

# Civil Justice Digest

NEWS, RESEARCH & COURT DECISIONS ON THE U.S. CIVIL JUSTICE SYSTEM

## WHO DECIDES: THE JURY OR THE ARBITRATOR?

This issue of the Civil Justice Digest considers, from a number of aspects, two alternatives now faced by many parties to disputes: litigate, or arbitrate?

Choices among formal methods of dispute resolution have expanded considerably since the middle-1970s, when Harvard Law School Professor Frank E.A. Sander introduced the concept of the “multi-door courthouse.” The system conceived by Sander included as options informal assistance from community resource centers, early neutral evaluation, mediation, arbitration, summary trials with or without a jury, conventional litigation, and others. Sander’s clear aims were to save time and money for disputants and the courts and to improve the public’s level of satisfaction with the process of dispute resolution.

The articles in this issue relate to two of Sander’s “doors”—jury trial and arbitration—but in a context hardly imaginable in the 1970s. At the beginning of the 21st century, the two options may no longer be coequal. Juries, jury verdicts, and the entire system of jury trial are attacked by self-interested repeat players in litigation, who make continuing efforts to change the system, to limit its applications, and to tamper with public attitudes about jury legitimacy. Choosing the “door” of litigation before a jury thus may no longer be the safe choice it was 25 years ago.

Arbitration, on the other hand, is less frequently a benign “choice” among doors to the courthouse. Often it is a mandatory process imposed on consumers and other litigants through adhesion contracts. Those who accept it—or who cannot escape it—may face unreasonably high costs, no meaningful access to an unbiased arbitrator, and no appeal.

What follows is a look at the two alternatives from the viewpoints of judges, academics, and journalists.

### 2001 Judges Forum Examines Jury Roles as Fact-Finder and Community Presence

On July 21, 2001, in Montreal, Canada, the Roscoe Pound Institute welcomed 111 judges from 31 states to its ninth Annual Forum for State Appellate Court Judges. The Forum’s topic was “The Jury as Fact-Finder and Community Presence in Civil Justice.” Two papers analyzing the importance of the jury system in America were pre-

sented by distinguished scholars Neil Vidmar of Duke University and Stephan Landsman of DePaul University. Attending judges heard presentations by the two authors and comments by a distinguished panel of American and Canadian lawyers and judges, and then participated in small group discussions on the role of the jury in their state justice systems.

The two Forum papers can be found on the Institute’s Internet site: [www.roscoepound.org](http://www.roscoepound.org).

### Neil Vidmar: *Juries, Judges and Civil Justice*

The first paper presented at the 2001 Judges Forum was Professor Neil Vidmar’s work “Juries, Judges and Civil Justice.”

Professor Vidmar teaches at the Duke University School of Law in Durham, North Carolina, where he holds the Russell M. Robinson II chair at the law school and a cross-appointment in Duke’s psychology department. He teaches courses on social science evidence in law, negotiation, the American jury, and the psychology of the litigation process. He has written numerous articles on criminal and civil juries and is co-author, with Valerie Hans, of *Judging the Jury* (1986), and the author of *Medical Malpractice and the American Jury* (1995).

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Professor Vidmar's paper reviewed the history of the jury, notably early criticism of the institution, and looked at recent empirical studies of the jury. Vidmar took as his starting point a celebrated 19th century criminal case in New York State in which a man was charged with poisoning his wife, stood trial, was found guilty, and ultimately was hanged. The testimony against the defendant included the opinion of a medical doctor who had conducted research on the poison suspected of being used (aconitine) and claimed to be the first person who had been able to detect it in a murder victim after it had entered body tissues. The doctor's testimony led to a major examination of the scientific question by leading U.S. experts and an unsuccessful campaign to have the sentence reversed on the basis of unreliable evidence. It also led to questions about the reliability of the jurors, who were suspected by some of having been swayed by a polished presentation of 19th-century "junk science" in support of the prosecution. Professor Vidmar pointed out that numerous criticisms of jury trial continue, across a range of issues.

### **Empirical Studies and Jury Control**

Next, Professor Vidmar reviewed a number of empirical studies of jury performance. In addition to considering the jury's decision-making process in general, he looked particularly at medical malpractice cases and cases involving expert witnesses with scientific evidence. He concluded that there is ample evidence that juries carry out their duties well.

Professor Vidmar then addressed a key debate in any current discussion of the jury—whether judges are better than juries at reaching rational verdicts. He tested the opponents' positions against available empirical evidence on questions of scientific evidence, juror bias, compensatory damages and the collateral source rule and, finally, punitive damages (in the latter case contrasting the results of jury simulations and actual jury verdicts). The evidence indicates that jurors and judges generally reach legitimate conclusions.

Finally, Professor Vidmar discussed a number of mechanisms used in recent years to assist jurors in reaching their conclusions, including trial bifurcation, note-taking, and improvements in both preliminary and final jury instructions. These innovations have engendered considerable debate, with some believing that they promote accuracy of fact finding, while others see them as compromising the adversary system and risking premature jury judgments. He concluded by inviting comment on two Arizona court rules that allow jurors to ask questions during trial and to discuss the evidence during trial recesses.

## **Panelist Comments on Vidmar Paper**

[All panelist comments on papers at the Forum have been condensed from the transcript of the panelists' remarks and edited for clarity.]

**Sharon J. Arkin, plaintiff lawyer from Newport Beach, California:**

Who doesn't want a jury and why? Collectively, juries are neutral. They are not biased. Each person comes into the jury room with their own private biases, their own prejudices, their own preconceptions. On a whole, when they get into that room together and they are trying to decide an issue, biases are set aside, or at least they get debated. . . . The people who don't want juries are people who don't want the truth to get out. That is the real heart of the jury system.

**Arthur E. Vertlieb, plaintiff lawyer from Vancouver, British Columbia:**

People will say, "Sometimes juries get it wrong," as though that is a surprise. Well, in 28 years, I have to say that I think sometimes judges get it wrong. . . . We can't say that our courts as a whole always get it right. Indeed, in every court in North America, judges will take a position today that 30 years later

they may decide is the wrong one to take. It doesn't mean they were wrong, and that, therefore, we shouldn't have had them doing it.

**Honorable John M. Greaney, Associate Justice, Massachusetts Supreme Judicial Court:**

I come to some of these studies with a great deal of skepticism, taking them with a grain of salt. I find many of them to be mainly partisan in nature. Not a month goes by when a book doesn't land on my desk on one or the other side of this equation. I am talking of such books as *Judging Science*, *Phantom Risk* and *The Litigation Explosion*, which expressed certain points of view.

I started as a trial judge 30 years ago, and I find that juries have become much more sophisticated. I think one reason is because they are more open. When I started, the average jury was all male and over 50 and, in some cases, not very much with it. Now you see very diverse juries, ethnically distributed, gender-distributed, and I think that is important. I think it is fair to say that juries are much less subject now to what I call the "bamboozlement" factor.

**Honorable Melvin L. Rothman, Justice of the Quebec Court of Appeal (highest court in the Province of Quebec, Canada):**

I have absolutely no hesitation in agreeing with Professor Vidmar that, in most cases, to suggest that the evidence is too complicated for the jury to understand just doesn't stand up. I have always found that jurors had a

*The evidence indicates that jurors and judges generally reach legitimate conclusions.*

collective wisdom and common sense in their conclusions that was truly impressive, and I would trust the reliability of juries, at least in criminal matters, and I have no reason to believe that they are any less reliable in civil trials. I wouldn't want to relinquish the criminal jury system for the world, but I do have some reservations and hesitations about jury trials in civil matters.

In 1976, the Province of Quebec abolished the jury system in civil matters. Following the abolition the world did not come to an end. Democracy did not crumble and justice has been done. I think it has been done as well as it has been done elsewhere.

Most ordinary people simply cannot afford the cost, the trauma and the delays of a serious civil trial, say a trial in first instance of two or three weeks, much less the appeals that are going to follow that trial. Contingency fee arrangements may lighten the burden financially, but it isn't really a principled answer to the question of accessibility in the civil justice system.

