

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

Soon, we'll be starting our next academic year at New York Law School and we're so excited about that! This experience has not only allowed us to work more closely with law students, but also has put us on the radar of the academic community in new, interesting ways. Already, we have been asked to participate in two important academic conferences this fall.

Meanwhile, our CJ&D work continues, uninterrupted. One of our newest projects – one about which we are particularly excited - is the "CJ&D Medal of Justice." These Medals are web plaques recognizing a special client with an inspiring story to show the heroic struggles of injury victims. Our plaques also recognize the victim's attorney and law firm.

These monthly plaques stay on our home page for the entire month, and then go into a permanent archive on our site. It's a project in which every trial lawyer should participate, to help counter the U.S. Chamber of Commerce victim-focused "lawsuit abuse" campaign.

If you would like to recognize one of your special clients, just drop us a line and let us know. And have a great summer!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: WOMEN

LIMITING NON-ECONOMIC DAMAGES

During this session of Congress, H.R. 5 - the anti-patient medical malpractice/drug/nursing home bill - passed the U.S. House of Representatives twice. It first passed after hearings and mark-ups in two committees. Then the House leadership brought the bill back to both committees – and passed it again as part of House Budget Committee Chairman Paul Ryan's budget package. Although one might not think to link H.R. 5 to the "war on women" that has gotten so much attention this election year, clearly, one should.

A key provision in H.R. 5 would establish a permanent across-the-board \$250,000 "cap" on compensation for "non-economic" injuries suffered by patients. Non-economic damages compensate for intangible but real "quality of life" injuries, like permanent disability, loss of a woman's reproductive system, disfigurement, trauma, loss of a limb or blindness.

Capping non-economic damages has a significantly adverse impact on women. In a groundbreaking 2004 law review article, University of Buffalo Law Professor Lucinda Finley examined jury verdict data and found, "certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries."

Finley explained, "The impact of these injuries – impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas of the body – is not primarily on the economic wage earning aspects of life. Rather, the impact is more in terms of emotional suffering and self-esteem – an impaired sense of self and ability to function as a whole

(continued on page 2)

WORKPLACE EQUALITY – STILL A LONG WAY TO GO

On March 24, 1978, Lois Jenson reported to work at Minnesota's Eveleth Mines. Jenson, a single mother who took the job to provide for her family, was one of the first women to work at the site. While there, she and other female employees were repeatedly subjected to lewd jokes, taunting and unwelcome physical contact from male co-workers. Male employees also stalked and threatened some of the women with assault outside the workplace.

Jenson filed a complaint with the union, supervisors and management at the plant but nothing changed. In October 1984, she filed a charge of sex discrimination with the Minnesota Department of Human Rights, which requested that Eveleth pay her \$5,000 for mental anguish and \$6,000 in punitive dam-



ages. When the company refused, Jenson went to court, fighting for fair treatment, a safe workplace and proper compensation. The case, *Jenson v. Eveleth Taconite Co.*, became the first class-action sexual harassment lawsuit in the United States. After a long, difficult battle, Jenson and 14 other women prevailed, settling the case for \$3.5 million in 1998. (Jenson was later played by Charl-

(continued on page 3)

person, or damaged relationships. These priceless aspects of life hold little economic worth in the market, so market-referenced economic loss damages are ill-suited and inadequate to compensate for them.”

For these reasons, Professor Finley explained, “juries consistently award women more in noneconomic loss damages than men,” meaning that “any cap on noneconomic loss damages will deprive women of a much greater proportion and amount of a jury award than men. Noneconomic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.”

President Bill Clinton vetoed a 1996 products liability bill based on this same conclusion, namely that limiting non-economic damages caused disproportionate harm to injured non-working women and other vulnerable members of society. “There is no reason for this kind of discrimination,” the President said in his veto message. “Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of protection stand the least chance of receiving it.”

In addition to reducing compensation to women, such caps disproportionately limit women’s access to the civil justice system, further undermining their ability to obtain compensation. This was the finding of a 2009 empirical study by American Bar Foundation Research Professors Stephen Daniels and Joanne Martin, who examined whether Texas’s \$250,000 non-economic damages cap in medical malpractice cases had closed the courthouse door to victims. Their research covered lawyers who devoted most, if not all, of their practice to plaintiffs’ work on a contingency fee basis. Under a contingency fee arrangement, lawyers front the costs of litigation

themselves, which gives low-income victims access to the courts. Lawyers only receive a fee if the case is successful. Without such a system, injured consumers could never find attorneys to fight doctors, hospitals, large corporations and entire industries.

According to Daniels and Martin, hard non-economic caps like Texas’s “are about changing the incentive structure for lawyers handling medical malpractice cases on a contingency fee basis to such a degree that lawyers will handle fewer, if any, medical malpractice cases....” Their data bore this out as the researchers “heard over and over again in our interviews” with plaintiffs’ attorneys that, because of the cap, women were among those who “are going to find it harder to find a lawyer, especially a specialist, to take their case regardless of how good the liability.”

