

# Civil Justice in the United States

## How Citizen Access to the Courts Is Essential to a Fair Economy

*Martha McCluskey*

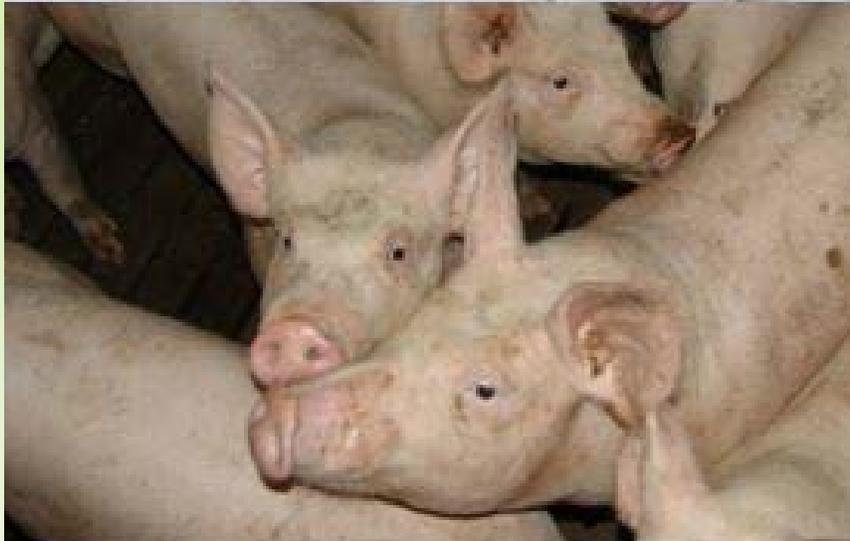
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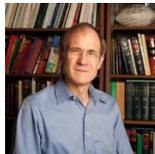
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# Civil Justice in the United States: How Citizen Access to the Courts Is Essential to a Fair Economy

## Executive Summary

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Americans depend on our civil courts to keep the economy on a fair and firm foundation, but a decades-long campaign to limit access and tamp down awards to injured parties has left courts with diminished power. In an era of rising economic insecurity and inequality that has left many individuals and communities struggling to overcome disadvantages beyond their control, we need legislators and policymakers at all levels of government to take action to promote greater access to justice.

Too many individuals and families have seen their chances at economic advancement stalled or undone by injuries caused by unreasonably dangerous products and other irresponsible corporate behavior. This report focuses on four relevant case studies, each of which illustrate how these kinds of profound harms can deprive individuals and communities of a meaningful opportunity to participate in the economy. These case studies include:

- The opioid crisis that has led to thousands of deaths and addictions and the destruction of families and communities across the country.
- The pollution from factory farms that raise thousands of hogs in confined spaces without using state-of-the-art management practices for the tons of manure generated daily.
- The Wells Fargo fake account scandal that resulted in the theft of millions of dollars from consumers who did not know about the accounts.
- The injuries to first responders, the significant property damage, and the disruption of entire “fenceline” communities located next to a chemical manufacturing plant that failed to safely shut down prior to Hurricane Harvey.

*When the courthouse doors remain open to help everyone, regardless of social or economic standing, even the wealthiest individuals and the largest and most powerful corporations can be held accountable.*

In a fair economy, people who suffer an injury or are hurt economically by someone else's irresponsible behavior are compensated adequately so that they may have the opportunity to achieve their full potential. Our civil courts play a key role in pursuit of this vision for our society. They provide an orderly process for victims to seek compensation when they are injured, and the resulting decisions about liability help govern our interpersonal actions to prevent or avoid future injuries. When the courthouse doors remain open to help everyone, regardless of social or economic standing, even the wealthiest individuals and the largest and most powerful corporations can be held accountable.

The four case studies illustrate how the pursuit of civil justice is able to contribute to a fair economy in each of these ways. "Civil justice" refers to holding people and corporations accountable for their actions (or in some cases, their inaction) through laws and procedures that ensure fair compensation for anyone harmed.

For civil justice to play this role, Americans require full and unfettered access to the courts. They look to their elected officials to remove barriers that might block such access. Over the years, teams of corporate lobbyists and lawyers have successfully pressed for legislation and devised consumer contract provisions that hobble the effective functioning of our courts as a check on the behavior of the politically and economically powerful. Three strategies in this campaign are:

- ***Barring the courthouse door*** through forced arbitration and onerous requirements that deserving plaintiffs must satisfy before they are eligible even to initiate a claim;
- ***Dividing and conquering*** plaintiffs with measures that prevent or limit access to class action litigation; and
- ***Shifting the burden*** to the victim with arbitrary caps or limits on the amount or type of damages available to prevailing plaintiffs.

While this campaign continues, individuals continue to stand up to the people and companies that have harmed them, as the case studies illustrate. With the aid of enterprising attorneys, they are using the courts to address harms that can contribute to social inequality.

People have turned to the courts in all of these cases because government standards for preventing these kinds of harms were inadequate or their enforcement was too feeble. Regulatory agencies' budgets and staffing levels have failed to keep pace with our expanding economy, and as a result, agencies have limited capacity to prevent harm and identify and respond to new hazards. This trend, viewed in the context of rising economic inequality

in the United States, underscores the value of our courts in providing individuals and families with an essential venue to seek compensation for their injuries. Our courts cannot reverse the rising economic inequality in the United States, but they can prevent the situation from becoming worse – if law and policy allow them to do so. As a nation, we are looking to lawmakers and advocates who believe in the importance of establishing a fair economy by guaranteeing meaningful access to the courts.

## Introduction

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Our civil courts are vital to the promotion of a fair economy for all Americans. They hold the potential to mitigate the gross social and economic inequalities that mark our society, curtail the worst excesses of our economy, and correct the manifest weaknesses of regulatory standards. Accordingly, Americans from all walks of life expect policymakers to remove improper barriers that block citizen access to the courts. Unfortunately, many lawmakers are engaged in a decades-long campaign aimed at hobbling the effective functioning of the civil courts. They have attempted to prevent people from using the courts to right wrongs that have been done to them by:

- ***Barring the courthouse door*** through the use of forced arbitration and onerous requirements that deserving plaintiffs must satisfy before they are eligible to bring a claim;
- ***Dividing and conquering*** plaintiffs by preventing or limiting access to class action litigation; and
- ***Shifting the burden*** to the victim by arbitrarily capping the amount or type of damages available to prevailing plaintiffs.

Too many people struggle with economic circumstances and other disadvantages beyond their control that make it difficult to recover from harms caused by the irresponsible behavior of others. In a fair economy, all Americans would have a reasonable opportunity to achieve their full potential without the burden of being injured by others. When operating without undue constraints, civil courts offer people a viable avenue for recovering from physical and economic injuries imposed on them by the unreasonable actions of others.

Inequality in the United States – inequality of wealth, opportunity, and power – has been at the center of debate on many issues in recent years. In fields as diverse as criminal justice, tax policy, environmental law, urban planning, and labor law, advocates are finding common ground in a shared vision of a fair economy that functions to mitigate inequality and ensure all Americans have the opportunity to achieve their full potential.

The U.S. civil courts, working in conjunction with our advanced regulatory programs, have long been great “equalizers” in our society. When the courthouse doors remain open to everyone, regardless of social or economic standing, even the wealthiest individuals and the largest and most powerful corporations can be held accountable. Our courts provide an orderly process for victims to seek compensation when they are injured, thereby restoring victims’ freedom and opportunities.<sup>1</sup> And the resulting decisions about

*Advocates are finding common ground in a shared vision of a fair economy that functions to mitigate inequality and ensure all Americans have the opportunity to achieve their full potential.*

liability help govern our interpersonal actions, incentivizing responsible behavior and thus preventing or avoiding future injuries. These protections, alongside those created by regulatory institutions, ensure that economic gains are responsible rather than reckless, and productive rather than exploitative.

