



Big progress on ending forced arbitration

SENATE BILL S.2342 WINS BIPARTISAN SUPPORT, BIDEN EXPECTED TO SIGN

WASHINGTON UPDATE

I'm very pleased to report momentous progress on the path to ending forced arbitration.

On February 10, the Senate voted affirmatively to pass a bill that will improve accountability for survivors of sexual assault and sexual harassment. This bipartisan vote for S. 2342, the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act, happened *only three days* after the House voted overwhelmingly to pass its version of the bill, H.R. 4445.

This legislation will restore survivors' rights to hold their perpetrators and the corporations who enable them accountable in court, instead of being forced into arbitration.

For decades, AAJ has fought to end forced arbitration for all workers, consumers, and survivors. Year after year, AAJ worked with victims and survivors to make their voices heard on Capitol Hill and in the media. We published research reports, participated in amicus curiae in significant cases, and directed a public information campaign about how corporations use forced arbitration to strip Americans of their fundamental rights to seek justice and accountability under the Seventh Amendment of the Constitution.

My hope is that because of our continued commitment to these efforts, an ever-increasing number of Americans will realize what trial lawyers have known for far too long: that countless survivors, workers, and consumers have long been silenced by forced arbitration. This legislation is a significant step forward in the fight to restore the rights of all Americans to seek justice.

The courage of the survivors and advocates who came forward at great personal risk to tell their stories to Congress was critical to the success of this bill. We will continue this fight, and we will do it by empowering all victims' voices to be heard.

We expect President Biden to soon sign this legislation into law.

AAJ State Affairs

AAJ State Affairs had a very busy start to 2022. Forty-five states are in session, and we are tracking 1,300 bills that affect plaintiffs' lawyers across the country. Major issue areas include transportation (with legislation on peer-to-peer car sharing, automated driving, and auto insurance), COVID-19 immunity, proposed immunity following disaster declarations, and asbestos. We are also tracking trends in information privacy and state civil rights legislation. Interestingly, there are a handful of bills backed by the U.S. Chamber, corporations, and their insurance companies that have begun to pop up – a bill to ban plaintiffs from asking a jury for a specific amount in noneconomic damages as well as a bill to institutionalize immunity whenever a disaster is declared. We've already handled over 50 requests nationwide and expect to see many more soon.

Advocacy in the U.S. Supreme Court

Hughes v. Northwestern University,
No. 19-1401 (U.S. Jan. 24, 2022)

Issue: ERISA (Employee Retirement Income Security Act of 1974) – Whether plan administrators breach their fiduciary duty to retirement plan participants by failing to remove high-cost/low-return investment options offered to participants.

Plaintiffs were employees of Northwestern University and participants in Northwestern's defined-contribution retirement plan. They sued under ERISA, alleging that plan administrators breached their fiduciary duty by offering participants high-expense/low-performing funds, including "retail" shares of mutual funds when the plan qualified for "institutional" shares of the same funds with the same risk-return profile but with lower management fees. The Seventh Circuit affirmed dismissal of the case,

finding no violation of fiduciary duty because the plan also offered low-cost investment options that participants could have chosen instead. The Supreme Court granted cert.

AAJ filed an amicus brief supporting Plaintiffs, arguing that the standard of care applied by the court below was inconsistent with the objective of Congress in enacting ERISA and with the fiduciary's affirmative duty under traditional trust law to monitor trust investments and remove imprudent ones. AAJ also urged the Court to reject the heightened pleading standard advocated by the U.S. Chamber, which would require a Plaintiff to show that the inferences supporting liability are "more likely" than alternative explanations consistent with non-liability. AAJ Senior Associate General Counsel Jeff White authored the brief.

In a favorable outcome, the Supreme Court reversed. In a unanimous decision authored by Justice Sotomayor, the Court held that the continuing duty of fiduciaries to remove imprudent investments extends to the plan offerings here. The plan was not permitted to evade that duty by simply offering other better investments and putting the burden on participants to avoid poor offerings. The Court remanded for a finding whether Plaintiffs' pleadings were sufficiently plausible under *Iqbal/Twombly* – implicitly rejecting the higher standard promoted by the U.S. Chamber. The Court's opinion is available at https://www.supremecourt.gov/opinions/21pdf/19-1401_m6io.pdf.

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.

