

# Civil Justice Digest

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

## A SCHOLARLY LOOK AT MANDATORY ARBITRATION

The Roscoe Pound Institute and the Duke University Law School Private Adjudication Center invited some of America's leading scholars to address important issues in arbitration at *The Coming Crisis in Mandatory Arbitration: New Perspectives and Possibilities*, a symposium at Duke Law School in October, 2002. The program featured papers and commentaries from these scholars, one of whom noted "When people write scholarly pieces about mandatory arbitration, they will most assuredly cite the papers coming from this conference."

In this issue of the *Civil Justice Digest*, we summarize three paper presentations from the conference and the commentaries on them. More material from the program will be published in subsequent issues of the *Civil Justice Digest*.

This issue's summaries provide only a snapshot of the outstanding scholarship that went into the symposium. For that reason, we strongly encourage readers to read the full papers, which are available in draft form at [www.roscoepound.org](http://www.roscoepound.org). While some authors focused their oral presentations on their papers, others used their papers as a starting point for discussion of the larger issues involved in the discussion of mandatory arbitration.

The final versions of the papers will appear in a special issue of *Law and Contemporary Problems*, a Duke Law Journal, in Spring, 2004.

Editor's Notes: In the summary of the paper presentations and commentaries, the participants are often quoted. These quotes are taken from a videotape recording of the program, thus there are no citations to published materials. The quotes have been edited for clarity, continuity, and readability on paper.

Finally, although the Roscoe Pound Institute was a major sponsor of the program, it had no editorial control over the papers or the presentations that were based on them.

### Mark Budnitz: *The Costs of Consumer Arbitration*

Professor Mark Budnitz presented a paper titled "The High Cost of Consumer Arbitration: *Green Tree v. Randolph* and its Aftermath."

Professor Budnitz, of Georgia State University College of Law, has written on ADR issues involved in "cyber-space" sales and the arbitration of disputes between con-

sumers and businesses, with an eye toward consumer protection. He chairs the board of the Consumer Law Center of the South. He is also co-chair of the Working Group on Consumer Protection of the Center's Cyberspace Law Committee and vice-chair of the ADR subcommittee of the Center's Consumer Financial Services Committee.

Professor Budnitz began his presentation by linking the cost of arbitration to the issue of access to justice. He noted that, when one begins to speak about the cost of arbitration, it may be too simplistic to simply look at the stated costs, and not the real costs. For example, Budnitz pointed out, a consumer who does business online with eBay.com will most likely use the PayPal online payment service—and PayPal's agreement provides that arbitration of any dispute with the company must take place in Santa Clara, California. "What do we really mean by arbitration being 'too costly?'" he asked.

What if it's arbitration through AAA, and it's only going to cost \$125 according to their fee schedule, but according to the agreement of the creditor or seller . . . the arbitration can only take place in Santa Clara, California? Now I would love to go to Santa Clara, California, but if I have a consumer case and it's only worth one thousand dollars, I'm not sure it's going to be worth my while to go there.

And the hidden costs may not always be financial, he added. They may cost consumers their rights: "What if it's a transaction that you have with Lending Tree [an inter-

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## HIGHLIGHTS

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net service that locates loans for consumers], with a nice low filing fee, very reasonable cap on arbitrator fees, but it allows no class actions, no consolidations, no punitives—nothing except actual out-of-pocket damages?”

By changing how we view arbitration, Budnitz remarked, we may change how we view the real costs involved:

If you look at it in terms of actual access to justice, then you have a different concept of cost than just those low filing fees that are so broadly touted. They are very attractive and very low, but is that all we should be looking at? We’re talking about the privatization of justice—who’s going to decide about the cost and who has access? Is it the courts? Is it the public policies made by the legislators? Or is it going to be the private companies that administer arbitrations?

Another issue Budnitz raised was whether the mandatory nature of some arbitration may have affected the integrity of contracts and arbitration itself. For instance, when a consumer buys a mobile home or a television set or any other product under a contract that requires an arbitration agreement, have they really *consented* to that arbitration contract? “Have we really destroyed the integrity of the contracts,” he asked, “by saying that these are enforceable contracts and there was meaningful assent?” Budnitz also lamented that arbitration, with “its very long and glorious history,” has been misused in consumer and employee disputes in such a way that it stains the “wonderful reputation of arbitration.”

### ***Green Tree Financial Litigation***

Professor Budnitz then examined the landmark Supreme Court arbitration case, *Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, Larketta Randolph bought a mobile home from Better Sense Homebuilders, with financing through Green Tree Financial Corporation, under a contract that included an arbitration agreement. The agreement itself, Budnitz noted, was light on details:

It said nothing about who would administer the arbitrations. It said nothing about what rules would apply. It said nothing at all about the costs. There were no names, addresses or phone numbers for anyone that Ms. Randolph could call in order to get any information about the arbitration to which any dispute would be subject.

Randolph brought suit alleging violation of two fed-

eral consumer protection statutes, the Truth In Lending Act [15 U.S.C. §§ 1601 et seq. (2002)], and Equal Credit Opportunity Act (ECOA) [15 U.S.C. §§ 1691 et seq.]. The Truth In Lending Act was designed to protect consumers in credit transactions by requiring clear disclosure of key terms of the lending arrangement and of all costs. The ECOA requires that all consumers be given an equal chance to obtain credit, and it prohibits illegal discrimination against people when they apply for credit.

When the case was decided by the 11<sup>th</sup> Circuit, it ruled in Randolph’s favor, said Budnitz:

What the 11<sup>th</sup> Circuit said was that the agreement fails to provide the minimal guarantees required to ensure that Randolph’s ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrator’s fees and other high costs of arbitration.

As Professor Budnitz noted, the 11<sup>th</sup> Circuit took seriously Congress’s intent in passing the Truth In Lending Act and the ECOA, and the need to make sure that Ran-

dolph could vindicate her statutory rights through the availability of an affordable forum for her dispute.

The U.S. Supreme Court, however, took a different view of the case. Budnitz decried the agreement because of its “silence” on rules, costs, and who would

administer the arbitration, and the 11<sup>th</sup> Circuit thought the agreement failed to provide minimal guarantees. The Supreme Court found the contract’s silence to be “golden,” according to Budnitz, and

Because it is silent, Mrs. Randolph cannot show that there were high costs that she could not afford. How could she say they were too high? She can’t show what the costs are because we don’t know what the costs are. No one knows what the costs are because the creditor is not telling anyone what the costs are. Therefore the burden is on Mrs. Randolph to show if the costs are too high—and until she can, she must go to arbitration. And though the Court did recognize that there was a possibility that high arbitration costs could preclude consumers from effectively vindicating their rights in such a forum, the burden to prove that the costs are too high is on the consumer.

Professor Budnitz noted that Justice Ginsburg, in her dissent in *Green Tree*, criticized the majority’s application of contract law. Ginsburg examined a long line of similar contract cases, and found that, in those cases, the burden of proof is normally put on the party who draft-

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ed the contract, had superior information about the costs, and is a repeat player. In *Green Tree*, she said, the burden of proof should have been on the finance company, not on Randolph.

Critical of the majority's decision and its ignoring everything in its opinion except the Federal Arbitration Act, Professor Budnitz expressed concern over the Court's treatment of silent agreements: "The pernicious result of this case, I think, is that the Supreme Court is encouraging agreements that are silent on the most important aspects. . . ."

