

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

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

With the new year comes new civil justice challenges in a number of states, especially in the 24 states now controlled by Republicans. But even in those controlled by Democrats like California, which has a supermajority, Democratic control may not be what it's cracked up to be. In California, Governor Jerry Brown has cut the judiciary budget so severely that court houses are closing all over the state and the civil justice system is being decimated.

We have been thinking a lot about budget issues and civil justice lately. In one of our recent studies, we heavily critiqued a Georgia proposal that would amount to government takeover of the medical malpractice system. And we have a brand new study about the contingency fee system, a brilliant system that depends on no government financing yet performs two remarkable functions: providing people in need with attorneys and keeping meritless cases from clogging our courts.

We are working on new ways of thinking about civil justice given today's political climate. If you're not already a CJ&D member, we invite you to learn more by visiting our website. <http://centerjd.org> And please join us! You'll be glad you did.

Sincerely,
Joanne Doroshov
Executive Director

IN THIS ISSUE: HOT TOPICS

ELECTION 2012 WRAP-UP

Let's just say, it could have been worse. Much worse, at least at the federal level. The President was re-elected and unlike his predecessor, President Obama has said he strongly opposes federal "caps" on damages. In the Senate, anti-tort reform Democrats remain firmly in control, even gaining seats. And while pro-tort reformers still control the House, there isn't much they can do alone. In fact, Matt Webb, a senior vice president at the U.S. Chamber of Commerce Institute for Legal Reform (ILR), admitted to *Business Insurance*, "I don't expect things to be all that much different on Capitol Hill with the new congress compared to the last one."

That said, the U.S. Chamber will not be sleeping through the next two years. All indications are that its agenda has not evaporated, and at least some House lead-



ers and committee chairs are expected to cooperate. First, there is asbestos legislation. Ohio enacted a new law in 2012 based on a model bill from the American Legislative Exchange Council, which increases the burden on sick and dying victims who seek compensation through underfunded trusts. Don't be surprised if this bill pops up nationally. Other ILR priorities include making it more difficult to file class actions, and blocking suits against banks for fraud. And finally, there is medical malpractice legislation, always a talking point for big business during any health care or deficit negotiations.

(continued on page 2)

CORPORATE MONEY

Big corporations continued to take advantage of the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, pouring tens of millions of dollars into special interest groups, which then spent on election races across the country, often without disclosing funding sources. Chief among such groups, the U.S. Chamber of Commerce, the nation's richest corporate lobby organization, spent over \$36 million during the 2012 election cycle to elect candidates who seek to protect companies from liability and regulation. According to its own news release, the Chamber "ran the largest voter education, candidate endorsement, and Get-Out-the-

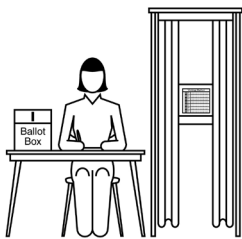


Vote effort in our 100-year history. ...In addition, our Institute for Legal Reform (ILR) conducted voter education efforts in key races at the state level across the country."

The Chamber was not alone, of course. According to the Center for Responsive Politics, American Crossroads and Crossroads GPS – both conceived by operatives Karl Rove and Ed Gillespie and led by former U.S. Chamber Chief Legal Officer and General Counsel Steven Law – together spent nearly \$176 million on election-related activities, with the groups ranking 1st in outside spending by special interest groups. Top corporate contributors to American Crossroads, a super PAC,

(continued on page 2)

Election results in several states painted a somewhat bleaker picture, although not entirely. In Alaska, Arkansas and Wisconsin, Republican lawmakers gained majority control in both legislative houses. This is especially worrisome news for Wisconsin. Since Governor Scott Walker took office in January 2011, five new “tort reform” laws have passed there. *Business Insurance* explained in



November that now, Wisconsin “could become even more fertile ground for new reforms....” The same fate may befall North Carolina, according to *Business Insurance*, where “[t]ort reform advocates are likely to pursue stricter limitations on civil liability and damage awards” since “the GOP will control the governor’s office and the state’s General Assembly....”

In contrast, legislatures in Colorado,

Maine, Minnesota, and Oregon flipped to Democratic control (as did New York, but legislative control remains divided), while New Hampshire split between parties, changes that may thwart business-backed efforts to pass or expand “tort reform” laws in those states. Some states, like California, even have supermajorities now. Let’s hope that’s good news for the civil justice system, but these days nothing should be taken for granted.

CORPORATE MONEY continued...

included Contran Corp. (\$3 million), TRT Holdings (\$2.5 million), Weaver Popcorn Company (\$2.4 million), Armstrong Group of Companies (\$1.32 million), Stephens Inc. (\$1.2 million) and Clayton Williams Energy (\$1 million). As a 501(c)(4) organization, Crossroads GPS was able to accept unlimited corporate donations while keeping its donors’ identities secret.

This secrecy may not last forever, though. New York Attorney General Eric Schnei-

derman is investigating the Chamber’s elections activities and funding sources. In the meantime – and fortunately for America’s consumers – “the results [of the Chamber’s election efforts] were disastrous: out of 48 House and Senate candidates that it spent money to try to either elect or defeat, the outcome went the chamber’s way only seven times,” explained the November 30, 2012 *New York Times*.



