Update from Washington
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Camp LeJeune Justice Act makes progress in Senate and House

ALSO: SUPREME COURT ALLOWS STATE MEDICAID PROGRAMS TO RAID SETTLEMENT PROCEEDS EARMARKED FOR FUTURE MEDICAL CARE

WASHINGTON UPDATE

I am pleased to report that the Camp LeJeune Justice Act of 2022 is on the cusp of enactment into law. The legislation creates a landmark remedy for individuals, particularly veterans and their surviving family members, who resided, worked, or were exposed to latent disease at Camp Lejeune in North Carolina between August 1, 1953, and December 31, 1987, by water supplied by the United States. The new federal cause of action is available to individuals exposed to contaminated water for at least 30 days. Claims must be filed in the Eastern District of North Carolina.

The Camp LeJeune Justice Act has many provisions intended to help victims receive justice:

- First, it establishes a lower burden of proof than what is traditionally required in toxic exposure cases.
- Second, by the nature of creating a federal cause of action for the exposure claims, the Supreme Court doctrine that typically blocks all active-duty servicemember claims, known as the *Feres Doctrine*, would not apply to these claims.
- The government is also expressly prohibited from asserting an immunity provided under the Federal Tort Claims Act (FTCA), known as the discretionary function exception (DFE).
- Lastly, by the express language in the bill, no otherwise applicable statute of repose would apply to claims filed under the new cause of action.

The Camp LeJeune Justice Act was added to H.R. 3967 (the Honoring Our Promise to Address Comprehensive Toxics Act, or the PACT Act), which passed the House in early March 2022. This comprehensive legislation will help veterans exposed to toxins. Most recently, the Senate passed its version of the PACT Act with the Camp LeJeune Justice Act included. The significant bipartisan support in the House and Senate was critical to getting legislation passed in both houses.

The Senate PACT Act is similar, but not identical to the House-passed version of the bill, so the House will need to pass the Senate version before the bill can head to the president's desk for signature.

AAJ member testifies at civil rights hearing

On June 9, 2022, the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties held the second in a series of hearings on civil rights litigation. Bhavani Raveendran, the chair of AAJ's Police Misconduct Litigation Group, testified at the hearing on the importance of holding state and local governments responsible for torts committed by their employees.

Regarding police misconduct, this would mean removing accountability from individual officers and shifting it to police departments. The hearing established that both respondeat superior, holding state and local governments accountable for negligent acts by employees, and *Monell* liability are important. Under *Monell,* an injured plaintiff must show that the government violated its own policy, which resulted in injury.

The first hearing on civil rights litigation focused on ending qualified immunity. AAJ has long supported eliminating qualified immunity, most recently for policing misconduct in the George Floyd Justice in Policing legislation.

Roundup of state sessions

As the 2022 state legislative sessions wind down, and the election cycle heats up, I will provide a roundup of the state sessions. AAJ State Affairs responded to nearly 100 requests while tracking over 1,600 bills this year. COVID-19 immunity, automated vehicles, privacy, and asbestos were some of the highest-profile bills for which the TLAs requested assistance, while legal regulatory reform was a hot topic outside of the legislature.

There was a lot to celebrate – California raised MICRA caps, New York reformed their wrongful death law to allow recovery of non-pecuniary damage, Virginia continued its success in auto insurance by fixing the UIM offset issue, with many other wins as well. Many states played defense well, with states fighting back against bad asbestos proposals, and efforts by the trucking industry to cap damages or immunize themselves from liability. Other topics in civil procedure, insurance, medical malpractice, and transportation also generated a number of requests.

Two arbitration-related victories

The Supreme Court recently issued two unanimous, favorable decisions in forced arbitration cases.

On May 23, the Court ruled in favor of workers who push back against unfair arbitration practices in *Morgan v. Sundance*. In the case dealing with an employee's overtime dispute, the Court found that the Eighth Circuit was wrong to hold that a plaintiff who asserts that a company has waived its contract right to arbitration must also show that he or she was prejudiced thereby. Justice Kagan, writing for the Court, explained that "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one here" and that the FAA's "policy favoring arbitration" only makes "arbitration agreements as enforceable as other contracts, but not more so."

On June 6, in *Southwest Airlines v. Saxon*, the Court unanimously held that an airline employee ramp supervisor belongs to a "class of workers engaged in foreign or interstate commerce" that is exempt from the Federal Arbitration Act. Plaintiff filed a putative class action alleging that Southwest Airlines failed to pay overtime, and the district court ruled in favor of enforcing the arbitration agreement in Plaintiff's employment contract. However, the Supreme Court found that a worker who loads or unloads cargo on and off airplanes is "intimately involved" in interstate commerce, and therefore directly engaged in interstate commerce, and exempt from arbitration under the FAA.

Both decisions represent victories for workers who have been subjected to unfair forced arbitration agreements and get them one step closer to having their disputes resolved in court.

AAJ provided a rapid response webinar June 16 for members and non-members during which faculty discussed the recent SCOTUS rulings in these two cases, and AAJ Public Affairs staff provided a legislative update on forced arbitration.

Adverse decision on Medicaid reimbursement

In a 7-2 decision on June 6, authored by Justice Thomas, the Court held in *Gallardo v. Marstiller* that the Medicaid Act allows a state to seek reimbursement from settlement payments that are allocated for victims' future medical care. The case involves a girl who endured devastating injuries after being struck by a truck when getting off a school bus. Florida sought to recover the portion of her personal injury settlement that was meant for her future medical expenses; the Court's decision will allow the state to do so.

Justice Sotomayor, joined by Justice Breyer, dissented, stating that the Court's holding "is inconsistent with the structure of the Medicaid program and will cause needless unfairness and disruption." This decision could lead to harm to Medicaid beneficiaries by taking from them funds needed for their future medical expenses, medical expenses that, as stated by Justice Sotomayor, "Medicaid has not paid and might never pay."

Fighting for you and your clients

Thank you for your continued support. AAJ remains committed to fighting for access to justice for your clients. We will keep you informed about important developments and welcome your input. You can reach me at advocacy@justice.org.