

THE RIGHT TO A JURY TRIAL: A FUNDAMENTAL PROTECTION FOR THE PEOPLE

By Charles Abourezk

After thirty years of insurance corporations and large manufacturers essentially taking control of the public narrative about the meaning of the civil justice system and the trial lawyers who work within it, it is important for us to remember the fundamental role that jury trials and trial lawyers play in our constitutional democracy.

This is particularly important right now, as the average American can now see in their daily lives the tangible results of thirty years of dismantling essential governmental regulation in banking, finance, insurance, and other powerful institutions and industries.

The right to a jury trial is a fundamental protection built into our constitution and laws as a "last line of protection for the public against unscrupulous or irresponsible corporations," as well as the citizens' last means of defense against the natural tendency of all governments toward authoritarianism.

The "civil justice system... is like the criminal justice system except that the only punishment is monetary and that the detectives and the prosecuting attorneys are not government employees paid by the taxpayers but are instead civil justice attorneys – trial lawyers paid out of damages assigned by the courts."²

Put another way, when government regulation fails to protect the public, trial lawyers step in to slow down or halt corporate or governmental behavior that harms the public good or our individual citizens. Trial lawyers are also the enforcers of community safety standards by bringing cases under our civil laws regarding negligence.

In our free market economic system, trial lawyers act as the free market's version of regulators, and unless government intervenes to limit the power of the citizenry, the "market" or jurors from our communities ultimately decide the appropriate amount of punishment necessary to limit and shape the behavior of corporations that, by their very nature as nonhuman entities, do not have a conscience or any sense of social obligation.

As Milton Friedman once said, "the social responsibility of business is to increase its profits." This is often at odds with the people's desire for safety, reliability of products, and protection, and it is trial lawyers, able to proceed because of the possibility of being paid from the damages determined by jurors who, along with their counterpart civil defense attorneys, present and test the evidence in front of a jury, in order to assist the jury in reaching a fair result that will protect our communities from corporate and individual excesses. Ultimately, it is juries who play the role of the final arbiters of community standards of fairness and decency.

If business tells us to trust the markets, then they must also trust the "market" of juries made up of our community members who can decide if there is too little or too much

punishment at any given time in our society. Ironically, it was activist justices on the United States Supreme Court, constitutionally charged with preserving the rights of political minorities and the average citizen *against* governmental intervention, in the Campbell v. State Farm Insurance case, who acted to wrest the power from jurors to determine the amount of sufficient punitive damages in order to contain or halt egregious corporate and private conduct.

The Court limited punitive damage awards to a single multiplier of nine times or less of the actual damages, which is little or no threat at all to large national and multinational corporations who engage in a pattern of willful and wanton behavior against consumers. This kind of pro-corporate judicial activism has raised the ire of many state supreme courts and appellate courts across the country who see in their courts the injury wrought by flagrant corporate conduct, and they have been pushing back against the United States Supreme Court in cases such as the recent case in the Oregon Supreme Court, Williams v. Phillip Morris USA, which the US Supreme Court finally left alone after several appeals.

This trend in judicial activism and deprivation of the constitutional power of juries on the US Supreme Court shall eventually pass, once the balance of power shifts in the highest court, and one must hope that the full constitutional power of jurors will be restored to them, as envisioned by the founders.

The right to a jury trial and the role of trial lawyers in the civil justice system remains one of the core protections built into the US Constitution. All trial lawyers, regardless of whether we do civil plaintiffs or defense work, have to make our voices heard in our communities about the importance of the right to a jury trial. We are in an honorable profession that plays an integral part in our constitutional democracy – and we must begin to redefine our important role in the public's eye.

Thankfully, the South Dakota Trial Lawyers Association - our trial lawyers group - has led the way in informing the public about the important role of trial attorneys and the jury system. We hope you will participate September 30-October 1 in our Fall Seminar which will proudly celebrate the right to a jury trial and the importance of legal counsel, and hopefully it will help South Dakota trial lawyers renew their enthusiasm about whatever sized case they might have that is working its way through our civil justice system in South Dakota.

¹ George Lakoff, The Political Mind, New York: Penguin Books, 2008, 2009.

² *Id.*