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

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friend,

On September 12, 2005, CJ&D's project, Americans for Insurance Reform, announced creation of a toll-free Katrina Insurance Hotline: (888) 450-5545.

The hotline, which is staffed by CJ&D Monday through Friday, 10 am to 6 pm EST, has become a crucial clearing-house for complaints by Hurricane Katrina victims who are being unfairly treated or denied claims by insurance companies on their hurricane-related insurance policies.

We have been able to assist many individuals with their insurance problems, often referring them to government agencies and other individuals who can provide direct help. If reports to the hotline are any indication, lawyers will be needed to help many residents fight to have their claims paid.

Thanks so much to those who have contributed to help keep the AIR Insurance Hotline going. If you would like to help, please use the coupon on page 4 to join CJ&D. Thanks again.

Joanne Doroshow
Executive Director

IN THIS ISSUE: Recent Constitutional Developments

"Torts Reforms" are Unconstitutional

On July 14, 2005, the Wisconsin Supreme Court took a step that numerous other state Supreme Courts have taken across the country. The Wisconsin court struck down that state's $350,000 cap on non-economic, or "quality of life," compensation for victims of medical malpractice. The Court found that the cap had no rational basis and violated equal protection guarantees of the Wisconsin Constitution.

"Indeed, the burden of the cap falls entirely on the most seriously injured victims of medical malpractice," Chief Justice Shirley S. Abrahamson wrote for the majority. "Those who suffer the most severe injuries will not be fully compensated for their non-economic damages, while those who suffer relatively minor injuries with lower non-economic damages will be fully compensated. The greater the injury, the smaller the fraction of non-economic

damages the victim will receive."

The case was brought on behalf of 8-year-old Matthew Ferdon, a child left severely disabled at birth after a doctor used substantial force to pull on his head during delivery. Based on a projected life expectancy of 69 years, the jury awarded Matthew $700,000 - slightly more than $10,000 a year - to compensate him for a lifetime with a deformed, partially paralyzed right arm that will never function normally. Under Wisconsin's cap, the award would be reduced to $350,000, or $5,900 a year, for his loss.

In declaring the cap unconstitutional, the Court ruled that "when the legislature shifts the economic burden of medical malpractice from

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Tort Reforms and the New Chief Justice

No one disputes that John Roberts, recently sworn in as Chief Justice of the U.S. Supreme Court, is an earnest, likeable, highly intelligent man who has dedicated his life to the law. These characteristics, however, reveal nothing about Roberts's qualifications to lead the Court, much less his commitment to safeguarding fundamental rights protected by the Constitution, like the Seventh Amendment right to jury trial in civil cases.

On this specific issue, Roberts has no public record. Yet his short tenure while on the D.C. Court of Appeals points to a pattern of legal interpretation that undermined claimants' abilities to hold wrongdoers accountable in court. For example, in *Acree v. Iraq* - a civil suit brought against the Iraqi government by 17 U.S. soldiers who had been tortured during the first Gulf War - Roberts favored eliminating the offices' rights to sue, effectively granting Iraq immunity for its cruel treatment of POWs. In other cases, he allowed companies to escape responsibility for

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"Torts Reforms" are Unconstitutional continued…

insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational," adding that "there is no objectively reasonable basis to conclude that the $350,000 cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children."

For nearly 30 years, courts across the country have invalidated all or parts of statutes limiting the rights of injured consumers to go to court (a.k.a. "tort reforms") on grounds ranging from violations of equal protection and due process to denials of the right to a remedy, the right to a jury trial and access to the courts. (For a state-by-state list, see http://centerjd.org/free/mytbusters-free/MB_Unconstitutional.htm.)

And, as in the past, the Wisconsin Court's decision has sparked renewed efforts to reverse the ruling and reinstate the cap.

Soon after these pronouncements, Wisconsin Manufacturers & Commerce began soliciting contributions for a massive public relations campaign intended to "overturn the court's rulings with legislation." In a letter dated July 21, 2005 to member CEOs, WM"s president wrote: "[C]omprehensive liability reform must move to the top of the legislative agenda. We intend to drive that agenda using your contribution to the WMC Job Defense Fund."