Most Western democracies have been attempting in recent years to make civil trials simpler, less cumbersome and more accessible to ordinary people than they have become in Canada. Alternative methods of resolving disputes have been successfully adopted in recent years—judicial mediation and arbitration, to name a few.

Now, civil jury trials are not, of course, incompatible with the current trend toward less formal procedural rules. But in its present form, as I understand it, the civil jury system seems to me unlikely to make civil justice simpler and more accessible to ordinary people, enabling them to resolve their disputes expeditiously and reasonably.

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## Luncheon Comments: "Where Have All the Juries Gone?"

During lunch, Forum participants heard comments by the two judicial panelists from Canada on the present status of jury trial in Canada. Representative excerpts follow, condensed from the transcript of the luncheon comments and edited for clarity.

### **Honorable John C. Bouck, Supreme Court of British Columbia (a court of original jurisdiction):**

I have four points about jury trial in British Columbia, and about why we have many fewer jury trials now than in the past.

First, we charge fees for empaneling juries. Until recently, we had a government who decided they would use the civil justice system to raise money to do all sorts of socially appropriate things. So, if you have a 15-day civil jury trial in British Columbia at the present time, you will be charged \$18,000 in jury empaneling fees and hearing fees.

Now, that is an awful lot of money, and that discourages an awful lot of people from requesting civil

juries. Art Vertlieb, a British Columbia practitioner who is one of our panelists today, is petitioning our court to eliminate all those jury fees, because they deny the people access to justice.

I suppose those fees will be abolished, and if they are, maybe we will start getting more civil juries back in the system.

The second point is that there seem to be a number of judges who don't particularly like civil jury work. They think they can do it better themselves and do it better than the jury can. I don't know why that is, but that is what happens. Perhaps when they practiced law before they became judges, they always tried cases before a judge alone, seldom with any jury, so they get on the bench and they want to continue to do that. That is another of the reasons why there is a bit of a discouragement to civil juries in British Columbia.

Third, we have a problem with the jury instruction system. It is unlike your patterned jury instruction system that you have. We have a book on jury instructions, but our system works a little bit differently from yours, in the sense that we have to instruct the jury on the evidence and weave the evidence into the principles of law. That takes a fair amount of time. We usually only have a couple of hours to prepare the jury charge after all the evidence is in and the counsel have made their submissions.

So mistakes can easily be made, and they are made, and the cases with mistakes go up to our British Columbia Court of Appeal, where there is a feeding frenzy over the jury charge. The trial judge gets thoroughly chastised in public and is told what an idiot he or she was. It often takes the higher courts up to 18 months to figure out what we did wrong in the trial court, when we were compelled to do it in two hours!

The fourth point is, there is a sort of anecdotal feeling amongst the Chief Justices that "We have got too many cases waiting for trial, and civil jury trials take longer than judge-alone trials. We can't hurry up a jury, so let's get rid of the juries and have judge-alone trials, where we can hurry the judges up."

### **Honorable Melvin L. Rothman, Quebec Court of Appeal (highest court in the Province of Quebec, Canada):**

Civil juries are gone in Quebec, and they are rarely used throughout the other provinces, even though they are still on the books. There are probably many reasons that can be advanced to explain this.

I think the most serious reasons are, first of all, the existence in Canada of a health care system that covers all medical and hospital expenses, bar none. I won't say that happens without cost, because the cost is there in taxes, but there is no indebtedness on the part of the victim for medical care, either for past medical care or future medical care.

Secondly, there is in Quebec a system of no-fault automobile insurance, so the victims of automobile accidents are compensated for the injuries they suffer. Now,

they may not be as generously compensated as a jury would compensate them—that is a matter of opinion and it is a matter of study in any individual case. But at least the no-fault insurance system is in existence. It covers all automobile accidents. There is no need to prove fault, and there is no possibility (in Quebec, at least) of obtaining compensation from the wrongdoer over and above the compensation that an injury victim receives from the government's insurance system.

That isn't the case in provinces other than Quebec. In other provinces there is automobile insurance for injuries, but there is still room for civil actions to recover some damages that are not covered under the insurance legislation in those provinces.

Thirdly, of course, there is a publicly financed, government-sponsored system of workers compensation. Again, that is no-fault and, again, it precludes any civil action against the employer or against co-workers. That kind of legislation is one of the most serious reasons for the decline of the jury system.

Other reasons are advanced for the decline of the civil jury system in Canada. Certainly, from Professor Vidmar's paper and his talk this morning, I am convinced that he is right—that the evidence of the additional cost of jury trials is probably not proved or is exaggerated. The evidence of additional delay also seems to be questionable. As to the inconvenience, I am not sure about that at all.

I said this morning that I believe in the jury system for criminal justice. Why do I promote and defend the jury system in the criminal justice system, but not for civil cases?

The reason I am as passionately devoted as I am to jury trials in criminal matters and less passionate about jury trials in civil matters is because I believe more passionately in liberty than I do in money. I think that we are justified in spending more time and being more formal and being more demanding in our procedures in a criminal trial than I think we are in most civil trials.

I think there is a trend to try to simplify civil trials, to make them less cumbersome, and to try to induce the parties to settle. I know that civil jury trials are settled at a far greater rate than judge-only civil trials, but I question whether you are going to really ever simplify the civil jury system as it now stands.

I hasten to add that if I were living in the United States, I would feel entirely differently about civil jury trials than I do about employing them in Canada.

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## **Stephan Landsman: *Appellate Courts and Civil Juries***

**D**uring the Forum's afternoon session, Professor Stephan Landsman presented his paper, "Appellate Courts and Civil Juries." Professor Landsman teaches at DePaul College of Law in Chicago, specializing in torts,

evidence, and the psychology of the courtroom. He holds the Robert A. Clifford Professorship in Tort Law and Public Policy, and is a nationally recognized expert on the civil jury system. Through his continuing study of the American jury he has become a leader in applying social science methods to legal problems.

Professor Landsman's paper examined how appellate courts in the U.S. have treated the jury in their review of jury decisions. At the outset, he discussed the civil jury's remarkable longevity as an institution that has come to represent not only good judicial decisionmaking but also participatory democracy itself. Briefly reviewing British and American history, he identified a number of incursions (both attempted and successful) into the jury's realm, and also acknowledged reforms since the mid-20th century that have made modern civil juries far more representative than their predecessors.

Professor Landsman then considered why the jury has survived so long and so well. He answered by citing:

- Contributions made by the jury institution to democracy (counterbalancing the sometimes less democratic leanings of professional judges and thereby enhancing the lawmaking and law-canceling powers of judges, neutralizing the power of the government when the state itself is a litigant, and protecting the public from the effects of domination of the legislature by special interests).
- The importance of a "neutral and passive" fact finder in the traditional American adversarial approach to adjudication.
- The critical legitimacy that citizen participation confers on judicial decisionmaking.
- A number of practical benefits of jury trial (effective decisionmaking, group participation ensuring that alternative points of view will be heard, reduced burdens on trial judges, speedy resolution, and the establishment of benchmark verdicts for the continuing process of negotiation and settlement by which the overwhelming majority of civil disputes are resolved outside the courtroom).

Landsman next analyzed recent trends in the review of civil jury verdicts by both trial and appellate courts, and identified legal mechanisms that can encroach on trial by jury as an institution.

The first mechanism, of course, begins with the trial judge's power to grant a new trial under limited circumstances. It culminates in the federal appellate courts' comparatively recent assumption of power to review jury verdicts and order remittitur solely on the basis of the paper record left by the trial court, without ordering new trials. (These decisions, he argues, may reflect an actual anti-plaintiff bias in federal appellate courts.)

The second mechanism is the use of demurrers, directed verdicts and JNOVs, all of which essentially eliminate the trial in toto.

Beyond those, the adoption of Federal Rule 50(a) extends the reach of judgments as a matter of law (JMOLs) from the pleadings stage through—and beyond—the jury's verdict and the entry of judgment. Such actions, he



believes, amount to serious encroachments on the Seventh Amendment and continue the current trend to marginalize the jury.