Professor Budnitz then discussed how he began to look more closely at the typical contracts that were in use:

I became interested in just how typical this contract might be. I mean, is the kind of arbitration agreement that Mrs. Randolph faced really a problem, or is this just an aberration? Well, one way of getting at it is to say how many people were subject to these contracts written by Green Tree Financial. I looked at the company's annual report filed with the Securities and Exchange Commission in 2001, under the name Conesco. Just in terms of mobile home financing alone, they extended \$2.5 billion in credit in 2001. So when Mrs. Randolph took out her credit transaction when she bought her mobile home, there were a lot of other people out there subject to this same silent agreement.

That discovery led to Budnitz's next step:

I gathered contracts—not in a way that is methodologically at all valid. I looked at cases since *Green Tree* where the court decisions, whichever way they went, reproduced the arbitration agreement. I also had my research assistant go to Web sites. I did not tell him which arbitrations to get, I just told him to try to get some from financial institutions, try to get some from major department stores, try to get some from online sellers.

Budnitz also had his researcher collect contracts from banks in the Atlanta area.

What he found in this sample was that almost none of the contracts specified rules. Most of them were subject to rules of arbitration set by organizations like AAA, NAF, or JAMS. The problem with that approach, Budnitz remarked, was that those organizations have different rules for different types of arbitrations:

AAA has a lot of different rules. You go to their Web page, and there are maybe 30 different sets of rules. Because there are all different kinds of arbitration, it's a good thing that there are a lot

of rules. But, the problem is that a lot of the arbitration agreements that consumers are being bound by do not specify which rules will apply. They just say 'AAA'. So, I guess it's up to the AAA to decide which are the relevant rules.

As Budnitz pointed out, that makes it a ". . . problem for consumers who want to challenge the cost. They cannot challenge the costs ahead of time, because they don't know what rule is going to apply until they get into arbitration itself."

In addition, Budnitz found that more than half of the contracts were silent on who would administer the arbitration. Typically, they said they were subject to the rules of an organization like AAA, but there was no specification of who would actually administer it. The service may refuse to administer the case because their requirements were not met. As a result, he said, ". . . the consumer has no way of knowing really who is going to be administering the arbitration and what rules it will be subject to—and, therefore, what fees will be charged."

### Silence on Fees

In his examination of the contracts, Budnitz discovered that most of them were also silent on the subject of fees. At times they would say that fees would be split, but would not disclose the exact amount of the fees—and that problem was not necessarily solved when the agreement indicated that one could go to the arbitration Web site for information.

Even if the consumer were to go to the arbitration service and look at the site and see what the fees are, those fees change. They change a lot, and most of the agreements provide that the fees which will apply will be the fee schedule that is in effect at the time you file your arbitration claim—not, in fact, the time in which you originally signed the arbitration agreement, which may have been years earlier.

The end result of this, according to Budnitz, is legal chaos. Courts are split on whether to take into account the hidden costs that Budnitz earlier alluded to—the restrictions on traditional remedies (such as no class actions and/or no punitive damages), and the costs of traveling to the city where the arbitration would be held. The split among courts regarding arbitration makes it even more confusing:

How do I know what all those costs will be? I'll estimate them, and some courts say, "That's right, let's do the best we can, and I will allow extensive discovery so we can find out what the arbitrator is going to charge. Let's see what arbitra-

tors in that locality charge for that example.” Other courts are much more narrowly focused and say, “You’re just giving a wild estimate. We don’t know what the real costs are going to be”—and your cost challenge is thrown out, it’s rejected.

Some courts look at the arbitration costs, the filing fees, the fee for compensating the arbitrator, and compare them to filing an action in court. And other courts looking at this say, “No, that’s not the way to do this.” They say the way to do this is to have a detailed examination of this individual plaintiff and see what his or her financial situation is to see if she is really so impoverished that she cannot afford the arbitration forum. So that is what we look at: assets, liabilities, cash flow, and so forth. You know—how much does your kid make on his paper route? That’s the kind of examination that some courts think is appropriate.

Budnitz noted that there is even disagreement over the cost issue among the courts when the business offers to pay the arbitration costs:

Many courts say, “There it is, it’s moot, you can’t complain about costs, the business will pay for it.” Other courts in consumer cases, and also in employment cases, will say, “Well wait. We’re not going to let the employer, or business get away with that.” Because that means that everybody else who is not able to mount a challenge is going to be subject to paying those fees when they go into arbitration. For the ones who somehow can mount a challenge, when the company faces that challenge, then the company pays. But everybody else is left in the lurch. In fact, a lot of people may never bring cases.

As Budnitz pointed out, in the wake of *Green Tree* there is still chaos in the courts with regard to arbitration agreement analysis. For example, courts will take a broad look at the unconscionability of an arbitration agreement, and find that the limitation of remedies make the contract unconscionable. But other courts reject these unconscionability claims based on the limitation of remedies.

Another factor looms large in examining whether consumers can recognize the costs of arbitration when they enter into the agreement. Budnitz asked,

How can the consumer make an estimate of what the costs might be without knowing what the nature of the dispute is? . . . Without knowing what dispute may arise sometime in the future, there is no way that the consumer can really make a judgment as to whether to agree to arbitration. Cost is one vital part of that deter-

mination which can’t be made until you know what the nature of the dispute might be.

Even after the consumer knows what the dispute is, he or she may still have difficulty assessing the costs and deciding on whether to go to court and challenge the agreement. Budnitz discovered that, “. . . with the AAA, you don’t know what the arbitrator’s fee is going to be if you have a claim that is in a higher amount. . . . You may not actually know, until the dispute is over, how the costs will be allocated by the arbitrator.” The AAA and NAF, Budnitz pointed out, have lower fees on smaller claims and will even waive or defer fees in some instances. They tend to have higher fees on larger claims, or claims that are non-monetary. But if the amount of the claim is indeterminate—that is, the consumer doesn’t put the dollar amount of the claim on the complaint form—then they will be subject to high fees. Even waivers, which normally would benefit the consumer, are discretionary, and it is hard for the consumer to know if the fee will be waived.

In addition, many contracts let the business select the arbitration service. Budnitz detected an appearance of bias here because, if the fees change, businesses might think the fees set by a certain arbitration service are too low, hence too appealing to consumers. They may go to another service with higher fees in order to dissuade consumers from even going to arbitration in the first place.

The end result of this confusion over waivers, the size of fees, and changing fee structures is that the consumer may have no idea what the actual fee will be. If they challenge the agreement in court, the court may determine that the consumer has not proven that the costs are too high. As Budnitz pointed out, because the case law is in such chaos, the risks are high for the consumer to even attempt a court challenge.

Budnitz concluded his presentation with two possible solutions to the problem of costs and arbitration, neither of which he really liked—in fact, he admitted that they were both “lousy.” The first solution would be the creation of regulatory agencies like those used by the NASD or the New York Stock Exchange, using legislation to set rules and fees to insure access. Budnitz recognized, but did not delve into, the problems of a new bureaucracy and the costs involved with that.

The second solution proposed by Budnitz would be to amend the Federal Arbitration Act (FAA) to prohibit pre-dispute arbitration agreements. By waiting until the dispute arises, the consumer can make a somewhat rational decision. Though consumers will still not have all the information on costs that they need, they will have more knowledge of the costs involved and an idea of what the dispute is and what the proper forum is to decide the case. Budnitz noted that that approach has been used in other countries without ill effects.

