



Update from Washington

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Having your day in court

FROM LOBBYING CONGRESS TO OPPOSING STATE BILLS THAT WOULD LIMIT PLAINTIFFS' LITIGATION FINANCING

We talk a lot about “having your day in court.” But a crucial first step is having your day in Congress, so that lawmakers will pass laws that create a true pathway to justice and accountability. Recently, AAJ members and their clients attended a Senate hearing on the failure of Big Tech to keep young people safe online – and they did so while holding up portraits of their children who were harmed or killed as a result of dangerous, addictive, and exploitative online content.

AAJ urges Congress to pass legislation to regulate Big Tech and protect the right to hold these corporations accountable.

Bipartisan opposition to the Texas Two-Step abuse of the bankruptcy system

Senators Dick Durbin (D-Ill.), Sheldon Whitehouse (D-R.I.), and Josh Hawley (R-Mo.) recently joined the attorneys general of 24 states in filing an amicus brief in *Bestwall LLC v. Official Committee of Asbestos Claimants*, U.S. Supreme Court, No. 23-675. The case involves the controversial Texas Two-Step loophole, which allowed the paper products giant Georgia-Pacific to move its operations to Texas for a matter of hours, establish a new company, Bestwall, offload all of Georgia-Pacific's asbestos liabilities to Bestwall, and allow Bestwall to file for bankruptcy, leaving the asbestos victims with little recourse. The Texas Two-Step maneuver has been attempted by several companies, including Johnson & Johnson, which has sickened thousands of people, primarily women of color, through dangerous talc products, and 3M, which allowed servicemembers to use faulty earplugs.

AAJ State Affairs update

Just weeks into the 2024 state legislative sessions, civil justice opponents are intensifying efforts to curtail litigation financing for plaintiff lawyers and their clients. Some bills target the ability of clients to obtain funding while they await a verdict or settlement (consumer financing). Other bills target financing agreements between lawyers or law firms and their lenders (commercial financing).

The financing bills have several components, including so-called “disclosure” provisions that require plaintiffs and their lawyers to provide opposing parties with the details of

any financing agreements. Proponents of this change inaccurately describe it as a “transparency” measure, even though disclosure requirements tend to be one-sided, impacting plaintiffs and their attorneys but not defendants. The reality is that these bills are meant to give defense attorneys and insurance companies access to plaintiff attorneys' and their clients' sensitive financial information to use it to their strategic advantage, i.e., force plaintiffs to accept exceedingly low settlement offers.

Proponents of these bills claim that these disclosures will protect national security and keep adversarial foreign governments from interfering in U.S. litigation. There is no evidence that this is a notable problem in U.S. courts – and if it were, the appropriate regulatory response would not be requiring disclosure to corporate defense attorneys. In fact, the greatest risk of foreign interference is with these corporate defendants, who are often multinational entities and who generally receive huge amounts of foreign capital.

So far this session, litigation financing legislation has been introduced in over a dozen states and has received hearings in Florida and Kansas.

AAJ Legal Affairs update

In 2023, AAJ filed 24 amicus briefs in 13 different state and federal courts nationwide. Below are some recent highlights.

Fifth Circuit upholds six-month limit on time to sue as “reasonable”

In *Harris v. FedEx Corporate Services, Inc.*, a three-judge panel of the Fifth Circuit affirmed in part and reversed in part a jury verdict awarding a FedEx employee over \$1M in past and future emotional damages and \$365M in punitive damages for race discrimination and retaliation under section 1981 and Title VII. On appeal, the panel held that her section 1981 claims were preempted by her employment contract's six-month limitation on the time to file suit, holding it was “reasonable” to prepare a section 1981 claim in that amount of time, opening the door for corporate employers to subvert statutes of limitations and insert exceedingly short time limits for their employees to assert their rights and seek justice. AAJ,

Public Justice, and NELA filed an amicus curiae brief in 2023.

California court opens courthouse doors to Tenofovir class action

In the *Gilead Tenofovir Cases*, a California appeals court affirmed in part a trial court's denial of a Gilead Science's motion for summary judgment in a negligence action brought on behalf of HIV patients prescribed tenofovir disoproxil fumarate (TDF), a lifesaving HIV therapy with potentially fatal side effects while Gilead delayed development of a less toxic drug in order to maximize its profits. The appeals court held that a manufacturer's legal duty to exercise reasonable care extends beyond the duty not to market a defective product in some cases. AAJ and the CAOC filed an amicus curiae brief in support of the patients in 2022.

Recent amicus brief highlights

- *Coinbase, Inc. v. Suski, et al.* (U.S. No. 23-3) (brief filed Jan. 29, 2024) – In the second interlocutory appeal in this litigation to come before the U.S. Supreme Court, AAJ urged the justices to hold that where parties enter into an arbitration agreement with a delegation clause, only the court (not an arbitrator) should decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation.

- *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., et al.* (U.S. No. 22-1079) (brief filed Jan. 31, 2024) – AAJ filed an amicus curiae brief urging the U.S. Supreme Court to reject the notion that an insurer is a “party in interest” that may object to a Chapter 11 plan of reorganization. The plan in this case, proposed by Kaiser Gypsum to resolve nearly 14,000 asbestos personal-injury claims, would channel claims covered by their primary liability insurer back into the tort system for a liability determination. The insurer objected, claiming that the civil tort system lacked the fraud-prevention measures available to insurers in federal bankruptcy courts.

To view filed AAJ amicus curiae briefs, visit www.justice.org/amicusbriefs. For more information about AAJ's legal affairs program or to request an amicus curiae brief in your appeal, please email legalaffairs@justice.org.