Professor Landsman proposed that appellate review of jury decisions should be “reoriented” so that jury verdicts are presumed to be legitimate. JMOLs should be disfavored, appellate courts should exercise restraint in reviewing verdicts, and courts should protect jury verdicts, as the U.S. Supreme Court did in a line of decisions from 1938 to 1968.

By the same token, he suggested several areas in which “more robust review” of jury verdicts may be appropriate—punitive damage awards so large that they amount to “civil death sentences” for corporate defendants or discourage vigorous defense against claims, and jury verdicts that can encroach on free speech rights or validate instances of illegal racial discrimination.

Looking forward, Landsman considered several possible future approaches to trial by jury in the United States. The first is to further diminish the jury’s role, influence and significance. That approach is evident in recent reductions in jury size and in the practice of “blindfolding” jurors so that they will be ignorant of significant matters (for example, the existence of liability insurance or legal requirements to reduce or increase damage awards under some circumstances). The second is to make jurors more “judicial,” by bifurcating trials and/or compelling juries to complete extensive verdict forms or lists of interrogatories—both of which, he contends, infringe on the crucial principle of jury deliberation in secret. A third, and more benign, approach would be to assist jurors in their important work by simplifying courtroom presentations, improving jury instructions, allowing additional proof and argument to help break deadlocks, and inviting jurors to ask questions (of witness, the judge, and counsel) during trial, in open court.

## Panelist Comments on Landsman Paper

[All panelist comments on papers at the Forum have been condensed from the transcript of the panelists’ oral remarks and edited for clarity.]

**Wayne D. Parsons, plaintiff lawyer from Honolulu, Hawaii:**

An historian from Yale University came to Hawaii 20 years ago at the invitation of our judiciary and gave a talk about the value of a jury verdict. He spoke of it from a position completely outside of the law: as a source of information for society.

Lawyers and judges are prone to the status quo. But a jury’s verdict is what 12 people who don’t have anything to do with anybody else say, in terms of who is right and who is wrong and what is it worth.

In Hawaii in the last 10 years, a few insurance companies insisted on taking to trial every case involving connective tissue injuries from auto accidents, regardless of the injuries, regardless of the medical bills. They tried 30, 40, 50 cases within a two-year period. The verdicts came in much lower than they had been.

We plaintiff lawyers were very upset with that. We got mad at the insurance companies. But through that experience we got valuable information: juries didn’t put the same values on these cases that we (both lawyers and judges) had been putting on them. Previously, judges would have beaten a defense attorney over the head who refused to pay \$50,000 in a case like those.

After those cases went to trial, the judges in the settlement conferences were telling us, “You know, that case is not worth that much. We have had all these cases go to trial and they have been coming in with very low results.”

What had happened? Did the jury get it wrong? Were we, the lawyers, and the judges who had been settling these cases, getting it right?

I don’t think that there is a simple answer to that, but I think

that respect for the jury system, and respect for the verdict of the jury, is very important. It is important to be humble about exactly how sophisticated the jury is.

**Gordon Kugler, plaintiff lawyer from Montreal, Quebec, Canada:**

I have not been brought up with the jury system, but, rightly or wrongly, I don’t see anything wrong with appellate review of the jury decision.

I noted that, in Professor Landsman’s paper, he wrote that federal appellate courts had overturned a set of lower court jury verdicts 38 percent of the time.

In our system, where we do not have civil jury trials, the Court of Appeal is reluctant to interfere with a finding of fact of a trial judge absent manifest error. Even so, the statistics show that the Court of Appeal here in Montreal reverses the lower court 35 percent of the time. So, the statistics are pretty similar. I have always felt that appellate review of any decision is necessary and is useful.

It seems to me that there is an overwhelming consensus in this audience, from the discussion groups and from the papers, that everyone here favors the jury system in civil cases, and that it ought to be maintained. I agree with that assessment. I don’t see anything wrong with the jury system. There appears to be a fear that someone—tort

*The civil jury has had a remarkable longevity as an institution that has come to represent not only good judicial decisionmaking but also participatory democracy itself.*

reformists or legislators or defense lawyers—are trying to do away with the jury system.

If that be the case, it seems that your focus has to be with the legislators who will enact the laws that will reduce jury trials. And if that be the case, I think you have to make a more convincing case about how necessary the jury system in is for civil cases.

**Justice Joette Katz, Connecticut Supreme Court:**

Let me begin by saying that I agreed with sections one and two of Professor Landsman’s paper—juries, why we love them and why we need them. But with all due respect, I have some fundamental disagreements with the paper as it unfolds. I think perhaps that is because, as Professor Landsman has acknowledged, and readily so, that it concentrates so much with the federal system. My experience, on both sides of the bench, has been confined to the state system. If I am qualified to speak on anything, it is in that regard.

I don’t see the problem. I don’t agree with the notion that the sky is falling, quite frankly. I understand the concerns, and I understand the notion that, if you start to whittle away, there is a slippery slope, but I just don’t see the problem. I think appellate courts, trial courts and juries can all co-exist and serve separate independent functions and, in fact, balance one another and keep one another on board.

Professor Landsman protests appellate review as being unjustified, and attacks it, in fact, as undermining the juries. But I think we need to know more about why directed verdicts, judgments notwithstanding the verdicts, etc., might be legitimate tools.

I don’t view them as unconstitutional, the re-examination of a jury decision. I don’t view them as being premised on outright legal fictions, and I don’t view them as marginalizing the jury.

On the contrary—I think that, as a matter of supervising the trial process, the appellate court must, when called upon to do so, examine the factual determinations of the jury, to assure that they are supported by the evidence.

**Justice John C. Bouck, Supreme Court of British Columbia (a court of original jurisdiction):**

I have three points.

First, I believe that juries are better fact finders than judges. When I am hearing the evidence, I only have to convince myself as to who I believe and who I don’t believe. Juries have to all convince one another.

Second, it has been my experience that a jury verdict is much better received in the community than a decision by a judge alone.

My third point is something that goes unexpressed in our jurisdiction, and I don’t know whether it does in yours, but it is talked about in coffee rooms and that sort of thing with appeal court judges. That is the intolerable delay that

can occur if an appeal court sends a case back for a new trial, because the justices don’t believe the jury has made the right finding of fact when they awarded damages.

## Reports of Discussion Groups

Following the commentaries on each of the Forum papers, the judges divided into six smaller groups to discuss their own responses to the papers and to consider a number of standardized questions under a guarantee of confidentiality.

At the closing plenary session, the discussion group moderators reported that common ground was observed during the dialogue, at least within individual groups, on a number of matters.

[All excerpts below have been condensed from transcripts of the group discussions and edited for clarity.]

- Judges found that their own opinions closely correlated with jury verdicts—in one judge’s experience, from 70 percent to 95 percent of the time. When there are differences, the jurors’ decisions still tend to be reasonable. The more diverse and rep-

resentative the jury pool is, the more consistency there is between what the juries do and what judges would do.

- Judges felt that juries are generally able to understand and evaluate scientific and other expert testimony and to weigh the credibility of technical and scientific evidence. Jurors appear to be increasingly skeptical of experts, regardless of credentials. With regard to complex cases, judges felt that the biggest problem with complex cases is the lawyers; if lawyers actually work to clarify complex cases, jurors will make good use of that work.

- Judges considered juries capable of evaluating punitive damages; punitive damage awards are relatively rare, and they appear to be driven by very egregious facts, not by other factors.

- Judges felt that bias on the part of judges is more of a problem than is juror bias, and that jurors tend to correct or counter each others’ biases.

- Judges asserted that, in reality, appellate courts seldom undo what a jury has done, either on the weight or sufficiency of the evidence, and that they do so on valid legal grounds; the potential for JNOVs, reversals and retrials is necessary to keep balance in the jury system itself.

- Among the often-cited “practical benefits of jury trial,” judges said that it aids in participatory democracy, and that, in addition to teaching citizens something of the law, it provides good civic lessons in how the justice system works.

- Judges expressed a fundamental belief that the jury system not only is essential as a democratic institution, but also that it legitimizes the entire judicial system in the eyes of the public. Some judges who had actually

*“I don’t agree with the notion that the sky is falling.”*

served as jurors reported that that experience reinforced their belief in the jury system. They observed that juries tend to become allies of the justice system in the process and had a better sense of its benefits.

