

# National Senior Citizens Law Center

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July 22, 2008

Honorable Patrick Leahy, Chair  
Honorable Arlen Specter, Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Leahy and Senator Specter:

On behalf of the National Senior Citizens Law Center, I am writing to commend you and the members of the Committee for holding the hearing scheduled for tomorrow, July 23, on “Courting Big Business: The Supreme Court’s Recent Decisions On Corporate Misconduct and Laws Regulating Corporations,” as well as the Committee’s June 11 hearing on “Short-Change for Consumers and Short Shrift for Congress: the Supreme Court’s Treatment of Laws that Protect Americans’ Health, Safety, Jobs, and Retirement.” These hearings spotlight a long-neglected but important trend: Supreme Court decisions that undermine laws designed to protect the basic needs of ordinary Americans. As Chairman Leahy noted at the June 11 hearing, these decisions have ignored the intent of Congress and often turned the laws upside down, “making them protections for big business rather than for ordinary citizens.”

Older Americans have a great stake in upholding these laws. We urge the Committee and Congress to correct judicial missteps such as those identified in these hearings, and to take steps to ensure that the Court construes the laws in accord with Congress’s broad goals of protecting Americans health, safety and financial security.

Across the spectrum of the laws addressed by the Committee’s hearings, the Supreme Court’s decisions show consistent patterns that, as Chairman Leahy observed, distort and weaken laws. Among these are:

- Expressly disavowing the relevance of the overall goals of a law when construing its specific provisions, and then imposing technical, obscure interpretations of such provisions that defeat or reverse Congress’ goals.
- Moving the goal-posts on Congress by replacing the rules lawmakers understood the Court to use in interpreting laws with different rules that operate to defeat Congress’s intent.
- Eliminating access to courts to enforce these laws, so that the very people Congress intended to protect are without recourse when those laws are violated.

- Construing federal laws to require preemption of long-standing state law protections, even though Congress never actually contemplated nor intended such radical consequences.

We wish to note a few of the areas touched on by the Committee's hearings that dramatically illustrate these misguided judicial approaches and their harmful impact on America's seniors.

### **No Remedies for Bad-Faith Denial of Health Care and Retirement Benefits**

Enacted to protect workers' pensions, in the Supreme Court's hands the Employee Retirement Income Security Act of 1974 (ERISA) has become a perverse grant of virtual immunity to the administrators of health and pension plans. As Justice Byron White acknowledged several years ago, the Court's decisions afford workers and their families "less protection...than they enjoyed before ERISA was enacted."<sup>1</sup> This is especially true for older workers, who depend on ERISA for the protection of their retirement benefits, and the protection of life insurance benefits for their families.

In a series of decisions, the high court has stripped ERISA of meaningful remedies for the wrongful denial of medical coverage, life insurance and retirement benefits. At the same time, the Court has wielded this now-toothless law to achieve sweeping invalidation of long-standing state remedies. These decisions have enabled some employers to save money by illegally cutting or cutting off retirement benefits across their workforce. And in a case the Supreme Court recently refused to hear, despite the urging of the Bush Administration, these decisions provided immunity for the wrongful denial of life insurance benefits.<sup>2</sup>

In its June 11 hearing, this Committee heard the story of Maureen Kurtek, who suffered amputations and multiple organ failure after her HMO would not approve timely treatment for her Lupus. The Court's ERISA decisions meant that when Ms. Kurtek sought compensation for what had happened to her she was simply thrown out of court. Congress never intended this result, and leading lawmakers called it flat wrong in a 2004 brief to the Court, which the Court ignored.<sup>3</sup> In its June 11 hearing on the Supreme Court, the Chairman aptly called what the Court has done to workers through ERISA "preposterous, unjust, and incompatible with Congress' true intent."

### **No Remedies for the Defrauding of Pension Plans and Small Investors**

A major Supreme Court decision this year cut off relief for victims of securities fraud, which has seriously threatened the retirement savings of older Americans. As AARP told the Court, "Older Americans are frequent targets of fraud because they often have significant assets and look for investment opportunities that will supplement Social Security and other sources of

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<sup>1</sup> *Mertens v. Hewitt Associates*, 508 U.S. 248, 264 (1993) (White, J. dissenting).

<sup>2</sup> *Amschwand v. Spherion Corp.*, *certiorari denied* Jun. 27, 2008 (Case No. 07-841).

<sup>3</sup> Brief of Amicus Curiae Senators Edward M. Kennedy, John McCain, Bob Graham and Representatives John D. Dingell, Charlie Norwood, George Miller, and Charles B. Rangel in Support of Respondents, *Aetna Health Inc. v. Davila* (Jan. 22 2004) (Case Nos. 02-1845, 03-83).

retirement income.”<sup>4</sup> Additionally, pension funds are also seriously threatened by securities fraud. For example, the University of California’s pension fund, containing the retirement savings of nearly 500,000 present and former employees, lost more than \$140 million in the collapse of Enron's stock.

Despite these dangers, the Supreme Court held in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*<sup>5</sup> that pension funds and small investors can’t seek compensation from third-parties who participated in securities fraud. The Court rejected the arguments of state governments and the Securities and Exchange Commission, who noted that in many cases this means no compensation at all, because the principal fraudster goes bankrupt when the fraud is uncovered. The narrow interpretation of the Securities Act to cut off relief in this way undermines the retirement security of millions of Americans.

