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It's Time to End Dirty Back Rooms of Injustice



By Joanne Doroshow



G-STOCKSTUDIO VIA GETTY IMAGES

Thirty years ago, a number of insurance companies got together in a room and agreed to create an insurance liability crisis in the United States. They would start raising rates, restricting coverage and canceling policies, largely for the purpose of coaxing state lawmakers into enacting so-called “tort reform.” These are laws that make it difficult or impossible for injured Americans to file lawsuits and be properly compensated. Indeed, once this insurance “crisis” spread across America, insurers convinced lawmakers that the only way to bring insurance rates under control was to strip Americans of their legal rights. Evidence of this and other strategy meetings was discovered by over a dozen state attorneys general, who in 1988 filed [class actions against these companies for violating antitrust laws](#).

Those class actions are over, having [settled](#) in the mid-1990s. But the days of backroom corporate strategy meetings aimed at limiting the legal rights of Americans, is clearly not. This was one of the startling findings of an extraordinary three-part *New York Times* series ([here](#), [here](#) and [here](#)) about the spread of “forced arbitration” clauses and class action

bans. For those who haven't read the series, let me summarize: If you have a credit card, bank account, purchased anything over the internet, rented a car, placed a loved one in a nursing home or even gotten a new job lately, it is likely that you have unknowingly agreed to have any dispute with the company resolved in a private, biased, corporate-controlled arbitration system. Not only that, you have probably also agreed that no matter how many millions of people may have been cheated or violated in the same way, you cannot join together with anyone else in a class action lawsuit. Many cases are too expensive to bring individually so in those situations, no lawsuit will ever be brought. This allows corporate wrongdoers to completely escape any legal accountability.

But it wasn't always this way. Incredibly, [found](#) the *New York Times*, the problem largely began in July 1999, when Alan S. Kaplinsky, a corporate lawyer who represented “Alabama money lenders accused of duping customers into taking out credit cards,” and a few other corporate lawyers, gathered together “Bank of America, Chase, Citigroup, Discover, Sears, Toyota and General Electric.” They met at a New York law firm “to strategize about arbitration.” The *Times* [reports](#):

Details of the meetings, and of more than a dozen others over the next three years, were culled from court records filed in a federal lawsuit in Manhattan and corroborated in interviews with lawyers who attended.

The records and interviews show that lawyers for the companies talked about arbitration clauses as a means to an end. The goal was to kill class actions and send plaintiffs' lawyers to the “employment lines.”

Of the companies participating, only American Express and First USA had adopted an arbitration clause banning class actions; months later, Discover Bank added its own. By the time the meetings concluded, many of the companies had followed suit.

Incredibly, “Discover, one of the companies involved with Mr. Kaplinsky's group,” was represented in court by “John G. Roberts Jr., at the time a prominent corporate defense lawyer” and now Chief Justice of the United States Supreme Court. Back then, Roberts, on behalf of Discover Bank, “unsuccessfully petitioned the Supreme Court to hear a case involving class-action bans. By the time the Supreme Court handed down its favorable decisions [in 2011 and 2013 upholding forced arbitration and class action bans], he was

the chief justice.” The Court adopted “essentially the same argument Mr. Roberts had made as a lawyer in the Discover case.”

What these corporate lawyers achieved in those meetings and later before the Roberts Supreme Court, is what the tobacco, insurance, pharmaceutical, chemical, oil, health care and auto industries have been trying to accomplish in Congress and state legislatures around the country for years - taking complete control of the civil justice system and abolishing our [Constitutional right to a civil jury trial](#).

It is a shocking development, but there are some things we can do to fix things. First, we should support the efforts of those in Congress who are trying to change the law, like [Sen. Al Franken \(D-MN\)](#) and [U.S. Rep. Hank Johnson, \(D-GA\)](#), and [Sen. Pat Leahy \(D-VT\)](#). Their bill, the [Arbitration Fairness Act](#), “would eliminate mandatory arbitration clauses in employment, consumer, civil rights and antitrust cases.”

In addition, the Consumer Financial Protection Bureau (CFPB) [right now](#) “is considering proposing rules that would ban consumer financial companies from using ‘free pass’ arbitration clauses to block consumers from suing in groups to obtain relief.” Sign [this petition](#) to support the efforts of this wonderful agency.

Finally, be sure to read the *New York Times* series. And be skeptical of any schemes that promise you a more fair and reliable way of resolving disputes on the condition that you stay out of court. Courts neutralize the imbalance between parties. Alternative systems magnify them, tilting the legal playing field in favor of corporations and circumventing rules about standards of conduct that have evolved over the years to protect us all.