Chamber of Commerce. And they have an enormous amount of money to do it. But they have not gotten nearly as far, either at the state or federal level, as they might have if we and others had not been there. That speaks to how effective a small group of people can be at fighting these powers. We’re not many, but we’re all important in the fight. 