- Judges felt that the jury system supports judicial independence; it is easier for judges to be independent when they have support from the jury.
- Asked about various attempts to “reform” jury trial in their states, judges didn’t believe such measures had yet amounted to encroachment on trial by jury or on judicial independence. However, they were wary of the term “reform,” as it suggests that there are problems with the jury trial system. They did not feel there are serious problems, but they did support innovative attempts to improve the jury system. Of the various jury trial modifications being attempted in several states, judges did not consider mandatory arbitration and/or mediation to be a proper measure. They felt that contractually binding arbitration threatens the jury system. One judge commented that the more arbitration is used, the more the law stagnates, and the less the jury trial process is allowed to stay flexible and to keep informing people of what they need to know in our society.
- Judges felt very strongly that any needed changes to the jury system should be made by the judiciary, not by legislatures.



## VALERIE HANS: HOW DO JURIES TREAT CORPORATE DEFENDANTS?

In the recent past, the question of bias on the part of juries and judges—part of the discussion at the Roscoe Pound Institute’s 2002 Forum—has been the subject of substantial empirical research by one of the country’s preeminent jury scholars. This is an important question, because of the many allegations by jury system opponents that juries often look for a corporate “deep pocket” from which to fund large awards. In *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale University Press, 2000, 269 pp.; hereinafter “Hans”), a systematic account of how juries make decisions in typical business cases, Dr. Valerie P. Hans addresses this and other matters related to juries in business litigation.

### Three Myths Examined

Hans, a professor in the department of sociology and criminal justice at the University of Delaware and a nationally recognized expert on jury behavior, examines three allegations made by critics of the jury trial system: (1) whether jury verdicts in business trials are influenced more by sympathy for plaintiffs than by the defendant’s actual conduct; (2) whether juries are prejudiced against

businesses; and (3) whether juries are influenced by popular notions that corporations have substantial wealth that can and should be applied to damage awards. Many corporate executives and members of the public believe that the answer to all three questions is yes.

Despite the conventional wisdom, however, Hans’s interviews with civil jurors, experiments with mock jurors, and public opinion polling shows these assumptions to be exaggerated, if not outright false. Hans finds that many civil jurors come to court initially feeling hostility toward plaintiffs who bring lawsuits, that juries only occasionally harbor anti-business sentiments, and that there is no evidence to support the “deep pockets” hypothesis.

### Myth No. 1: “Juries Are Pro-Plaintiff”

Hans’s research contradicts the popular perception that jurors are always sympathetic to plaintiffs who sue businesses.

[J]urors are often suspicious and ambivalent toward people who bring lawsuits against business corporations. Jurors and the public are deeply committed to an ethic of individual responsibility, and they worry that tort litigation could be fraying the social fabric that depends on a personally responsible citizenry.

Hans at 216.

Hans found that, contrary to the belief that juries favor plaintiffs, jurors in fact examine “plaintiffs’ claims with a critical eye, probing for ways in which plaintiffs were responsible for their own injuries and assessing the degree to which they could be overstating their injuries. Part of the jury’s task, as they saw it, was to be vigilant about spotting frivolous lawsuits.” Hans at 216.

Though Dr. Hans conducted her research in one jurisdiction, she notes that her findings about juror attitudes are “are virtually identical to those found in national surveys and in polls in other jurisdictions. Across the country, Americans express deep concern about spiraling litigation and unjustified lawsuits.” Hans at 217. She suggests that this concern is probably a result of a symbiotic relationship between the core beliefs that jurors hold and the stories they encounter in the news media about frivolous lawsuits:

[J]urors and other citizens respond to the news reports and advertisements because they resonate with their own concerns that expansive rules of civil liability might undermine our societal commitment to individual responsibility.

Hans at 217. Rather than siding with the plaintiffs as tort “reform” advocates claim, potential jurors are very suspicious of the motivations of plaintiffs. Hans admits that her “conclusion that juries are not particularly pro-plaintiff may not apply in every area.” However, she states, “the nationally shared suspicions about civil litigation

indicate that these pro-plaintiff jurisdictions, if they exist, are in the distinct minority.” Hans at 217.

### **Myth No. 2: “Juries Are Anti-Business”**

As one might expect from Hans’s first finding, she found little support for the corollary claim that juries are hostile to businesses. Rather, she found that the jurors interviewed in her studies, as well as the public at large, display a general support for business and a concern for possible detrimental effects on business that excessive litigation could cause. Hans states:

Most business litigants in the cases that were part of this study were described in a neutral or positive light. In a minority of cases, jurors levied some harsh comments against particular business defendants, but to the extent that I could determine through interviews, their criticism seemed to be linked largely to trial evidence of business wrongdoing rather than to jurors’ preexisting anti-business hostility.

Hans at 217. Hans further states that jurors’ “general attitudes towards business were only modestly related, at best, to judgments of business wrongdoing.” Hans at 218. In fact, Hans found a substantial overlap in jurors’ treatment of corporations and individuals: “Jurors appeared to adopt an individual template, regarding the business corporation as a ‘person’ for the purposes of determining liability.” The fact that the defendant is actually a corporation makes no difference, as jurors regard corporations as “persons” when deciding whether a defendant should be held liable. Hans at 218.

Importantly, however, jurors expect these professional individuals to have a substantial degree of knowledge and resources. Therefore, Hans states, a corporation’s actions may be evaluated differently from those of a “nonprofessional” individual defendant: “Experiments that varied the identity of the defendant in mock trial simulations showed that business corporations are held to a higher standard of behavior.” Those experiments indicate that

the higher standards that jurors insist upon for business corporations are derived from specific expectations about what is necessary and desirable for business actors, rather than generally negative (or positive) views of the business community.

Hans at 218. This higher standard of behavior (read: care) may explain why it appears that jurors target the “deep pockets” of corporations. But, as Dr. Hans indicates, there are several reasons why the “deep pockets” theory is troublesome.

### **Myth No. 3: “Juries Look for ‘Deep Pockets’ ”**

The “deep pockets” theory, which suggests that jurors routinely make large awards to individuals because corporations can afford to pay them, regardless of their culpability, has long been popular with tort “reform” publicists. However, Hans’s results show that jurors’ decisions were not greatly influenced by corporate defendants’ wealth. She found that “a defendant’s financial resources are not a major factor leading to high jury awards.” Hans at 220.

Hans explains that the “deep pockets” theory appears to be valid on its surface, as other studies generally show that jury awards to plaintiffs who sued corporations are higher on average than awards made to plaintiffs when the defendant is another individual. Digging deeper though, Hans finds that the reason jurors are predisposed to transfer wealth from a wealthy defendant to a poor plaintiff is that they expect corporations to adhere to a higher standard of care than they would for an individual defendant. She states that

***Jurors expect corporations to adhere to a higher standard of care than they would for an individual defendant.***

those differences appear to arise not primarily from jurors’ hostility toward business but rather from their distinctive standards for business defendants. A considerable number of jurors, and a majority of the public, believe that it is

appropriate to hold business corporations to higher levels of responsibility.

Hans at 179. These higher standards (which also emerge in examination of jurors for any “anti-business” bent) play a major role in the jury’s factual determinations of negligence and resultant damages.

### **Impact of Settlement Practices**

Beyond considerations of standards of corporate behavior, however, Hans’s findings that suggest that corporate defendants pay more than individual defendants are complicated by the nature of cases involving corporations and also settlement behavior. Hans points out that it is likely “that the cases against individuals and businesses differed in a number of ways, including the extent and type of injuries, the number and type of claims, legal rules, defenses, and settlement practices.”

Arguably, the most important factor is likely to be the process of settling cases. Different settlement practices by individuals and businesses could account for much of the observed differences in awards. If business defendants routinely settled most small-stakes cases but individual defendants did not, that would leave a range of low- to high-stakes cases for individual defendants [whose cases go to trial] but predominantly high-stakes cases for



business defendants. Under these circumstances, contrasting individual and corporate cases would be like comparing apples and oranges.

Hans at 180.