For our courts to function effectively, we need broad and meaningful access for all Americans. In this report, the term “civil justice” refers to holding people and corporations accountable for their actions (or in some cases, their inaction) through laws and procedures that ensure fair compensation for anyone harmed. Courts are the main venue in which individuals and their attorneys seek redress for their injuries and accountability for wrongdoing. As the case studies and analysis contained in this report show, the pursuit of civil justice is intertwined with regulatory policy, public health protections, and other important tools for addressing inequality.

### *Markers of Economic Inequality in the United States*

- **40 percent of our country’s wealth is in the hands of just the top 1 percent of America’s wealthiest households – the greatest concentration of wealth in at least the last 50 years.<sup>2</sup>**
- **Over the last two decades, the highest-earning workers consistently saw the greatest increases in wages, while those toward the bottom typically saw the smallest increases.<sup>3</sup>**
- **In 2016, the median wealth of white households (\$171,000) was ten times greater than that of African American households (\$17,100) and eight times greater than that of Hispanic households (\$20,600).<sup>4</sup>**
- **In 2016, women experienced a gender wage gap of roughly 20 percent, earning about 80.5 cents for every dollar earned by their male counterparts.<sup>5</sup>**

### *Forced Arbitration: Limiting Access to Justice for Historically Disadvantaged Groups*

- **The Economic Policy Institute found that while more than 60 million workers are subject to forced arbitration clauses in their employment contracts, the prevalence of these clauses is greater among low-wage jobs and in those industries that employ disproportionately large numbers of women and African Americans.<sup>6</sup>**
- **Workers in the restaurant industry – in which lower-income women and women of color are disproportionately employed compared to the rest of the economy – experience alarming rates of workplace sexual harassment.<sup>7</sup>**
- **As the prepaid credit and debit card industry has grown in recent years, its customers have endured a multitude of problems, including fraudulent fees and unreliable service.<sup>8</sup> The Consumer Financial Protection Bureau (CFPB) found that such clauses appeared in 92 percent of contracts for prepaid credit and debit cards.**

## Civil Justice for Families and Communities: Four Case Studies

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The connections between civil justice and a fair economy are clear in the many cases involving individuals and communities availing themselves of the courts to fight back against egregious acts of wrongdoing by powerful companies. On the pages that follow, four representative case studies present important themes regarding the relationship between civil justice and economic fairness, its significance, and its uncertain future:

- First, each involves wrongful actions by powerful companies, the resulting harms of which disproportionately burden disadvantaged members of our society.
- Second, the harms in each of these case studies occurred despite the existence of federal and state regulations meant to avert them.
- Third, the lawsuits have provided – or have the potential to provide – some measure of compensation and deterrence against wrongful actions in the future.
- Fourth, many of the case studies illustrate how legislators and court decisions continue to block access to the courts, preventing plaintiffs from pursuing civil justice.

Taken together, the lesson of these case studies is that if our nation is to make progress on achieving a fair economy, it is essential that the country fix the broken aspects of civil justice to ensure that citizens have meaningful access to the courts to vindicate their rights.

## The Opioid Epidemic



- For several years, pharmaceutical manufacturers and distributors pushed opioid-based medications, causing widespread misuse and addiction, killing tens of thousands and devastating entire communities, particularly in economically distressed, rural parts of the United States.
- Poor regulatory oversight of opioid marketing practices and inadequate responses from agencies charged with addressing illicit drug use helped enable the epidemic.
- Individuals and state and local governments bearing the costs of the epidemic have brought class action suits against opioid manufacturers, distributors, and corrupt doctors. Much like the Master Settlement Agreement against the tobacco industry in the 1990s, this litigation has the potential to compensate these victims, hold responsible companies accountable, and institute measures that might prevent future drug epidemics.

Beginning in the late 1990s, at the apparent instigation of the pharmaceutical manufacturing and distribution industries, U.S. doctors drastically increased prescriptions of opioid-based drugs to patients. According to a 2016 U.S. Surgeon General's report, doctors across the United States had written more than 289 million opioid prescriptions every year between 2007 and 2012.<sup>9</sup> This rampant over-prescription of opioids fueled a massive addiction crisis that continues to tear families apart and devastate entire communities. Among the hardest hit are rural and Rust Belt

communities in Appalachia, the South, and the Midwest – areas that were already suffering the destabilizing consequences of severe economic distress and dislocation.

Abuse of prescription opioids is now widespread, and addiction rates and fatal overdoses have soared to catastrophic levels. By some estimates, nearly 12 million Americans – or roughly 1 in 27 of the U.S. population – abused prescription opioids in 2016.<sup>10</sup> More than 2 million Americans are thought to suffer from an opioid-use disorder.<sup>11</sup> By 2016, the number of fatal opioid overdoses reached more than 42,000, helping to make fatal drug overdoses the leading cause of accidental death among Americans under the age of 50.<sup>12</sup> Fatal opioid overdoses have become so prevalent that they have contributed to a decrease in U.S. life expectancy.<sup>13</sup> In 2015, the White House Council of Economic Advisors pegged the annual cost to the economy of the opioid epidemic at more than \$500 billion.<sup>14</sup>

Feeding this epidemic has become a massive business. Each year, the prescription opioid industry – including manufacturers, distributors, and retailers – brings in about \$13 billion.<sup>15</sup>

Even as this crisis has grown ever more unmanageable, the response of federal policymakers has been woefully inadequate. The first efforts to limit over-prescription of opioids turned out to be too little too late, as many of those who were already addicted simply turned to black market sources of prescription opioids, such as “pill mills,” or illicit forms of opioids, such as heroin or illegally produced fentanyl.<sup>16</sup> Only in 2016 did federal lawmakers finally begin to tackle the critical issue of opioid addiction with the enactment of the 21st Century Cures Act, which included nearly \$1 billion in grants to states over two years to provide access to addiction treatment services.<sup>17</sup> Many public health experts agree that these grants fall well short of the tens of billions of dollars that will be needed to fight the opioid epidemic.<sup>18</sup>

Our civil courts offer an avenue for filling this policy void, as government officials and ordinary citizens have brought lawsuits against drug manufacturers, distributors, and corrupt physicians for their role in causing the opioid epidemic. Several states, cities, and counties have filed lawsuits, following a strategy similar to that of the litigation brought against major tobacco companies in the 1990s.<sup>19</sup> Beyond providing hundreds of billions of dollars to compensate states for tobacco-related health care and other costs, the Master Settlement Agreement also funded educational programs aimed at preventing youth smoking and instituted significant policy changes, including advertising restrictions that sought to limit tobacco companies’ ability to target their products at minors.<sup>20</sup>

Among other things, the opioid suits claim that pharmaceutical companies deceptively marketed their opioid-based products to doctors and the public,

*Among the hardest hit are rural and Rust Belt communities in Appalachia, the South, and the Midwest – areas that were already suffering the destabilizing consequences of severe economic distress and dislocation.*

failing to disclose the full risk of addiction those products posed. They also claim that the distributors failed to recognize that the massive flow of opioids moving through their supply chains were going to improper uses and that they should have taken appropriate measures to stem the tide of these drugs.<sup>21</sup>

In December 2017, a federal district court in Cleveland, Ohio, consolidated nearly 250 different pending federal lawsuits arising from the opioid epidemic. The presiding judge has since embarked on an ambitious effort to bring together all relevant parties to hammer out a global settlement that would resolve all claims against the opioid industry.<sup>22</sup> In February 2018, Attorney General Jeff Sessions filed a statement of interest on behalf of the Department of Justice expressing support for the settlement effort.<sup>23</sup> Meanwhile, several states have pursued separate litigation, which remain pending in state courts.<sup>24</sup>

These lawsuits illustrate many of the key themes at the heart of the relationship between civil justice and a fair economy. First, they spring from the reckless actions of several large pharmaceutical companies that promoted the overuse of opioids despite the known dangers they posed. Second, several regulatory failures contributed to the opioid crisis, including inadequate oversight of opioid marketing practices and the slow and inadequate policy responses from Congress and relevant agencies, such as the Drug Enforcement Agency and the White House Office of National Drug Control Policy, to contain the crisis while its earliest stages were unfolding.

