



Update from Washington

Linda A. Lipsen

CEO, AMERICAN ASSOCIATION FOR JUSTICE

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

As congress returns from recess, there's much work to be done

WORKING AT THE FEDERAL LEVEL AND WITH STATE ASSOCIATIONS

Congress will be back in September from recess, and AAJ will continue its important work on behalf of your practices. We remain dedicated to advocating in Congress for as many of our members' practice areas as possible. The strength and support of the trial lawyer community fuels AAJ's fight for your clients' rights. Thank you for everything you do for civil justice – we truly are stronger together.

Below are some recent highlights that will interest you.

Over 99% of consumers unaware they are subject to forced arbitration

A new study confirms that Americans are unaware of how often and to what extent they are stripped of their rights through forced arbitration clauses. The key findings demonstrate the need for formal rulemaking by the Consumer Financial Protection Bureau (CFPB) to rein in the use of forced arbitration:

- Less than 5% of consumers recall reading anything about forced arbitration, even when presented with typical consumer terms and conditions containing a forced arbitration clause.
- Less than 1% of consumers understood that forced arbitration robs them of their constitutional right to seek accountability through public courts.
- Less than 5% of consumers understood they would not be able to appeal an unfair or biased decision.
- Even when corporations let Americans "opt-out" of forced arbitration (which is very rare), the study confirmed that the hoops consumers must jump through, such as sending a letter via snail mail, makes them meaningless.

Our fight to end all forced arbitration continues with support for a bipartisan bill to protect older Americans from age discrimination. This proactive bill joins two others that AAJ supports – the FAIR Act to end all forced arbitration and the Ending Forced Arbitration in Race Discrimination Act.

AAJ state affairs

Much of the tort reform legislation the state trial lawyer associations (TLAs) face is model legislation in which a concept is repurposed and adapted to each state. Many of these model bills originate at the American Legislative Exchange Council (ALEC). For decades, ALEC has granted corporate representatives unique access to state legislators with little transparency. At these closed-door meetings, corporations present model legislation, which the legislators take home and introduce in their statehouses. ALEC's Civil Justice Task Force has dozens of model bills that would restrict access to the courts, and the TLAs and AAJ State Affairs have worked in recent decades to defeat them.

These bills cover topics that include asbestos, the ability of state attorneys general to contract with outside counsel, the ability to collect pre- and post-judgment interest, limits on noneconomic and punitive damages, restrictions on class actions, and the abolishment of joint and several liability. This summer, ALEC hosted its 50th Annual Meeting, where the Civil Justice Task Force discussed Florida's recent omnibus tort reform law, litigation financing, and "prospective model policy discussions" that have not been disclosed. AAJ State Affairs will closely monitor legislation coming out of this meeting and track and identify trends in state legislation in 2024.

AAJ legal affairs

Our strong amicus curiae program helps develop good law through filing amicus briefs nationwide. Often filed with state TLAs, AAJ's briefs

ensure that access to justice, right to trial by jury, and public policy arguments are rigorously supported in federal and state courts. Below are some recent highlights.

Domino's delivery drivers exempt from arbitration of labor claims

In *Carmona v. Domino's Pizza, LLC*, the Ninth Circuit held that Domino's drivers who transported supplies from the company's warehouses to franchise outlets were involved in a single, unbroken stream of interstate commerce and expressly exempt from arbitration of their class action against the company for violating California labor laws. Furthermore, the Court found that the fact that the goods paused at the warehouse did not remove those goods from interstate commerce. AAJ filed an amicus brief in support of the drivers in February of this year. The brief was authored by AAJ member Gerson H. Smoger of Smoger and Associates.

Punitive-to-compensatory damages ratio upheld as constitutional by Pa. high court

In *The Bert Co. v. Turk*, the Pennsylvania Supreme Court unanimously affirmed a punitive damages award, rejecting arguments that the verdicts were excessive and relying heavily on caselaw brought to the Court's attention by AAJ and the Pennsylvania Association for Justice. The joint brief was filed in August 2022 and authored by AAJ member Robert S. Peck of the Center for Constitutional Litigation, PC.

Recent amicus brief highlights

- ***Great Lakes Insurance SE v. Raiders Retreat Realty Co. LLC*** (SCOTUS, No. 22-500) (filed Aug. 7, 2023) – AAJ urged the U.S. Supreme Court to adopt an exception to the enforcement of a marine insurer's choice-of-law clause in order to protect the forum state's compelling public policy interest in regulating marine insurance coverage for their citizens. The amicus brief was authored by AAJ members Benjamin C. Hassebrock, Alexander Loy, and Michal Meiler of Ver Ploeg & Marino in Miami, Florida.
- ***Harris v. FedEx Corporate Services, Inc.*** (5th Cir., No. 23-20035) (filed July 20, 2023) – AAJ filed an amicus brief in the Fifth Circuit to oppose an attempt by FedEx to circumscribe federal civil rights statutes of limitations by restricting the time in which an employee may bring a suit against the corporation to just six months. AAJ argued that the private contractual time limit violates public policy and constitutes an impermissible prospective waiver of federal statutory rights. AAJ's brief was authored by Senior Associate General Counsel Jeffrey R. White.
- ***Mera v. SA Hospitality Group, LLC*** (S.D.N.Y., No. 1:23-cv-03492) (filed July 19, 2023) – AAJ joined Public Justice and the National Employment Lawyers Association in response to a federal district court decision to split an employee's wage claims from his sexual harassment claims under the Ending Forced Arbitration in Sexual Harassment and Sexual Assault Act of 2021. Amici urged the S.D.N.Y. to interpret the Act as applying to a plaintiff's entire case to address the complex reality of sexual harassment claims and promote judicial efficiency. The brief was authored by Shelby Leighton of Public Justice.

All AAJ amicus curiae briefs are available at www.justice.org/amicusbriefs. For more information about AAJ's legal affairs program, please email legalaffairs@justice.org.