



"Do not seek to follow in the footsteps of the wise. Seek what they sought."

- Matsuo Basho

Might Makes Right?

This past month a Staten Island lawyer, rightly or wrongly fed up with the conduct of the opposing party and the opposing attorney, filed a motion with the court seeking permission to resolve their dispute through trial by combat. Trial by combat is a venerable tradition in jurisprudence and is conducted by having the two parties meet in a field and hack at each other with swords. The dispute is resolved when one of the parties is killed, at which point the survivor is declared to have won the legal argument. It is literally a system of "might makes right," and for good reason was abandoned in the 15th century.

The temptation to use superior power to overcome opposing legal arguments has not been abandoned, though, even if in modern life it gets expression in different forms than it did back in the Middle Ages. These days, instead of the powerful using the sword to impose their will on the less-powerful, they use binding arbitration clauses, caps on civil damages, and other so-called "tort reform" to win the arguments they can't win on the merits. Let me explain.

In the years after courts stopped deciding which of two parties was right by holding a duel, we developed a remarkable civil justice system, replacing "trial by combat" with "trial by jury." Somewhere along the line of our long legal history we figured out that six to twelve impartial citizens, given the evidence and an opportunity to hear the parties' arguments, would reach the right result far more often than not. The use of a jury, not just in criminal trials but to resolve private disputes in civil cases as well, became the cornerstone of our legal system.

Juries are dependable because the ordinary citizen is a good, honest, hard-working person with common sense. Because "the law is no respecter of persons," as the adage goes, jurors are instructed to decide each case based on the evidence and the law and not based on sympathy, or favoritism, or prejudice, and they do. Jurors tend to be conscientious and fair, and although the system is not perfect it seems to be the best one yet devised. Certainly in my experience, jurors take their jobs very seriously, require parties to prove their claims, and follow the law. Accordingly, our civil justice system is one place where the ordinary citizen can stand as an equal with the most powerful interests in the land, and can have his case decided on the merits, rather than based on which party is bigger or stronger or richer.

That's why the most powerful interests in the land don't want juries to decide cases – they don't want a level playing field. To be fair, we all – big guys and little guys – would probably like to tilt things in our favor if we could, but it is the big, rich, politically-connected corporations, industries and industry associations, and financial and insurance companies that have the means to do so. And they do so.

One of the easiest ways they do so is by sticking mandatory arbitration clauses in their contracts (or, worse, by sneaking them into those "Update of Account Terms" tissue-paper booklets they mail you months after you signed your contract). If you **continued**

Upcoming Events

September 12 – 8:30 a.m.

Atlanta Bar Association
15th The Legal Runaround
Road Race
John Howell Park
797 Virginia Ave. NE
Atlanta, Georgia 30306
<http://atlantabar.org>

September 25 – 8:00 p.m.

Marietta Kiwanis
Concert on the Square – Grapevine
Band (Oldies/R&B)
Marietta Square
Marietta, Georgia 30066
<http://www.mariettkiwanis.org>

October 10 – 10 am - 9 p.m.

Marietta/Cobb Museum of Art
Chalktoberfest
30 Atlanta Street
Marietta, Georgia 30066
<http://mariettabartmuseum.org>

Be Our Guest

*Join us anytime at these recurring events.
Email us for details.*

- **BNI Network North**, Weekly, Thursdays, 7 am, *Best Western Kennesaw*.
- **Kiwanis Club of Marietta**, Weekly, Thursdays, 11:30 am, *Marietta Country Club*.
- **Kiwanis Club of Kennesaw**, Weekly, Wednesdays, 11 am, *Provino's on Barrett Pkwy*.
- **Northeast Cobb Business Association**, Monthly, 3rd Wed., 11:30 am, *Piedmont Church*.
- **Main Street Morning Buzz**, Monthly, Last Friday, 8:00 am, *Woodstock City Chambers*.
- **Cobb Young Professionals**, Monthly, Last Thursday, 5:30 pm, *Varies*.

have a cell phone, credit card, insurance policy, gym membership, or the like, there is a good chance you are bound to arbitrate any disputes that arise between you and your provider under that contract. Big companies take advantage of their market power to demand that you give up your right to a trial by jury. Unfortunately, arbitration before a theoretically-neutral arbitrator, who plays the roles of both judge and jury, in reality tilts overwhelmingly in favor of the corporate party, which gets to select the arbitrator and, consequently, decide which individual arbitrators get to continue working on that company's cases in the future. When one party holds the livelihood of the judge in its hands, neutrality is out the window, and the results show it.

