



Update from Washington Linda A. Lipsen

CEO, AMERICAN ASSOCIATION FOR JUSTICE

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Consumer agency proposes rule to highlight corporate arbitration-clause abuses

ALSO: FLORIDA ENACTS BROAD TORT REFORM PACKAGE

The Consumer Financial Protection Bureau (CFPB) is taking action through a proposed rule to shine a light on hidden, unfair clauses – like forced arbitration – that corporations use in their terms and conditions. AAJ and 64 consumer advocacy, civil rights, environmental, and workers' rights organizations have submitted comments supporting the proposed rulemaking. The agency proposes to create a publicly accessible national database highlighting commonly used terms and conditions in form contracts that have been weaponized by businesses to limit consumer rights.

This rulemaking would require CFPB-regulated nonbank entities, such as payday lenders, auto lenders, private student lenders, and the big three credit reporting agencies, to annually report commonly used terms and conditions in their form contracts. This language would include forced arbitration clauses, class action and collective action waivers, clauses forcing consumers to completely absolve businesses of wrongdoing, and provisions that make it harder and more burdensome for consumers to file legal claims against a business, by limiting how, where, and when they can file claims.

Historically, the nonbank financial services industry has targeted low-income communities and consumers of color, who may rely on their services when traditional forms of credit are not available. The proposed national registry would increase transparency on these predatory terms and conditions that undermine consumer rights.

AAJ has also created a Take Justice Back action item to express support for the CFPB's proposed national registry of terms and conditions and to call upon the Bureau to regulate these terms and conditions, especially forced arbitration clauses in consumer form contracts. Please help amplify our message by posting the pre-loaded tweet as well as sharing it on your personal Facebook and LinkedIn networks.

AAJ State Affairs update

Florida recently enacted a broad tort reform package, which also made changes to the state's insurance framework and to

its medical billing and premises liability doctrines. The package was a top legislative priority for Gov. Ron DeSantis, and it was rushed through the legislature despite strong pushback from the Florida Justice Association, including incredibly powerful testimony from tort victims.

General changes

- Shifts the state from pure comparative negligence to modified contributory negligence, meaning that plaintiffs recover nothing if they are over 50% at fault.
- Presumes that the lodestar fee is an accurate measure of attorney fees except for in rare and exceptional circumstances.
- Reduces the statute of limitations for general negligence from four years to two.

Insurance changes

- Modifies the state's "bad faith" framework to allow insurers to avoid liability by tendering the lesser of policy limits or the amount demanded within 90 days after service of the complaint.
- Additionally allows insurers in cases with multiple claimants to limit their liability to the policy limits by filing an interpleader or entering into arbitration.
- States that negligence alone is insufficient to demonstrate bad faith and further imposes a good faith requirement upon claimants with respect to furnishing information, making demands, setting deadlines, or attempting to settle a claim.
- Repeals one-way attorney fees for insurance cases.

Medical provider/billing changes

- Disrupts the letter of protection treatment process in Florida by capping medical damages at 140% of Medicaid or at the amount that other existing health coverage would pay.
- Repeals the collateral source rule, instead requiring that the amount paid vs. the amount billed be admitted.
- Narrows attorney-client privilege by stating that referring a client for treatment by a provider is not covered by the privilege.

Premises liability changes

- Requires the trier of fact to consider the fault of "all persons," giving premises owners and operators protection from liability in cases involving third-party criminal conduct.

Despite this insurer-friendly law, property/casualty insurers in the state have recently filed for rate increases with the Florida Office of Insurance Regulation.

Federal Rules update

On March 28, the Advisory Committee on Civil Rules met in West Palm Beach, Florida, to review and discuss proposed amendments to the Federal Rules of Civil Procedure. During this meeting, the committee unanimously voted to move two proposals into formal public comment periods. The first proposal has been under consideration since 2017 and would create a new Rule 16.1 to guide the initial management of MDL cases by federal judges, many of whom do not have extensive experience in complex litigation.

The second proposal submitted for formal comment would amend Rules 16 and 26 to direct parties to discuss, and include in their discovery plan, the timing and method for disclosing privilege logs. The formal comment will begin in mid-August, and AAJ will provide additional information about how to participate.

Later this month, the Advisory Committee on Evidence Rules will consider and take final action on a number of proposed amendments, including an amendment to Rule 611 that would create an evidence rule on illustrative aids. Currently, there is no federal rule, and Maine is the only state with a comparable rule. Many AAJ members submitted helpful comments on the real-world implications of this proposal in February 2023. AAJ will provide more information after the Advisory Committee meets in Washington, D.C., on April 28, 2023.

Finally, if trial lawyers have had any experiences with Rule 41, the dismissal of actions by plaintiffs, please reach out to susan.steinman@justice.org or kaiya.lyons@justice.org regarding a meeting on May 2. A possible amendment to Rule 41 is being considered to resolve a circuit split. The split would potentially resolve whether a plaintiff can dismiss some claims or must dismiss the entire action. Please also reach out if you have had difficulty serving a subpoena in the United States under Rule 45(b).