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# Tort Reform: Blocking the Courthouse Door and Denying Access to Justice

Joanne Doroshow

*New York Law School*, joanne.doroshow@nyls.edu

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Racial Justice Project

**JUSTICE, JUSTICE SHALL YE PURSUE**

Honorable Jonathan Lippman

**SPECIFIC AREAS FOR REFORM**

**HOUSING**

Andrew Scherer  
Susanna Blankley

**IMMIGRATION**

Claire Thomas & Lenni Benson  
Fidèle Menavanza

**PRISONERS' RIGHTS**

Brett Dignam

**TORT LIABILITY**

Joanne Doroshov

**WOMEN'S RIGHTS**

Catherine Carr

**ALTERNATIVE MODELS**

David Udell  
Randal Jeffrey  
Karen Simmons  
Amy Barasch  
Joan Vermeulen  
Raymond Brescia

**THE ROLE OF GOVERNMENT OFFICIALS**

Paris Baldacci  
Lisa Grumet

**IMPACT**

**COLLECTED  
ESSAYS ON  
EXPANDING  
ACCESS TO  
JUSTICE**



# Tort Reform: Blocking the Courthouse Door and Denying Access to Justice

Joanne Doroshow<sup>1</sup>

The right of injured people to sue and collect compensation from the perpetrators of their harm is one of the great achievements of American democracy. In our system, the poorest and most vulnerable can challenge the largest corporation or institution and hold them accountable for causing injury. With corporate wealth and power dominating the executive and legislative branches of government, the civil courts are among the only places left in our American system where individuals can successfully confront large companies on a somewhat level playing field. And civil juries are the one arena where average citizens can participate directly in government, where they can have a direct impact on events and ultimately the state of their lives. This paper will discuss the importance of the civil jury system, and how recent changes in tort law – i.e., “tort reform” – are restricting access to civil justice by the sick and injured. We will address three types of tort reforms that are having a particularly severe impact on access to the courts: caps on damages, contingency fee limits, and forced arbitration clauses.

## Introduction

The right to a civil jury trial is among our earliest rights as Americans. The American colonists believed that trial by jury was an important right of freedom.<sup>2</sup> England repeatedly attempted to restrict the right to jury trial in the colonies, as colonial administrators made increasing use of judge-tried cases.<sup>3</sup> In virtually every major document and speech delivered before the Revolution, the colonists portrayed trial by jury as, if not their greatest right, one that was indispensable.<sup>4</sup> In 1791, during its first session, Congress drafted the Bill of Rights, ratified as the first ten amendments to the Constitution, securing the right to civil jury trial in the Seventh Amendment.<sup>5</sup>

But the right to civil jury trial amounts to a guarantee without any practical significance if attorneys are not available to help individuals navigate the legal system. Very few injured parties have the financial resources to hire an attorney at an hourly rate. With medical expenses, disability, pain

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<sup>1</sup> Adjunct Professor of Law & Executive Director, Center for Justice & Democracy at New York Law School. This article is based in part on previously published studies, websites, blogs and other publications by the Center for Justice & Democracy and by author Joanne Doroshow, writing for the Center for Justice & Democracy and the Center for Study of Responsive Law.

<sup>2</sup> Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–54 (1973).

<sup>3</sup> For example, on March 22, 1765, England passed the Stamp Act, which placed stamp duties on all legal documents, newspapers, pamphlets, college degrees and other documents. “The British reasoned that since the American colonists had been the chief beneficiaries of the expulsion of the French” after the 1754-63 French and Indian War, “they should bear the financial responsibility for the government and defense of the American continent.” The Act aroused strong opposition, in large part because the admiralty courts, which operated without juries, were given jurisdiction to enforce the Act. AMERICAN BAR FOUNDATION, SOURCES OF OUR LIBERTIES 262–263 (Richard L. Perry & John C. Cooper eds., 1959).

<sup>4</sup> See generally Wolfram, *supra* note 2.

