Update: Arbitration

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ABOUT THE AUTHOR

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Prior to joining MI, Copland was a management consultant with McKinsey and Company in New York. Earlier, he was a law clerk for Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.

TRIPLE THREAT

The Obama Administration Helps the Litigation Industry to Take On Arbitration

In the second half of the 20th century, the United States experienced a "litigation explosion"[1] that enriched some lawyers but cost American businesses and consumers (see *The Litigation Explosion* nearby) dearly. The cost of lawsuits in America remains uncommonly high—a 2013 study by NERA Economic Consulting found that tort liability costs in the U.S. are 2.6 times the cost in the European Union[2]—but the growth rate in liability costs has fallen below that in the broader American economy in recent years.[3] In no small part, the slower growth of U.S. litigation costs is attributable to alternative dispute resolution mechanisms like arbitration—essentially, private parties opting out of the courts, in advance, through binding contractual language.[4]

Plaintiff lawyers have worked tirelessly to roll back arbitration and bring back more class-action lawsuits essential to their business model (see *Trial Lawyers, Inc.: A Government-Relations Behemoth,* nearby). Recently, they have made substantial progress.

In Congress, Senator Al Franken (D. Minn.) successfully inserted an amendment to a military spending bill that forbade defense contractors from inserting any arbitration clause in their employment contracts that applied to "any claim under Title VII of the Civil Rights Act of 1964" or "any tort related to or arising out of" an "intentional infliction of emotional distress" or "negligent hiring, supervision, or retention."[5] And Congress outlawed arbitration clauses in mortgage loans in the 2010 Dodd-Frank Act.[6]

The Obama administration has taken anti-arbitration steps in three main areas—labor law, consumer finance, and nursing-home care—which are the focus of this report.

After Republicans retook the House in the 2010 elections, congressional action to attack arbitration faltered, but that merely set the stage for the Obama administration, which began taking executive actions, promulgating new regulations, and adopting new regulatory interpretations to eliminate arbitration and reopen the door for what we've called Trial Lawyers, Inc. The administration used an executive order to extend the Franken amendment to all government contracts, its Department of Labor proposed new fiduciary duties for investment advisors that forbade arbitration clauses in investment-advisor contracts, and its Department of Education forbade arbitration clauses to resolve student-loan disputes.[7]

In addition, the Obama administration has taken anti-arbitration steps in three main areas—labor law, consumer finance, and nursing-home care (see *Arbitration in the Crosshairs*, nearby)—which are the focus of this report. In all three, consumers stand to be the losers, while trial lawyers stand to collect substantial fees—and impose more costs that all other Americans will bear.

TRIAL LAWYERS, INC.: A GOVERNMENT-RELATIONS BEHEMOTH

Lawyers and law firms have been the largest special-interest political contributors to Congress in each electoral cycle in the 21st century, with such donations concentrated among Democrats.[8]

Two of the three largest contributors to the career of former Senate majority leader Harry Reid of Nevada were out-of-state plaintiffs' law firms, trailing only his home-state MGM Casinos.[9] (Many, but not all, Republicans supported efforts to curb litigation abuse—notably, George W. Bush, who successfully advocated for tort-reform legislation both as governor of Texas and president.)[10]

Democrats won the 2006 midterm elections, and after Barack Obama was elected president in 2008, the litigation lobby sprang into action. Trial-lawyer allies in Congress introduced bills that would have forbidden arbitration clauses in nursing-home contracts,[11] mortgage and home-equity loans,[12] payday and tax-refund loans,[13] consumer contracts,[14] and employment and franchise contracts.[15]

ARBITRATION IN THE CROSSHAIRS

The Obama administration has taken efforts to eliminate arbitration agreements in three areas:

