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Special to
The National Law Journal

This is a unique time in our nation’s history. 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.

At this moment, however, many of those with power – in both the public and private sectors – have few restraints. They can only be held accountable in the courts. So they’re trying to do to many Americans what the Bush administration tried to do to “enemy combatants” – eliminate their access to the courts.

Take a look around. Throughout America, corporate wrongdoers are being held liable for injuring, discriminating against and cheating their customers, employees and investors.

What’s their solution to this problem? Eliminate access to the courts. They’re amending their consumer, employment and investors’ contracts explicitly to ban individual and class action litigation. They’re expanding federal pre-emption, the use of binding mandatory arbitration and court secrecy to preclude many suits and bury the rest.

They’re not alone. The Bush administration has reversed the Environmental Protection Agency’s position and just argued to the U.S. Supreme Court that the Federal Insecticide, Fungicide and Rodenticide Act pre-empts and precludes all state lawsuits for damages stemming from pesticide use. The Food and Drug Administration is now arguing that the Medical Device Amendments of 1976, passed to protect consumers in the wake of the Dalkon Shield scandal, bars all lawsuits against medical device manufacturers. And the Office of the Comptroller of the Currency claims that national banks are immune from most state consumer protection laws, including those barring predatory lending.

Meanwhile, Congress just enacted class action legislation that the federal judiciary opposed because it will overwhelm the already overloaded federal courts, enormously complicate and delay class and mass actions and deny many Americans a chance to obtain justice. The disrespect for the constitutional role of the courts – and access to justice – is palpable.

Last year, the House of Representatives passed two pieces of legislation that would bar the federal courts, including the Supreme Court, from even considering their constitutionality. Representative Todd Akin, R-Mo., predicted that a president will tell the courts, “You can write as many opinions as you want. We’re going to ignore them.” He said, “That is something completely legitimate for the Executive to do.”

This extraordinary approach should not be a surprise. America’s founders knew what would happen if too much power got into any group of people’s hands. That’s why they made sure power was checked. Even so, this approach is a surprise, because the mere idea (much less the practice) of trying to eliminate access to the courts is (as the Supreme Court’s decisions in the “enemy combatant cases” reflect) so fundamentally un-American.

But that’s what we’re seeing more and more. The oil and gas industry is pushing to solve water contamination caused by the gasoline additive MTBE by eliminating MTBE victims’ rights. The gun industry is trying to eliminate gun violence victims’ rights. The asbestos and insurance companies are working to bar asbestos victims from court. And the medical industry is seeking to solve the medical malpractice insurance problem by limiting neither medical
malpractice nor insurance rates, but medical malpractice victims’ rights.

**Rights to counsel, jury trial**

The attack on access to justice is so wide-ranging that even the rights to counsel and a jury trial are threatened. Forty years ago, the Supreme Court held in *Gideon v. Wainwright* that the Constitution protects the right to counsel for the poor in criminal cases. Within a decade, the Legal Services Corp. was created to protect the right to counsel for the poor in civil cases. Funding for both is now endangered.

The right to a jury trial is explicitly protected by the Seventh Amendment to the U.S. Constitution and by state constitutions. Corporations, however, have a new tactic for eliminating it – including predispute waivers of the right to jury trial in their form agreements. The Wall Street Journal highlighted this approach in an article entitled, “Companies Ask People to Waive Right to Jury Trial: After Years of Requiring Arbitration, Companies Return to the Court System—but With Conditions.”

Nearly 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.” *Chambers v. Ohio Railroad Co.*, 207 U.S. 142, 148 (1907). Lawyers and judges know this is true. In America, the courts are the one place where even the poorest, most powerless 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.

In 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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