Worse than mandatory arbitration clauses is legislative "tort reform." Although the phrase suggests a noble effort to improve our legal system, in reality "tort reform" is a self-interested effort by large businesses to deny average citizens their rights to redress. Behind poll-tested slogans like "frivolous litigation" and "jackpot justice," and wielding hundreds of millions of dollars in campaign spending for friendly judges, business groups have done all they can to prevent juries from deciding cases on the merits.

Common defense-friendly "reforms" include burdensome filing requirements, rules that can leave a plaintiff paying for the defendant's attorney fees *even if the plaintiff wins the case*, and the crown jewel: caps on damages. While some filing requirements can make some sense, and the attorney fee rules at least tend to encourage both parties to settle claims speedily, caps on damages are completely illogical and unconstitutional, as they nullify the constitutional right a plaintiff has to a trial by jury.

How can legislators, with no knowledge of the facts of a given case, at a distance and in advance, decide for a jury the proper, or maximum, amount of damages to award? The damages awarded by a jury are, or ought to be, the jury's best estimate of the value of the injuries suffered by the plaintiff and caused by the defendant, so how can such caps, which constrain juries from deciding certain cases the way they believe they ought to be decided, be consistent with the constitutional guarantee of a trial by jury?

Who benefits from damage caps? Only defendants, of course. And who benefits the most? Perversely, those defendants who cause (or insure those who cause) the most and the greatest injuries. The worse or more common the injury, the greater the windfall damage caps give to the defendant and the greater incentive to spend money to buy laws that undermine the jury system.

Imagine if buyers and sellers of a certain commodity were required by law to use a broker for the exchange. The buyer chooses how much to buy, the impartial broker weighs it, and then based on the reading on the scale the broker tells the buyer how much to pay the seller. Imagine, then, what would happen if the biggest buyers persuaded the legislature to cap the dials on the brokers' scales at five pounds, capping the amount buyers have to pay no matter how much of the commodity they buy. Would anybody doubt that the system was being rigged to allow buyers to take advantage of sellers? Would anybody think that was fair?

Damages caps are the same thing, and wrong for the same reasons, albeit with much more serious consequences. Families with members so badly injured as to need a lifetime of care have pursued cases for years, finally getting justice from a jury, only to see their verdicts reduced by caps to amounts inadequate for them to care properly for their now-dependent loved ones. The verdicts weren't reduced because the defendants weren't responsible for the injuries, or because the juries exaggerated the seriousness of the damage; they were reduced because the legislature in that state decided *in advance* to cap damages, regardless of the facts.

The supposed justifications for this rigging, "frivolous lawsuits" and "jackpot justice," are terms invented by big businesses to help them sell the legislation that shields them from liability when they hurt people. For reasons that would be obvious to anybody familiar with actual jury trials, the jury system itself is already a check on frivolous lawsuits, and the wisdom of jurors is, almost always, enough to ensure that only deserving plaintiffs get judgments, and that those judgments give justice, not jackpots.

Lawsuits are expensive, stressful, and time-consuming to pursue, and pushing a bad case into litigation is a good way to lose a lot of money and waste a lot of time. Any attorney with sense knows that if he takes a frivolous case to a jury the jury is most likely going to see through it and send him, and his client, away empty-handed. Not only will the plaintiff fail to recover the costs expended to prosecute the case, but for pursuing truly frivolous litigation the plaintiff and the plaintiff's attorney can face expensive sanctions. The notion that frivolous lawsuits are choking our courts and holding our industries hostage is nonsense; some industries just don't want to be held accountable for the damages they cause and want to buy laws to shield themselves.

Our civil justice system is one of the best institutions our society has ever devised. It allows the peaceful resolution of disputes, holds people and companies accountable for the injuries they cause, and improves product safety and quality of life for all of us. I am very proud of our role upholding this institution and the promise of "Equal Justice Under Law" for our clients and for everyone.



Remember us when you are driving, because just like I-285 we help people on the roads around Atlanta. If you or someone you know is injured in a car wreck, reach out to us for advice and your free consultation at www.crossonlawgroup.com, www.285lawyers.com, or 844-285-HELP(4357).