

Preserving Access to Justice for All

by **ARTHUR H. BRYANT**

This is an extraordinary moment in our nation's history. All eyes are focused on President Obama, trying to bring change to America, and the economic crisis, where corporations let avarice overwhelm them. Few are noticing, however, that, at the very same time, companies throughout America – some benefiting from bailouts – are trying to immunize themselves from liability and keep millions of their victims out of court. All who care about justice must be aware of these efforts, understand how they undermine our nation and the principles on which it is based, and work to defeat them nationwide.

America was founded by people who understood that power unchecked is power abused. That's why we have, among other things, separation of powers, the Bill of Rights, and the right to a day in court. For several years now, however, many of those with power – in both the public and private sectors – had few restraints. The federal government did nothing to restrain them or facilitated their conduct while their greed ran amok. They could only be held accountable in the courts. So they unleashed an unprecedented, calculated, and fundamentally un-American attack: step by step, in area after area, they started working to eliminate their victims' access to the courts and, ultimately, justice itself. Those efforts have not stopped.

Corporations are using many tactics to avoid accountability, but three are critical – federal preemption, mandatory arbitration, and class action bans. If these three succeed, most Americans can kiss many of their rights good-bye.

Federal preemption is when federal law *wipes out* state law. In the past, it had little effect on consumers' rights. Congress passed laws setting (or having federal agencies create) minimum legal standards that companies had to meet to get or keep their products on the market. State liability law said companies had to compensate people they injured if their products were inadequately labeled, designed, manufactured, or sold and a reasonable company would have done more than meet the minimum requirements established by federal law. Congress left injury victim compensation to state law. (In the rare instances when Congress displaced state liability law, like after 9-11, it created alternative systems for compensating the injured.) Federal legislation increased consumer protection, with federal regulation and state liability law working side-by-side.

The Bush Administration, however, reversed the federal government's long-held anti-preemption position, worked with corporate representatives to advance federal preemption and eliminate consumers' rights, and changed the Supreme Court's membership. And federal preemption became a huge danger.

Eight months ago, at the Bush Administration's urging, the Supreme Court held in *Riegel v. Medtronic* that federal regulation of medical devices, which Congress authorized thirty years ago to protect consumers,



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preempts and eradicates injured consumers' rights to sue the manufacturers of millions of devices for compensation. Unless Congress acts, those lawsuits are now barred, even if the manufacturer hid crucial information or lied; the FDA was bribed, overwhelmed, or made a mistake; or the medical device was defective and withdrawn from the market. Meanwhile, in courts across the country, almost every company regulated by the federal government i.e., almost every company is now arguing that federal preemption bars suits against it.

As scary as preemption is, mandatory arbitration is closing the courthouse doors to far more people. Throughout America, companies are putting mandatory arbitration clauses in their form consumer and employment contracts that prohibit lawsuits against them and require customers and workers to submit to

arbitration heavily weighted in the companies' favor. Almost all credit card, mortgage, phone, and computer companies are now using them, as are banks, HMOs, car dealers, doctors, and insurers. There's often no knowledge or choice. (When was the last time you read your credit card "agreement"?) Companies slip these provisions into fine print they know isn't read. Workers "agree" by keeping their jobs.

These clauses are designed to eliminate Americans' right to a day in court. As repeat players in the process, companies do far better in arbitration, even when they don't twist the procedures to make them unfair. If the arbitrator rules against them, they don't pick and pay him again. They often add words to these clauses saying consumers and workers "waive" their rights to get what the law provides – full compensation, punitive damages, their attorneys' fees paid, etc. Most courts will strike these provisions (if you can get to court), but far too many (in part because they're overburdened) are forcing people into mandatory arbitration.

Class action bans go one giant step further, enabling companies to avoid being held accountable in court and arbitration. Aiming for total immunity, these corporations use form contract provisions that ban customers and workers from bringing or participating in any class action against them. Credit card and other companies charging small amounts to lots of people love class action bans; they know no one will sue them individually for the amounts involved. If a company cheats 5 million customers out of ten dollars each and no one can bring a class action, the company can walk away with \$50 million.

That's why state high courts in California, New Jersey, New Mexico, Washington, and elsewhere have found them illegal. But courts in Delaware, Texas, and other states have enforced them. Class action bans serve as corporate "get out of jail free" cards, leaving consumers and workers with no chance at justice at all.

We must stop the abuse and expansion of federal preemption, mandatory arbitration, and class action bans. Over a century ago, the Supreme Court said, "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." All Americans know this is true. In our country, the courts are the one place where even the poorest, least powerful person can hold the richest, most powerful person or corporation accountable. Extremely emotional and heated disputes are resolved non-violently in the courts every day. If they can't be, they'll be resolved in the streets – because our nation is violating the principles on which it's based.

This is the United States of America. We don't pledge allegiance to liberty and justice "for some." We must keep the courthouse doors open – and preserve access to justice – for all. ♦