<sup>5</sup> The Seventh Amendment states, “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII. See generally Wolfram, *supra* note 2.

and often an inability to work, most injured people cannot afford to pay an attorney up front. As one attorney told American Bar Association (“ABA”) Foundation researchers Stephen Daniels and Joanne Martin, “The simple truth is at least 95% of our clients could not afford to pay the lawyer and could not finance the lawsuit. They just couldn’t – at least 95%.”<sup>6</sup>

Moreover, unlike in England and some other nations,<sup>7</sup> U.S. government-funded attorneys cannot represent the injured who seek compensation in the United States. That is why the third option – the contingency fee system - is so important. Under this system, an attorney agrees to take an injury case without any money up front. The attorney fronts all costs and gets paid only if successful. In return, the lawyer is entitled to a percentage of the money collected if the case succeeds. But if the case is lost, the lawyer is paid nothing. This type of representation has been an accepted (and even celebrated) arrangement for more than 150 years.<sup>8</sup> Today “[m]any consumer organizations, public advocates, labor unions, and plaintiffs’ lawyers view the United States’ system of contingency fees as nothing less than the average citizen’s ‘key to the courthouse door,’ giving all aggrieved persons access to our system of justice without regard to their financial state.”<sup>9</sup> But in recent years, lobbyists for big corporations, medical societies and the insurance industry have been pushing for government-imposed schedules and “caps” on both contingency fees and on overall damage awards, making it more difficult for victims to access the civil justice system.

## A. “Tort Reform” and Attacks on Justice

Laws that keep injured consumers from filing legitimate cases or obtaining compensation from the companies responsible for causing their injuries, are commonly known as “tort reform.” The “tort reform” movement has had devastating consequences for many vulnerable children and families. It has also weakened the ability of the civil justice system to protect us all from injury and disease, whether or not we ever go to court. That is because the prospect of civil liability deters manufacturers, builders, chemical companies, hospitals and other potential wrongdoers from repeating their negligent behavior and provides them with an economic incentive to make their practices safer.<sup>10</sup> Tort actions also force disclosure of often extremely important internal information about unsafe products and practices, and force airing these disclosures through the media. Often, corporations that may have blocked regulatory laws have been forced to change harmful behavior because of lawsuits brought by individuals. Judges and jurors are free from the influence of corporate lobbyists who wine and dine legislators and regulators, and who use their influence to weaken safety laws.

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<sup>6</sup> Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 348 (2011).

<sup>7</sup> See discussion of British system in Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739 (2002), available at <http://ssrn.com/abstract=907863>; Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 LAW & CONTEMP. PROBS. 175 (2001), available at <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.

<sup>8</sup> Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 775–776 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1465164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465164) (discussing the history of the contingent fee).

<sup>9</sup> Inselbuch, *supra* note 7, at 175.

<sup>10</sup> Conservative theorist Richard Posner has written that the tort system’s economic function is deterrence of non cost-justified accidents, and that tort law creates economic incentives for “allocation of resources to safety.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 312 (1987). See also MEGHAN MULLIGAN & EMILY GOTTLIEB, *LIFESAVERS: CJ&D’S GUIDE TO LAWSUITS THAT PROTECT US ALL* (2002), available at <https://centerjd.org/content/study-lifesavers-cjds-guide-lawsuits-protect-us-all>.

Before the mid-1970s, consumer rights organizations focused little time or energy on the tort system. Until then, the common law of torts had generally operated without much political interference, having evolved through the courts for generations - indeed centuries - to afford citizens a means to challenge injustice and negligence. But that changed in the mid-1970s when the nation experienced its first liability insurance crisis. Insurance rates for doctors and some businesses suddenly started to skyrocket for no apparent reason.<sup>11</sup> Insurers quickly blamed what they believed was occurring in the country – a “litigation explosion.” They demanded huge rate hikes from state regulators and convinced lawmakers that the only way to bring rates under control was to limit the legal rights of injured victims.<sup>12</sup>

It “turns out that there never was a ‘litigation explosion.’”<sup>13</sup> However, the political lessons learned by the insurance industry were clear: by blaming lawyers and litigation for a crisis that the industry itself had manufactured, the industry could obtain major changes in tort laws to reduce or eliminate legitimate claims brought against businesses and professional groups.

## B. How Tort Reform Restricts Access to Justice

Two tort reform proposals that have a significant impact on access to justice are caps on damages and mandatory limits on contingency fees for plaintiff lawyers. In addition, companies are making increasing use of “forced arbitration” clauses in consumer, employment and health care contracts, preventing harmed individuals from accessing the civil justice system at all.