WHEN THE FDA DOESN'T REGULATE: THE MENINGITIS OUTBREAK

In the fall of 2012, one of the biggest U.S. public health crises ever struck the United States. Over 600 people in 19 states contracted fungal meningitis traced to epidural injections for back and joint pain produced by Massachusetts-based New England Compounding Center (NECC). Thirty-nine patients have died, to date. As many as 14,000 have been exposed, according to the U.S. Centers for Disease Control and Protection.

In the aftermath of this crisis, the public learned not only what compounding pharmacies are (*i.e.*, facilities that take drug ingredients and customize them into medications and dosages for specific clients) but, more importantly, that they are regulated by the states (not the FDA), and the states are doing a horrible job of it. “Congress exempted drugs compounded by pharmacists from the usual safety and efficacy requirements,” Public Citizen’s Dr. Michael Carome told *Reuters* in November 2012. “And

now it’s led to a public health disaster.” FDA Commissioner Dr. Margaret Hamburg echoed these sentiments in a December 20, 2012 opinion piece in the *Washington Post*: “The meningitis tragedy strongly called attention to the weaknesses in our framework and the need for federal laws that specifically address non-traditional compounding. ... This isn’t the first time the FDA has sought more authority to crack down on compounding pharmacies,” she added. “In the past, special interests have interfered, and conflicting federal appellate court rulings in the 5th and 9th circuits have made a confusing system even worse. If we do not work together to find a practical solution that puts patients first, the country will remain vulnerable to more public health crises.” Despite calls from the FDA to strengthen its oversight powers, Congress has yet to act.

In the meantime, victims and their families have turned to the civil courts for

answers and accountability. As of publication, at least 50 federal lawsuits in nine states have been filed against the NECC, with more being filed in state courts every day. Among those seeking justice: Dennis O’Brien, who suffers nausea, vomiting, dizziness, drowsiness, blurred vision, exhaustion and trouble with his speech and attention after receiving a series of NECC steroid shots tainted with fungal meningitis. He has undergone three spinal taps, was in the hospital for 11 days, is now hooked up to an IV, lives in an antibiotic stupor, has bruises from injections and blood tests and makes weekly 6-hour round-trip visits to the hospital. “I don’t have a life anymore. My life is a meningitis life,” the 59-year-old former schoolteacher told the *Associated Press* in December 2012. Sadly, O’Brien’s story is indicative of the devastation suffered by hundreds of others who sought treatment to ease their pain but were instead killed or left to endure horrific injuries.

CALIFORNIA'S EXCRUCIATING BUDGET CRISIS

Justice is suffering in the Golden State. With judiciary budget cuts of \$650 million, California's civil justice system is headed in a very disturbing direction.

In Los Angeles County alone, all courtrooms in 10 regional courthouses have been closed. And as Judge Michael L. Stern of the Los Angeles Superior Court wrote in the December 7, 2012 *Los Angeles Times*, "Although there will be some closures and adjustments to criminal courts, constitutional and public safety imperatives dictate that criminal prosecutions will not be much impacted by the reorganization." In other words, civil cases principally will take the hit. As a result, writes the November 14, 2012 *Recorder*, "many personal injury cases will be sent to just two master calendar courtrooms in a single location to sort out all pretrial or settlement matters. Each of those judges is expected to have

as many as 8,000 cases under his or her jurisdiction at any one time."

What's more, writes Judge Stern, "A greater financial burden will be placed on litigants, especially the economically disadvantaged, who will have to present



their legal issues at distant courthouses. And more staff layoffs, further slowing the judicial process, appear inevitable." And there's more. "For the most part

the Los Angeles civil courts no longer have staff court reporters recording and transcribing various proceedings. ...The reorganization will complete the elimination of these reporters in civil courtrooms, including for trials. If litigants in civil cases want a transcript, they will have to hire a reporter on a pay-as-you-go basis. One wonders what the 'record' will look like in appeals when there is no official transcript of the proceedings."

Judge Stern concludes that the "public should not be content with the dislocation and delays in resolving civil disputes caused by court funding shortages. Equal access to justice under the law demands more. It requires action by everyone to make the elected officials responsible for funding our courts aware that the words 'equal justice under the law' cannot become just another hollow slogan." We couldn't agree more.

GUN VIOLENCE AND IMMUNITY

December 14, 2012 was a day of unspeakable tragedy. Twenty first-graders and six adult staff members at Sandy Hook Elementary School in Newtown, CT were gunned down by a 20-year old assailant. He used a Bushmaster AR-15 assault rifle – the civilian version of the M-16 rifle used by the U.S. military, which can reportedly fire 45 rounds per minute in semiautomatic mode – as his primary weapon. He was also armed with two handguns, a 10mm Glock and a 9mm Sig Sauer.

As President Obama told mourners at a December 16th memorial for the victims, "Since I've been President, this is the fourth time we have come together to comfort a grieving community torn apart by a mass shooting. The fourth time we've hugged survivors. The fourth time we've consoled the families of victims. And in between," he explained, "there have been an endless series of deadly shootings across the country, almost daily reports of victims, many of them children, in small towns and big cities all across America – victims whose – much of the time, their only fault was being in the wrong place at the wrong time. We

can't tolerate this anymore. These tragedies must end. And to end them, we must change."