Third, the lawsuits, if successful, could help promote a fairer economy by providing compensation for victims and by holding the drug companies accountable for the opioid crisis they helped fuel. As with the tobacco settlement, a settlement with opioid manufacturers could result in compensation for state and local governments for the significant public resources they have expended trying to address the opioid addictions suffered by so many, including health care costs and other social programs.<sup>25</sup> With this compensation, states and localities can direct more support toward effective addiction treatment programs, helping victims regain an opportunity to improve their health and their ability to earn a living.

Moreover, a settlement can be designed to avert future addiction epidemics. Funds could be directed to a youth education program designed to warn children and young adults about the dangers associated with opioid-based medication. The settlement could also be used to place restrictions on how opioids are marketed to doctors and the general public, which could help limit future instances of over-prescription.

This multifaceted pursuit of civil justice is a crucial step in solving the opioid crisis. Along with other policies, tort law can help restore economic strength

and opportunity to those struggling with the effects of opioid abuse. Other government “safety net” or economic development programs provide important assistance to devastated communities and individuals, but lawyers and their clients pursuing civil justice can go further to hold irresponsible corporations accountable for the damage caused by the opioid crisis.

## Industrialized Hog Farm Nuisance



- The world's largest pork producer improperly disposed of massive amounts of hog waste in North Carolina, harming the environment and the health and property of nearby residents, many of whom are low income and people of color.
- Industrial-scale agriculture facilities have long taken advantage of inadequate regulation and weak enforcement, increasing their profits at the expense of significant environmental and public health harms.
- Residents sued the company to obtain compensation and to force it to better manage its waste.
- Arbitrary damage caps have greatly diminished the cases' deterrent effect. Corporate interests responded to these cases by pushing state legislators to pass laws that would deny victims meaningful access to the courts to bring similar cases to address future hog waste disposal problems.

North Carolina is the nation's second-largest hog producing state, with about 2,300 farming operations raising more than 9 million hogs. Hog production has become highly industrialized, with the largest operations raising several thousand hogs at once. The largest pork producer in the world, the Chinese company WH Group, operates dozens of these larger facilities in North Carolina through its American-based subsidiary, Murphy-Brown/Smithfield Foods.<sup>26</sup> WH Group is one of the largest companies in the

world, listed on the Fortune Global 500, and claiming reported revenues of more than \$22 billion in 2017.<sup>27</sup>

Most of North Carolina's hog farms are located in the eastern part of the state, situated among rural communities with high rates of poverty.<sup>28</sup> The number of African Americans living within three miles of the state's industrial hog farms is 1.5 times greater than whites; the number of Latinos is 1.39 times greater, while the number Native Americans is 2.18 times greater.<sup>29</sup>

These hog farms generate an enormous amount of manure and other waste. A 2008 study by the U.S. Government Accountability Office found that the 7.5 million hogs located in five North Carolina counties produced more than 15.5 million tons of feces every year.<sup>30</sup> While many aspects of industrialized production of hogs have become modernized and mechanized, the method of disposing of all of this waste remains shockingly antiquated. Even the largest farms simply put all this waste into large open-air pits, called "anaerobic lagoons." There are an estimated 3,300 such anaerobic lagoons across North Carolina. Their contents are eventually liquefied and then sprayed onto open fields around the hog farms. Other forms of waste generated by these farms include the numerous dead hogs, which die prematurely due to disease or other causes.<sup>31</sup>

People living near North Carolina's industrial hog farms face a host of harms to their health and property as a result of all the waste the farms produce. The odors from the anaerobic lagoons, piles of decaying dead hogs, and open-field spraying attract flies, mosquitoes, mice, and other pest species that carry diseases. The stench can become so overwhelming that residents must remain indoors. Mists of feces and other biological waste from the lagoons and sprays carry on the wind and drift over onto nearby neighborhoods, where they coat houses, cars, and anything else that is located outdoors. Public health researchers have found links between air pollution from the farms and increased rates of nausea, respiratory illnesses, asthma, and elevated blood pressure.<sup>32</sup>

Weak or nonexistent regulations enable these awful conditions. Bedrock environmental laws, such as the Clean Air Act, the Clean Water Act, and Superfund, largely exempt agricultural activities from their pollution control and reporting programs. The increased prevalence of "contract farming" makes regulatory accountability and enforcement even more difficult. Under this relationship, large corporations such as WH Group contract with individual farms to produce livestock. The corporations dictate nearly every aspect of the production process but leave the problem of waste disposal to the farmer. Under these contracts, farmers operate on such a thin margin that they are strongly incentivized to use the cheapest means of waste disposal available.

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In response to these harms, the neighbors of North Carolina's mammoth hog farms have brought a series of lawsuits against Murphy-Brown. In all, nearly 500 residents have sued the company, alleging that the farms with which it has production contracts constitute a nuisance that prevents residents from enjoying the use of their property. The plaintiffs claim that because the farms continue to rely on anaerobic lagoons and open-field spraying to dispose of hog wastes, they have failed to take adequate measures to control the odors and fecal mists that drift into the surrounding areas. They further contend that even though modern technologies exist to control these impacts, the farms have unreasonably failed to use them.

The first of the trials concluded in April 2018 with a group of 10 residents prevailing in their claims against Murphy-Brown. The jury awarded these residents a total of \$750,000 in compensation and another \$50 million in punitive damages.<sup>33</sup> In the second trial, the jury also found in favor of the plaintiffs, a couple that lives adjacent to another large hog production facility. They awarded the couple \$130,000 in total compensation and another \$25 million in punitive damages.<sup>34</sup>

However, previous efforts by corporate interests to hobble civil justice in North Carolina are denying these plaintiffs meaningful justice for the harms they have suffered. A 1995 law in the state arbitrarily caps punitive damages at just three times the compensatory damages or \$250,000, whichever is greater. Consequently, the judge drastically reduced the total punitive damages awarded to the first group of plaintiffs to just \$2.5 million.<sup>35</sup> The plaintiffs in the second trial face a similar scenario, with each likely receive only \$315,000 each.

These arbitrary caps severely undercut the ability of the courts to provide justice in these cases. The large size of the punitive damages underscore the fundamentally reprehensible nature of Murphy-Brown's actions, especially when considering how rarely juries grant punitive damages. Because these damages were drastically reduced, Murphy-Brown is able to escape any meaningful sanction for its deplorable indifference to the health and welfare of its neighbors. In addition, if the original awards were allowed to stand, they would have gone a long way toward pushing Murphy-Brown and other industrialized hog farm operators across North Carolina – and perhaps even across the United States – to finally bring their waste disposal practices into the 21st century. Without such an inducement, the communities that live adjacent to industrialized hog facilities will likely be forced to continue enduring the assault on health, property, and dignity that these facilities perpetrate.

While this arbitrary cap on punitive damages applies to most types of lawsuits in North Carolina, agricultural interests have sought to further insulate themselves from nuisance lawsuits. Following the large jury verdict in the first trial, the North Carolina legislature enacted – over the veto of

Governor Roy Cooper – new legislation that would significantly shorten the statute of limitations and restrict the grounds on which these cases may be brought. Potential plaintiffs now must bring their lawsuits within one year after an agricultural facility made a “fundamental change” to its operations, a concept the law defines very narrowly. Moreover, it would bar punitive damages except in cases where the harms at issue arise from conduct that has resulted in either a criminal conviction or a regulatory violation.<sup>36</sup>

The effect of this new legislation is to make punitive damages unavailable in nearly all cases. As a result, the potential awards available in many agricultural nuisance lawsuits would be so small that they would not be worth the expense of pursuing, effectively insulating large companies like WH Group against any liability for the environmental and public health harms their farms cause.