Another factor to consider in looking at the “deep pockets” theory is the pockets of the individual defendants. Hans writes, “If resources do affect jury awards, it could be because jurors discount the award against an individual defendant rather than inflate the award against a business defendant.” Hans at 181-182. In other words, jurors may be reluctant to search for individuals’ “shallow” pockets and impose on them awards outside their means.

Hans’s work provides a carefully researched explanation of three major public policy concerns on the fairness of jury trials that dominate continuing public policy debates. It is a vital contribution to the search for a more accurate picture of what goes on in jury rooms following civil trials.

### Continuing Jury Research

Under a grant from the Roscoe Pound Institute, Professor Hans has also researched potential jurors’ perceptions of connective tissue injury lawsuits. The results of some of this research were published in Valerie P. Hans and Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569 (2000). She is currently continuing this line of research, conducting mock trials that test jurors’ reactions to the presentation of evidence in connective tissue injury cases.



## MEDIA SCRUTINY OF THE JURY SYSTEM

In recent years, the American jury trial system has attracted the attention of the media around the country. The coverage has ranged from examining specific issues and problems of the jury system, such as evasion of jury duty, to the thorough analysis of the jury institution as a phenomenon, its current state, and what lies ahead for its future. The stories have also put a human face on a discussion often mired in statistics and legalese.

Does the jury remain a viable institution capable of rendering judgments in contemporary cases—in particular in civil cases—with all their complexities and technicalities? Is the justice system really undermined by “run-away juries” that give million-dollar awards to plaintiffs and put corporations out of business for minor misconduct? What are the limitations that are currently being imposed on the jury system by legislatures of many states, as well as on the federal level, and how do these limitations affect the civil justice system? How does the system look from the jurors’ perspective, and what are their motivations, experiences, and their understanding of the

changing role of the jury in society? These questions are addressed by some of the following stories.

### What Judges Think About Juries and Jurors

In 2000, *The Dallas Morning News* published a comprehensive series of articles titled “Jury on Trial,” in which two investigative reporters, Mark Curriden and Allen Pusey, looked closely at the American jury system. Their series was based on six-months of research by both the newspaper reporters and by scholars at Southern Methodist University School of Law, and it included a survey of nearly 1000 state and federal judges.

This survey, which asked a wide range of questions about the jury system, was sent to all federal judges in the United States, and all state trial judges in Texas. About 65 percent of the federal judges and 70 percent of Texas judges responded. The results demonstrated overwhelming support by judges for the jury system, with 98% of respondents saying that juries do at least “moderately well” in reaching a “just and fair” verdict. Nine out of every 10 respondents felt that the system needs only minor adjustments at best. Moreover, 6 in 10 would prefer a jury over a judge or an arbitrator in their own civil case, and 8 out of 10 would prefer a jury if they had been accused of a crime (Allen Pusey, *Judges Rule in Favor of Juries*, DALLAS MORNING NEWS, MAY 7, 2000; hereinafter “Pusey, Judges Rule”). Only 1 percent of the judges who responded to the survey gave the jury system low marks, and only 30 percent believed that fewer types of cases should be handled by juries.

Some of the judges interviewed for the series discussed exemplary jury work that had occurred in their time on the bench. Judge William L. Dwyer from Seattle recalled a complicated conspiracy case in his court against 10 African-American defendants. The jury, which included 11 whites, deliberated for 10 days without asking any questions, and finally rendered 32 separate verdicts. They convicted seven defendants, acquitted two, and were unable to reach a verdict on one defendant, against whom the charges were subsequently dropped. “They were thoughtful and methodical. There was no hint of racial bias”, noted Judge Dwyer. Judge John T. Curtin, a senior judge in Buffalo, N.Y., expressed the opinion that jurors are as capable as judges at handling the complexities of contemporary cases. “Lawyers complain sometimes that a jury cannot understand the complicated cases they present,” he said, “but that’s what a good lawyer can do: present a complicated situation in a way that can be understood.” Pusey, Judges Rule.

### Restrictions on the Power of the Jury: Limiting Damage Awards

Despite the overwhelming confidence that judges, who are the legal actors most familiar with the workings of the jury, have in the jury system, the right to a jury trial has

been steadily diminished. State legislators, often swayed by the claims of tort “reformers,” don’t share the judges’ confidence in the jury system. As a result, decision-making powers are effectively being transferred from jurors to lawmakers, judges, and private lawyers.

One of the most important manifestations of this trend is the enactment of legislative limits (“caps”) on damages. Some states cap punitive damages at a specific dollar amount, no matter how egregious the conduct. In other states, the amount of punitive damages is limited to a multiple of economic damages. Other states limit noneconomic damages, or limit damages in specific types of cases (e.g. medical malpractice). A few states limit even the recovery of economic damages in medical malpractice suits.

These caps often subvert the intention of well-meaning juries. In a Texas case where the victim died in a refinery equipment explosion, the jury came to the conclusion that the company knowingly used faulty equipment and risked people’s lives, and rendered a \$42.5 million verdict in order to “send a strong message”—only to find the award slashed by the judge to \$200,000, the cap level for this type of lawsuit.

The jurors’ frustration was exacerbated by the fact that they were not informed about the cap, as the Texas statute expressly forbids telling them about it. “I wanted the jury to send a message to oil companies that they need to make their refineries safe,” one juror was quoted as saying. “Forty-two million dollars definitely sent that message. \$200,000 is nothing for these guys.” (Mark Curriden, *Jury Awards Fall Under Weight of Obscure Law*, DALLAS MORNING NEWS, MAY 7, 2000.) John Denove, President of Consumer Attorneys’ Association of Los Angeles, expressed a concern that taking away the risk of sizable punitive damages will prompt corporations to simply factor the “caps” into their expenses, rather than increase safety of their products and operations. (John Denove, *Juries Aren’t Just Suckers for Awards*, WILMINGTON (DEL.) NEWS JOURNAL, JULY 12, 2000.)

### Limiting Types of Cases Juries Can Hear

Other limitations on the jury’s powers come in the form of restricting the types of cases that juries can hear. Forty-two states have such restrictions. In federal courts, cases of patent infringement, bankruptcy and employee retirement insurance programs are decided by judges rather than juries. The same situation goes for consumer fraud cases in Illinois, infant injuries at birth in Virginia, and negative vaccine reactions in North Carolina. In some instances, states shield certain professions from certain types of lawsuits altogether. For instance, in Texas accountants, doctors, lawyers, engineers, and real-estate agents cannot be sued under the consumer protection law; tobacco companies cannot be sued by sick smokers.

Moreover, there are limitations on what type of issues jurors can decide. Judges, rather than jurors, are now decid-

ing the legitimacy of expert testimony in all civil and criminal cases in states using the *Daubert* rule (in the past, a judge had to approve only the expert’s qualification, leaving the decision of his or her credibility to a jury). Considering the key importance of expert testimony in many contemporary civil cases, it is hardly surprising that judges are dismissing numerous cases after they reject expert witness testimonies as unreliable. (Mark Curriden, *Tipping the Scales*, DALLAS MORNING NEWS, MAY 7, 2000; hereinafter “Curriden, Tipping”).

For more information on this issue see “Pound Foundation Releases Report of State Judges Forum on Scientific Evidence,” CIV. JUST. DIG., Vol. 5, No. 3 (Summer, 1998), available at [www.roscoepound.org](http://www.roscoepound.org).

### Contracting Away Trial by Jury

A third limitation on trial by jury ostensibly comes from consumers themselves, by purchasing goods in transactions that exclude jury trial by their terms, or by signing many other kinds of commercial contracts. In place of the opportunity to have a dispute resolved by a jury, consumers are often limited to arbitration, and often they themselves must pay for the adjudication.

The “Juries on Trial” series highlighted the case of a Texas man who purchased a house that stood on shifting land. The house sustained major damage. However, the homeowner was not able to take the home builder to court. His purchase contract had a mandatory arbitration clause buried in its fine print, and he had “consented” to it without being aware of it. His only chance to secure adjudication was to pay a \$3,000 fee to file an unappealable complaint with a private arbitrator. Apart from the fact that \$3,000 is a significant sum to most people, in this case the arbitrator belonged to an association chosen by the home builder, raising questions about the arbitrator’s neutrality. (Mark Curriden, *A Weapon Against Liability*, DALLAS MORNING NEWS, MAY 7, 2000; hereinafter “Curriden, Weapon”).