Repealing the federal Protection of Lawful Commerce in Arms Act, signed into law by President George W. Bush in 2005, would be a start. This law, which the law enforcement community was strongly against, provides the gun industry with immunity from lawsuits brought by gun violence victims, as well as cities and counties. The bill immunizes gun manufacturers, dealers, distributors and trade associations from lawsuits. Even dealers who negligently sell guns to traffickers are immune from lawsuits.

Until this law passed, litigation had become an increasingly important tool for those working to reduce gun violence. Freddie Hamilton, mother of a murder victim who sued gun manufacturers for deliberately feeding an illegal firearms market in New York, said, "Time and again, we have seen instances where the only way our voice can be heard or we can get the attention of those who've harmed us is a court of law."

(continued on back page)



185 West Broadway
New York, NY 10013
Phone: 212.431.2882
centerjd@centerjd.org
<http://centerjd.org>

IMPACT

Editor:
Daniel Albanese

Written By:
Emily Gottlieb

© Copyright 2013 Center for Justice & Democracy.
All rights reserved.

Here is one reason for that: despite the fact that firearms kill nearly twice as many Americans as all household consumer products, no federal agency has the authority to ensure that guns with design or manufacturing defects are made safer or removed from the market. Guns are virtually the last unregulated consumer product in the United States. The Consumer Product Safety Commission, the federal agency established to oversee the safety of common household and recreational products, is prohibited from exercising any jurisdiction over firearms. In addition, the federal Bureau of Alcohol, Tobacco and Firearms has no power to ensure that firearms and ammunition meet basic health and safety standards.

Denise Johnson, whose husband was killed by the D.C. snipers in 2002, wrote in a *Washington Post* column: “No other industry enjoys the protections that the gun industry is seeking. Gun sellers and manufacturers shouldn’t be above the law. If any other product injured my husband and irresponsible sell-

ers played a part, I would be able to bring a case in court. But because Conrad was shot with a gun, my lawsuit would not be allowed. Those who sell guns that are sought by criminals need to be more careful than sellers of other products, not less careful.”

As preeminent constitutional scholar and Dean of the University of California-Irvine School of Law Erwin Chemerinsky wrote more recently in the *National Law Journal*, “It is outrageous that a product that exists for no purpose other than to kill has an exemption from state tort liability. Allowing tort liability would force gun manufacturers to pay some of the costs imposed by their products, increase the prices for assault weapons and maybe even cause some manufacturers to stop making them.”

The gun industry remains unchecked by any regulatory authority or legal accountability. It’s time for change.

THE U.S. SUPREME COURT’S 2012-13 TERM: TORT RIGHTS IN JEOPARDY?

As *Thomson Reuters’s* Alison Frankel put it in a December 2012 article, “quietly, the justices have agreed to hear a clutch of cases that could result in a real retrenchment for big businesses and a corresponding ebbing of the power of individuals to hold corporations accountable.” Here are a sampling of Supreme Court cases for this upcoming terms and the issues they will address. It could be a bumpy ride!

American Express Co. v. Italian Colors Restaurant

Whether the Federal Arbitration Act permits courts to invalidate arbitration agreements that do not permit class arbitration of a federal-law claim.

Amgen Inc. v. Connecticut Retirement Plans

Whether investors claiming securities fraud must prove that the defendant had made a material misstatement in order to win class certification.

Comcast v. Behrend

Whether antitrust plaintiffs must prove their theory of damages before they can be certified as a class.

Genesis HealthCare Corp. v. Symczyk

Whether a case is rendered moot when a lone plaintiff who files suit on behalf of themselves and others decides to reject a defendant’s settlement offer that provides everything sought by the individual who sued. According to Cornell University Law School’s Legal Information Institute, “The decision will affect collective-action trial practices for both plaintiffs and defendants, including plaintiffs’ use of the discovery process to join class members and defendants’ use of individual offers of judgment to forestall or avoid collective actions.”



Kiobel v. Royal Dutch Petroleum

Whether corporations can face tort liability in U.S. courts for violations of the law of nations, such as torture, extrajudicial executions or genocide, that occur outside the United States.

Mutual Pharmaceutical Co. v. Bartlett

Whether generic drug manufacturers can be liable for design defects under state tort law.

Oxford Health Plans v. Sutter

Whether arbitrators can order classwide arbitration when an agreed-upon contract contains broad language that bars litigation and requires arbitration of all disputes arising under the contract.

Standard Fire Insurance Co. v. Knowles

Whether a plaintiff pursuing a class-action complaint can keep his/her case in state court by filing a stipulation that damages and fees would not exceed the \$5 million threshold that triggers mandatory removal of the case to federal court.

Vance v. Ball State University

Whether an employer may be liable for harassment by employees to whom the employer has delegated authority to: 1) direct and oversee the victim’s daily work; or 2) “hire, fire, demote, promote, transfer, or discipline” the victim.