### **No Remedies for Harmful Medical Devices**

This year the Court also stripped people injured by defective medical devices of remedies that have been available for decades. The Court held in *Riegel v. Medtronic, Inc.*<sup>6</sup> that if a device has received premarket approval from the FDA, its manufacturer enjoys immunity for any defect in design or labeling that harms consumers. This decision involved the most complex, life-sustaining devices on which many senior citizens depend. Defects in these crucial devices can have devastating effects on patients who are already facing serious health problems. State law remedies have provided an increased incentive for safety and help bring information about dangerous defects to light.

An additional concern is that medical device immunity will shift the cost of injuries caused by defective devices from manufacturers to Medicare and Medicaid. These programs are the largest payers for these devices, and stand to pay millions to treat those who now cannot seek compensation through the legal system. This cost shift, from negligent manufacturers to public health care programs, will unfairly burden taxpayers and exacerbate the fiscal challenges facing Medicare and Medicaid.

Congress never intended to overturn state common law, which coexisted with federal regulation for thirty years before the Court’s decision. Many dangerous problems come to light after FDA approval, when devices are already on the market. Bridget Robb, who testified at the June 11 hearing, was horrifically injured by a faulty lead in a cardiac defibrillator that caused the device to deliver random shocks to her heart. The device had been recalled months before, but Ms. Robb was never warned of the risk. The high court’s decision leaves Bridget Robb and the many seniors who depend on similar devices without any recourse.

### **Replacing Americans’ Day in Court with an Unfair Private Legal System**

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<sup>4</sup> Brief of AARP, Consumer Federation of America, and U.S. PIRG as Amici Curiae in Support of Petitioner, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, (Jun. 11, 2007) (Case No. 06-43).

<sup>5</sup> 128 S.Ct. 761 (Jan. 15, 2008).

<sup>6</sup> 128 S.Ct. 999 (Feb. 20, 2008).

The Supreme Court's distortion of the Federal Arbitration Act has turned a century-old law, meant to allow expeditious resolution of disputes between businesses, into a parallel legal system controlled by corporations and forced upon unwitting and unwilling consumers and workers. The law was passed in 1925 to bolster the arbitration process in its infancy, but Congress never anticipated its use in employment or consumer contracts, where businesses leverage their vastly superior bargaining power against individuals. As a result of the Court's decisions, Americans today have no real choice but to accept mandatory binding arbitration, in advance of any dispute, in order to get anything from a credit card to health insurance.

The effects of the Court's misguided decisions have been particularly pernicious in the area of nursing home care. A June 10 hearing by this Committee highlighted some of the horrific instances of nursing home neglect, which are frequently shielded from the public eye and judicial review through binding arbitration clauses tucked into nursing home admission agreements. David William Kurth described how his father had suffered such severe neglect in a nursing home that he died of infections caused by bedsores. When Kurth's father was rushed from one home into another due to a change in health coverage, his mother hurriedly signed an agreement with a binding arbitration clause, which the company that owned the home then used to keep the Kurth family out of court.

Experiences like the Kurths' have become all too common in nursing homes across the country. The binding arbitration clauses require confidentiality, and are tucked into admission agreements that are often signed under unconscionable circumstances when families are highly stressed. In many instances, such arbitration clauses make substandard nursing care more profitable than providing patients with the appropriate level of care, while allowing the practices to remain unknown to the public.

### **Enabling Deceptive and Predatory Lending and Credit Practices**

Perhaps most perversely in light of the ongoing mortgage crisis, the Supreme Court has been for years been engaged in broad judicial deregulation of the financial industry, where seniors have been disproportionately victimized by unfair and illegal practices. The Court's decisions have swept aside state laws designed to protect consumers from predatory lending practices, exorbitant interest rates, and deceptive and outrageous fees. And last year in *Watters v. Wachovia Bank*,<sup>7</sup> the Court greatly cut back the ability of state attorneys general to even investigate not just national banks, but state-chartered subsidiaries as well.

These decisions by the Court, along with aggressive assertions of preemption by the Bush Administration, have contributed to the crises in mortgage lending and consumer credit. As Professor Robert Lawless told the Committee at the June 11 hearing, the average mortgage and consumer debt is more than \$53,000 for every person in the United States – and that figure includes those who do not even own homes or credit cards. Just this Sunday, the *New York Times* reported how the aggressive marketing and equally aggressive interest rates and fees of credit card issuers have contributed to millions of Americans being on the brink of financial ruin.<sup>8</sup> Seniors are targeted by these companies, and are much more likely than younger

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<sup>7</sup> 127 S.Ct. 1559 (Apr. 17, 2007).

<sup>8</sup> Gretchen Morgenson, *Given a Shovel, Americans Dig Deeper into Debt*, N. Y. TIMES (Jul. 20, 2008).

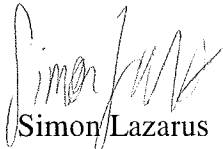
homeowners to have gotten a subprime mortgage. Once again, this is a serious threat to the retirement security of many Americans, and one that has been exacerbated by the decisions of the Supreme Court.

### Conclusion

The above are just some of the areas in which the Supreme Court has undermined Americans' health, safety and economic security, weakening and distorting the work of Congress, as well as that of state legislatures. As we have described, the harmful effects of these decisions fall especially hard on America's seniors. We strongly support proposals to fix these problems, such as the Fairness in Nursing Home Arbitration Act and the Medical Device Safety Act.

But as important as these bills are, Congress must do more than pass piecemeal solutions to particular destructive court decisions. These decisions constitute a broad pattern of disregard for the work of this body, and for its goals of providing real protections and remedies for ordinary Americans, including America's seniors. We commend the Committee for the holding these hearings, which are a much-needed step toward reversing these trends, and hopefully nudging the Court toward a path more faithful to Congress's intentions.

Sincerely,



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