As noted by Richard Reuben, an authority on dispute resolution at the University of Missouri at Columbia School of Law, in most arbitration clauses an arbitrator or arbitrators are pre-selected. This creates conditions where an arbitrator is likely to develop a bias in favor of the corporation that provides his regular source of income. For example, the arbitration group selected by First USA Bank has ruled in the bank’s favor 99.6 percent of the time. In Reuben’s opinion, arbitration may never win public trust the way juries do: “The wonderful thing about juries is that they are extremely independent.” Curriden, *Weapon*.

### “Runaway” Juries?

Those advocating the trend toward taking the juries’ powers away view the limitations on jury system as safeguards against the potential volatility of jury verdicts, in particular against “runaway juries.” In the opinion of Texas State Senator David Sibley, a prominent tort “reform” advo-

cate, "too many jury verdicts were disproportionate with the actions or conduct of the corporate defendants." Curriden, Tipping. Cases cited as examples are usually the same few highly publicized cases, especially the infamous McDonald's coffee case (Mark Curriden, 'Runaway' No More, DALLAS MORNING NEWS, MAY 8, 2000; hereinafter "Curriden, Runaway"). Out of an estimated 150,000 trials each year, it is these few that are remembered, affecting the reputation of the jury system as a whole. It "leads to the impression that there is chaos in the courtroom," said Judge Dwyer of Seattle, "but those of us who work with juries can tell you that there isn't." Pusey, Judges Rule. More than three quarters of the judges who participated in the survey said they have never encountered a "runaway jury."

The trend to limit the powers of juries concerns many experts. "The American jury is in serious trouble," says Professor Valerie Hans, a legal scholar well-known for her works on jury issues: "The influence that juries have in determining societal rights and wrongs—determining what's acceptable and what's not—has been gradually sliced away." Curriden, Tipping.

### **A Juror Bias Against Plaintiffs?**

Certainly, some juries can be erratic or radical, but more often than not they are conservative, even stingy. Contrary to public perception, jury trial statistics show trends toward lower awards in civil cases and more "law and order" verdicts in criminal cases. Overall, juries are more conservative than judges. Nationwide, juries rule in favor of plaintiffs just under half the time, whereas judges rule in favor of plaintiffs 6 out of 10 times. According to the Dallas Morning News investigation, the median civil jury award nationally declined by one-third between 1992 and 1999, to \$35,000. In some places juries are even tougher. For instance, in Dallas County, Texas, juries issued less than half as many million-dollar verdicts in 1999 as in 1992; within the same time period, the median punitive award fell 43 percent to \$31,000, twice the national decline. Curriden, Runaway.

In her book *Business on Trial: The Civil Jury and Corporate Responsibility*, Dr. Hans concludes that "Robin Hood" juries (jurors who take money from rich corporations to help poor individuals) is a myth. She argues that most jurors are "suspicious and ambivalent" toward people who sue corporations, and "vigilant about spotting frivolous lawsuits."

Hans also noted juries' concern about potential job losses among a corporation's employees, which may occur as a result of a large punitive award. This trend can be eas-

ily observed in relatively minor connective tissue cases, when jurors are not overly sympathetic to the injuries, and are often reluctant to compensate even the plaintiff's medical expenses, finding them excessive or unnecessary.

### **The Reach of Juries**

Juries exert influence often felt beyond the parties in an individual case. On occasion, juries use their power to tackle issues that go far beyond punishing the wrongdoings of individual corporations. They make statements demanding changes in public policy, government and public institutions, or businesses.

The aforementioned Texas refinery equipment explosion case was one such case. Another occurred in 1997 when a jury ordered the Catholic Diocese of Dallas to pay \$119.6 million in damages to 11 plaintiffs who reported childhood sexual abuse by a local priest. As this jury's foreman explained, the message that they are not properly supervising their pastors was intended for all churches.

This trend is relatively new. The joint study by the Southern Methodist University professors and *The Dallas Morning News* turned up over 700 cases since 1990 where jurors declared their intent to make an impact beyond their concrete cases. There were less than 100 such cases in the preceding two decades.

"We are witnessing the emergence of an activist jury pool," says University of Georgia professor Ron Carlson, "People are frustrated by the inaction of the other branches of government and realize that as jurors they hold incredible powers of change. They are ready and willing to wield this power." (Mark Curriden, *Deliberate Influence*, DALLAS MORNING NEWS, JUNE 25, 2000).

Even those who do not approve of jurors' actions that parallel what would be considered legislative or regulatory functions acknowledge that it can be necessary when the legislative and executive branches do not act. The study identified over 250 cases in which jury verdicts led to positive changes in policy or behavior of certain industries, such as the tobacco and gun industries, which have been forced to change their marketing. The behavior of the jury in the sexual abuse case above and others like it, along with attendant media coverage, forced the Catholic Church to adopt a more stringent reporting policy of sexual abuse by priests.

### **Continued Confidence**

Overall, the jury system still enjoys the overwhelming confidence and trust of the public and judges. James

***Juries exert influence often felt beyond the parties in an individual case. On occasion, juries use their powers to tackle issues that go far beyond punishing the wrongdoings of individual corporations.***

Madison, the author of the U.S. Constitution, went so far as to equate the survival of democracy with preservation of jury trials. More recently, U.S. Supreme Court Justice Antonin Scalia wrote in a 1996 opinion: "It is not up to us . . . to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 449 (1996).



## MANDATORY ARBITRATION AND THE JURY TRIAL SYSTEM

### Academic Symposium on Mandatory Arbitration Held at Duke University

On October 4-5, 2002, the Roscoe Pound Institute, in conjunction with Duke University School of Law's Private Adjudication Center, cosponsored an important symposium on mandatory arbitration. The landmark conference featured new scholarship by some of the leading experts on mandatory arbitration.

#### Background

The world of mandatory arbitration is undergoing seismic changes as its impact on everyday life—and people's rights—become more apparent. Until recently, the use of mandatory arbitration clauses appeared to provide businesses with a reliable alternative to going to court. The U.S. Supreme Court had begun to read the Federal Arbitration Act (FAA) to apply to all forms of arbitration, without leaving disaffected claimants much leeway to challenge the arbitral requirement.

Despite extensive Supreme Court scrutiny over the past decade, courts continue to be deeply involved in considering the appropriate limits of mandatory arbitration. In *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the Supreme Court ruled that the FAA mandates enforcement of an employment contract arbitration clause in a discrimination case. On remand, the Ninth Circuit found the clause unconscionable under state law and thus unenforceable. The Court itself poked a hole in mandatory arbitration in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), overruling earlier precedents and holding that an arbitration agreement did not bar the EEOC from pursuing relief on behalf of an employee. Additionally, a federal magistrate judge declared AT&T's mandatory dispute resolution program "illegal and unconscionable" in a class action, *Ting v. AT&T*, 182 F.Supp.2d 902 (N.D. Cal. 2002). *Ting* is now on appeal to the Ninth Circuit.

In addition to the courts, others are also reconsidering fundamental assumptions about the utility of mandato-

ry arbitration:

- Studies suggest that mandatory arbitration is more costly and less efficient than previously advertised.
- The American Arbitration Association has announced it will not handle any health care dispute involving an individual, unless she has voluntarily agreed to arbitration.
- California's state legislature is considering bills designed to eliminate secrecy, financial conflicts and excessive fees in mandatory arbitration.
- Momentum is building in Congress to pass legislation that would limit the uses of mandatory arbitration or establish methods to ensure quality control.

At the same time, mandatory arbitration remains for many businesses the preferred means of resolving disputes:

- Credit card companies change their cardholder agreements to incorporate arbitration agreements.
- Computer manufacturers incorporate mandatory arbitration into the never-read agreements that pop up onscreen when starting a new machine for the first time.
- The American Bar Association is looking at whether to permit lawyers to insist on arbitration of fee disputes, even while condemning mandatory arbitration in the health care arena.

These practices and proposals raise questions worthy of serious consideration.