### 1. Caps on Damages

A damages cap is an arbitrary ceiling on the amount an injured person can receive in compensation by a judge or jury, irrespective of what the evidence presented at a trial proves compensation should be. The most typical cap proposals cover non-economic damages. Non-economic damages compensate injured people for intangible but real “quality of life” injuries, like the loss of a reproductive system, permanent disability, disfigurement, trauma, loss of a limb, blindness or other physical impairment. As University of Buffalo Professor Lucinda Finley has written, “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.”<sup>14</sup>

Caps on damages usurp the authority of judges and juries, who listen to the evidence in a case, to decide compensation based on each specific fact situation. Caps specifically on non-economic damages discriminate against senior citizens, children, stay-at-home parents, low-income families, or anyone with a relatively low level of economic or wage loss. According to Professor Finley,

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<sup>11</sup> See *Malpractice - Doctors in Revolt*, NEWSWEEK, June 9, 1975 (“Like measles in a nursery, doctors’ strikes seem to be erupting all across the nation. What the doctors are protesting is the skyrocketing cost of their malpractice insurance premiums.”).

<sup>12</sup> For example, during this period California enacted a \$250,000 cap on non-economic damages for malpractice victims. CAL. CIV. CODE § 3333.2(b).

<sup>13</sup> AMERICANS FOR INSURANCE REFORM, REPEAT OFFENDERS; HOW THE INSURANCE INDUSTRY MANUFACTURES CRISES AND HARMS AMERICA 9 (2011), available at [http://www.insurance-reform.org/studies/Repeat\\_OffendersFinal.pdf](http://www.insurance-reform.org/studies/Repeat_OffendersFinal.pdf).

<sup>14</sup> Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004).

[J]uries consistently award women more in noneconomic loss damages than men ... [A]ny 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.<sup>15</sup>

Professor Joanna Shepherd of Emory University School of Law explained,

[B]y limiting certain types of damages relative to other damages, tort reform disproportionately reduces both compensation and access to justice for specific segments of the population. For example, existing studies show that caps on noneconomic damages disproportionately reduce compensation to females, children, the elderly, and the poor because a much greater proportion of their damage awards are in the form of noneconomic damages. These demographic groups often have lower incomes than other groups and, as a result, they have correspondingly less economic loss and relatively more noneconomic loss. Thus, noneconomic damage caps act as a regressive tax on their recoveries because they reduce the recoveries of lower-income plaintiffs by a higher fraction than they reduce the recoveries of higher-income plaintiffs.<sup>16</sup>

As will be explained in more detail later, caps also make it more difficult for injured people to find competent contingency fee attorneys to take their cases. California insurance defense attorney Robert Baker, who had defended malpractice suits for more than 20 years, told Congress in 1994, “[a]s a result of the caps on damages, most of the exceedingly competent plaintiff’s lawyers in California simply will not handle a malpractice case ... There are entire categories of cases that have been eliminated since malpractice reform was implemented in California.”<sup>17</sup>

## 2. Limits on Contingency Fees<sup>18</sup>

The contingency fee system provides anyone with a legitimate injury case, regardless of his or her financial means, with access to an attorney. As noted earlier, the attorney takes a case without charging any money up front and is paid only if the case is successful. Even organizations generally known for their support of tort reform have recognized this critical function of the contingency fee system. Associate Professors of Economics Alexander Tabarrok and Eric Helland of George Mason University and Claremont McKenna College wrote a book about this topic, called *Two Cheers for Contingency Fees*, published by the conservative American Enterprise Institute. In it, the authors wrote, “A second advantage of contingent fees [the first being cost reduction] is improved access to the legal system.”<sup>19</sup> They also explained, “[c]ontingent-fee lawyers ‘screen’

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<sup>15</sup> *Id.*

<sup>16</sup> Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, VANDERBILT L. REV. 151, 175 (2014) (citing Lucinda M. Finley, *supra* note 14, at 1264–65); NICHOLAS M. PACE ET AL., CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 30–33 (2004); Eleanor D. Kinney et al., *Indiana’s Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275, 1288–89 (1991).

<sup>17</sup> See Jamie Court, *The Medical Malpractice Insurance Crisis Hoax*, MULTINATIONAL MONITOR (Mar. 2003), <http://www.multinationalmonitor.org/mmm2003/032003/court.html>.

<sup>18</sup> This section is based on an earlier publication, CENTER FOR JUSTICE & DEMOCRACY, COURTHOUSE CORNERSTONE: CONTINGENCY FEES AND THEIR IMPORTANCE FOR EVERYDAY AMERICANS (2013), available at <http://centerjd.org/content/white-paper-court-house-cornerstone-contingency-fees-and-their-importance-everyday-americans>.

