Stephen Brobeck and Robert N. Mayer, Editors

WATCHDOGS AND WHISTLEBLOWERS

A REFERENCE GUIDE TO CONSUMER ACTIVISM

TORT-RELATED CONSUMER ADVOCACY

For almost forty years, insurance companies, manufacturers of potentially dangerous products and chemicals, the tobacco industry, medical lobbies, and other special interests have been engaged in a nationwide campaign to block injured consumers' access to the civil justice system. This movement to restrict the ability of injured consumers to obtain compensation from the companies causing their injuries is commonly known as "tort reform." During this entire period, consumer advocates have fought back to preserve and improve consumers' access to the civil justice system, to increase the accountability of large institutions through the civil justice system, and to support the civil jury system. They have maintained that a weak civil justice system does not protect consumers, especially the most vulnerable, and that a strong system provides large corporations and other institutions with economic incentives to make their products and practices safer.

Before the mid-1970s, consumer rights organizations focused little time or energy on the tort system. Until then, having evolved through the courts for centuries, the common law of torts had generally operated, without much political interference, to afford citizens a means to challenge injustice and negligence. But in the mid-1970s, a liability insurance crisis occurred in which insurance rates for physicians and some businesses started to escalate. Insurers blamed these price hikes on a "litigation explosion." They demanded large rate hikes from state regulators and convinced many lawmakers that the best way to limit these increases was to restrict the legal rights of injured victims through "tort reform." During this period, insurers learned that state regulators would allow rate increases and

that state lawmakers would limit the rights of "victims." California, for example, enacted the Medical Injury Compensation Reform Act, which, among other measures, placed a $250,000 cap on non-economic damages for malpractice victims.

After insurers stopped insuring some medical and product manufacturer lines, President Gerald Ford decided to review the situation. He asked an inter-agency working group, which included Federal Insurance Administrator J. Robert Hunter, to examine the insurance crisis and learn whether rising medical malpractice claims were causing the large increases in malpractice coverage rates. When the working group could not find data to answer this question, working with the National Association of Insurance Commissioners (NAIC), it undertook a closed-claim study. This study revealed that there was no "explosion" of claims, and thus no justification for the insurer actions. The group reported back to the White House that insurers had panicked and that the problem seemed related to insurer economics. The group also negotiated with the NAIC to create a new medical malpractice line of data in insurers' annual statements so that rates and losses could be more carefully monitored.

In 1978, a federal inter agency working group on product liability recommended that Congress approve legislation creating a single set of national standards related to product liability. The proposed legislation would preempt product liability laws in all fifty states and include anticonsumer provisions, such as revising strict liability to make it more difficult for injured consumers to sue manufacturers and sellers of defective products. Industry groups had already been calling for such laws, prompting sharp criticism from Ralph Nader, who claimed that no data substantiated a product liability crisis.

In 1981, the first federal product liability bill was introduced in Congress with Senator Robert Kasten (R-WI) as the lead sponsor. This bill became the major civil justice focus for the business community in Congress for many years thereafter. Though it never became law, it was re-introduced every year through the late 1990s and often came close to passage. It did finally pass Congress in 1996 but was vetoed by President Clinton. It was never seriously considered again, in part because of the effectiveness of the consumer opposition.

Insurer efforts at the state and federal levels activated the consumer movement, led by Ralph Nader. Recognizing the need to fight these insurer efforts in a knowledgeable and sustained way, in the early 1980s, Nader offered Hunter, a property-casualty insurance actuary, the opportunity to leave government and establish the nonprofit National Insurance Consumer Organization (NICO). NICO then produced a series of influential critiques of property/casualty insurance industry practices. Also in the early 1980s, three Washington, D.C.–based national consumer organizations united in opposing federal legislation: Public Citizen (Joan Claybrook, Jay Angoff), U.S. PIRG (Pamela Gilbert), and Consumers Union (Linda Lipsen). Throughout the 1980s, Public Citizen also ran a state-based grassroots organizing campaign, led by organizer Craig McDonald, against the bill. Citizen Action also assigned an organizer, Don Weiner, to mobilize its state network against the legislation.

In the early 1980s, insurers began raising rates and reducing or canceling coverage, using these actions as an excuse to start pressing again for tort reform. This "liability insurance crisis" was broader than the last one, affecting municipalities, daycare centers, nonprofit groups, some manufacturers, and nearly all commercial customers, as well as physicians. Studies by the National Association of Attorneys General and several state commissions found that this "crisis" was again self-inflicted—caused by the mismanaged underwriting practices of the industry itself. Before an industry audience, one prominent insurance leader—Maurice Greenberg, chief executive officer of American International Group—complained that the industry's problems resulted from price cuts taken "to the point of absurdity" in the early 1980s.