## Ralph Peeples: Commentary on Budnitz's Paper

Wake Forest Law Professor Ralph A. Peeples commented on Professor Budnitz's paper and presentation regarding issues relating to the costs of arbitration.

Professor Peeples has been on the faculty of Wake Forest since 1979, and was Associate Dean there from 1995-2000. He served on the Committee on Dispute Resolution for the Business Law Section of the American Bar Association and was a co-reporter for the North Carolina Bar Association's Task Force on Dispute Resolution (1985).

Professor Peeples began by addressing his concern as to whether arbitration can be effectively separated into different types for research purposes: "I'm not sure I can draw the distinctions that would be necessary to conduct meaningful research in this area." Professor Peeples used the different types of consumer arbitration as an example of how matters in this broad category can be dissimilar to each other.

Specifically, he differentiated between credit disputes and car purchases, both of which contain a mandatory arbitration clause. Peeples stated,

If, for example, we're talking about arbitration where a major credit card issuer invokes an arbitration clause simply to get a judgment against a consumer who cannot pay an accelerated balance on the credit card, it seems to me that that should be a collection matter. There might be some other claims, but mostly it's a collection matter, so that the credit card issuer can get this arbitral award, convert it to a judgment through superior court, and then, if they ever want to, levy execution at some point.

But Peeples noted that other forms of disputes may be more complex: "We heard talk earlier this morning," he noted, "about required arbitration for new car purchases in Alabama. . . . But that would be different, would it not? Because the range of remedies would be much broader, and it's easy to see how there would be a larger need for discovery—perhaps on both sides, but certainly on the side of the purchaser of that new vehicle."

To summarize his point that separating disputes subject to arbitration for research purposes would be a difficult task, Peeples elaborated on the role of discovery in these types of disputes:

It used to be a bragging point for arbitration that it involved no discovery, or only limited discovery. In some of these disputes I could see where

discovery would matter a great deal. In a lot of disputes involving consumers, I don't think it matters at all, or just a little. So my problem is, I don't know what to compare in terms of aggregating, or what to study in terms of separating, in the context of arbitration.

Professor Peeples then compared arbitration's current status to mediation's status in the past. He remarked,

In a way, in my mind, it's become the way mediation was 15 or 20 years ago. All of a sudden a thousand flowers bloomed and it became difficult to say exactly what mediation was. It could mean a lot of things to a lot of different people. It really is legal chaos.

Professor Peeples also commented on the potential size of litigation deriving from disputes related to arbitration clauses:

I was amazed, when I looked at Professor Budnitz's paper, how many cases there are post-

Green Tree, in absolute numbers. These are for the most part, just the appellate cases, I imagine. It says nothing about the initial skirmishes in the trial court or the motion practice that had to happen before we got to these written opinions. And it of course begs the question that a lot of opinions are just an order, not even an opinion. And if it is an opinion, sometimes it's not even published, and you can't find it. So if Professor Budnitz is showing us the reported opinions or the ones that can be accessed electronically, there must be even more out there, and it's much larger chaos and much more confusing than I, at least, ever imagined. I find this discomfoting.

Peeples also remarked that the identity of the initiating party also could make a difference in terms of how cases are separated for research purposes: ". . . It should matter whether it's going to be plaintiff-initiated, consumer-initiated, or invoked by the merchant or the non-consumer. . . . I think that would make a difference in terms of how we should approach these cases."

Professor Peeples then addressed the issue of arbitration costs. He noted that one consistency between all of the arbitration clauses is an attempt to eliminate lawyers from the process:

We have focused on costs of filing, but at some point I think we do have to take on the fact that, whether intended or not, these arbitration clauses

***One consistency between all of the arbitration clauses is an attempt to eliminate lawyers from the process.***

es . . . are really designed to make sure that the lawyers stay out of it, for good or bad.

He then explained that attorney fees are the true barrier to a plaintiff's ability to find representation in small consumer matters. Peeples said,

It would be very difficult, it seems to me, for a lawyer to be interested in a collection matter brought by VISA where there's no chance at class certification, and where damages for any individual plaintiff can't be more than \$100. . . . How are you going to get a lawyer to even argue that you should be in federal court or state court, and not before an arbitral forum, in order to produce these opinions?

Peeples compared this difficulty to statutory provisions involving Veterans Affairs benefit denials:

For years, as a matter of statute, attorney fees in V.A. benefit appeals were limited to \$10. The effect was that most veterans' appeals of benefit denials were conducted pro se. It seems to me that's exactly the situation we're looking at here. We can focus on filing costs as a barrier, but in the end the real costs are attorney fees and barrier is the willingness of attorneys to take a case or not take a case. . . . Most agreements that I've seen clearly are not conducive to the involvement of attorneys on either side, but certainly not on the plaintiff's side.

He then addressed Professor Budnitz's suggestion of government or business subsidization of arbitration. Peeples agreed that funding is a problem that must be addressed if arbitration is to be improved:

Professor Budnitz makes the point that, in order to keep consumer costs low, it would be necessary for either the government or the business to subsidize the arbitrations. I think that's exactly the point. Part of the problem here, when we focus on cost, is that we are asking organizations like AAA, which is a not-for-profit organization, to function like a court subsidized by taxation and filing fees. It's a bit unfair, it seems to me, to expect a non-profit to be able to provide the kinds of administrative services that a governmental entity can provide. So if we're going to be serious about a system of consumer arbitration, some thought needs to be given to subsidy.

Professor Peeples concluded by predicting that legislation would be unavoidable for either of Budnitz's proposed solutions—amending the FAA, or creating a super-

visory bureaucracy: "In light of *Casarotto* [*Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)], if nothing else, there would have to be legislation either way to amend the FAA. It's a daunting task.

Finally, Peeples stated that he would vote for such an amendment simply because an amendment would avoid the need to answer the above-mentioned research concerns that would have to be answered in order to regulate arbitration effectively.

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## Christopher Drahozal: *Behavioral Analysis of Arbitration*

Professor Christopher Drahozal, of the University of Kansas School of Law, presented his paper titled "A Behavioral Analysis of Private Judging," in which he compared decision making by arbitrators and juries.

Professor Drahozal began his tenure at Kansas in 1994. Before that he practiced law with Sidley & Austin in Washington, D.C., and served as a law clerk for Chief Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit, Justice Byron R. White of the United States Supreme Court, and Judge George H. Aldrich of the Iran-United States Claims Tribunal in The Hague. Drahozal's writing focuses on the law and economics of dispute resolution, particularly arbitration. He is the author of a casebook on commercial arbitration and has taught and lectured on the subject in Europe as well as in the United States.

Professor Drahozal began his presentation by noting that behavioral analysis of law is truly interdisciplinary analysis. It comes to some extent from psychology and the psychology of decision making. Economists and law and economics people are trying to "co-opt" the field by calling it behavioral economics, [but] perhaps the best name for it is behavioral decision theory.

Drahozal then related traditional law and economics to behavioral analysis:

[L]aw and economics generally has this rational actor model that is used to predict behavior, but behavioralists identify situations in which people don't act rationally. . . . The theory is there are departures from rationality that can be tested and verified empirically.

