CENTER FOR JUSTICE & DEMOCRACY
CJ&D

IMPACT

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

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friends,

CJ&D has faced some shaky times over the past ten years. On September 11, 2001, we evacuated our offices close to the World Trade Center without knowing if or when we'd be returning, what had happened to our friends and neighbors, or how we would survive financially.

We were lucky and made it through. And somehow we are surviving the recession too.

Thanks so much to all our friends and supporters. We wouldn't be here without you. And if you aren't already a member, please join CJ&D today!

THANKS!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: A CIVIL JUSTICE DECADE

With this issue of Impact, we look back with pride and amazement at some of the great civil justice wins over the past decade. It hasn't been easy but protecting the rights of injured patients, workers and consumers is worth the fight.

PRESIDENT GEORGE W. BUSH'S UTTER FAILURE TO EXTINGUISH PATIENTS' RIGHTS

No president came to office more determined to limit the rights of patients injured by medical malpractice than George W. Bush. Spurred by his Senior Advisor and Deputy Chief of Staff, Karl Rove, this issue became one of Bush's most important domestic policy goals. Whether in a speech, state of the union address, press conference, radio address, campaign debate or political fundraiser, Bush or then Vice-President Cheney attacked the tort system or trial lawyers nearly every single day of their Administration.

With AAJ and consumer groups lobbying heavily against efforts to severely limit compensation to injured patients, CJ&D took action organizing a massive network of patients to legislation from then-U.S. Senate Majority Leader Bill Frist (R-TN), a doctor whose family hospital and insurance business, HCA/HCI, stood to benefit from Bush's anti-patient agenda. Indeed, Frist brought

at least five bills to the Senate floor that would have severely capped compensation for injured patients: S.11; S.2061; S.2207; S.22 and S.23. Most of these bills would have imposed non-economic damages caps of $250,000 without any exceptions; some applied only to certain types of malpractice; some allowed a limited stacking of damages depending on the number of defendants. Each bill was roundly defeated during the earliest stages of Senate debate.

RIGHTS RESTORED FOR VICTIMS OF GM AND CHRYSLER DEFECTS

When GM and Chrysler filed for bankruptcy in 2009, both companies sought immunity from past and future product liability suits involving the tens of millions of GM and Chrysler cars on the road. Victims, lawyers, state attorneys general and consumer advocates were outraged, including CJ&D, which organized victim demonstrations and news conferences and co-authored a letter with the Consumer Federation of America, Consumers for Auto Reliability and Safety, Public Citizen and U.S. PIRG to President Obama protesting this injustice.

Consumers for Auto Reliability and Safety led consumer groups in petitioning the Federal Trade Commission (FTC) seeking warnings on Chrysler vehicles purchased prior to May 30, when the "New" Chrysler emerged from bankruptcy court. CJ&D organized letters from victims to Chrysler's board, asking "would you let your son, daughter, or other family member drive one of these potentially dangerous cars knowing that they would be left unprotected if a defect caused them harm?" Ads starting running alerting the public to the safety disaster looming as a result of Chrysler/GM immunity for product defects.

Facing mounting pressure, the companies agreed to accept responsibility for defect-related injuries suffered by consumers who bought their GM and Chrysler vehicles post-bankruptcy.

U.S. SUPREME COURT'S REPUDIATION OF BUSH'S "PREEMPTION" POLICY

In *Wyeth v. Levine* (2009), the Court rejected the Administration's argument that companies could escape accountability for killing or injuring someone if their product was regulated by the government, in this case the FDA. The suit involved Diana Levine, a professional guitarist whose right arm was amputated after an anti-nausea drug was improperly injected into an artery. Though the manufacturer, Wyeth, knew injection could cause gangrene, there was no explicit warning on the FDA-approved label. A Vermont jury awarded Levine $6.7 million; the verdict was upheld by the state Supreme Court.

In a 6-3 decision, the U.S. Supreme Court ruled that drug companies were not immune from liability for injuring or killing patients with unsafe drugs. Moreover, the Court found that lawsuits were critical for supplementing FDA efforts to ensure drug safety and compensating the injured. "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness," Justice Stevens wrote. The FDA has "limited resources" and "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly." Moreover, rejecting the policy of the Bush Administration to eliminate tort rights in "preambles" of federal regulations, he wrote, "[T]he FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight."

WASHINGTON STATE TURNS THE TIDE, TWICE

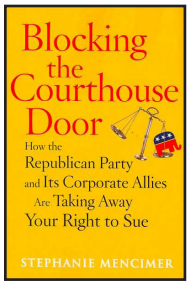
In November 2005, civil justice supporters beat back I-330, a cruel initiative pushed by doctors, hospitals, pharmaceutical companies and the insurance industry that would have severely limited the legal rights of patients injured by medical malpractice. I-330, among other things, placed a $350,000 cap on "quality of life" damages.

