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Senior Rights and Wrongs

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A wave of federal court decisions in recent years has made it difficult and sometimes impossible for older Americans to enforce important rights, such as hard-earned pension benefits, freedom from age discrimination, access to long-term care, compensation for injuries caused by faulty medical devices and decent treatment in nursing homes. These decisions are often densely reasoned, relying on abstract notions like national uniformity, efficiency and respect for state governments. Many are motivated, explicitly or implicitly, by a desire to lighten the dockets of overburdened federal courts. The common thread connecting them all is lack of attention to the goals of Congress and the real problems facing older Americans.

For example, the Supreme Court has turned the federal pension law on its head, eliminating virtually all remedies when employers deny benefits in bad faith. Since the Court has given them virtual immunity, employers are encouraged to play fast and loose with the law. Last December, the Supreme Court denied review in *Eichorn v. AT&T Corp.*, a case in which the telecom giant engineered the sale of a subsidiary to eliminate the pension rights of more than 1,000 employees. While employees had the right under their pension plan to transfer to other divisions of AT&T and retain their benefits, AT&T effectively canceled those rights by promising its buyer not to rehire them. A federal appeals court acknowledged that

the evidence showed a large-scale, intentional violation of law, but it nevertheless threw the case out, ruling that the law provided no remedies for the employees.

To make matters worse, the Supreme Court's ruling this January in *Stoneridge Investment Partners v. Scientific-Atlanta Inc.* left public and private pensions more vulnerable than ever to securities fraud. When Enron tanked, pension funds lost tens of millions, yet Enron itself was judgment-proof. The Court shielded Enron's equally culpable corporate collaborators from suit, cutting off the only realistic source of compensation.

With their assets depleted by escalating medical needs, a growing number of formerly middle-class seniors are turning to Medicaid, which now pays for 60 percent of all nursing home care. Yet federal appeals courts have increasingly ruled that key protections in the Medicaid Act can't be enforced in court. For example, in 2005 a federal appeals court refused to allow seniors to challenge an Oregon rule that, for purely budgetary reasons, deemed some seniors "not sick enough" for home healthcare services; the rule was probably illegal under a provision of the act requiring eligibility standards to be reasonable.

According to the General Accounting Office, one in five nursing homes was cited last year for putting residents' safety at risk. Yet in a series of decisions, the Supreme Court has rendered seniors more vulnerable by turning the eighty-year-old Federal Arbitration Act, meant for voluntarily resolving disputes between businesses, into a tool for nursing homes and other businesses to force seniors, consumers, workers and others to sign away their right to go to court. By including arbitration clauses in contracts before a dispute arises, companies get an arbitration system that lets them handpick the arbitrators and the rules to be applied, is tilted against consumers, forces families to travel hundreds of miles, hides abuses from the public eye and strictly limits damages. There is no public record, and no appeal. In June David Kurth testified at a Senate hearing

that his father died of infected bedsores in a Wisconsin nursing home. When the family sued the facility owner, it used a boilerplate arbitration clause in its admission agreement to force the case out of court and into the industry-controlled arbitration system.

Congressional leaders have called for legislation to restore rights to older Americans in some of these areas, and a bill to ban predispute arbitration clauses in nursing home admission agreements gained some traction, but no action is expected in this Congress. Older Americans should look to the upcoming election and demand leaders who will undo the damage the courts have done--and appoint judges who won't continue to strip away their rights.

Other Contributions to the Forum

"The Supreme Court and the Election: What's at Stake," by Herman Schwartz

"Safety Last," by David C. Vladeck

"Health Cares," by Sara Rosenbaum

"Debtor Nation," by Robert M. Lawless

"Hard Knocks in the Workplace," by Eric Schnapper

About Harper Jean Tobin

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