He further clarified the topic and goal of behavioral analysis, explaining that it is not just the measurement of seemingly irrational decisions. Drahozal stated,

It's not just people act irrationally. It's that they behave irrationally (or not rationally) in a systematic way. This isn't just . . . random decision-making. This is not strictly rational as an economist would think about it, but it's consistent across people and it can be predicted and it can be tested.

## Impact of Four “Cognitive Illusions”

Next, Professor Drahozal identified and defined various cognitive illusions that may impact the behavior of juries and arbitrators. *Hindsight bias* can occur when decision makers, knowing that something has occurred in the past, are asked to place themselves in the time the original decision was made and determine how likely a certain result was to occur. “Once you know something has happened, it’s really hard to go back and put yourself in the position of the person at the time the decision was made whether to do something, without taking into account that you know that the bad thing happened,” he said. Professor Drahozal suggested that hindsight bias can be a concern in cases involving determinations of negligence, reasonableness, and foreseeability.

*Anchoring* occurs when a decision maker is asked to determine an appropriate award and is given a baseline figure as a starting point. A decision maker uses this as a “baseline, and then you make adjustments to that baseline to come up with your final answer.” This cognitive illusion can become problematic when the anchor used is irrelevant or when the adjustments made are inappropriate. As an illustration of anchoring, Drahozal cited experimental studies finding that plaintiffs who ask for more compensation tend to be awarded more, even on identical facts.

The *representativeness heuristic* is “when you try to fit something into a category. What you do is you look at characteristics of the thing you’re evaluating, compare them to characteristics you know of the category, and see how representative what you’re observing is compared to what you are expecting.” The representativeness heuristic becomes a concern when the decision maker relies too much on the individual characteristics and too little on the underlying baseline. Drahozal cited rules of evidence dealing with character evidence as a possible response to concerns about this cognitive illusion.

The final cognitive illusion Drahozal discussed was *extremeness aversion*. Extremeness aversion is defined as the desire to avoid making extreme choices, with the result that people may reach compromise decisions. He noted that studies examining extremeness aversion originated in advertising research, but that the possibility of compromise decisions plainly is important for the legal system as a whole.

Professor Drahozal addressed concerns regarding how studies of cognitive illusions translate into the real world. Some have suggested that selection effects (e.g., parties particularly subject to certain biases may avoid certain jobs) and the greater accountability of real world decision makers will mute the impact of cognitive illusions. (See for example, Richard A. Posner, *Rational Choice*,

*Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1570-71 (1998).) Drahozal stated,

My reaction is, given the selection effects in particular . . . for many real world situations, those don’t apply to juries. Yes, there’s some selection by plaintiffs’ lawyers and defense lawyers. . . . [Y]ou can challenge people for cause and peremptorily, but in general, the whole idea of a jury is to get a representative sample from the community. You don’t have the same selection effects that occur in market situations. Conversely, yes, you do have a greater deal of accountability for jurors as opposed to individuals who are participating in psychological studies. Nonetheless, my reaction is that, if we’re going to see [cognitive illusions occurring] in the real world, the jury seems a likely place to look for them. And there’s reason to think that jury decisions may be affected by them, in theory.

**Very little information exists regarding the effect of cognitive illusions on arbitrator decision making.**

Professor Drahozal conceded that very little information exists regarding the effect of cognitive illusions on arbitrator decision making. In the absence of studies examining arbitrators, Drahozal looked to studies on judicial decision making. He assumed that “arbitrators are going to be more

like judges than jurors, and so how judges compare to jurors gives us some idea of how arbitrators might compare to jurors.”

One study examining judicial susceptibility to cognitive illusions concluded that judicial decision making was less susceptible to the representativeness heuristic than decision making by other groups. But it found that judges’ decisions were similarly affected by anchoring and by the hindsight bias. Another study found that judges were much less disposed to hindsight bias than jurors. While this study (unlike the other one) included a juror control group, it has been criticized for examining only judges who were attending a law and economics conference, thereby risking potential selection bias. On the other hand, Drahozal broadly summarized some other studies finding less effect of cognitive illusions than experimental studies might indicate. This review suggested the possibility that “[t]here’s something in the legal system or in the real world that reduces the effect of cognitive illusions on decision making.”

### Arbitrator Decision Making

Professor Drahozal then applied the results of these judicial decision-making studies to arbitrators. Analogizing to judges, Drahozal concluded that arbitrators may

be less subject to some cognitive illusions than are jurors, but are equally susceptible to others. For example, he said the available evidence rejects the idea that arbitrators are affected by extremeness aversion (i.e., the studies found no evidence that arbitrators “split the baby”). Similarly, there is no empirical evidence to support the contention that potential financial incentives result in arbitrators favoring repeat players.

His examination of these studies led Drahozal to suggest that arbitrators might be better decision makers than jurors – i.e., their decision making may be less susceptible to cognitive illusions. He said, “At least looking at cognitive illusions, arbitral decision making may be more accurate than jury decision making. . . . [I]f that’s true, restricting the use of arbitration may be costly to the parties involved.”

Drahozal then cited several possible complications. One is the effect of deliberations on jury (and arbitral) decision making. Most studies of juror susceptibility to cognitive biases do not account for how deliberation might affect these biases. Those that consider the possibility are split, with some finding that deliberations improve jury decision making while others finding that it actually makes things worse. Drahozal stated, “It may be that group decision making fixes all these things, or reduces the effects substantially, and so we don’t have to worry about it.” Or the opposite may be true.

Structural differences between arbitration and litigation pose other difficulties. As just one example, Drahozal noted that the fee structure of arbitration (a graduated rate often based on the amount of damages claimed as opposed to fixed court costs) may affect the amount of damages sought and thus reduce the effects of anchoring:

The result is, as a matter of behavior, in arbitration you would expect more realistic demands than you would in court on the part of claimants, because, if they ask for more money, it’s going to increase the fees they pay. So to the extent that plaintiffs’ demands [might] bias the jury’s outcome because of this anchoring phenomenon, you would expect that to be less of a problem in arbitration because you’ve got a financial cost to doing so.

Professor Drahozal concluded by warning that these results must be confirmed by arbitrator-specific research: “We just don’t know enough right now. The conclusions I’m drawing are based on extrapolating from laboratory studies on judges and we don’t know that much about arbitrators at all, so we really need to do more research.”

[Results of some of the studies referred to by Professor Drahozal were published in Cass Sunstein, et al., *PUNITIVE DAMAGES: HOW JURIES DECIDE*, University of Chicago

Press (April 2002). One of the studies cited concluded that “juries perform poorly when making the decisions required to assess liability for punitive damages.” Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 *ARIZ. L. REV.* 901, 917 (1998).]

## Neil Vidmar: Commentary on Drahozal’s Paper

Dr. Neil Vidmar, of the Duke University School of Law, provided the commentary for Professor Drahozal’s paper. Professor Vidmar teaches courses on social science evidence in law, negotiation, the American jury, and the psychology of the litigation process. He started at Duke in 1987 and is now Vice-President for Research at Duke’s Private Adjudication Center. He holds the Russell M. Robinson II chair at the law school and has a cross-appointment in Duke’s psychology department. He has written numerous articles on criminal and civil juries and is co-author, with Valerie Hans, of *JUDGING THE JURY*, Plenum Publishing, New York (1986). Professor Vidmar is a Fellow of the American Psychological Society and has held several elected offices in the Law & Society Association.

Vidmar discussed two main issues in his commentary on Professor Drahozal’s paper and presentation.