This case study illustrates each of the four themes connecting civil justice and a fair economy, and it demonstrates how progress on those fronts is hobbled by limits on meaningful citizen access to the courts. First, the world’s largest pork producer made a calculated choice to increase its profits through improper disposal of hog wastes, thereby forcing neighboring homeowners and the public to bear the costs of severe loss to their property, health, and environment. Unlike Murphy-Brown, the North Carolina residents neither should nor can bear these costs, particularly given that most of the communities already suffer high rates of poverty and racial inequality. The risk of substantial tort penalties, including punitive damages, can change this calculation to prevent such destructive and irresponsible business practices.

Second, the problems of inadequate waste disposal were in large part enabled by inadequate regulation of the public health and environmental impacts of industrialized agricultural operations.

Third, if civil courts were not burdened by arbitrary limits on their power in these cases, the jury awards would have provided more meaningful compensation and served as a better deterrence to pork producers using unacceptable waste disposal practice.

Fourth, legislators have responded to these cases by further limiting meaningful access to the courts for underserved communities seeking redress of the harms they have suffered.

## Wells Fargo Fake Account Scandal



- For more than a decade, Wells Fargo, one of the largest banks in the United States, defrauded customers out of millions of dollars and damaged their credit scores by setting up millions of bank accounts, credit card accounts, and banking services without customers' knowledge or consent.
- While much of the fake account scandal was unfolding, the public lacked a government watchdog dedicated to policing financial products and services.
- Affected consumers have settled class action litigation against Wells Fargo that has resulted in tens of millions of dollars of restitution. Other lawsuits are still pending.
- Wells Fargo has tried to enforce the forced arbitration clauses in the victims' consumer contracts, which has likely undermined victims' pursuit of civil justice in the cases that have already settled and may have a similar effect in pending cases.

Beginning in the early 2000s, corporate managers at Wells Fargo bank began pressuring branch employees to engage in aggressive “cross-selling” – marketing multiple financial products such as bank accounts, credit cards, or overdraft protection services to customers. Employees faced sales quotas, many of which were nearly impossible to meet, and they were regularly hounded over their progress. The failure to meet these quotas carried dire consequences: official reprimands and even dismissal.<sup>37</sup>

The predictable result of this relentless pressure was that many of the bank's employees resorted to unethical practices to meet their impossible quotas. They sold their clients products they did not need or could not afford. When even that was not sufficient to satisfy management's expectations, they set up accounts, credit cards, monitoring programs, or loans for clients *without their knowledge or permission*. In many cases, the bank's retail salespeople carried out these fraudulent activities with the approval, and even the encouragement, of supervisors.<sup>38</sup> Notably, this behavior began years before the Consumer Financial Protection Bureau (CFPB) was up and running.

While details of the Wells Fargo fake account scandal began to emerge around 2011, the practice continued unabated until at least 2016. By then, the full extent of the scandal had become public. In September of that year, federal regulators had documented more than 2 million fake bank and credit card accounts that had been opened between 2011 and 2016.<sup>39</sup> Additional investigations uncovered still more cases, and by August 2017 Wells Fargo had acknowledged the existence of 3.5 million fraudulent accounts dating back to 2009.<sup>40</sup>

These fake accounts caused massive harm to affected Wells Fargo customers, especially lower-income account holders. The bank admitted to cheating customers out of nearly \$11 million in improper charges and fees related to the fake accounts, though the total damages are likely far higher.<sup>41</sup> Just as important, but harder to measure in dollar figures, is the potential damage the fake accounts did to many people's credit scores.<sup>42</sup> Bad credit reports could mean that many of those affected will have a harder time securing a job, renting an apartment, buying a home or a car, or obtaining a loan.

In response to the fake account scandal, federal regulators and the city of Los Angeles joined together to take aggressive enforcement action against Wells Fargo. In 2016, the bank agreed to pay \$100 million in fines to the CFPB for various violations of the Consumer Financial Protection Act and to set aside an additional \$5 million for compensating defrauded customers. As part of the settlement, Wells Fargo also agreed to pay \$35 million to the federal Office of the Comptroller of the Currency and \$50 million to the city of Los Angeles.<sup>43</sup>

While important, this enforcement action did not cover the full extent of Wells Fargo's wrongdoing. Fortunately, many affected account holders have been able to avail themselves of the courts to achieve some measure of justice. In July 2017, Wells Fargo settled several class action lawsuits, covering potentially millions of customers, for \$142 million. The settlement covers claims going as far back as 2002. In addition to reimbursing account holders for fraudulent fees and charges, the settlement funds will also seek to compensate those whose credit scores were damaged.<sup>44</sup>

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It appears, however, that Wells Fargo's abuse of the forced arbitration clauses it includes in its consumer contracts may have short-circuited this settlement, resulting in inadequate compensation for the plaintiffs and perhaps shielding the bank from further accountability. Soon after the class action litigation had been initiated, Wells Fargo sought to block it by invoking the forced arbitration clauses.<sup>45</sup> Without the prospect of being relegated to arbitration, the plaintiffs may have pushed for an even larger settlement that would have more fully compensated them. They might have even bypassed settlement altogether and proceeded with their claims in court – a process that would have subjected Wells Fargo to discovery, which could have uncovered even more evidence about the nature and extent of the bank's fraudulent activities.

Wells Fargo has continued to seek to enforce the forced arbitration clauses in other pending litigation arising from its fake accounts scandal, including a class action lawsuit brought in a federal district court in Utah. The judge in that case ultimately denied Wells Fargo's motion to compel the plaintiffs to pursue their claims through arbitration.<sup>46</sup>

It is also possible that the existence of these forced arbitration clauses helped to prevent details of the full extent of Wells Fargo's cross-selling practices and the fake accounts they helped spur from coming to light well before 2011. These clauses might have prevented the earliest customers affected by the fake accounts scandal from having their valid claims heard in court, which could have served to alert other potentially affected Wells Fargo customers.

The litigation in response to the Wells Fargo fake account scandal illustrates many of the important themes related to the role of civil justice in promoting a fair economy. First, the lawsuits arose from a broad pattern of fraud perpetrated by one of the largest banks in the world that resulted in the theft of millions of dollars and other economic harms – harms that are particularly devastating for the victims who are already impoverished or disadvantaged in other ways.

Second, the seeds of the fake account scandal were planted in the early 2000s, well before there were federal regulatory programs dedicated to protecting consumers of financial products and services. The extent of the fraud started to come to light only once key elements of the CFPB's enforcement programs had been put into place.

Third, the July 2017 settlement with Wells Fargo, while far from perfect, shows how success in the courts has promoted economic fairness for the account holders affected by the fake account scandal. The financial compensation that the plaintiffs receive through the settlement will be especially valuable to Wells Fargo's low-income customers, as forcing them to absorb the costs of the bank's fraudulent activities would further undermine their economic stability. Compensating low-income customers for the damage to their credit scores may be of even greater significance. The realities of our modern economy are such that it is virtually impossible for individuals to improve their economic status without access to affordable credit. For example, lacking such access can serve as a formidable barrier to the kinds of economic activities that enable individuals to build wealth, such as purchasing a house or pursuing higher education.

Fourth, the case shows how corporate interests have succeeded in limiting meaningful citizen access to the courts, with the result of undermining progress toward civil justice and economic fairness. The widespread use of forced arbitration clauses, which had been enabled by favorable court decisions for corporate interests, likely forced the plaintiffs to accept an inadequate amount of compensation as part of their July 2017 settlement with Wells Fargo.

*The financial compensation will be especially valuable to low-income customers, as forcing them to absorb the costs of the bank's fraudulent activities would further undermine their economic stability.*



- A large chemical producer harmed the health, environment, and property of the largely poor communities surrounding one of its manufacturing plants when it failed to prepare for the effects of Hurricane Harvey.
- Weak oversight of chemical facility safety has allowed the chemical industry to cut corners on safe production and storage practices, increasing the likelihood of catastrophes that put fenceline communities, which are often home to low-income residents and people of color, in danger.
- Residents and injured first responders have brought lawsuits seeking compensation for personal injuries and property damage. If successful, these suits could spur other chemical companies to improve safety measures at their plants.