To the public, however, insurers told a different story. On March 19, 1986, the *Journal of Commerce* reported that the Insurance Information Institute (III) was beginning a $6.5 million nationwide advertising campaign to "change the widely held perception that there is an insurance crisis to a perception of a lawsuit crisis." Around the same time, the American Tort Reform Association (ATRA) was organized. It represented hundreds of U.S. and foreign corporations who supported overhaul of civil liberty laws at the state and national levels. Several dozen ATRA members were insurance companies or insurance-related. Also in this decade, another major tort reform group emerged at the state level—American Legislative Exchange Council (ALEC). ALEC members, which included conservative state legislators and supporting corporations, drafted and pushed model bills. Its Civil Justice Task Force focused on tort reform.

During this period, tort reform proposals typically included the following restrictions on victims' rights: caps on damages (non-economic and punitive), mandatory limits on contingency fees for plaintiff lawyers, modification or elimination of joint and several liability, restrictions on lump sum payments, repeal of the collateral source rule, and relaxed liability standards. Insurers had some success promoting these proposals. During the 1985–1988 legislative sessions, nearly every state passed some sort of tort reform legislation, and a few states enacted across-the-board tort law changes.

However, consumer advocates and attorneys did win a few battles. In 1988, for example, a Florida ballot initiative to cap damages was voted down. More significantly, in the same year, largely in response to rising auto insurance rates, California voters passed Proposition 103. This initiative included a mandatory 20 percent rate rollback and required future rate increases to be approved by an elected insurance commissioner after public hearings. The effort to pass this initiative was spearheaded by Ralph Nader and his colleague in California, Harvey Rosenfield, who formed a new consumer organization dedicated to the passage of the proposition. Since then, this organization—now named Consumer Watchdog—has been one of California's leading consumer groups.

During the 1990s, liability insurance rates changed little and availability of coverage improved, undermining the tort reform movement's principal justification for state tort reform—spiking insurance rates. To keep the federal product liability bill alive, tort reform leaders changed their main rationale for legislation, now arguing

that tort reform was needed to keep the United States economically competitive with other nations. In 1991, the White House Council on Competitiveness, under the leadership of Vice President Dan Quayle, embraced tort reform as a priority issue and assigned then U.S. Solicitor General Kenneth Starr the task of developing a plan to overhaul the country's civil liability laws. The "Starr Report," released in 1992, presented fifty recommendations for tort reform, which it said were necessary to "maintain America's competitiveness." Consumer groups argued that this was not the case. Although some of the recommended reforms were included in Newt Gingrich's "Contract with America," broad efforts to enact federal tort restrictions failed.

In the 1990s, though, Congress did enact some industry-specific tort legislation. In 1994, President Clinton signed into law the General Aviation Revitalization Act, which established an eighteen-year statute of repose for general aviation aircraft. In 1996, a Republican Congress passed a product liability bill. President Clinton vetoed it but told Congress to pass something he could sign. They did, and he did. That legislation immunized from liability most suppliers of raw materials and components used in the manufacture of medical implants. Clinton did veto the Private Securities Litigation Reform Act of 1995, which made it more difficult for defrauded investors to file lawsuits for securities fraud, but his veto was overridden, and the bill became law. In 1998, the president signed into law a second bill expanding the first one, the Securities Litigation Uniform Standards Act.

In 1998, new pro- and antitort reform groups were formed. The U.S. Chamber of Commerce created its Institute for Legal Reform to pursue the Chamber's tort reform agenda. In opposition to this agenda, Citizen Action's Dan Lambe organized a civil justice project in Texas and, soon thereafter, a separate organization called Texas Watch. Activists in other states—including Alabama, Kentucky, and Georgia—formed similar groups, though none as long-lasting or influential as Texas Watch. Since 2004, this group has been led by Alex Winslow and has focused on insurance, community safety, patient safety, and tort issues generally.

Also in 1998, Joanne Doroshow organized Citizens for Corporate Accountability & Individual Rights, which later changed it name to the Center for Justice & Democracy (CJ&D). Throughout the last half of the 1980s, Doroshow had been Nader's anti–tort reform and insurance industry staff attorney, then, for nine months, Public Citizen's civil justice lobbyist in Washington, D.C. Since 1998, CJ&D has been the only national consumer organization with an exclusive mission to halt and reverse the momentum for tort reform, especially at the state level.