### Arbitrators Who Miss the Point

The first issue, he said, speaking from his experience in dealing with arbitrator panels, is that arbitrators often overlook the underlying dispute in the case. He demonstrated this using an example based on his experience working with small claims courts. In the example, the issue in dispute is the difference between the amount a contractor estimates his work will cost and the amount of his final bill. Specifically, the contractor’s oral estimate was \$300, but the final bill amounts to \$600, due to “extra” work the contractor claims he performed. The customer understandably balks, believing the extra work was part of the original estimate. According to Vidmar, most arbitrators would offer \$300 as settlement, thinking they were “splitting the difference,” when in fact they are missing the point. The dispute is not about whether or not the customer would pay the bill, but about the discrepancy between the estimate and the final bill. The dollar difference is not between \$0 and \$600, but between \$300 and \$600, Vidmar explained.

### Problems of Mock Jury Research

The second issue Vidmar addressed was the problem of cognitive biases discussed by Professor Drahozal, and

**Arbitrators often overlook the underlying dispute in the case.**



how to determine the extent to which these biases may affect jurors as opposed to arbitrators.

Because Drahozal used judges as a surrogate for arbitrators in trying to compare their performance against juries, Vidmar explored some of the research on judge and jury decision making. Pointing to an example from his own research, he said he found that judges and juries appear to reason the same way when presented with identical facts regarding victims of medical malpractice.

Vidmar was particularly concerned about the employment of mock jury trials in research discussed in Drahozal's paper. Even though he had used laboratory experiments in his own training and research, Vidmar's later experience in working with "real world" juries led him to express skepticism about the ability to generalize the findings of the mock jury studies to the real world. Thus he questioned the usefulness of mock trial studies as a means to prove a juror's susceptibility to cognitive bias.

In his experience as someone trained in the field of experimental study, he said, most mock trial studies are flawed for several reasons. He observed that these laboratory studies, some of which were cited by Drahozal, often have "very impoverished facts," and the instructions to the participants are often minimal. Another problem is that the trials do not simulate the deliberative process—or, for that matter, the overall courtroom experience. There is always the problem of artificiality with mock jury studies, or "ecological validity," as he called it.

Vidmar illustrated the problem of artificiality with a synopsis of one such experiment in a study of jurors' handling of punitive damage awards. [The study's results were published in Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L. REV. 2071 (1998).]. Vidmar explained:

The experiment was conducted in a downtown motel, using survey forms. A diverse group of 899 volunteers was recruited, with median income between \$30,000 and \$50,000, and a median age of 30-39. Each respondent was asked to answer questions about ten scenarios about personal injury cases. Each scenario reported that the compensatory damages had been already awarded. After reading each scenario, the mock juror was asked to respond to two six-point rating scales measuring their opinion of how much the defendant should be punished with a punitive damage award. Finally, they indicated a dollar amount that should be awarded as punishment. Most respondents completed their task in 30-40 minutes. Thirty-two of the respondents were dropped from the experiment because they gave incomplete responses or failed to understand the task.

"That was the 'jury experiment,'" Vidmar concluded.

Professor Vidmar noted that these same problems arise not only in the studies cited by Drahozal, but in other jury research as well. When one thinks about these studies and the issue of generalizability, he said, a number of issues arise:

- although almost all of the studies involve personal injury cases, they now have been generalized to bad faith cases;
- these mock trials do not simulate the deliberative process; and
- the studies are contradicted by real world observations of juries.

Vidmar also questioned the studies comparing juries and judges because of the "confounds" that exist in them. For instance, he cited one study that asked mock jurors to make a decision about law, which is the province of the judge, not about facts, which is the province of the jury.

### "Real World" Jury Studies in Arizona

By way of comparison, Vidmar described in some detail the "clinical experiment" in Tucson, Arizona, where the Arizona Supreme Court allowed the videotaping of fifty civil juries during deliberations. From this "real world" study, Vidmar said, he and his research partner Shari Diamond are learning a great deal about the jury process: "The insights we are getting from these studies raise serious questions about the generalizability and the assumptions that have been made about the way juries deliberate, especially in these simulation studies." [For a report on initial results of the Arizona project, see Shari Seidman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).]

One of the things they found in studying the fifty juries is that they worry a lot about insurance—which Vidmar suggested would not surprise anyone, except for the fact that the insurance they worry about is *the plaintiff's*: "They put the plaintiffs on trial, more often than they put the defendants on trial. There is incredible skepticism," Vidmar observed.

Vidmar also pointed out that the juries take their work seriously and question the presentations by both sides: "They heavily scrutinize the experts. They do not abrogate their responsibility and simply defer to the experts. In their deliberations, what we're discovering is that they really and truly scrutinize the conflicting stories. They pay a great deal of attention to the judge's instructions. They spend a lot of time on consensus going back and forth on the evidence."

Vidmar also noted that when the "anchoring" cognitive bias occurs among juries, they will pay more attention to the defense anchor than to the plaintiff anchor.

Additionally, he challenged the notion that arbitrators are more knowledgeable than jurors. He raised the point that, when judges and jurors are given the same *abstract issues* to consider, the difference in the way each group

responds is not great. When shown the same *information*, judges and jurors appeared to reason the same way; when it comes to *outcomes*, judges and jurors are similar. And despite the extremely high jury awards we hear about in the news, research by the U.S. Department of Justice's Bureau of Justice Statistics tends to indicate that real-world juries are reasonable when assessing punitive damages. [See *Bureau of Justice Statistics Bulletin*, "Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties" (August 2000, NCJ 179769)(available at [www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf).)]

Vidmar also cited findings suggesting that judges, rather than being more expert than juries at understanding scientific research, may not be as versed in statistical methodology as they ought to be. He cited a recent study by Sophia Gatowski [Assistant Director for Research and Development, National Council of Juvenile and Family Court Judges—Permanency Planning for Children Department; Faculty Associate, Grant Sawyer Center for Justice Studies, University of Nevada-Reno] and others interviewing 600 state court judges around the United States about the U.S. Supreme Court's *Daubert* decision [*Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993)]. Almost all of these judges emphasized the importance of *Daubert* and the

gatekeeping role of the judge. The judges were then asked about falsifiability and error rate—key components of the test established by the *Daubert* decision. "Only four to six percent of the judges could give a reasonable explanation of what error rate was or what falsifiability was," Vidmar said.

Vidmar does acknowledge that there are uses for mock jury studies. They can be very useful in answering certain questions. For example, mock trials can be used to improve the comprehensibility of jury instructions, especially with regard to the death penalty or civil issues, or in discovering why, even after an eyewitness has been discredited, the witness's account still has an effect on a jury's decision.

In conclusion, Vidmar was skeptical of using laboratory experiments to compare possible biases of juries versus arbitrators. In the end, he said, decisions of judges and jurors tend to be very similar; therefore he questioned Drahozal's tentative conclusion that arbitrators may be higher-quality decision-makers than jurors. Citing evidence that professionals such as doctors and lawyers are highly susceptible to cognitive biases, he suggested that, although "I suspect that juries are susceptible to some hindsight bias, I'm not sure that they are any worse than judges."