<sup>19</sup> ALEXANDER TABARROK & ERIC HELLAND, TWO CHEERS FOR CONTINGENT FEES 7 (2005), available at [www.aei.org/files/2005/08/22/20050817\\_book827text.pdf](http://www.aei.org/files/2005/08/22/20050817_book827text.pdf).

potential cases and clients. In constructing a litigation portfolio for his firm, the lawyer will reject weak cases and agree to handle stronger ones. This screening function is useful both for clients and, most likely, for the legal system at large.”<sup>20</sup>

Today half the states in this country have some type of law dealing with contingency fees.<sup>21</sup> Some states simply allow for judicial review of fees while others cap fees at levels considered fair and ethical, *i.e.*, one-third.<sup>22</sup> However, many state laws covering contingency fees prevent recovery of “one-third” by using sliding scales, with the most severe limits on the highest award or the most serious cases. New York’s law is a good example. New York limits contingency fees in medical malpractice cases to 30 percent of the first \$250,000, 25 percent of the second \$250,000, 20 percent of the next \$500,000, 15 percent of the next \$250,000 and just 10 percent of anything over \$1.25 million.<sup>23</sup> While such a fee may still seem like plenty of money, it is important to understand what high-value cases can cost to bring, and how attorneys must evaluate risk before taking any case on contingency.<sup>24</sup> Indeed, the risk of losing the case completely is not the only risk faced by contingency fee lawyers:

[R]ecovery or no recovery is only one part of the uncertainty inherent in litigation. The other contingencies faced by the lawyer (and the client) include:

- uncertainty about the amount that will be recovered (and hence the fee the lawyer will receive);
- uncertainty about what it will cost, in both effort and expenses, to obtain the recovery; and
- uncertainty about how much time will pass before the recovery is obtained.<sup>25</sup>

High-stakes cases, like medical malpractice cases involving catastrophic injuries, can be extremely costly for the patient.<sup>26</sup> Even Victor Schwartz, General Counsel of the American Tort Reform Association, has said that it is “rare or unusual” for a plaintiff lawyer to bring a frivolous malpractice suit because they are too expensive to bring.<sup>27</sup> By allowing lawyers to distribute their risks among cases, the contingency fee system allows attorneys to survive professionally even if they lose some cases and are paid nothing. The more restrictions placed on the ability of a contingency fee attorney to recover their costs and fees in cases they win, the less likely they will risk taking any cases at all.

In 2009, researchers from RAND’s Institute for Civil Justice (ICJ) surveyed 965 plaintiffs’ attorneys who were presented with “hypothetical meritorious cases” and asked if they would take the case given that either noneconomic damages caps or attorney fee limits were in effect. ICJ

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<sup>20</sup> *Id.* at 8.

<sup>21</sup> See full list in CENTER FOR JUSTICE & DEMOCRACY, *supra* note 18, Appendix 1.

<sup>22</sup> See, e.g., MICH. CT. R. 8.121 (B).

<sup>23</sup> N.Y. JUD. LAW § 474-a(2).

<sup>24</sup> TASK FORCE ON CONTINGENT FEES, ABA TORT TRIAL & INSURANCE PRACTICE SECTION, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION 8 (2004), available at <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.

<sup>25</sup> Kritzer, *supra* note 7, at 748.

<sup>26</sup> David Goguen, *The Challenges in Winning a Medical Malpractice Lawsuit*, ALLLAW, <http://www.alllaw.com/articles/nolo/medical-malpractice/challenges-winning-lawsuit.html> (last visited Feb. 9, 2016).

<sup>27</sup> Mark A. Hofmann, *White House Open to Medical Liability Changes*, BUSINESS INSURANCE, <http://www.businessinsurance.com/article/20110130/ISSUE01/301309974> (last visited Feb. 9, 2016).

concluded that caps and attorney fee limits each “make it harder to retain counsel.”<sup>28</sup> In states where both types of laws are in effect, the impact on victims with the most serious harm is even more severe, as attorneys simply cannot afford to front high litigation costs when the possible recoverable damages are so limited.

What’s more, noted the ABA Tort Trial and Insurance Practice Section, just as caps on non-economic damages have a disproportionate impact on women, children, minorities and the poor, so do attorney fee caps:

Elimination of, or significant constraints on, contingent fees would make legal assistance available only to those injured persons who are wealthy. The poor, the retired, African Americans, and women especially will suffer because they are often unable to afford hourly fees.<sup>29</sup>