Early in the morning of August 31, 2017, just a few days after Hurricane Harvey made landfall near Houston, a series of explosions rocked the Arkema chemical manufacturing plant, releasing a noxious cloud of smoke and gaseous chemicals into the surrounding fenceline communities. A few hours earlier, the storm's heavy rainfall and ensuing floodwaters had knocked out the plant's last backup generators, leaving it without any power to keep the highly volatile chemicals stored onsite safely stabilized. The deteriorating situation prompted company officials to abandon the plant and the local fire marshal to evacuate everyone within a 1.5-mile radius.

Police officers stationed along the perimeter of the evacuation zone were the first to be hit by the dangerous fumes. According to witness accounts,

the officers doubled over and began vomiting and struggling to breathe. Emergency first responders soon arrived to assist the police officers there, and they, too, were immediately overcome by the smoke and chemical gases. In the end, more than a dozen police and first responders required medical treatment.<sup>47</sup> The industrial catastrophe at the Arkema chemical plant continued to play out in slow motion over the next several days. Plant employees set off a series of intentional explosions to get rid of the remaining volatile chemicals at the site, releasing still more smoke and gas into the air.

Air pollution was not the only problem. During the height of the storm, Hurricane Harvey's floodwaters overran chemical wastewater tanks located at the Arkema plant, washing an estimated 23,000 pounds of contaminants into the surrounding communities.<sup>48</sup> Later, water and soil testing at nearby homes found worrisome levels of several highly toxic chemicals, including volatile organic compounds, polycyclic aromatic hydrocarbons, dioxins, and furans.<sup>49</sup> During the recovery efforts in the weeks after the storm, residents of the areas bordering the plant began experiencing a wide variety of health issues, including rashes and other skin maladies, intense headaches, and persistent breathing problems.

The Arkema chemical plant is located in Crosby, Texas, one of the many communities that make up an industrial corridor that runs along the Houston Ship Channel east of the city's downtown area. As compared to other parts of Houston, these communities are home to a greater share of people of color and people living at or below the poverty line.<sup>50</sup> Such is the case in the fence-line neighborhoods bordering facilities like the Arkema chemical plant.<sup>51</sup>

The storm and its aftermath exposed how poorly prepared many of the refineries, petrochemical plants, and other industrial facilities in the Houston area are for such events, despite the region's long history with major hurricanes and tropical storms. A weak set of regulations implemented by the Environmental Protection Agency (EPA) imposed vague mandates on chemical facilities like the Arkema plant to develop plans aimed at averting such industrial catastrophes. While Arkema's plan identified some of the potential hazards that a massive storm like Hurricane Harvey might bring, it failed to specify the actions the facility would actually take when faced with circumstances like high floodwaters or extended periods without power – even though the facility housed chemicals likely to explode in the absence of adequate refrigeration. The EPA had been working on a set of reforms that would modestly strengthen those planning mandates, but the Trump administration squelched those efforts just a few months before Hurricane Harvey struck.<sup>52</sup>

Prior to the Hurricane Harvey catastrophe, the Arkema plant had already built up a troubling safety record. In the months leading up to the storm,

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federal and Texas regulators had taken several enforcement actions against the facility for various regulatory violations.<sup>53</sup> Despite this history of noncompliance, regulatory oversight of the facility was uneven; records reveal that the EPA last inspected Arkema plant for compliance with applicable chemical facility safety standards in 2003, 14 years before the hurricane-triggered explosions.<sup>54</sup>

In the months following the Arkema plant disaster, a group of police and other first responders injured by the first series of explosions, along with several nearby homeowners, joined a lawsuit in Texas state court against the company. The suit claims that Arkema should have known about the risks a massive hurricane posed to its operations and taken adequate precautions to address those risks, including measures to properly secure its stock of volatile chemicals and to protect critical equipment, such as backup power supplies, against damage from floodwaters. It also claims that the 1.5-mile evacuation zone was insufficient to protect the surrounding area and that the company misled them and the residents of the fenceline communities about the potential health hazards posed by the chemicals released in the explosions.<sup>55</sup>

The police and other first responders are seeking compensation for their medical costs and other losses caused by Arkema's chemical leak. For their part, the homeowners claimed that the chemical releases damaged their property and that they and their families suffered personal injuries in the form of various health ailments after returning to their homes following the rescission of the evacuation order.<sup>56</sup> The case is still pending.

Separately, another group of fenceline residents initiated a class action lawsuit against the company in federal court.<sup>57</sup> Similar to the state lawsuit, the second group of plaintiffs raised claims of personal injury, failure to warn, and property damage arising from the explosion at the Arkema plant and the release of toxic chemicals from the facility's wastewater tanks. Their case also remains pending.

Many of the key themes related to the role of civil litigation in promoting economic fairness are on display in this case as well. First, the class action lawsuits arose from a deliberate refusal by a multinational chemical manufacturer worth billions of dollars to take even the most basic of precautions to ensure that the highly dangerous chemicals it used and produced were safely stored. Even when faced with the realistic prospects of a historic hurricane, Arkema chose to protect its bottom line by failing to properly safeguard surrounding communities from the risks caused by its business activities.

Second, inadequate regulatory oversight of chemical storage and worker safety helped to create conditions in which companies like Arkema felt free to disregard the safety of these communities.

Third, if the pending state and federal lawsuits are successful, they will help promote economic fairness for the many victims of the Arkema plant disaster by compensating them for their injuries and by providing much-needed deterrence against reckless chemical storage practices that pervade the industry. The compensation would be an important source of strength and opportunity to the residents of the fence-line communities next to the Arkema plant. A disproportionately large number of these residents are poor or persons of color. Left uncompensated, the personal injuries and property damage they suffered might serve to reinforce existing causes of social and economic inequality. Instead, provided that they function effectively in this case, civil courts can help these individuals by restoring them as closely as possible to the position they were in prior to being harmed. In this way, civil litigation would promote equality and fairness for the victims of the Arkema plant disaster by helping to ensure that injuries do not end up denying them a chance to achieve their full potential.

In addition, civil litigation offers the only real mechanism for deterring reckless chemical storage practices. It is unlikely that agencies like the EPA or the Occupational Safety and Health Administration (OSHA) will address the hazards associated with the chemical manufacturing industry during the Trump administration. If the lawsuits result in sufficient damage awards for the first responders and residents, however, at least some chemical companies might be compelled to better plan for foreseeable risks.

## Promoting a Fair Economy Through Civil Justice

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### Compensation for Victims, Accountability for Wrongdoers

The United States was founded on the ideal of a nation ruled by law, rather than by individuals wielding arbitrary power. That principle means we enjoy individual rights along with responsibilities to others. We all will inevitably suffer risk and loss at some point in our lives, but the law enables us to share protections and institutions that foster a fair economy, one that offers stability and support so we can better respond to life's diverse challenges.

The traditional core principle of tort law – namely, that the freedom to advance one's own interests does not include the right to indiscriminately injure others or to otherwise gratuitously deny others' freedom and opportunity – is a cornerstone of a fair economy. This basic duty of reasonable care applies to everyone, regardless of their power or status. As individuals living in a complex society, we are inevitably subjected to risks of harm from others' activities. While civil justice does not guarantee protection against all injury and loss, it does provide a means for holding people and businesses accountable by preventing or mitigating unreasonable harm to others.