Nearly two weeks later in early August, WMC hosted a "liability summit" for lawmakers, business trade groups and independent companies to plot legislation to overturn recent Wisconsin Supreme Court rulings that protected consumers. Options ranged from finding a way to reinstate non-economic caps for medical malpractice victims to advocating a constitutional amendment that would limit the Court's ability to review liability laws.

That same month, Wisconsin FreedomWorks, a pro-"tort reform" group led by former House Majority Leader Dick Armey (R-Tex.) and a former White House attorney under the first President Bush, announced a $2 million campaign to overturn rulings like Ferdon and target the one Wisconsin Supreme Court justice now up for re-election who voted with the majority.

Also in August, Wisconsin State Assembly Speaker John Gard appointed a medical malpractice task force to design a new non-economic damages cap. Of Gard's five appointees, two are CEOs of healthcare providers, one is vice president and general counsel for a major healthcare company and another is an attorney who clerked for one of the dissenting justices in the Ferdon case.

"Where are the injured patients? Where are the advocates for children and for seniors? Where's the public?" asked Bob Hudek, Executive Director of the non-profit Wisconsin Citizen Action. "Speaker John Gard's selections for his Task Force on Medical-Malpractice Reform betray a shameless stacking of the deck, designed to assure a pre-determined conclusion regardless of any evidence…."

Despite the fact that Wisconsin's top insurance regulator testified befo re

(continued on page 4)

Arbitration and the U.S. Supreme Court

The Seventh Amendment to the U.S. Constitution and most states have a strong state constitutional right to trial by jury in civil cases. Nevertheless, courts have upheld mandatory binding arbitration clauses, which force employees, consumers and patients to sign away their legal right to trial by jury and with it, the ability to hold wrongdoers accountable in court.

Beginning in 1991, the U.S. Supreme Court began to expand the scope of the Federal Arbitration Act (FAA) when it held that employees with claims under the Age Discrimination in Employment Act (ADEA) could be forced to arbitrate. The decision was based upon an interpretation of the ADEA, and it opened the door to the resolution of statutory daims, rather than just contract disputes, by arbitration.

Then in 2001, the Court expanded to an even greater extent the scope of the FAA in employment contracts in a widely criticized decision. In the *Circuit City* case, the Supreme Court held that the FAA excluded only those workers engaged in transportation employment. Most employers were subsequently free to insist upon arbitration in the contracts they offered to their employees, leaving employees little choice but to sign or risk losing their jobs.

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Tort Reforms and the New Chief Justice continued…

anti-competitive pricing, claims of fraud and evasions of environmental mandates.

While in private practice, Roberts was affiliated with various conservative business groups that support "tort reform," like the National Legal Center for the Public Interest, the Washington Legal Foundation and the Federalist Society, which can be seen as another indication of his pro-business leanings. In fact, the business community strongly endorsed Roberts's nomination, including the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM), the nation's largest industrial trade association.

Though it has yet to rule on the constitutionality of "tort reforms," the U.S. Supreme Court has imposed constitutional restrictions on the scope of state tort liability. For example, in the 2003 decision *State Farm Mutual Auto v. Campbell*, the Court capped most state punitive damages awards to no more than nine times the amount of compensatory damages on due process grounds. In its 2005-2006 term, the Court will not only clarify when companies can face state law class action suits over claims the companies misled investors (*Merrill Lynch v. Dabit*) but also consider how much of a victim's lawsuit winnings can be taken by the government to cover health expenses paid for through Medicaid (*Arkansas Department of Health v. Ahlborn*).

Roberts was affiliated with various conservative business groups that support "tort reform."

On September 15, 2005, while being questioned by Senator Russ Feingold (D-WI) about whether "lawyers that represent injured persons in product liability and medical malpractice cases are harming America," Roberts answer "no," adding, "I've represented plaintiffs' interests. I think if you look, for example, at the antitrust cases I've argued: more of them have been on

the plaintiff's side than on the defendan's side. One of my co-clerks when I clerked for Justice Rehnquist is a very prominent personal injury lawyer and I think he does a wonderful job. I know there are abuses in this area. There are abuses in the area of defense representation as well. I certainly don't have any biases one way or another."