The reason caps on fees have had this impact is obvious: costs. As the ABA Tort Trial and Insurance Practice Section report found, “imposing such limitations will likely preclude many medical malpractice actions from being filed because the prospective damages and resulting attorneys’ fees will not justify the expected time and expense associated with the litigation,”<sup>30</sup> which often costs the attorney hundreds of thousands of dollars. Practically speaking, this means that “[o]nly those most grievously injured by the grossest medical negligence would likely be able to bring an effective action”<sup>31</sup> and that, for many victims, limiting contingent fees “would have virtually the same effect as prohibiting them.”<sup>32</sup> Indeed, such limitations would have the additional impact of driving attorneys out of the system altogether, particularly those specializing in costly and complex cases like medical malpractice:

If prices for lawyer services are fixed below what the market would yield, lawyers will have incentive to employ their services elsewhere, where their expertise and skill match the demand for them.... Limiting contingent fees will likely squeeze lawyers out of medical malpractice litigation, leaving some, perhaps many, victims with no representation.<sup>33</sup>

Indeed, the contingency fee system provides the injured with access not just to any lawyer, but to one who is capable of fighting an insurance company on a somewhat level playing field. As the ABA Tort Trial and Insurance Practice Section put it:

Limitations [on contingency fees] do not simply serve to ignore medical error and to eliminate medical malpractice victims from the system, they also would shift meritorious cases to less experienced (and therefore less expensive) lawyers. This could have the effect of reducing the likelihood or amount of recovery. Plaintiffs would not really be able to have the counsel of their choice and might have to settle for counsel unfamiliar with the procedural intricacies of the specialized area of practice.<sup>34</sup>

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<sup>28</sup> Steven Garber et al., *Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?*, 6 J. EMPIRICAL LEGAL STUD. 637 (2009).

<sup>29</sup> TASK FORCE ON CONTINGENT FEES, *supra* note 24, at 32.

<sup>30</sup> *Id.* at 20.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 29.

<sup>34</sup> *Id.* at 33.



At the same time,

there would be no limit on the number of lawyers the defense could employ or the amount of fees those lawyers could charge. That creates a potential imbalance in favor of the defense. Thus, even where medical malpractice victims could find representation, the law would say to them, “you are not allowed to use a lawyer whose market valuation is equivalent to those who might represent the defendant.”<sup>35</sup>

There is no question that the tort reform movement has been skillful in getting everyday Americans to support this kind of imbalance while undermining their own constitutional rights of access to the civil justice system. This is precisely what was accomplished in Florida in 2004 with the passage of Amendment 3, a voter initiative. This amendment to the Florida State Constitution was sponsored by the state’s medical lobbies, and it imposes caps on contingency fees in medical malpractice cases. The amendment as passed limits contingency fees to 30 percent of the first \$250,000 awarded and 10 percent of any amounts above \$250,000.<sup>36</sup>

What is remarkable and dangerous about Amendment 3 is how the medical lobbies won popular support for it. Specifically, the Amendment was couched in misleading language suggesting that the law’s purpose was to allow injured patients to keep more of their recovery. In reality, its aim and impact were no different than any other contingency fee limit law: preventing injured patients from obtaining competent counsel.

Specifically, the constitutional provision reads as follows:

(a) Article I, Section 26 is created to read “Claimant’s right to fair compensation.” In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.<sup>37</sup>

When the Florida Supreme Court allowed this Amendment on the ballot, Justice R. Fred Lewis dissented, recognizing it for what it was – an attempt to mislead voters. He wrote that the Amendment:

attempt[s] to “hide the ball” from the voters and disguise a very clear end...[with] false promises of benefits when [it] really...restrict[s] existing rights... Clearly, the proposed amendment as written portrays that it will provide protection for citizens by ensuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the amendment actually has the singular and only purpose of impeding a citizen’s access to the courts and that citizen’s right and ability to secure representation for a redress of injuries. Its purpose is to restrict a citizen’s right to retain counsel of his or her choice on terms chosen by the citizen and selected counsel and to thereby negatively impact the right of Florida citizens to seek redress for injuries sustained by medical malpractice. This is truly a wolf in sheep’s clothing.<sup>38</sup>

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<sup>35</sup> *Id.* at 29.

<sup>36</sup> FLA. CONST. art. I, § 26(a).

<sup>37</sup> *Id.*

<sup>38</sup> TASK FORCE ON CONTINGENT FEES, *supra* note 24, at 37–38 (citing *In re: Advisory Opinion to the Attorney General Re: The Medical Liability Claimant’s Compensation Amendment*, 880 So.2d 675, 683 (Fla. 2004) (Lewis, J., dissenting)).