The ideal of a nation ruled by law led the Founders to enshrine meaningful access to the civil courts for all Americans as a constitutional guarantee. This guarantee comes through the Seventh Amendment, which provides that in civil cases, "the right of a trial by jury shall be preserved."<sup>58</sup> In introducing the Bill of Rights, James Madison explained the necessity of the Seventh Amendment by remarking, "Trial by jury [in civil cases] . . . is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."<sup>59</sup> And many states followed suit with a provision in their respective constitutions that guarantees access to the courts for civil lawsuits.<sup>60</sup>

The ideal of a fair economy was well stated by President Abraham Lincoln as "a fair chance in the race of life."<sup>61</sup> Lincoln meant that a fair economy is one that allows all Americans a reasonable opportunity to achieve their full potential, and our nation has been committed to this principle ever since. To be sure, reality has fallen well short of this ideal – often considerably so – as massive inequities in opportunity remain an indelible feature of our society, particularly for low-income communities, communities of color, and women. But the nation's history also includes many examples of progress in ameliorating inequalities, even if that progress has been grudging, episodic, and frustratingly incomplete. Moreover, embedded within this shared national commitment is the principle that individuals and families should not be pushed over the edge into inescapable poverty due to circumstances of tragedy or misfortune beyond their control, including injuries caused by

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unreasonably dangerous products or other irresponsible corporate behavior.

When the law supports people's pursuit of civil justice, it promotes a fair economy by ensuring that those who are harmed through no fault of their own are not forced to bear the economic costs of their injuries. Far too often, those individuals are at a significant power disadvantage relative to those who have harmed them. When they are not fairly compensated because their access to civil justice has been limited by legislation or other roadblocks, those who have been harmed must instead pay for the consequences of others' unreasonable behavior themselves. They bear the health consequences of a company's decision not to clean up its pollution, and the bills that go with it. They bear the burden of lost dollars and a poor credit rating, because their bank cheated them and then refused to make them whole. They suffer death and incapacity because the medical professionals on whom they relied were indifferent to the addictive nature of the drugs they marketed and prescribed them. Or they suffer profound health problems and loss of property values because a company with a facility bordering their community chose not to spend what was necessary to protect against the discharge of toxic chemicals.

In the absence of a robust civil justice enterprise, the harm caused to individuals effects a wealth transfer between the victims to those who harm them that is not only unjust but usually regressive in nature. For individuals and families struggling to make a living, put food on the table, and educate their children, the inability to recover compensation can be a body blow to economic stability and too often to economic survival.

The Wells Fargo fake accounts scandal and industrial hog farm nuisance cases illustrate the importance of compensating victims as a component of pursuing civil justice. While this function has been undermined in both cases by limited access to courts, the compensation that was achieved still helps offset some of the harms the victims suffered and thus positions them to better tackle future challenges. Likewise, the individuals harmed by the opioid epidemic and Arkema chemical plant explosion deserve compensation to ensure that they will not bear the costs of corporate wrongdoing on their own, a result that would be especially unjust for those who were already disadvantaged.

### Prevention of Harm

Plaintiffs' pursuit of civil justice further helps to promote economic fairness by creating incentives for people and corporations to prevent harm *before it occurs*, thereby avoiding the injuries and costs of fair compensation. Facing a credible threat of tort liability, most companies will opt to act cautiously or put safe products on the market.<sup>62</sup> Wells Fargo settled litigation in the wake of its fake accounts scandal with a payout of \$143 million. The settlement

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will likely deter other banks and financial institutions from taking advantage of their customers by misusing their private information or by tricking them into paying for services they do not want or need.

In the absence of this deterrence, however, there is little to discourage those with the most power and wealth from systematically injuring others. Left unchecked, this dynamic could lead to a “race to the bottom” of increased loss and inequality. While the social safety net and other social systems might be available to pick up the pieces and repair the harms left by those who seek to profit from their irresponsible and destructive behavior toward others, that dynamic is wasteful, economically inefficient, unfair, and ultimately ineffective. Among those victims who happen to belong to historically disadvantaged groups, their ability to pursue their full potential, including by participating in and benefiting from economic opportunities, is likely to be only marginally improved, if at all.

The value of harm prevention through civil justice litigation is especially crucial when government regulation fails to serve its primary function of preventing harms to public health, safety, financial markets, and the environment. Indeed, the pursuit of civil justice can make regulation more effective. For example, discovery in civil litigation can uncover new information about the risk of products or actions that are subject to regulatory programs. Armed with this information, regulators can then make any necessary changes to strengthen or improve the protections those programs deliver.<sup>63</sup>

This function was on display in civil litigation brought by residents near the DuPont chemical manufacturing plant in Parkersburg, West Virginia, who claimed that the company had fouled their drinking water. During the course of discovery in the case, the plaintiffs uncovered evidence that one of the main contaminants, PFOA, was more dangerous than DuPont had previously disclosed to federal environmental regulators. This revelation prompted the EPA to take a more protective stance on the chemical, including pressuring manufacturers to study its effects on human health more closely and to phase out its production.<sup>64</sup>

The pursuit of civil justice can also serve as a partial antidote to the problem of regulatory capture, which often results in inadequate public protections. Regulatory capture occurs when the industry that is the target of a regulatory program – such as permitting requirements for hazardous waste storage or safety standards governing the design of cars – exerts undue influence over the implementation of that program such that it ends up being more attentive to the concerns of the industry than to protecting people or the environment. Motivated in part by these kinds of concerns, courts tend to treat regulations as providing the minimal level or “floor” of protections. When justice requires, these courts can hold individuals and businesses to higher standards of conduct embodied in tort claims.<sup>65</sup>

In each of these ways, civil justice litigation can help protect us from harm before it occurs. The resulting protections help to promote a fair and strong economy for all Americans, but they are crucial for the most marginalized members of our society. For example, residents of eastern North Carolina will be able to focus on pursuing greater economic opportunities if they are not forced to worry about things like missing shifts at work because of chronic health conditions stemming from nearby industrial agriculture. Residents of fence-line communities like those located closest to the Arkema chemical plant might not in the future bear so many burdens in the form of illnesses, mental anguish, and property damage if litigation following Hurricane Harvey brings them relief. And better government oversight of the pharmaceutical industry might be a lasting consequence of litigation surrounding the opioid epidemic, ensuring that in the future, sick and injured people get better faster.

These consequences underscore the need to ensure that civil justice is able to function as effectively as possible, free of undue constraints. One of the biggest challenges is restricted citizen access to the courts. Fixing this and other problems will go a long way toward helping all of us, but especially those toward the bottom of the socioeconomic ladder, by providing protections that serve to enhance our opportunities to thrive.

## The Ongoing Assault on Civil Justice

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Incremental changes in court precedent and legislation, accumulating over the last several decades, have drastically constrained the power of the courts to be a “great equalizer” in our society.<sup>66</sup> Much of this damage has been accomplished through federal or state legislation, which has followed three general approaches; bar the courthouse doors; divide and conquer the plaintiffs; and shift the burden to the victims.

### Bar the Courthouse Doors

Congress and several states have enacted or are considering several bills to impose onerous requirements that plaintiffs must satisfy in order to have their claims heard. These obstacles can include heightened pleading standards that plaintiffs must sustain or inappropriately short statutes of limitations.<sup>67</sup>

Other bills would make it easier for businesses to force their customers to use arbitration instead of the courts to resolve claims.<sup>68</sup> In 2017, Congress used an obscure law known as the Congressional Review Act to repeal a regulation issued by the CFPB that sought to limit the kind of forced arbitration clauses that banks and other financial institutions regularly include in their contracts with consumers. Thanks to the repeal of this rule, financial institutions once again enjoy nearly unfettered leeway to subject their consumers to forced arbitration.

The harms to consumers are illustrated by some of the earliest lawsuits brought against Wells Fargo regarding the fake accounts scandal, which were dismissed on the grounds that the plaintiffs were subject to the forced arbitration agreements they had entered into when they had opened their original, non-fake accounts.<sup>69</sup> In other words, even though the customers’ claims arose from the accounts and services they had not opened – subject to terms, including forced arbitration agreements, that were imposed without their knowledge or consent – the terms of their original accounts nonetheless barred them from suing.