By 2001, insurance rates, especially for doctors, were again rising. Medical and insurance lobbyists argued that rising tort system costs were largely responsible for these increases. Supported by President George W. Bush, a longtime advocate for tort reform, these lobbyists urged Congress to enact medical malpractice litigation limits. The U.S. Senate rejected related bills at least five times between 2003 and 2006, in part because of the efforts of consumer advocates, especially CJ&D. In January 2003, the group launched a medical rights bus tour, which along the way was joined by malpractice survivors and other consumer rights representatives. The bus, driven by longtime Pennsylvania community activist Gene Stilp, visited

a dozen states in the East, South, and Midwest. The next month, CJ&D brought some fifty families from twenty-six states to lobby, hold press conferences, and testify at a "rump" hearing before House Judiciary Committee Democrats. In January 2005, when President Bush traveled to southern Illinois to lay out his tort reform agenda, CJ&D organized a protest, including a news conference with victims who had been denied adequate access to the courts. Despite these protests, several states enacted new tort reform laws, many of which focused on limiting the rights of patients injured by medical negligence. According to the National Conference of State Legislators, by the early teens a majority of states had some kind of limit on compensation; thirty-two states had either modified or eliminated joint and several liability; and thirty states either allowed or required periodic payments. When challenged in court, some of these measures were ruled unconstitutional by state high courts. For example, the supreme courts of Florida, Missouri, Georgia, Illinois, and Wisconsin have struck down their state caps on non-economic damages. However, the Kansas Supreme Court upheld its state cap.

Recently, tort reformers have shifted their focus from traditional tort restrictions to new efforts to restrict tort lawsuits. During President George W. Bush's administration, for instance, federal agencies began inserting language into rule "preambles"—thus avoiding any notice or comment—attempting to preempt state tort law in the event a regulated product caused injury or death. Consumer groups and attorneys fought against these preemption proposals, and in May 2009, the Obama administration stopped the practice. However, several recent U.S. Supreme Court decisions—including *Riegel v. Medtronic* (2008), which dealt with certain dangerous medical devices, and *Pliva v. Mensing* (2011), which concerned generic drugs—have resulted in the preemption of several types of state tort suits. Consumer groups asked Congress and the Food and Drug Administration (FDA) to provide relief from these decisions either through statute or regulation. A Public Citizen petition to the FDA resulted in a rule that, if finally adopted, would restore liability for the generic drug industry.

In other areas, industry has proposed federal and state legislation that would invite invasion of the privacy of asbestos victims while creating delays in compensating them. At the state level, ALEC has promoted this legislation and has helped persuade several states to enact it. ALEC has also focused much attention recently on procedural reforms. For example, its two legislative tort reform priorities in New Jersey in 2013 dealt with appeal bonds and class actions.

CJ&D has continued to lead recent consumer group efforts against these and other tort reforms. During the GM and Chrysler bankruptcies, it worked with automobile crash victims to help persuade both companies to accept liability for certain future product liability claims—relief that both companies had earlier requested from the bankruptcy court. CJ&D has also organized injured patients in opposition to medical malpractice litigation limits.

In the past decade, issues related to class actions and forced arbitration have become a major focus of the business community and, consequently, consumer advocates as well. In 2005, after years of lobbying by the U.S. Chamber of Commerce, Congress passed legislation making it more difficult for consumers to win class action lawsuits against corporations that commit fraud or violations of consumer health, safety, and environmental laws. Then in 2011, in *AT&T Mobility LLC*

v. Concepcion, the U.S. Supreme Court upheld class action bans, which are found in arbitration clauses buried in many consumer and employment contracts. By forcing consumers or workers with complaints into private, corporate-controlled systems to resolve disputes, these clauses take away, or severely restrict, the right of people to a trial by jury. The Supreme Court's 2013 decision, in *American Express v. Italian Colors Restaurant*, further limited the ability of groups of individuals to file class action suits.

National and state consumer groups are united in opposition to these court decisions. Their hope is that at some point in the future, Congress will restore these lost consumer remedies.

Joanne Doroshow

See also: Consumer Watchdog; Insurance Advocacy; Litigation; National Insurance Consumer Organization; Public Citizen

Further Reading

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