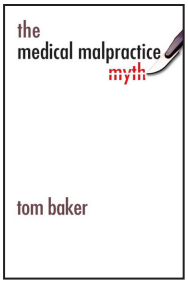
Washington citizens' "No" vote was so strong, at 57 percent, that doctors in other states backed off plans for similar campaigns. For example, according to Gerhard Letzing, Executive Director of the Washington State Association of Justice, "After we beat the medical/health insurance industry on I-330, the medical lobbies abandoned their efforts in Arizona using the same consultants."

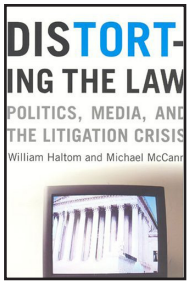
Then in 2007, a majority of state voters approved Referendum 67, a cynical industry-backed initiative that forced citizens to confirm that they wanted an insurer "bad faith" law to take effect. As reported in the October 12, 2007 *Seattle Post-Intelligencer*, Farmers (Zurich), Allstate, State Farm and Safeco — who collectively held the biggest share of Washington's insurance market as well as the biggest share of customer complaints in the state insurance office — invested millions, unsuccessfully, to defeat the law, which allowed consumers to sue for triple damages if their insurer unreasonably denied a legitimate claim.

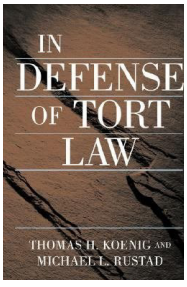
New Books Expose the Lies Behind "Tort Reform" Myths

The past decade witnessed the publication of some great books that debunk the so-called "tort reform" movement and its myths. Among our favorites: *Blocking the Courthouse Door* (2006) by Stephanie Mencimer, who first covered the issue for the *Washington Monthly*; *The Medical Malpractice Myth* (2005) by Tom Baker; *Distorting the Law: Politics, Media, and the Litigation Crisis* (2004) by William Haltom and Michael McCann; and *In Defense Of Tort Law* by Thomas H. Koenig and Michael L. Rustad (2003).









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ARBITRATION FINALLY GETS THE BAD NAME IT DESERVES

Unfair arbitration agreements, i.e., those clauses in credit card agreements, employee contracts, even health insurance policies that prevent injured consumers from gaining access to the courts, took a big hit in 2009.

In March, the U.S. Supreme Court made it easier for credit card holders to challenge mandatory arbitration agreements (*Vaden v. Discover*, No. 07-773).

In July, the National Arbitration Forum (NAF) — the country's largest administrator of credit card and consumer collections arbitrations — agreed to stop arbitrating credit card debts and other consumer collection disputes nationwide after Minnesota Attorney General Lori Swanson sued the company for failing to disclose its financial ties to the debt-collection industry in violation of state law.

"To consumers, the company said it was impartial, but behind the scenes, it worked alongside credit card companies to get them to put unfair arbitration clauses in the fine print of their contracts and to appoint the Forum as the arbitrator. Now the company is out of this business," said Swanson.

The settlement came less than a week after Swanson filed the lawsuit. According to the July 21, 2009 *Wall Street Journal*, NAF claimed it was pulling out of consumer cases "because it was being hit with a wave of lawsuits."

Two days after NAF's settlement became public, the American Arbitration Association (AAA) said it would no longer participate in consumer debt-collection disputes "until some standards or safeguards are established."

In November, JPMorgan Chase, the biggest U.S credit-card lender, announced that it would: 1) drop the arbitration clause from its cardholder contracts for at least three and a half years; 2) immediately stop enforcing existing arbitration clauses against cardholders; and 3) not engage in collusive behavior with other credit card companies regarding arbitration. Bank of America and Capital One followed.

In December, President Obama signed a bill into law that forbids most military contractors from enforcing mandatory arbitration clauses in their employment contracts. The legislation, championed by U.S. Senator Al Franken (D-MN), was inspired by the story of Jamie Leigh Jones, a 20-year-old KBR/Halliburton employee who was drugged, gang-raped and imprisoned by co-workers while stationed in Iraq. Under this new law, all American civilian employees who become victims of bias or violent crime while abroad will have the right to seek justice before a judge and jury.

INSURANCE REFORM WORKS

Consumer groups, including CJ&D's project Americans for Insurance Reform (founded in 2002), have long argued that the reason medical malpractice insurance rates rise periodically is because of market forces and dropping interest rates (not because jury awards or payouts have suddenly increased), and that reforming and regulating the insurance industry is the only way to fix the problem. Evidence gathered this decade bears this out.

In a September 18, 2005 front-page article, the *Hartford Courant* explained that after being "[c]rushed by years of skyrocketing insurance rates, doctors around the nation are starting to see malpractice premiums level off or even drop, raising questions about the insurers' role in the crisis and whether lawsuit awards really need to be capped." The article noted that "[r]ate increases are even slowing or stopping in some states that have not limited awards for pain and suffering, including Connecticut, where premium increases in the past have soared as much as 90 percent in a single year."