- **LABOR LAW.** In January 2012, two of three sitting members of the National Labor Relations Board (NLRB)—a five-member bipartisan body that at the time remained unfilled due to a standoff between the Senate and the Obama administration—issued an order holding that arbitration clauses that precluded class-action wage-and-hour lawsuits were unenforceable under federal labor law.[16] The NLRB has continued to enforce its order even as multiple federal circuit courts have ruled against it; the issue is now pending in a petition to the U.S. Supreme Court.[17]
- **CONSUMER FINANCE.** In March 2015, the Consumer Financial Protection Bureau (CFPB)—a new agency created by the Dodd-Frank Act that vested power in a single director—published a study for a new rule, formally proposed in May 2016, that would forbid arbitration clauses that did not allow class-action lawsuits in most consumer-finance contracts.[18] A final agency determination on the rule is pending.
- **NURSING HOMES.** In July 2015, the Centers for Medicare and Medicaid Services (CMS) proposed a new rule that would forbid nursing-home contracts from including clauses requiring arbitration in lieu of litigation.[19] The final nursing-home rule was issued in September 2016 and would have gone into effect on November 28, 2016—until a federal judge issued an order blocking the rule.[20]

THE LITIGATION EXPLOSION

America has long been a litigious country,[21] but from the 1950s through the 1980s, the cost of lawsuits exploded—with tort costs growing more than 10% annually from 1950 through 1990.[22] Behind this explosion are a number of legal changes, including:

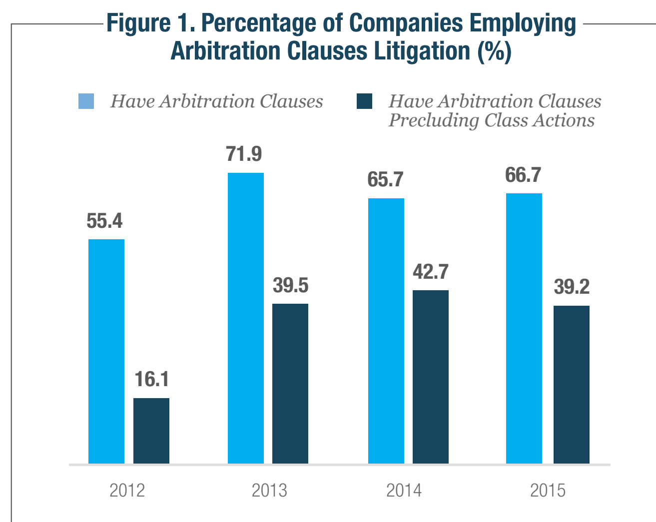
- **NOTICE PLEADING.** In the New Deal era, Congress delegated to the judicial branch the drafting of the Federal Rules of Civil Procedure,[23] which gave the task to Yale Law School dean Charles E. Clark. Clark's new rules dispensed with historical code pleading that forced plaintiffs to narrow legal issues and worked to exclude meritless claims.[24] The new Federal Rules allowed virtually any claim to have its day in court—and forced defendants to offer generous "discovery" upon mere notice of being sued.[25] This shift, in combination with America's long-standing but unusual rule that the losers in lawsuits are not required to reimburse the winners' costs,[26] allowed lawyers to file nuisance lawsuits that had settlement values even when they could be expected to lose at trial.
- **FORUM SHOPPING.** At around the same time, the New Deal Supreme Court overturned more than a century of precedent to eliminate federal common law[27] and loosened historical jurisdictional requirements to make it easier to sue out-of-state defendants.[28] These changes, in combination, allowed lawyers to tap into America's federalist system and "shop" cases to the most plaintiff-friendly jurisdictions.
- **EXPANDED LIABILITY.** In 1944, in the famous case of *Escola v. Coca-Cola Bottling Company,* the California Supreme Court expanded product-liability law by determining that a jury could find fault without showing a manufacturer's negligence.[29] Given the facts in that case—an exploding soda bottle—the holding was relatively uncontroversial, but by the 1960s, "strict" liability for product defects became the law in California.[30] In 1965, law professor William Prosser worked these theories into the American Law Institute's Second Restatement of Torts,[31] and lawsuits proliferated that asked juries to second-guess manufacturers' design choices and warnings to consumers.
- **CLASS ACTIONS.** In 1966, the Supreme Court amended the Federal Rules of Civil Procedure for "class action" lawsuits, in which similar cases are joined into a single legal action. Whereas the previous rules required plaintiffs to opt in to a class-action lawsuit, the new rules permitted attorneys to structure opt-out class actions[32]—essentially enabling lawyers to conceive of lawsuits without plaintiffs, based on theories of wrongdoing.
- **ATTORNEY ADVERTISING.** In 1977, the Supreme Court decided *Bates v. State Bar of Arizona*, ruling that attorney advertising was commercial speech protected by the First Amendment to the U.S. Constitution.[33] The ruling swept away age-old professional barriers against trial-lawyer solicitation and ushered in a new form of entrepreneurial litigation, the "mass tort," in which Trial Lawyers, Inc. advertises to attract clients for lawsuits that are not similar enough to be joined into class actions.