He went on to write of the Florida Medical Association, “[The FMA] should not falsely claim they are providing a benefit to those injured by medical malpractice when they are in fact restricting their rights to secure adequate legal representation. There really is no other purpose of this proposed amendment.”<sup>39</sup>

### 3. Forced Arbitration

In 2011, the United States Supreme Court held that the Federal Arbitration Act of 1924 (“FAA”) allows corporations to strip people of their basic right to civil jury trial and force them into private, corporate-designed systems to resolve their disputes. The case was *AT&T Mobility LLC v. Concepcion*.<sup>40</sup> The Court ruled that even when an existing state law protects individuals from abusive forced arbitration clauses, the FAA - a law originally enacted simply to help resolve commercial disputes between businesses - trumps these state laws.

This is a problem for several reasons. Our judicial system is designed to neutralize imbalances between parties through procedural and substantive rights, like the right to know and rebut evidence through discovery, cross-examination and argument, civil rules of procedure, and an impartial judge who is guided by the substantive law. Arbitration, on the other hand, does none of these things. Arbitrators are often on contract with the businesses against which a claim is brought. Often the company, not the victim, is allowed to choose the arbitrator. This creates inherent bias and self-interest on the part of the arbitrator—the arbitrator is motivated to rule in a way that will attract future company business. At the same time, arbitration companies have a financial incentive to side with corporate repeat players who generate most of the cases they handle.

Arbitrators are also not required to have any legal training and they need not follow the law. Court rules of evidence and procedure do not apply. There is limited discovery making it much more difficult for individuals to have access to important documents that may help their claim. Arbitration proceedings are secretive. Decisions are still enforceable with the full weight of the law even though they may be legally incorrect. This is especially disturbing because these decisions are binding. And sometimes, victims must split the sizeable costs of arbitration with the defense.<sup>41</sup> Finally, “consent” to forced arbitration is hardly voluntary. These clauses are usually outlined in tiny print, buried in documents and paragraphs and written in legalese that is incomprehensible to most people. And because entire industries are inserting arbitration terms into contracts - including class action waivers - there is little choice but to agree to them.

In March 2015, the federal Consumer Financial Protection Bureau (“CFPB”) released a comprehensive study about the use of forced arbitration clauses in consumer financial contracts.<sup>42</sup> CFPB found that among the millions of transactions covered by forced arbitration clauses between consumers and financial institutions, consumers filed very few arbitration cases. From

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<sup>39</sup> *Id.* at 38.

<sup>40</sup> 563 U.S. 333, 343–344 (2011).

<sup>41</sup> See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES, Nov. 1, 2015.

<sup>42</sup> See generally CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

2010 through 2012, cheated consumers alone filed on average only about 400 arbitration cases each year for six product markets combined – credit card, checking account/debit cards, payday loans, prepaid cards, private student loans and auto loans.<sup>43</sup> The agency found that consumers had counsel “in roughly 60% of the cases” but “companies almost always had counsel.”<sup>44</sup> In addition, “[a]lmost all of the arbitration proceedings involved companies with repeat experience in the forum,” and consumers prevailed in a little over 20 percent of cases filed in 2010 and 2011 that were resolved by an arbitrator while companies prevailed in 93 percent of cases in which companies made claims or counterclaims that were resolved by arbitrators.<sup>45</sup>

By contrast, CFPB’s review of 419 federal consumer financial class action settlements during this time period found that “the total amount of gross relief – defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses was \$2.7 billion,” and covered 350 million class members.<sup>46</sup>

## Conclusion

Our uniquely-American civil justice system is a cornerstone of our democracy, fundamental to protecting individual rights and liberties, ensuring public health and safety and restraining abuses of power. Even the late conservative Chief Justice William Rehnquist wrote eloquently in defense of the right to civil jury trial, instructing that “a right so fundamental and sacred to the citizen ... should be jealously guarded.”<sup>47</sup> Unfortunately, as a nation we are not doing a very good job guarding this right. The civil justice system is an embattled and vulnerable institution in the United States. Corporations and their insurers have been at the forefront of attacks on civil judges and juries as industries seek to limit corporate liability exposure by blocking access to the courts by everyday people. But Rehnquist’s admonition should give pause to any government leader intent on further weakening our civil justice system. This nation fought a grueling and bloody war to win these freedoms. We should not have to re-fight those battles within our own country today. •

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<sup>43</sup> *Id.* at Section 1, 11.

<sup>44</sup> *Id.* at Section 1, 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at Section 1, 16 & Section 8, 4-5.

<sup>47</sup> *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 352 (1979) (Rehnquist, J., dissenting).