Americans have no choice but to wait and see.

Excerpts from Wisconsin Supreme Court Decision

(Ferdon v. Wisconsin Patients Compensation Fund, 2005 WI 125, July 14, 2005)

Severely Injured Children and their Families Are Most Hurt By Cap: "Young people are most affected by the $350,000 cap on noneconomic damages, not only because they suffer a disproportionate share of serious injuries from medical malpractice, but also because many can expect to be affected by their injuries over a 60- or 70-year life expec-tancy….Furthermore, because an injured patient shares the cap with family members, the cap has a disparate effect on patients with families." (¶100)

Patient Safety Hurt by Cap: "'[I]t is a major contradiction to legislate for quality health care on one hand, while on the other hand, in the same statute, to reward negligent health care providers.'…A cap on noneconomic damages diminishes tort liability for health care providers and diminishes the deterrent effect of tort law." (¶ 89)

Caps Do Not Lower Malpractice Premiums: "Based on the available evidence from nearly 10 years of experience with caps on noneconomic damages in medical malpractice cases in Wisconsin and other states, it is not reasonable to conclude that the $350,000 cap has its intended effect of reducing medical malpractice insurance premiums." (¶129)

Caps Do Not Attract Physicians to the State: "The available evidence indicates that health care providers do not decide to practice in a particular state based on the state's cap on noneconomic damages." (¶171)

Medical Malpractice is a Tiny Fraction of Health Care Costs: "[M]edical malpractice insurance premiums are an exceedingly small portion of overall health care costs." (¶162)

Defensive Medicine Does Not Lead to Higher Health Care Costs: "Three independent, non-partisan governmental agencies have found that defensive medicine cannot be measured accurately and does not contribute significantly to the cost of health care." (¶174)

"Torts Reforms" are Unconstitutional continued . . .

the task force that the state would not face a medical malpractice insurance crisis now or "anytime in the near future, regardless of what your committee or the Legislature decides," Republican state lawmakers have pledged to introduce cap legislation by mid-October.

Not surprisingly, "tort reformers" are also using Ferdon as a rallying cry to pass federal legislation which would limit non-economic damages in medical malpractice cases to $250,000, while doing nothing to control insurance rates for doctors. As Gretchen Schaefer, a spokeswoman for the American Tort Reform Association, told *Bestwire* in August 2005, courts that strike down "tort reforms" as unconstitutional, like the Wisconsin Supreme Court, are "precisely why Congress needs to take action."

Yet in the face of these well-heeled efforts to erode the civil justice system at state and federal levels, courts in 2005 continue to safeguard rights guaranteed by their respective state constitutions. In August 2005, Pennsylvania's Commonwealth Court struck down a measure limiting joint and several liability because it was improperly attached to other legislation.

The doctrine of joint and several liability is a fairness rule, developed over centuries to protect injured consumers. It applies when more than one defendant is found fully or substantially responsible for causing an injury. If one wrongdoer is insolvent or cannot pay their share, the other fully-responsible wrongdoers must pick up the tab to make sure the innocent victim is fully compensated.

Similarly, in September 2005, a Georgia trial court overturned a "winner-pays" law because it violated the right of access to the courts and could not be retroactively applied. The statute required a party that prevailed in a lawsuit to obtain a judgment of more than 125% of the proposed settlement offer or face paying the opposing party's attorney fees - even if the party who turned down the settlement offer won the suit.

And constitutional challenges are expected in Illinois and Missouri where caps on non-economic damages recently became law. The Illinois Supreme Court has twice invalidated such caps - first in 1976, and then in 1997 - under the state's constitution. Whether Missoui"s $350,000 cap will pass constitutional muster remains to be seen.

But one thing is certain: As long as legislatures continue to undermine the rights of injured consumers to go to court, battles over the constitutionality of "tort reforms" remain far from over.

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