By the 1990s, aggressive litigation had bankrupted entire industries—not only those that had made dangerous products, such as the manufacturers of asbestos,[34] but companies such as Dow Corning, whose product, breast implants, had been shown to be essentially harmless in dozens of peer-reviewed medical studies.[35] The vaccine industry escaped a similar fate only owing to congressional action in 1986 that exempted manufacturers from suits.[36] In 1995 and 2005, Congress responded with further legal reforms designed to rein in the worst class-action abuses.

BACKGROUND

The Rise of Arbitration

In 1925, before the explosion in litigation in the United States, Congress passed the Federal Arbitration Act (FAA),[37] which stated that written contractual provisions "involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable."[38] Enacted in reaction to widespread judicial hostility to arbitration agreements, the FAA was intended to support broadly the enforcement of arbitration clauses in contracts. The U.S. Supreme Court read the FAA to enshrine a "liberal federal policy favoring arbitration,"[39] and in 1984, in *Southland Corporation* v. *Keating*,[40] the Court applied the act to an arbitration clause in 7-Eleven franchisor contracts, holding that a California law prohibiting such clauses in franchise agreements was superseded by the federal statute.



Source: Class Action Survey (2016)[41]

Not every arbitration clause passes muster: to be enforceable, a clause must provide a meaningful opportunity for redress, and courts review contractual provisions for fundamental fairness. But precisely because the litigation system is so expensive, arbitration is often the preferred remedy—especially for consumer disputes involving small sums, which make litigation uneconomical.

An alternative way of enforcing small consumer claims, of course, is the class-action lawsuit. In *Southland,* the Supreme Court did not consider whether an arbitration clause that precluded class-action lawsuits was enforceable under the FAA—but it answered that question in the affirmative in the 2011 case of *AT&T Mobility LLC* v. *Concepcion.*[42] Because class-action waivers enable companies to profitably offer consumers arbitration—the only economically realistic vehicle for adjudicating small-dollar disputes[43]—arbitration clauses have become more commonplace in recent years, to consumers' benefit (**Figure 1**).

Outside the class-action context, companies had put arbitration provisions in their contracts long before *Concepcion.* Nursing-home contracts for new admissions regularly contained such clauses as early as 2002.[44] Among large nursing-home providers surveyed by AON Consulting in a 2009 study for the American Health Care Association, all but one provider offered residents the option of whether to sign up for binding pre-dispute arbitration.[45] None of the clauses limited awards; the nursing homes agreed to cover most arbitration costs; and applicants were informed that the clause would preclude a jury trial. Seventy percent of residents selected the option for alternative dispute resolution.[46]

Nursing-home residents' preference for arbitration is consistent with other evidence that individuals tend to be happy with the outcomes of alternative dispute resolution in the context of health care. A 2014 survey by the Kaiser Foundation, which has mandatory arbitration clauses in its health plans, found that 92% of parties that had gone through arbitration found the process at least as good as the court system.[47]

In the context of nursing homes, there has been no observed relationship between arbitration clauses and the likelihood of recovery in a dispute,[48] but dispute resolution was usually faster.[49] By squeezing out the large contingent fees typically afforded to lawyers in litigation, arbitration has generated overall savings for nursing-home providers, which, in turn, have passed those savings on to consumers.[50]