[Professor Vidmar has since written a detailed criticism of the jury studies to which Professor Drahozal referred, providing specific methodological concerns

with this research. See Neil Vidmar, "Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s *Punitive Damages* (2002)," a paper presented in February, 2004, at Emory School of Law's 2004 Randolph W. Throver Symposium. An edited version of the paper will be published in the *Emory Law Journal*. For another review of the same book, see David A. Hoffman, *How Relevant is Jury Rationality?*, 2003 U. ILL. L. REV. 507 (2003).]

### **Linda Demaine and Deborah Hensler: *Substituting Arbitration for the Courthouse***

Dr. Linda Demaine presented a paper she co-authored with Professor Deborah Hensler of Stanford University Law School, titled, "Only Another Forum: Substituting Arbitration for the Courthouse in Consumer Disputes."

Dr. Demaine is a behavioral scientist for the RAND Institute for Civil Justice, specializing in the application of social science to law and legal procedure, and the analysis of social issues from legal and psychological perspectives. She also has held an American Psychological Association Con-

gressional Fellowship and an American Psychological Science Policy Fellowship, both in Washington D.C.

Professor Hensler is the Judge John W. Ford Professor of Dispute Resolution at Stanford, and the former Director of the RAND Institute for Civil Justice, where she remains a fellow. Dr. Hensler has taught at the University of Chicago and the University of Southern California. She is a member of the board of directors of the American Judicature Society and a Fellow of the American Academy of Political and Social Science.

In their paper and the subsequent presentation, Drs. Demaine and Hensler examined the "real world" use of arbitration clauses—specifically, how often the average consumer is exposed to such clauses and what these clauses actually say. As Demaine noted in her presentation, the current discussion of arbitration appears to have been driven by three developments:

- Headline cases involving arbitration clauses—the ones that get press attention and are most known within the lay community as well as within the academic community;
- General statements of ubiquity of arbitration clauses, in that there is a general sense that use of these arbitration clauses is becoming more frequent; and
- Investigations of specific industries, as people have tended to focus on arbitration clauses within a particular industry, such as securities or health care.

Demaine and Hensler attempted to take a macro level look at arbitration clauses in order to determine con-

**When judges and jurors are given the same abstract issues to consider, the difference in the way each group responds is not great.**

sumer exposure to them, and then to examine systematically the key characteristics of these clauses drawn up by businesses.

Demaine then discussed their development of a statistical profile of “the average American consumer,” whom they named “Joe.” They created “Joe” by examining a population survey done by the Bureau of Labor Statistics (BLS) and the Bureau of the Census. By using the most populated cell in four demographic categories—age, sex, race, and family income—they found that Joe was a white male between the ages of 35-54 with a family income above the median national income. Demaine did note that there did not appear to be “any clear trends on whether these demographic characteristics would impact the extent to which people are exposed to these contracts.” But the idea was to develop a statistical composite of the kinds of purchases Joe would make, and then examine his exposure to arbitration clauses in making these purchases.

In order to identify the types of purchases Joe might make, Demaine and Hensler located him in Los Angeles, a large metropolitan area with diverse industries, where they could most effectively conduct the research needed to obtain existing clauses from businesses.

Demaine then discussed the process in which they selected the industries for study. Demaine and Hensler focused on industries that provided what they termed “important purchases”—transactions that were expensive, ongoing, or something with a potentially large impact. For example, the purchase could be an expensive one like an automobile, an ongoing one such as long-distance telephone service, or one with a significant impact, such as the use of healthcare services.

Using consumer data on purchasing decisions, identifying dominant businesses, and conducting random sampling within particular industries, the authors identified 161 businesses to investigate. They then contacted these businesses for information about their use of arbitration clauses, and ultimately got responses from 99 percent of them.

Demaine and Hensler found that 57 of 161 (35 percent) businesses they contacted used arbitration in their consumer contracts. Industries varied on how often they were used, ranging from the restaurant and entertainment industry, in which none used it, to the financial industry, in which 69 percent of the businesses surveyed used it.

Demaine noted that, from the 57 businesses that used arbitration clauses, she and Hensler were able to obtain 52 of those clauses to examine. They looked at the scope of the clause, information about the arbitration provider, the use of counsel, secrecy, and rules about the arbitrators, as well as discovery and evidentiary rules, fees, and waivers.

Demaine and Hensler found that 65 percent of the clauses state that they will apply to all claims arising

under the contract, which, as Demaine noted, is the broadest wording they could choose. Demaine said such wording “has very important implications. For example, in California, under a healthcare contract, if a person signs off on an arbitration agreement, any claims that might be brought by a third party, such as a spouse, are also held to be under this clause, even if the spouse hasn’t signed off on this contract.” Demaine and Hensler found that 31 percent of the businesses did except small claims from the arbitration mandate, and 31 percent of them precluded class actions within arbitration.

Thirty of the fifty-two clauses examined designated a single arbitration provider. Of these, nineteen used the American Arbitration Association (AAA), five used the National Arbitration Forum [NAF—a not-for-profit ADR service], and two used JAMS. Some businesses in the securities industry also used the special purpose arbitration forums provided by the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE).

Demaine and Hensler also looked at some of the procedural issues the consumer might encounter. While all of the clauses allowed either party to initiate arbitration, Demaine indicated that “. . . the location of the arbitration was specified in 50 percent of the contracts. In each instance in which it was specified, it was in a place that was near to the consumer, except in the case of online businesses and one tour operator. Each of these establishments required the consumers to go to a specific location within the U.S. as opposed to a place that is more convenient to the consumer’s residence.”

Demaine and Hensler found that all of the clauses allowed the consumer to be represented by counsel. With regard to secrecy, they found that 13 percent of the clauses required that the arbitration proceedings remain confidential, with some of the clauses requiring that the fact that an arbitration had taken place at all was not to be conveyed to anyone.

Several of the clauses surveyed (15 percent) specified necessary arbitrator qualifications, often stating that he or she be a retired judge or have experience in the particular industry. Demaine noted that, with regard to arbitrator selection, 27 percent of the clauses specified how that would be done: “For the most part, when it was a single arbitrator being used, that arbitrator would be selected by both parties. When multiple arbitrators were being used, each party would select an arbitrator, and then those two arbitrators would select a third arbitrator, a neutral arbitrator, and the court would resolve any conflicts that arose.”

Demaine reported that 33 percent of the arbitration clauses discussed discovery rules, mostly letting consumers know that discovery rules in court would not apply in arbitration.

With respect to fees, Demaine and Hensler found that 58 percent of the clauses did discuss the breakdown of

fees between the consumer and the business, while 42 percent made no mention of fees. In some cases, they were equally divided; in others the person who initiated the arbitration would pay; and in others, the arbitrator would decide. Some clauses specified that whoever lost the arbitration would pay the fees. Twenty-three percent of the clauses addressed situations of financial hardship for the consumer in some manner.

Demaine wrapped up her discussion of the paper's findings by discussing the waiver of rights involved in many arbitration clauses. She and Hensler found that "many of the clauses, 56 percent, explicitly state that the consumer is waiving the right to proceed in court. Only four percent, however, . . . alert the consumer that they are waiving their right to a jury trial, and 77 percent of the clauses alerted the consumer that this was going to be binding arbitration. That is, they gave some sense or they used the words that it would be binding; or they said there would be no appeal afterwards, but gave some sense that this would be the final forum."