#### About the Symposium

The Roscoe Pound Institute and the Private Adjudication Center of Duke University School of Law invited America's leading arbitration scholars to address some of the most important current issues in dispute resolution at the symposium held at Duke. The symposium's topic was "The Coming Crisis in Mandatory Arbitration: New Perspectives and Possibilities." For two days, top experts in the field of dispute resolution presented original research on topics such as:

- The nature of secrecy in mandatory arbitration.
- The growing scope of mandatory arbitration.
- The role that federalism concerns should play in the mandatory arbitration debate.
- The relative performance of arbitrators versus juries when it comes to decision making.

A distinguished panel of law professors, journalists and practitioners offered their insights on the presented papers.

In addition to the groundbreaking papers, in an effort to provide a bridge between academic work and doctrinal developments in the courts, the symposium featured a mock oral argument of *Ting v. AT&T*. Lawyers involved in that case presented arguments to Judge Paul Niemeyer of the Fourth Circuit U.S. Court of Appeals, author of the *Waffle House* opinion. The audience had an opportunity to question the participants about the strengths and weaknesses of their cases and to examine the strategies they intend to use in presenting their cases on appeal.



## Paper Presenters

The symposium featured papers by distinguished academics, including some of the foremost experts on dispute resolution, presenting new research on mandatory arbitration, including. They included:

Lisa Bingham, Indiana University  
Mark. Budnitz, Georgia State University  
Paul Carrington, Duke University  
Christopher Drahozal, University of Kansas  
Deborah Hensler, Stanford University  
Thomas Metzloff, Duke University  
Richard Reuben, University of Missouri-Columbia  
David Schwartz, University of Wisconsin  
Jean Sternlight, University of Missouri-Columbia  
Katherine Van Wezel Stone, Cornell University  
Elizabeth Thornburg, Southern Methodist University  
Stephen Ware, Samford University

In addition, symposium attendees heard a keynote address by Hon. Melvin L Watt, U.S. House of Representatives, 12th District of North Carolina. Congressman Watt serves on the House Judiciary Committee, and is the ranking member of the Subcommittee on Commercial and Administrative Law.

The proceedings of the symposium will be edited by Professor Metzloff and will be published in a special issue of *LAW AND CONTEMPORARY PROBLEMS*, a Duke journal.

For further information about the symposium, including copies of papers presented, please visit [www.roscoe-pound.org](http://www.roscoe-pound.org).

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## Mandatory Arbitration v. Trial by Jury

[The following analysis is adapted from *Defeating Mandatory Arbitration Clauses: What's a Consumer Lawyer to Do When the Boilerplate Bars the Courthouse Door?* by John Vail, Senior Counsel for Constitutional Litigation at the ATLA Center for Constitutional Litigation. It was originally published in ATLA's *TRIAL* magazine. The full article, with its citations, can be found at [www.atlanet.org/homepage/triaj00.ht](http://www.atlanet.org/homepage/triaj00.ht).]

Boilerplate mandatory arbitration clauses (i.e. clauses in adhesion contracts which, prior to any dispute having arisen, bind consumers to arbitrate disputes) are showing up everywhere. This "mandatory arbitration" is distinct from voluntary arbitration, in which parties to a dispute, who have the right to go to trial, agree instead to arbitrate their claims. Voluntary arbitration waives rights only after a dispute has occurred and serves as a substitute for settlement; mandatory arbitration waives rights prospectively and serves as a substitute for trial.

An article in the journal of the ABA's Torts and Insurance Practice Section relates that Alabama insurance

companies, "in a further effort to limit litigation exposure in general, and exposure to class actions in particular," are scrambling to use mandatory arbitration. Michael R. Pennington, "Every Health Insurer's Litigation Nightmare," 28 *THE BRIEF*, Summer 1999 at 52. Banks are quietly imposing them through amendments in depositor agreements. See *Southtrust Bank v. Williams*, 775 So.2d 184 (Ala. 2000); *Badie v. Bank of America*, 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273 (1998), *rev. denied* (1999). American Express is imposing them on cardholders. Health insurers contend they preempt litigation of everything from medical malpractice to unfair trade practices. *Broughton v. CIGNA Healthplans*, 988 P.2d 67 (Cal. 1999). Buy a Gateway computer over the phone and you agree to arbitration, even though the arbitration agreement arrives in the box with the computer. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

What's wrong with that? Plenty. Arbitration clauses can leave unwitting consumers before a biased decisionmaker who is not bound to follow the law and who is in a faraway, inconvenient place. Consumers may forfeit discovery, have limited remedies, and pay handsomely for the privilege of engaging this forum. Mandatory arbitration clauses take dispute resolution—long acknowledged to be a function in which the public interest is great—away from the judgment of jurors and the scrutiny of the public. They exact waivers of fundamental constitutional rights without meeting the standard of informed consent—knowing, intelligent, and voluntary—generally required for such waivers. The most prestigious professional groups in America interested in arbitration of health care claims—the American Bar Association, the American Medical Association, and the American Arbitration Association—have found that acceptance of mandatory arbitration agreements *never* can be knowing and voluntary.

Especially offensive is the federal policy, embodied in a long line of Supreme Court cases interpreting the Federal Arbitration Act (FAA), that immunizes many of these clauses from state regulation and requires that they be enforced. In the last Supreme Court case dealing directly with the FAA, the Court preempted a Montana statute that required a simple disclosure notice in boilerplate agreements containing arbitration clauses. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652 (1996).

## Extant Social Science

Any discussion of the utility of mandatory arbitration must acknowledge the difficulty of saying anything with certainty. The results of studies of court-ordered (post-dispute) arbitration have "limited applicability in predicting the effects of pre-dispute arbitration agreements," as court-ordered arbitration serves as a substitute for settlement, not as a substitute for trial. Data available to evaluate pre-dispute schemes "are widely dispersed, private, and often well-guarded." Elizabeth Rolph, Erik Moller, and John E.

Rolph, *Arbitration Agreements in Health Care: Myths and Reality*, 60 Law and Contemp. Probs. 153, 157-158 (Winter 1997). Empirical research on arbitration in medical malpractice cases is "sparse. . . . Nor is there compelling empirical information from other arbitration contexts to contribute much to the inquiry." Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 Wake Forest L. Rev. 203, 213-214 (1996).

Still, what empirical work has been published regarding pre-dispute arbitral schemes indicates severe disparities between arbitral and jury awards. David S. Schwartz, *Enforcing Small Print To Protect Big Business*, 1997 Wis. L. Rev. 33, 64-66, compares the results of more than 1000 employment disputes decided by juries in California courts with results of 62 arbitration awards issued by the National Association of Securities Dealers and New York Stock Exchange arbitrators over a comparable period.

Overall, before either forum, employees won a little over half of the cases. Arbitrators were much less sympathetic than juries, however, toward discrimination claims (finding liability less than half as often as juries) and to tort claims (finding liability less than 40 percent as often as juries). *Id.* In damage awards, arbitrators proved penurious, their mean and median awards being less than 20 percent of awards made by juries. These data suggest that plaintiffs, if they are forced to try their case to an arbitrator instead of a jury, are less likely to establish liability and, even if they do, are likely to receive less compensation for damages.

No social benefit outweighs this loss. Arbitration "in theory" reduces litigation costs but doesn't necessarily do so in fact. Arbitration fees can be very high, especially as a percentage of the amount involved in relatively small disputes; for lower fees, very little justice is secured. Under the Commercial Dispute Resolution Procedures of the American Arbitration Association, consumer cases where less than \$10,000 is in dispute can be brought for a filing fee of \$125, but the proceedings are limited to the submission of a letter briefly explaining the dispute. In disputes valued at between \$10,000 and \$100,000, a consumer will face a filing fee of \$500 to \$1,250, a daily hearing fee of \$150, a daily room rental fee of \$150, and a portion of the arbitrator's fee of \$100-350 per hour. A number of recent cases have refused to enforce arbitration agreements because the costs were unconscionable.