Americans for Insurance Reform
"PROTECTING RIGHTS, NOT WRONGS"

In October 2006, the Illinois Division of Insurance announced that Berkshire Hathaway malpractice insurer MedPro would be expanding its coverage and cutting premiums for doctors by more than 30 percent. According to the October 13, 2006 *St. Louis Post-Dispatch*, state officials and the company itself said this was made possible because of new insurance reforms enacted by Illinois lawmakers in 2005, which required malpractice insurers to disclose data on how to set their rates, not because of the cap on patient compensation that was enacted at the same time. According to Michael McRaith, director of the state's Division of Insurance, the rate disclosure requirement allowed MedPro to "set rates that are more competitive than they could have set before."

Americans for Insurance Reform's July 2009 study, *True Risk: Medical Liability, Malpractice Insurance and Health Care*, confirmed that "[t]he periodic premium spikes that doctors experience, as they did from 2002 until 2005, are not related to claims but to the economic cycle of insurers and to drops in investment income."

BIG PROBLEMS AT THE U.S. CHAMBER OF COMMERCE

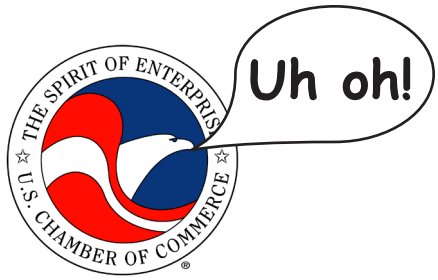
In 2008, the country's biggest lobby group and vicious advocate for corporate immunity began losing its grip on government despite spending millions to elect pro-business, anti-consumer candidates.

2009 wasn't much better. The group started taking bizarre views on legislation, like opposing U.S. Senator Al Franken's amendment to give rape victims justice. The Chamber also began losing significant members, like Apple, over its opposition to regulating greenhouse gas emissions. In an October 5, 2009 letter to Chamber president and CEO Tom Donohue, Apple said it was "frustrating to find the Chamber at odds with us in this effort" and "would prefer the Chamber take a more progressive stance on this critical issue and play a constructive role in addressing the climate crisis. However, because the Chamber's position differs so sharply with Apple's, we have decided to resign our membership effective immediately."

To make matters worse, the White House was taking aggressive steps to remove the Chamber from its traditional role as the voice of big business in Washington. As reported in the October 25, 2009 *Los Angeles Times*, "[T]he administration has been meeting privately with prominent corporate leaders — more than 60 of them since June — in an effort to develop its own pipeline to the business community."

"This is a shift," explained Valerie Jarrett, the president's chief business liaison. "Previously, the chamber had served as the sole intermediary for business. That's not our approach."

The *L.A. Times* also noted that "President Obama, his Energy secretary and one of his other most senior advisors have begun criticizing the chamber publicly, casting it as a profligate lobbying organization at odds with its members in opposing the administration on such issues as consumer protection and climate change."

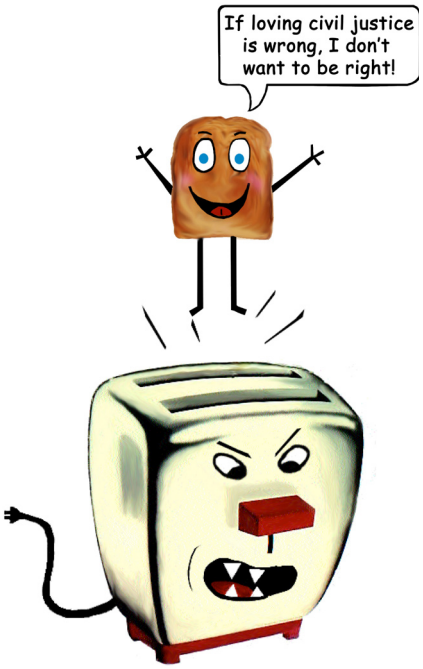


ThePopTort is Born

There weren't many blogs focusing on support for the civil justice system, and one was sorely needed. So in 2008, CJ&D founded ThePopTort.com to cover the latest news on product defects, corporate cover-ups, opposition front groups, workers' rights, health care, medical malpractice and other consumer topics. By December of that year, editors at the *ABA Journal* selected ThePopTort as one of the country's top 100 legal blogs.

In naming ThePopTort, the ABA Journal editors said this: "It's not just because the name reminds us of those tasty toaster treats that we like this blog. The Pop Tort takes a witty, clever and irresistibly irreverent approach to otherwise weighty consumer advocacy issues. Launched in January, it's also the Center for Justice & Democracy's latest riposte to the tort reform movement."

In December 2009, the *ABA Journal* editors once again selected ThePopTort as one of the nation's top 100 legal blogs, stating, "[T]he authors are definitely not asleep at the switch, writing daily impassioned posts with spunky commentary and art elements."



The POP torx .com ...so civil justice isn't toast

ThePopTort Makes the ABA Journal's Top 100 Legal Blogs in Country - Two years in a row!

With pithy commentary, occasional wit, and perhaps a little bit of pizzazz, these zaniest of zanies discuss why, at a time when corporate crime and abuse is at an all time high, it is actually a good thing to take Corporate America to court sometimes.

Read ThePopTort.com