This disproportionate impact was particularly evident from responses to the researchers’ pre- and post-cap hypotheticals. More specifically, when attorneys were asked whether they would take the med mal case of a 45-year-old employed, married male with dependents versus that of a 45-year-old non-working, married, woman with dependents – with both potential clients having suffered the same injury – before and after Texas’s 2003 non-economic damages cap, they answered as follows: Before the cap passed, around 63 percent of attorneys would take the case whether the client were male or female. After the cap passed, 36 percent would take the male case. That’s a significant enough drop. But *only 19 percent would take the female’s.*

Clearly, non-economic damages caps leave injured women with far fewer legal options than men have.

“[J]uries consistently award women more in noneconomical loss damages than men.”

RECENT ATTACKS ON WOMEN’S ACCESS TO THE CIVIL COURTS

H.R. 5

This legislation, which passed the U.S. House twice, would establish a permanent across-the-board \$250,000 “cap” on compensation for “non-economic damages” in medical malpractice cases and would limit the liability of the drug and medical device industries.

Bans on Wrongful Birth Actions

Arizona, Kansas and New Jersey are poised to join nine other states that currently shield doctors from legal accountability for failing to give pregnant women medical information about prenatal problems so they can make informed health decisions.

U.S. Senate Minority

In June 2012, a small group of U.S. Senators blocked legislation that would help women seek legal redress for wage discrimination. The Paycheck Fairness Act would, among other things, permit class action lawsuits over male-female wage disparities and allow women to seek compensatory and punitive damages for pay discrimination.

Wisconsin Gov. Scott Walker

In April 2012, the Governor signed a bill that blocks workers from collecting compensatory and punitive damages in employment discrimination suits. He also repealed a 2009 law that allowed women and others to bring pay discrimination cases in state court as opposed to the more costly federal system.

8th Circuit Court of Appeals

In February 2012, the court made it more difficult for the EEOC to bring class-action discrimination and harassment cases on behalf of women in the Midwest. According to the *Associated Press*, under the court’s new standard, re-affirmed in May, the EEOC must “identify every affected worker, investigate their claims and seek informal settlements before suing a company,” setting “a higher bar than the agency faces elsewhere.”

ize Theron in the 2005 Hollywood movie, *North Country*, based on this case.)

Legal experts agree that because of the Jenson case employers across the country instituted sexual harassment policies to protect their employees, making workplaces safer for women nationwide.

The civil justice system has remained an important tool for women who are mistreated in the workplace. Below are some recent examples.

Pay Discrimination

Lilly Ledbetter was a supervisor at Goodyear's Gadsen, Alabama plant from 1979 until her retirement in 1998. When she discovered she had been paid significantly less than her male counterparts for the very same work, she filed a lawsuit and was awarded more than \$3 million by a jury. After the U.S. Supreme Court overturned the decision, ruling that Ledbetter had waited too long to file her case, Congress passed equal-pay legislation that



restarted the statute of limitations with each discriminatory paycheck. Ledbetter's lawsuit was the catalyst for this measure. The Lilly Ledbetter Fair Pay Act was the first bill President Obama signed into law. "Goodyear will never have to pay me what it cheated me out of," Ledbetter said after the signing ceremony. "In fact, I will never see a cent. But with the president's signature today I have an even richer reward."

Pregnancy Discrimination

Despite the fact that federal law bars employers from discriminating based on pregnancy or childbirth, pregnant women continue to face unfair treatment at work or in hiring. Many have turned to the EEOC and its civil litigation powers for help. As EEOC general counsel David Lopez stated in a February 2012 agency hearing, "Over the past 10 fiscal years, the EEOC has filed 268 lawsuits alleging pregnancy discrimination, resolved 216 lawsuits, and obtained more than 42 million dollars in monetary benefits for victims of discrimination" as well as non-monetary relief, "such as changes to the policies, training to ensure that discrimination does not recur." According to Lopez, of those 268 pregnancy discrimination lawsuits, approximately 75 percent alleged wrongful firing and 10 percent claimed unlawful failure to hire. "At the core, all of these cases involve employers who held stereotypical

assumptions about pregnant women or caregivers," stated Lopez.

Systemic Discrimination

In 2001, Betty Dukes, along with five other female Wal-Mart employees, filed a lawsuit alleging that the retail giant routinely favored men over women in pay and promotions. For ten years, they sought to bring the case as a class action on behalf of more than 1.5 million women who suffered similar discrimination at Wal-Mart. Though the U.S. Supreme Court ultimately denied class certification, Dukes and her co-workers have not backed down. In October 2011, they filed a new class-action bias case on behalf of over 90,000 women who claim pay and job promotion discrimination at Wal-Mart and Sam's Club stores in four regions in California and neighboring states. As Dukes told Congress in the wake of the Supreme Court's decision, "We will press on with our case against Wal-Mart for ourselves and for the women who have worked there and continue to work there, despite the roadblocks that the Supreme Court has erected. Our fight is not over." The lawsuit is pending. A similar class action has been brought in Texas on behalf of more than 50,000 current and former women employees of Wal-Mart's Texas retail and Sam's Club stores. Additional class actions are expected to be filed in other states this year.

