

*The Times of Trenton*  
**America's Access to  
Justice at Risk**  
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This is an extraordinary moment in our nation's history. All eyes are focused on President-Elect Obama, who will bring change to America, and the economic crisis, where huge corporations let avarice overwhelm them.

But few people are noticing that President Bush and some companies, trying to maximize profits, are implementing changes that, if not stopped, will put most Americans last -- and out of court. 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 -- have had few restraints. The federal government did nothing to restrain them, facilitating 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 are working to eliminate their victims' access to the courts and, ultimately, justice itself.

They are using many tactics, but three are critical -- federal preemption, mandatory arbitration, and class action bans. If these three

succeed, most Americans can kiss many of their rights goodbye.

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.

Four years ago, however, the Bush Administration reversed the federal government's long-held position and argued that pesticide manufacturers could not be sued by injured consumers because federal law preempts -- i.e., eliminates -- all state laws on which those lawsuits are based. The Supreme Court rejected that argument as "particularly dubious." Then President Bush got a chance to change the 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 vs. Medtronic* that federal regulation of medical devices, which Congress authorized 30 years ago to protect

consumers, 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. And that's just the beginning.

The Supreme Court is now considering two cases, *Altria vs. Good* and *Wyeth vs. Levine*, in which the tobacco and drug companies are asking the Court to expand federal preemption and grant them immunity by judicial fiat, too. Pre-emption is supposed to turn on Congress's intent, but Congress said nothing about eliminating consumers' rights. The companies are asking the Court to rule that Congress implicitly extinguished consumers' rights.

Doctors are worried. For the first time ever, the editors and writers of the nation's leading medical publication -- *The New England Journal of Medicine*-- joined together on a legal brief, opposing preemption before the Court. At the same time, in courts nationwide, almost every company regulated by the federal government, i.e., almost every company, is 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.

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