Demaine called these findings a snapshot of what is found in arbitration clauses today. She returned to the question the Demaine-Hensler paper raised: ". . . Is arbitration only another forum, or is it actually providing a different level of justice than might be provided in the courts?" She suggested that their findings provide a mixed answer: "Few of the clauses that we found reflect the sort of egregious self-dealing that is reflected in the headline cases. Few of the clauses have reached the level of conduct seen in *Engalla* [*Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997)] or the other cases that have been discussed today. Most of them appear to be fair on their face."

Demaine recapped:

- arbitration is available at the request of either party on the whole;
- it's almost always held in location convenient to both the consumer and the business;
- the costs are often split between the consumer and the business;
- legal representation is available to either party; and
- interim relief is available to either party.

But, looking deeper, Demaine expressed some concern:

The question that might be asked is whether, although they look equivalent on the face in terms of both the consumer and the business, arbitration clauses have a disparate impact on the consumer. For example, 1) it may be difficult for the consumer to find legal representation;. . .2) the consumer may be disproportionately impacted by the costs;. . .and 3) businesses are much more likely to have a better understanding of the provisions than the consumers would.

Professor Demaine concluded her presentation by dis-

cussing some projects for future study:

- *Consumer awareness*: "Looking at the extent to which consumers are aware of these clauses, how well they understand them, and how willing they are to accept them."
- *Consumer choice*: "Some courts have stated that consumers have a choice when there is a dispute, so that, even if one arbitration clause doesn't provide a fair process for the consumer, the consumer can go elsewhere in the industry. So it would be interesting to take a look to see whether there actually is choice, or if certain industries are now blanketed with the arbitration clauses, such that choice isn't really available in deciding whether or not to go to arbitration."
- *Consumer behavior when faced with arbitration clauses*: "We are thinking about looking at the effect of mandatory arbitration clauses on consumer disputes in terms of the process. We are interested in whether consumers are lumping their disputes—that is, not bringing them because they realize they have to go to arbitration and they are not familiar with that, or they don't know what it is, or there appear to be barriers to bringing their claims. So we want to see whether or not, if there is a predispute arbitration clause in the contract, they actually are less likely to bring a claim that they might otherwise pursue."

## Francis McGovern: Commentary on Demaine-Hensler Paper

Professor Francis McGovern of the Duke University School of Law commented on the paper by Demaine and Hensler.

McGovern began teaching at Duke in 1997. Before that, he had taught at the law schools of Stanford University, the University of Alabama, Boston University, and the University of California at Berkeley, among others. Professor McGovern was among the first in the nation to write about, and to use, alternative dispute resolution (ADR) techniques to avoid or to improve the litigation process. As a court-appointed special master or neutral expert, he has been involved with significant mass claim litigation in the U.S., including the DDT toxic exposure litigation in Alabama, the Dalkon-Shield controversy, and the silicone gel breast implant litigation. Professor McGovern is the co-author of two published books—*Successful Litigation Techniques* and *The Preparation of a Product Liability Case*—and two of books in progress: *Toxic Substances Litigation* and *Alternative Dispute Resolution*.

McGovern first addressed the arbitration phenomenon broadly and suggested that it was part of a larger pattern:

The sense that I get in looking at this paper, and indeed the entire symposium on arbitration, that this is a symptom of a much larger phenomenon—a phenomenon, as would characterize it, in which courts are becoming decreasingly hos-

pitiable to the sorts of consumer claims that you've been talking about in general and, more specifically, in the context of class actions. It seems to me this is a much larger phenomenon than just the matter of arbitration clauses. We had *The Death of Contract*. [Grant Gilmore, *THE DEATH OF CONTRACT* (Ohio State Press 2d Ed. 1995)] I'm wondering now if we shouldn't write a book entitled *The Death of Tort*. That is to say, the theme here seems to be a general constriction of opportunities to bring these kinds of claims.

McGovern, however, clarified his comments by stating that the alternative to arbitration—a jury trial—might not be as powerful as it is believed to be: “As far as the ‘jury’s thumb’ is concerned, the thumb . . . may be strong, but it may not be all that long. That alternative may not be quite as powerful as some people have assumed.”

McGovern's next topic was class actions, in which he sees a battle between two opposing forces on this issue—the plaintiff bar and certain members of the judiciary:

At least in the context of consumer fraud cases, there has been an effort on the part of the plaintiff's bar to push the envelope with class actions to see how much of an alternative this would really be. There also has been a corresponding push on the part of very prominent members of the judiciary to reduce the scope of the availability of class actions in these kinds of cases.

McGovern pointed to three cases as examples of this battle.

### Three Court Decisions

*Tire litigation*. The first case was *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002). McGovern explained how that decision questioned the use of class actions in consumer fraud cases—actions that are often eliminated by arbitration clauses:

Judge Frank Easterbrook issued an opinion in *Bridgestone/Firestone* in large part debunking the use of class actions in the consumer fraud cases, at least in the context of a reduction in the value of the tires in the Ford Explorer—the vehicle associated with the rollover cases. And he went even further . . . , saying that no federal class action would be available in that kind of case, but also saying he didn't see how any state class action would apply either, given the

unique characteristics associated with the facts of the case. And he went even further, as Judge Easterbrook is wont to do, to say that “[e]fficiency is a vital goal in any legal system—but the vision of “efficiency” underlying this class certification is the model of the central planner. The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution.”

McGovern cited Judge Easterbrook's comments on the central planning model as an example of a recent trend in federal courts: “That's a major, major trend that we see in federal court, starting with *Amchem* and *Ortiz* [*Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (U.S. 1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).] Now we're seeing lots of spin-offs of that.”

*PPA litigation*. In his next example, McGovern observed that this trend also extends to state courts:

In state courts as well, we're seeing a contraction of the use of class actions. Let me use as an example the PPA [phenylpropanolamine—an ingredient in over-the-counter cold medicines] litigation. . . . One of the issues that came up was whether or not a class action device would be appropriate for those consumers who had purchased PPA, and should they get their money back because this was a substance that the FDA had indicated should not be put in those over-the-counter drugs. And Judge Moore in Los Angeles, who has all the California PPA cases, decided that, in terms of the monetary relief for purchasing a product that had virtually no utility or a deleterious effect, . . . the class action device was not the appropriate device that should be used and declined to certify the class.

*Cooper Tire class action*. McGovern used the *Cooper Tire* cases for his last example in order to illustrate the efforts of the plaintiff's bar to utilize class actions in the consumer fraud context:

These were cases where the enterprising plaintiff lawyer found a videotape of the folks on the line at the Cooper Tire plant puncturing the little bubbles of air in the tires with a knife. In all probability it was no harm, but the vision of a knife going into a tire before it was sold was a little disconcerting. So, a number of lawyers brought suit under a warranty theory, a consumer protection type theory. . . . But they didn't bring

***I'm wondering now if we shouldn't write a book entitled The Death of Tort.***

it in federal court, because they felt pretty certain that there would be no class certification. Instead, they brought it in about twenty different state courts to see if they could get a judge to certify a class. . . . Cooper Tire eventually decided to settle the case because of the multiple litigation and because of the adverse publicity—which was, of course, going on at the same time as the *Bridgestone/Firestone* publicity.

McGovern next addressed the assumptions tested in the Demaine-Hensler study. He agreed that the results do not conclusively rule out the possibility that some arbitration clauses are used to the seller's advantage, but cited different reasons:

I'm not certain that the values embedded in those assumptions are indeed the values that folks who are opposing the use of class actions—and, indeed, those who are imposing the use of arbitration, would use. It's unclear to me that, even if your data were to show conclusively that those assumptions were erroneous, there wouldn't be alternative values that would enter into the fray, because the push toward restricting these . . . smaller kinds of cases is so intense that I think it would manifest itself in a number of forms.