DRUGS AND MEDICAL DEVICES THAT KILL

H.R. 5 would limit the accountability of the drug and device industries for placing unsafe products on the market. Again, women would be harmed by this bill. University of Buffalo law professor Lucinda Finley has written, "Reproductive or sexual harm caused by drugs and medical devices has a highly disproportionate impact on women, because far more drugs and devices have been devised to control women's fertility or bodily functions associated with sex and childbearing than have been devised for men." Here are some examples:

Dalkon Shield IUD

A.H. Robins's contraceptive device caused at least 17 American deaths and over 200,000 injuries, including pelvic inflammatory disease, perforated uteruses, septic abortions and infertility. After three years, the FDA suspended distribution

of the IUD but did not recall existing stock or require the company to tell doctors to remove them. For the next 10 years, A.H. Robins continued to promote the device. It took several lawsuits and the threat of larger punitive damages awards for the company to finally urge women to have the IUD removed and pay for the removal.

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DRUGS AND MEDICAL DEVICES THAT KILL continued...

Vaginal Mesh

As of March 2012, Johnson & Johnson's Ethicon unit faced more than 550 lawsuits from women injured or killed by the company's vaginal-mesh implant device. Evidence shows that the company sold the product for three years without FDA approval.

High-Absorbency Tampons

A woman died from toxic shock syndrome (TSS) after using Playtex super-absorbent tampons. Her family sued, and a jury awarded over \$11.5 million in damages, \$10 million of which was punitive. After the verdict, Playtex stopped making these tampons, took all such tampons off the market, modified the TSS warning statement on its tampon packaging and agreed to inform the public about TSS.

Ortho-Evra Patch

Approved by the FDA in 2002, the weekly birth-control patch caused blood clots, heart attacks and strokes. Both Ortho McNeil and FDA knew of major problems with the patch but kept the information quiet until documents, including those produced in litigation, forced the information out.



Ortho-Novum 1/80

A woman who suffered life-threatening injuries after taking the oral contraceptive sued. At that time, there were 21 reported cases of women who had suffered similar harm from oral contraceptives, as well as a number of scientific articles documenting potential dangers. Yet, Ortho Pharmaceutical never warned physicians of the possible connection in its package inserts. After a \$4.75 million

jury award, \$2.75 million of which was punitive, Ortho reduced estrogen levels in the drug.

Parlodel

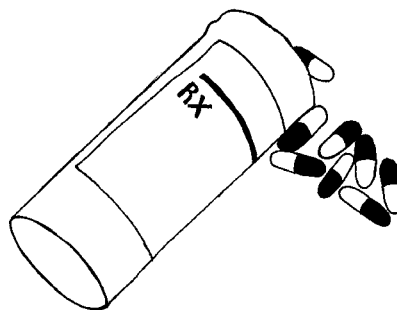
In 1980, the FDA approved the drug to suppress lactation after birth. Instead, it caused heart attacks and strokes. Sandoz was the only manufacturer who refused the FDA's request to voluntarily take the drug off the market, and for the next five years, continued to promote the drug and persuaded hospitals to prescribe it to all non-breast feeding postpartum patients. It took a large punitive damage award and the threat of lawsuits seeking punitive damages that were pending at the time, plus pressure from consumer groups, for Sandoz to pull Parlodel from the market.

Paxil

In July 2010, GlaxoSmithKline settled some 800 Paxil lawsuits for more than \$1 billion, because the drug caused birth defects in children of women who took it. According to *Pharmalot*, this settlement, "which would provide an average payout of more than \$1.2 million to families of the affected children, leaves more than 100 similar cases pending."

Prempro

Evidence had been around since the 1930s and 1940s that estrogen caused cancer. Yet by 2000, untold numbers of women had been harmed or killed from being over-prescribed hormone replacement therapy for common menopause symptoms like hot flashes and night sweats, as well as osteoporosis and other health problems. According to a January 13, 2012 *Bloomberg* article, "[m]ore than 6 million women took [Pfizer's]



Prempro and related menopause drugs to treat symptoms including hot flashes and mood swings before a 2002 study highlighted their links to cancer. At one point, Pfizer and its units faced more than 10,000 lawsuits over the medications."

In April 2012, a Connecticut jury awarded \$3.75 million to a woman who had taken Prempro and developed breast cancer. The jury also awarded \$250,000 to her husband for his loss of consortium claim. A punitive damages award is forthcoming. Three months earlier, a panel of the Pennsylvania Superior Court ruled that Pfizer must pay more than \$45 million to two Illinois women who developed breast cancer after taking the company's menopause drugs.



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