Mandatory arbitration is plagued by the well-documented phenomenon of "repeater bias." In arbitration a consumer typically will face a large corporation which is involved in many cases. The consumer is likely to be involved in just one. Arbitrators depend for their livelihood on attracting business from the corporation with a high volume of cases and are subject to systematic bias in favor of these "repeat players."

### ***Engalla v. Permanente Medical Group***

One of the very important cases in the fight against mandatory arbitration, *Engalla v. Permanente Medical*

*Group*, 15 Cal. 4th 951 (1997), shows how mandatory arbitration clauses, especially in practice, work to the benefit of those who wrote the clause in the first place. In March of 1986 a radiologist working with the Kaiser health plan, noted an abnormality on Nida Engalla's lung and recommended follow-up. For five years Mr. Engalla tried to, but didn't, get appropriate follow-up. He was denied permission to see a doctor, and was diagnosed with colds and allergies. In 1991, inoperable cancer was discovered.

Mr. Engalla's counsel dogged a foot-dragging opponent to appoint arbitrators and to have the case heard before Mr. Engalla died. It took 144 days to schedule the case. The day after it was scheduled, Mr. Engalla died.

Mr. Engalla's survivors shifted the claim to court, and initially were given 90 days to do discovery on issues related to arbitration and to make their best showing to defeat the arbitration clause. That time eventually stretched to five months, during which thirteen motions were filed and a dozen depositions taken. During this time, counsel were able to garner facts which allowed the court to find that only 1% of cases had a neutral arbitrator appointed within the contractually required 60 day time, that only 3% had one appointed within 180 days, that on average it took 674 days to appoint an arbitrator and 863 days to go to hearing, and that going to trial in the trial court in which the case was filed took only about half to two-thirds as long. They demonstrated delay and got Kaiser's former general counsel, on deposition, to admit that Kaiser was responsible for it. They uncovered evidence that Kaiser kept extensive records about arbitrators it had used, indicating that Kaiser might have delayed the process in order to seek a favorable decisionmaker.

### **Right to Trial by Jury**

Mandatory arbitration, by its nature, displaces a fundamental right secured by both federal and state constitutions: the right to trial by jury. The importance of this right is sometimes overlooked in modern discourse, but even minimal reflection reminds us that it was a core concern of framers of constitutions, as important as the rights of *habeas corpus* and freedom of religion. Trial by jury was designed to be, and remains, an instrument of popular control over private, as well as governmental, power. This, of course, is one of the reasons business interests seek to avoid it.

Mandatory arbitration generally requires confidential resolution of disputes. For example, the Loewen Group, a Canadian funeral home business, was involved in a commercial dispute in Mississippi. In 1995 a jury awarded \$500 million against it, \$400 million in punitive damages. That part was widely noticed. Of much lesser note, however, has been the claim Loewen asserted in 1998 under NAFTA, alleging that the award resulted from anti-Canadian bias and seeking reimbursement from the United States of the \$175 million Loewen paid to settle the

claim. Why? Because the claim is being heard by a NAFTA arbitral tribunal, an arm of the World Bank, whose rules call for secrecy. [The above description of the Loewen litigation is derived from the "Notice of Claim" prepared by Loewen for the NAFTA arbitration, which was released to John Vail under the Freedom of Information Act.]

Another chilling example: Shahzad Kaligh, an Iranian aerospace engineer at NASA's Jet Propulsion Laboratory, alleged that she was denied advancement because of gender and religious bias. But an arbitration clause will prevent the public from learning whether the allegations are substantiated. Discrimination is practiced more easily outside of public view. *Sex Bias Suit Ordered Settled*, WASHINGTON POST, Aug. 25, 1999, at A7.

Arbitration also can be foisted on people who don't have choices. In the *Broughton* litigation in California, discussed above, the plaintiff, a recipient of government funded Medicaid, had no choice but to accept an arbitration clause in her health insurance policy: the state had agreed on her behalf to waive her constitutional right to a jury trial. Both federal and state constitutional doctrine prohibit the state from conditioning the receipt of a public benefit on the waiver of a constitutional right; if they didn't, nothing would prohibit the state from, for example, granting welfare benefits only on the condition that recipients campaign for incumbents.

### The Conflict Between Constitutional Provisions and Arbitration Clauses

Because of the preemptive reach of the FAA, direct challenges to arbitration clauses often do not work. One key to successful challenge can be the use of constitutional concerns to demonstrate that the arbitration clause is unenforceable because of generally applicable law.

Many arbitration clauses in the health care arena result not from the direct agreement of the principal but from the agreement of an agent acting on behalf of the principal, such as a union negotiating a health care plan. As a matter of generally applicable law of agency, does the general authority of an agent allow the agent to waive a constitutional right, or must there be specific authority? In the *Broughton* case, ATLA, as *amicus*, argued that specific authority is necessary, a view supported by the most recent pronouncement of the Supreme Court regarding arbitration, *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70, 119 S.Ct. 391 (1998). *Wright* involved the question of "whether a general arbitration clause in a collective bargaining agreement (CBA) requires the employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act . . ." *Id.* at 392-393.

Adhering to precedent, the Court said that, in a collective bargaining agreement, any waiver of the right to a judicial forum must be "clear and unmistakable." *Id.* at 396, citing *Metropolitan Edison Co. v. NLRB*, 460

U.S. 693, 708 (1983); see also *Wright* at 397. Refusing to decide whether precedent required a finding that such a right *never* could be waived, the Court noted that precedent required at *least* that the right to a federal judicial forum "is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." *Id.* at 396.

Under this approach, the U.S. Constitution is not a direct barrier to arbitration. Rather, it informs a more general inquiry into whether an agent had authority.

Generally, the standard for waiver of constitutional rights is high—often waiver must be knowing, intelligent, and voluntary. Most often, however, constitutional rights are triggered by "state action," and traditional notions of state action are not necessarily involved in actions to enforce contracts. Every day courts enforce private employment contracts that call for confidentiality, arguably a waiver of free speech rights, without even considering whether constitutional standards for waiver of constitutional rights should come into play. Expanding notions of when state courts should apply constitutional analysis to certain claims—could be a key to defeating efforts to enforce mandatory arbitration.

A litigator can assert that certain constitutional rights—such as the right to trial by jury or the right to privacy—directly involve private parties and can be asserted directly against them. The lawyer also can invoke precedent to demonstrate that the use of courts to enforce private agreements—or at least certain agreements—itsself is state action. She also can insist, as a matter of common law, that waivers of rights such as free speech or jury trial should be subject to the same scrutiny they would receive if the state were involved.

Recognition of such common law principles would promote the constitutional value of checking arbitrary power, be it exercised by the state or by a corporation that effectively has state-like powers over individuals.



## CORRECTION AND UPDATE

The last issue of the CIVIL JUSTICE DIGEST (Vol. 6, Nos. 1-2, dated Winter/Spring 2001) featured a discussion of legislative attempts to limit punitive damage awards. On p. 8, the article inaccurately cited a case in which North Carolina's legislative punitive damage cap is being challenged under the state constitution. In an April 16, 2002, decision, the Court of Appeals of North Carolina held the statute in question constitutional. Because a dissenter agreed that the damage cap is unconstitutional, the challengers have a right of appeal. Appeal proceedings in the case were stayed pending further developments on the defendant's bankruptcy petition, but, at the time of this writing, the stay has been lifted by the U.S. Bankruptcy Court for the Northern District of Illinois. The case is *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. 2002).

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Please address correspondence to the Editor, **CIVIL JUSTICE DIGEST**, The Roscoe Pound Institute, 1050 31st Street, NW, Washington, DC 20007.

Phone: 202-965-3500, ext. 380

Fax: 202-965-0355

e-mail: [civil.justice.digest@roscoepound.org](mailto:civil.justice.digest@roscoepound.org)

The Institute's Internet site is

[www.roscoepound.org](http://www.roscoepound.org)

President	Mark S. Mandell
Academic Director	Richard Marshall, Ph.D.
Program Manager	Irina Dline
CIVIL JUSTICE DIGEST Editor	James E. Rooks, Jr.
Contributing writers for this issue:	Richard Marshall, John Vail, Irina Dline, Serwat Perwaiz
CIVIL JUSTICE DIGEST Production	Trina F. Cox



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