As compared to litigation in civil court, arbitration is more secretive and more likely to be rigged to prevent plaintiffs from pursuing justice. Individuals often must overcome a host of burdensome procedural obstacles to initiate an arbitration proceeding, including large up-front filing fees and potentially risky fee-shifting arrangements. Some clauses provide that arbitration hearings must take place in specified locations, which could require claimants to travel hundreds or thousands of miles from home at their own expense. Other impediments include unreasonably short statutes of limitations and a bar on pursuing arbitration through a class action claim. This bar on class action arbitration is particularly significant because many claims that might be resolved through this process involve smaller dollar

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amounts, which make the costs of individual arbitration actions prohibitively expensive.

Even when individuals do overcome these barriers and manage to initiate arbitration actions, they are unlikely to prevail because of the various ways in which the arbitration process can be stacked against them. Corporations typically enjoy a close relationship with the arbitrator that resolves their disputes, raising serious concerns about whether arbitration provides consumers with a neutral forum in which to pursue their claims.

The arbitration process is also skewed against the interests of consumers and the public because it is typically conducted in secret. In most cases, relevant information concerning the proceedings and results of individual arbitrations, as well as the existence of the arbitrations themselves, are shielded from public disclosure. Not only does this lack of transparency harm the public by enabling scofflaw businesses to hide their misdeeds; it also silences victims, preventing them from speaking out against wrongdoing.

This silencing effect can be uniquely pernicious for disadvantaged members of society who already face significant challenges in having their concerns heard. For instance, while policymakers are just now beginning to turn their attention to the issue of workplace sexual harassment, women – especially those employed in low-wage positions – have been speaking out against this injustice for decades to little avail. In contrast, civil justice gives an important platform to all victims. When they are allowed to share their experiences, it can encourage others to come forward, tell their stories, and shine a spotlight to the injustices they have suffered.

Unlike civil courts, arbitration offers few procedural safeguards to ensure that claimants receive a meaningful opportunity to seek relief. Arbitrators are generally not required to have any legal training or expertise. In making their decisions, arbitrators are not required to follow precedent or any applicable law, and they do not have to provide parties with clear reasons for their decisions. The lack of such procedures increases the likelihood that an arbitrator's decisions will be arbitrary or otherwise based on improper considerations. Nevertheless, these decisions are binding on the claimant and could subject them to tens of thousands of dollars in fees and penalties. When individuals receive adverse determinations, they rarely have the opportunity to appeal them on the merits to either a civil court or an arbitration appeals panel.<sup>70</sup>

*In the absence of this tool, many who have been harmed by corporate wrongdoing might not pursue their claims at all.*

### **Divide and Conquer**

The second category of legislation that Congress and state lawmakers have considered involve bills that are designed to make it harder for groups of similarly situated plaintiffs to bring and sustain class action lawsuits, potentially denying them a realistic and fair opportunity to obtain justice.<sup>71</sup>

As the North Carolina hog farm nuisance, opioid epidemic, and Arkema chemical plant explosion cases illustrate, some controversies involve complex fact-finding and a large number of potential plaintiffs with substantially similar claims. One critical function of class action litigation is to achieve a fair and efficient resolution of these kinds of controversies, and to do so in a way that conserves scarce judicial resources. In the absence of this tool, many individuals who have been harmed by corporate wrongdoing might not pursue their claims at all, concluding that the expense would be too great to justify proceeding on their own, particularly in light of the uncertainty involved.

Moreover, corporate wrongdoing often involves defrauding a large number of people out of a small amount of money, as the Wells Fargo account scandal illustrates. Individually, the amount at stake might be too small to warrant individual lawsuits. Class action lawsuits help victims overcome this barrier by enabling the plaintiffs to band together and share the litigation costs.

### **Shift the Burden to Victims**

The third category of legislation seeks to force the public to bear some portion of the costs of the corporate defendant's wrongdoing. The main way such legislation pursues this objective is by instituting arbitrary limits on damages that plaintiffs can seek in certain kinds of lawsuits or by making it economically infeasible to bring a lawsuit in the first place.<sup>72</sup>

The statutory caps on punitive damages for the plaintiffs in the North Carolina hog waste cases illustrate the impact of such limitations. Among other things, these caps will likely blunt the ability of these suits to spur industrial hog production facilities to adopt modern waste disposal practices. As a result, communities that live adjacent to these facilities will continue to suffer harm to their health, property, and dignity.

## The High Stakes of the Legislative Assaults on Civil Justice

While the assaults on civil justice are not new, they are taking on even greater significance, given the increasingly hobbled state of our federal and state systems of regulatory safeguards. At the federal level, the convergence of politicized interference, outdated statutory authorities, and destructive budget cuts have reduced the regulatory system to a dysfunctional state. Protector agencies like the EPA, the CFPB, the Consumer Product Safety Commission (CPSC), the Food and Drug Administration (FDA), and OSHA are now often unable to fulfill their statutory responsibilities of protecting people and the environment. To make matters worse, the Trump administration has made weakening public safeguards and undercutting the regulatory system one of its top domestic policy priorities.<sup>73</sup> Rebuilding an effective regulatory system – one that works for everyone – from this damaged state will likely take decades.

In this environment, the pursuit of civil justice becomes all the more important for protecting the public. In many areas of public policy, the deterrence effect that civil justice litigation offers is the most significant countervailing force that discourages industry from cutting corners on health, safety, consumer, and environmental protections in pursuit of greater profits. Likewise, agencies have become increasingly dependent on civil justice advocates to advance the implementation of parts of their regulatory programs. With fewer resources available to independently investigate new and emerging risks, agencies may instead rely on information generated in the course of civil litigation to drive improvements to their regulatory programs.

The PFOA contamination of community drinking water supplies in West Virginia was one instance where civil discovery allowed EPA to institute greater protections related to the toxic chemical. Similarly, the FDA's post-market oversight of prescription drug and medical device safety has benefited from civil litigation. Suits involving prescription drugs like Vioxx have been instrumental in identifying post-market problems that the FDA was not able to identify during the pre-market approval process. These suits have been invaluable because the FDA's own post-market monitoring programs have been rendered ineffective by weak legal authority and chronic underfunding.<sup>74</sup>

As the case studies above reveal, the inevitable result of the hobbled regulatory system is that more and more preventable harms are occurring. Weak chemical facility safety rules helped contribute to the Arkema plant explosion after Hurricane Harvey. The Wells Fargo fake accounts scandal was in part attributable to absence of a consumer protections watchdog focused on banking and financial services prior to the creation of the CFPB. And one of the major causes of the opioid epidemic was poor FDA oversight of the pharmaceutical industry's fraudulent marketing of its opioid products to

*In many areas of public policy, the deterrence effect that civil justice litigation offers is the most significant countervailing force that discourages industry from cutting corners on health, safety, consumer, and environmental protections in pursuit of greater profits.*

doctors and patients. In the absence of a functional regulatory system, the pursuit of civil justice – and the promise of compensation and accountability that it offers to the victims – represents the best hope for preventing these harmful behaviors. Critically, and unlike rules adopted through the regulatory system, successful outcomes in civil justice litigation can directly help individuals who have been harmed by unreasonably dangerous actions or products by restoring them to a position where they are able to fulfill their innate potential and thrive.

## A Better Path Forward: Promoting Civil Justice and a Fair Economy

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Americans from all walks of life need federal and state lawmakers to explore legislative reforms that would affirmatively restore full and meaningful access to the courts. Already, some states are moving in this direction. For example, in response to growing awareness of workplace sexual misconduct, Arizona, Massachusetts, and New Jersey have considered legislation that would ban or limit the use of forced arbitration clauses and non-disclosure agreements in employment contracts for claims involving sexual harassment or assault.<sup>75</sup>

The states are also pushing Congress to act on this issue. In February 2018, the attorneys general of all 50 states, along with their counterparts in the District of Columbia and the federal territories, sent a letter to congressional leaders in both parties, urging them to enact legislation that would bar the use of forced arbitration for claims involving sexual harassment in the workplace.