McGovern concluded by suggesting that comparative studies involving arbitration should also critically examine the alternatives to arbitration.

In focusing on this issue from a much broader context, it's worthwhile to look at what the alternatives are. . . . It's not abundantly clear to me that, in a number of circumstances, arbitration doesn't provide virtually the only recourse that you would have available to deal with certain kinds of problems. So I would argue that aggregating the research might make some sense; that in certain circumstances one could write an arbitration clause and an arbitration solution that would make a lot of sense, while in other circumstances it probably doesn't.



## Books of Note

*Lawyers, Lawsuits, and Legal Rights*  
by Thomas F. Burke

Reviewed by  
Professor Michael L. Rustad, Suffolk University

A recent issue of *The Economist* magazine analyzes Karl Marx's intellectual legacy, finding that "many of his assumptions, analytical traits, and habits of thought

are widespread in Western academia and beyond." Without addressing the controversy over whether or not Marx was a scientist employing objective research methods, it is easy to agree with the article that Marx did found a "faith"—in the possibility of positive change. It is this legacy of faith in transformative politics, coupled with John F. Kennedy's celebration of public service, that influences the contemporary field of political science. Consequently, political scientists tend to favor "reform" movements.

In the American tort "reform" debate, political scientists exercise this liberal bias and favor so-called reform instead of objective analysis of the issues. They are easily duped by the call of the tort "reformer" to replace our civil justice system because they often find change for change's sake attractive and defense of the status quo, unattractive. They are frequently enamored with European-style bureaucracies that provide "expert" opinions on issues that currently, in the U.S. courts, rest in the more unpredictable, but democratic, hands of the jury.

Thomas F. Burke's book *Lawyers, Lawsuits and Legal Rights* incorporates the liberal bias toward changing the world, while acknowledging two needs: to recognize special interests that potentially corrupt the debate and to examine the issues carefully. Neither duped by the tort "deformers," (as one professor dubbed them) nor unwilling to investigate the issues seriously, he seeks to explain the causes and consequences of America's uniquely litigious public-policy style.

Burke argues that litigious policies have produced a legal environment "where the threat of a lawsuit always looms." But he acknowledges the excesses and inaccuracies of the tort reform propagandists and unwittingly builds a strong case for retaining our civil justice system. There is little empirical evidence, he observes, that Americans sue more than citizens of other countries do, or that there is an explosion in personal injury lawsuits.

In recent years, the largest multimillion-dollar awards are found in litigation over business torts, patents, and the misappropriation of trade secrets. Burke asks why "politicians, pundits, and journalists criticize 'litigiousness,' targeting personal injury lawsuits" rather than these more common forms of litigation. Perhaps the simplest explanation is that the large corporations that finance the tort reform movement want to limit their own liability, but not their rights and remedies against competitors.

The author describes the successes of a dedicated corps of tort reformers who continually conjure up the image of a litigation crisis to serve their own political ends. These "cultural con artists," as he calls them, have succeeded largely by capturing the public's imagination with amusing vignettes of lawsuit abuse. Why are Americans so fascinated by horror stories about "handymen who sue after their ladders slip in cow manure, [or] restaurant customers who collect thousands of dollars after eating 'Kentucky Fried Rat'"? Even though many of these tall tales are false, they have had a chilling effect on juries, poli-

cymakers, and judges.

In Chapter One, "The Battle over Litigation," Burke explains that urban legends reflect a widespread belief in a breakdown of our civil justice system. His argument that Americans are deeply conflicted over our litigious public policy style unwittingly provides a compelling defense of solving social problems through lawsuits. He argues that the litigation crisis should not be blamed on greedy lawyers or even on litigants: Americans turn to the courts because litigation is the most effective way to solve social problems under our constitutional system. He blames the "crisis" on federalism, separation of powers, and judicial independence. Burke is a compelling writer, urging the reader to "stop blaming the Stella Liebeck of the world [the McDonald's coffee plaintiff] and focus instead on Mr. Madison and his compatriots."

The author next traces the expansion of litigation in products liability, civil rights law, due process, environmental law, and constitutional law. Every example confirms the wisdom of our founding fathers in distrusting government bureaucracy. Since the 1970s, victims of mass-marketed products, hospital negligence, gender and racial discrimination, and toxic exposures have used litigation to hold regulators and corporate wrongdoers accountable. Litigants' use of the courts to solve social problems and to implement or enforce regulations is as American as apple pie.

Burke argues that our constitutional tradition creates three reasons why activists prefer litigation to a cumbersome administrative state: because lawsuits insulate policy implementation from political enemies, do good things for citizens without spending government dollars, and provide a means of gaining power over states and localities.

Burke's book persuades me that private enforcement to advance the public interest is a more efficient means of solving social problems than bureaucratic compensation schemes. Judge Jerome Frank used the term "private attorney general" to refer to lawyers for private plaintiffs whose lawsuits also serve the public interest. Private attorneys general provide a "backup" remedy when government bureaucracies fail to protect the public adequately. Cost-shifting from the taxpayer to the wrongdoer is sound public policy and certainly more palatable to Americans than a vast compensation bureaucracy.

The asbestos litigation exemplifies this. Trial lawyers uncovered numerous "smoking gun" documents revealing that manufacturers deliberately failed to warn shipyard workers of the dangers of unprotected exposure to asbestos. Public regulators used the efforts of trial lawyers working as private attorneys general to develop regulations governing the use of asbestos in the workplace and

other settings.

Chapter Two, on the creation of a litigious policy, carefully documents the struggle to enact the Americans with Disabilities Act. Burke does a good job of explaining why Republican Presidents Ronald Reagan and the first George Bush joined civil rights leaders and disability activists to expand rights and remedies for the disabled.

Burke's proposed alternatives to litigation are compelling reasons to prefer the status quo. A case in point is no-fault auto insurance and the failed campaign for it in California. Burke says one reason we prefer to litigate auto-accident claims is that many traffic victims lack health insurance. Bureaucratic schemes to handle auto-accident injuries have as much prospect of being enacted as universal health and disability insurance. In Chapter Four, he uses the Vaccine Injury Compensation Program to illustrate a successful replacement for litigation in a very limited area. This case study is not a precedent for any other mass tort—vaccines are a unique product demanding a special response.

Burke assiduously avoids case studies that show where real reform is needed, such as in insurance billing practices. To what extent is the recent West Virginia doctors' walkout attributable to insurance billing practices rather than to medical malpractice exposure? The author could have chosen more intriguing case studies than a failed automobile compensation scheme or a limited vaccine compensation program. He mentions the September 11th Victim Compensation Fund, which is an important contemporary example of a replacement scheme that is worthy of analysis.

What's missing in Burke's book and the work of other political scientists is an exploration of how our jury system advances American democracy. Burke neither understands nor appreciates the flexibility of the jury system that Justice Hugo Black described as a uniquely democratic institution. In *Toth v. Quarles*, Black observed that it was "fully known to the founders of this country, [that] jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices." (350 U.S. 11, 18-19 (1955).)

While Burke and other political scientists are fully capable of stitching a patchwork quilt to replace our democratic civil justice system, I would just as soon leave well enough alone.

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