



Update from Washington

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The face of the federal judiciary

BIDEN HAS CONFIRMED ALMOST 100 JUDGES AND GREATLY DIVERSIFIED THE BENCH

WASHINGTON UPDATE

In his first two years in office, President Biden has confirmed almost 100 federal judges, including one Supreme Court justice, 28 circuit court judges, and 68 district court judges.

With the start of the 118th Congress, America has a 51-49 Democrat-controlled Senate. Judicial nominees can now be confirmed without facing the procedural hurdle of a discharge motion, which was a product of a previously evenly divided Senate Judiciary Committee and required additional floor time.

Biden has made significant strides in diversifying the face of the federal judiciary, both professionally and demographically. 67% of Biden's nominees are racially diverse, and 55% are professionally diverse, steering away from the trend of previous administrations nominating mostly prosecutors or Big Law corporate lawyers. Of those confirmed so far, 15 are former plaintiff lawyers, and 10 more await confirmation. Many more have pro-civil justice backgrounds with experience representing individuals and are supported by AAJ. The challenge that remains for the Administration is filling all the district court vacancies, which still require both home state Senators' approval – by way of a blue slip – no matter the party. AAJ will continue to seek out and support excellently qualified candidates to continue to build on the success of the past two years.

State Affairs

AAJ State Affairs closely monitors legislation at the state level and assists your trial lawyers associations (TLAs) with talking points, state-by-state comparisons, and other resources. We anticipate that many issues tackled in recent years will continue to be active in the coming year.

Public nuisance doctrine has been used in litigation over the opioid crisis, environmental harms, vaping, and firearms. Its use has prompted industry to aggressively push for legislative restrictions on when it can be applied. But not all our work is coming from a defensive position.

AAJ and the TLAs are working to protect your clients' interests in shaping policy around emerging issues, such as data privacy and the regulation of autonomous vehicles. And some states are making proactive pushes to raise auto insurance minimums. With inflation, especially medical inflation, far outpacing current minimums, there is potential for other states to do the same to avoid an indirect tax on tort victims.

Newer topics also lie ahead. In response to large jury verdicts meant to deter egregious corporate misconduct, tort reform organizations are pushing legislation to limit juries' decision-making abilities and restrict the relevant information to which they can have access (for example, the Anchors Away Act or legislation to block so-called "nuclear verdicts"). We are also watching for legislation to prohibit or restrict litigation financing or to limit claims related to harmful PFAS chemicals, as these issues have been receiving increased public attention.

Legal Affairs

AAJ filed 30 amicus curiae briefs in 2022, many of which were filed in collaboration with state trial lawyer associations and other organizations

committed to protecting access to justice. These briefs were filed in the United States Supreme Court, state supreme courts, and federal courts of appeal on more than 16 different issue areas.

The AAJ Legal Affairs team also continues to monitor recent certiorari petitions filed during the Supreme Court's current term and eagerly awaits the Court's opinions in *Mallory v. Norfolk S. Rwy. Co.* (No. 21-1168) and *Health & Hosp. Co. of Marion Cty., Ind. v. Talevski* (No. 21-806), which were heard in October 2022 and in which AAJ participated.

Recent court opinions

Damages cap unconstitutional as applied in Ohio CSA case

The Supreme Court of Ohio recently lifted a significant limit to justice for survivor of child sex abuse in holding that the state's statutory damages cap, as applied, violates state constitutional due process guarantees. In October 2021, AAJ filed an amicus brief in the case to challenge the state's compensatory-damages cap facially and as applied. (*Brandt v. Pompa*, 2022 WL 17729469, No. 2021-0497 (Ohio Dec. 16, 2022), *reconsideration denied*, 2022 WL 18028654 (Ohio Dec. 29, 2022).)

Victory in West Virginia collateral estoppel case

The U.S. Court of Appeals for the Sixth Circuit upheld judgment in favor of residents who were exposed to "forever chemicals" emitted by DuPont factories on December 5, 2022. The court held that plaintiffs were entitled to assert nonmutual offensive collateral estoppel, as AAJ had urged in its brief as amicus curiae in September 2021. (See *In re E.I. du Pont de Nemours & Co. C-8 Personal Injury Litigation*, No. 21-3418, 2022 WL 17413892 (6th Cir. Dec. 5, 2022).)

Circuit enters judgment for plaintiff in duty-to-warn case

On November 7, 2022, the U.S. Court of Appeals for the Eleventh Circuit held in favor of an advanced-stage kidney disease patient seeking damages for Shire Pharmaceuticals' failure to instruct doctors to monitor patients' kidney function while using the company's mesalamine drug, LIALDA. (See *Blackburn v. Shire U.S., Inc.*, No. 20-12258, 2022 WL 16729466 (11th Cir. Nov. 7, 2022).) The Circuit Court denied Shire's petition for rehearing en banc on January 5, 2023. AAJ previously filed an amicus brief in the Alabama Supreme Court in the case, arguing that the duty to warn included a duty to provide instructions for safe use.

AAJ amicus curiae briefs are available on our amicus curiae web page. For more information about AAJ's legal affairs program, please email legalaffairs@justice.org.

AAJ 2023 Winter Convention

I hope you've made your plans for the AAJ 2023 Winter Convention. We're headed to the JW Marriott Desert Ridge Resort and Spa in Phoenix, Arizona, February 4-7. This event is open only to AAJ members. To join AAJ, nonmembers can visit www.justice.org/join. If you are an AAJ member, register now at www.justicewinterconvention.org.

In addition to the trial advocacy skills CLE and specialized litigation programs, we've built in plenty of time for networking via receptions, wellness sessions, and activity-based networking opportunities. 🌟