Some members of Congress appear to be listening. They have introduced the bipartisan Ending Forced Arbitration of Sexual Harassment Act in both chambers.<sup>76</sup> In addition, members are continuing to work toward the enactment of the Arbitration Fairness Act, an important piece of legislation aimed at reversing a series of troubling U.S. Supreme Court decisions that give corporations nearly unfettered power to deprive their customers and employees of their right to have their disputes heard in court. Specifically, the bill would bar the enforcement of arbitration clauses insofar as they purport to cover employment, consumer, antitrust, or civil rights claims.<sup>77</sup>

By ensuring that the victims of wrongdoing such as workplace sexual harassment and anti-consumer practices have their day in court, these and other measures would help to promote a fair economy. In the absence of meaningful access to the courts, individuals who have been harmed might otherwise be forced to bear the economic and other burdens of their injuries – burdens that disadvantaged individuals are especially ill-equipped to bear. Moreover, by making full compensation available to the victims of wrongdoing, civil justice litigation offers these individuals the opportunity to pursue their full potential, as unencumbered as possible by the injuries they have suffered. In each of these ways, these bills would serve to promote freedom and economic opportunity for everyone, but especially the historically disadvantaged members of our society.

*By making full compensation available to the victims of wrongdoing, civil justice litigation offers these individuals the opportunity to pursue their full potential, as unencumbered as possible by the injuries they have suffered.*

## Conclusion

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When they are freed from arbitrary constraints, civil justice advocates can play a vital, though often underappreciated role in correcting the myriad causes of economic and social inequality that continue to plague the United States. The corrective function of civil justice litigation helps individuals absorb and recover from misfortune and disruption caused by another person's or business's unreasonably dangerous actions or products. Moreover, successful civil justice campaigns help mitigate the effects of individual social and economic disadvantages by working in concert with federal and state regulatory systems to protect people from harms before they occur.

The decades-long assault on citizen access to the courts has serious implications for inequality in America. Legislators have introduced a wide variety of legislation aimed at making it harder for citizens to bring and sustain meritorious claims. Several of these bills seek to accomplish this objective by targeting class action litigation or by making it easier for corporations to force their customers and employees to resolve claims against them through arbitration. Others would effectively force individuals to bear at least part of the costs of a company's wrongdoing, either by preventing them from obtaining full compensation for their injuries or by rendering it economically infeasible to bring a lawsuit at all.

Americans from across the political and socioeconomic spectrum need lawmakers to recognize the dangers these legislative proposals pose and make their defeat a top priority. We need legislative proposals that would promote civil justice by, among other things, ensuring that plaintiffs have full access to the courts to have their claims heard and to obtain fully restorative compensation. With such legislation in place, we can further our pursuit of a fair economy available to all, helping to empower everyone and reverse institutional inequality.

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<sup>58</sup> U.S. CONST. amend. VII.

<sup>59</sup> James Madison, Speech to House of Representatives Proposing the Bill of Rights (June 8, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>.

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<sup>65</sup> Buzbee, *supra* note 62, at 1609-10.

<sup>66</sup> THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* 204-14 (2013).

<sup>67</sup> For example, H.R. 1565, the so-called “Saving Lives, Saving Costs Act,” sponsored by Representative Andy Carr in the 115th Congress, would effectively insulate specified health care professionals from civil liability for injuries arising from their provision of health care treatments by establishing a complex process for screening lawsuits brought against them. Saving Lives, Saving Costs Act, H.R. 1565, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/1565>. Significantly, if this bill were law, it could be used to defeat claims against doctors who contributed to the opioid epidemic by overprescribing these medications to their patients.

<sup>68</sup> Renae Merle & Tory Newmyer, *Congressional Republicans Use Special Maneuver to Kill ‘Arbitration Rule,’* WASH. POST, Oct. 25, 2015, [https://www.washingtonpost.com/business/economy/once-again-congressional-republicans-find-it-easier-to-kill-policy-than-write-it/2017/10/25/06eb764e-b997-11e7-be94-fabb0f1e9ffb\\_story.html?noredirect=on&utm\\_term=.7aae8a3d8f55](https://www.washingtonpost.com/business/economy/once-again-congressional-republicans-find-it-easier-to-kill-policy-than-write-it/2017/10/25/06eb764e-b997-11e7-be94-fabb0f1e9ffb_story.html?noredirect=on&utm_term=.7aae8a3d8f55) (last visited July 11, 2018).

<sup>69</sup> James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers are Locked Into Arbitration*, L.A. TIMES, Dec. 5, 2015, <http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html> (last visited July 11, 2018).

<sup>70</sup> Martha McCluskey et al., *Regulating Forced Arbitration in Consumer Financial Services: Re-Opening the Courthouse Doors to Victimized Consumers* 11-21 (Ctr. for

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<sup>71</sup> For example, in 2017, the House of Representatives passed H.R. 985. Among other things, this bill would establish several new onerous requirements that injured consumers or workers would have to satisfy before their class action lawsuit can proceed in federal court. Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/985>.

<sup>72</sup> There have been several examples of this type of legislation introduced in the 115th Congress. The FCRA Liability Harmonization Act would limit the amount of damages that could be awarded in class action lawsuits brought against credit reporting agencies under the Federal Credit Reporting Act to just \$500,000 while barring punitive damages altogether. FCRA Liability Harmonization Act, H.R. 2359, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/2359>. The Protecting Access to Care Act would set an arbitrary cap of \$250,000 on non-economic damages in all “health care lawsuits.” Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/1215>.

<sup>73</sup> Thomas McGarity et al., *Trump’s New ‘Regulatory Czar’: Poised to Lead the Assault on Our Safeguards* 4-7, 14-21 (Ctr. for Progressive Reform, CPR Paper 1701, 2017) *available at* [http://progressivereform.org/articles/Trump\\_Regulatory\\_Czar\\_1701.pdf](http://progressivereform.org/articles/Trump_Regulatory_Czar_1701.pdf).

<sup>74</sup> See FDA, Merck, and Vioxx: Putting Safety First?: Hearing Before the S. Comm. on Finance, 108th Cong., 2004 (statement of David J. Graham, MD, PHD, Assoc. Dir. for Sci. & Med., Office of Drug Safety, U.S. Food & Drug Admin.). See also Buzbee, *supra* note 62, at 1616

<sup>75</sup> Dustin Gardiner, *Arizona Bill Targets Nondisclosure Agreements for Sexual Assault, Harassment*, AZCENTRAL, Dec. 1, 2017, <https://www.azcentral.com/story/news/politics/legislature/2017/12/01/arizona-bill-would-void-nondisclosure-agreements-sexual-assault-harassment/910425001/> (last visited July 11, 2018); Christian M. Wade, *Lawmakers Seek Ban on Non-Disclosure Agreements*, SALEM (MAS.) NEWS, Mar. 4, 2018, [http://www.salemnews.com/news/local\\_news/lawmakers-seek-ban-on-non-disclosure-agreements/article\\_dd47d40d-fcba-585a-bfdc-03e99602fe48.html](http://www.salemnews.com/news/local_news/lawmakers-seek-ban-on-non-disclosure-agreements/article_dd47d40d-fcba-585a-bfdc-03e99602fe48.html) (last visited July 11, 2018); Phillips & Assoc., *New Jersey Legislature Considers a Bill that Would Ban Non-Disclosure Agreements in Sexual Harassment and Discrimination Cases*, NEW JERSEY EMPLOYMENT LAWYER BLOG, Dec. 21, 2018, <https://www.newjerseyemploymentlawyerblog.net/2017/12/new-jersey-legislature-considers-bill-ban-non-disclosure-agreements-sexual-harassment-discrimination-cases.html> (last visited July 11, 2018).

<sup>76</sup> Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/senate-bill/2203/text?format=txt>; Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/4734>.

<sup>77</sup> Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/1374>.