THE LITIGATION INDUSTRY FIGHTS BACK

Once Republicans took control of the House in 2010, the Obama administration began taking aggressive steps to curtail arbitration through administrative agencies. The first battleground was the National Labor Relations Board. On January 3, 2012, the two sitting Democratic members of the NLRB, Craig Becker and acting chairman Mark Gaston Pearce, issued a ruling that class-action waivers in labor-contract arbitration clauses violated employees' collective-bargaining rights under the National Labor Relations Act of 1935 (NLRA).[51]

▲ Mark Gaston Pierce

The administrative posture of the decision was strange: given a standoff between President Obama and Republicans in the Senate, only two of five NLRB seats were filled with confirmed appointees. The January 3 action—from which Republican NLRB member Brian Hayes recused himself—involved only confirmed NLRB member Pearce. Becker's "recess appointment" by the president had expired three days earlier. The day after the ruling, the president named three more recess appointees to the NLRB, appointments that were ultimately judged unconstitutional by the Supreme Court in 2014.[52] In *Murphy Oil* v. *NLRB*, the U.S. Court of Appeals for the Fifth Circuit struck down NLRB's 2012 ruling that the NLRA precluded arbitration clauses foreclosing class-action lawsuits.[53] The NLRB has continued to assert its interpretation,[54] and circuit courts have split on the question; the case is currently pending a petition before the U.S. Supreme Court.[55]

In March 2015, the Consumer Financial Protection Bureau—newly formed under the post-financial-crisis Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010—released a 410-page study purporting to justify a potential rule that would prohibit arbitration clauses that foreclosed class-action lawsuits in various consumer-financial products.[56] In May 2016, the CFPB proposed a rule that would outlaw arbitration clauses that foreclose class-action litigation in most consumer-finance contracts.[57]

▲ Andy Slavitt

Finally, in July 2015, in response to a request by the trial lawyers' chief lobbying organization, the Centers for Medicare and Medicaid Services proposed a new rule outlawing arbitration clauses in nursing-home contracts.[58] On September 28, 2016, the CMS issued its final rule.[63] In a blog post, acting CMS director Andy Slavitt noted that the agency had reviewed nearly 10,000 comment submissions regarding the rule on arbitration clauses.[64] A federal judge blocked the new anti-arbitration rule from taking effect in November 2016.[65]

THE FIGHT OVER RECESS APPOINTMENTS

Contentious disputes over the leadership of two administrative bodies involved in the Obama administration's assault on arbitration were ultimately resolved by the U.S. Supreme Court.

Three months after assuming the presidency, in April 2009, President Obama nominated three individuals to fill empty seats on the NLRB—by statute, two Democrats and one Republican. The Democratic nominees were Mark Gaston Pearce, a labor lawyer, and Craig Becker, the associate general counsel of the Service Employees International Union. Republican senators balked and failed to act on the nominations, and in March 2010, President Obama filled the two Democratic seats by invoking a "recess appointment" power while the Senate was away.[59]

▲ Richard Cordray

Ultimately, in the summer of 2010, the Senate confirmed Pearce as well as Republican nominee Brian Hayes, a former Senate staffer, without acting on Becker's nomination.[60] The impasse continued until the president purported to make three more nominations—filling vacant NLRB seats not held by Pearce and Hayes—in January 2012, when the Senate was not in Washington but not formally in recess. At the same time, President Obama invoked the same recess-appointment power to place Richard Cordray as the director of the new Consumer Financial Protection Bureau.

Litigation over the NLRB recess appointments made their way to the Supreme Court, where, in 2014, in the case of *NLRB v. Noel Canning,* the Supreme Court unanimously decided that the president's purported recess appointments were unconstitutional.[61] Although the decision also applied to the Cordray appointment, it did not affect the CFPB, since the Senate ultimately confirmed Cordray in the summer of 2013.[62]

THE POTENTIAL COSTS OF SCALING BACK ARBITRATION

The principal benefit of arbitration is that it is significantly less costly than litigation and pays out claims more quickly.[66] A 2009 study conducted for the Searle Center at the Northwestern University School of Law found that individual consumers were more likely to prevail in arbitration than in court, after controlling for variations in case characteristics. The study also found "no statistical difference in the amount they were awarded as a percentage of the amount sought."[67]

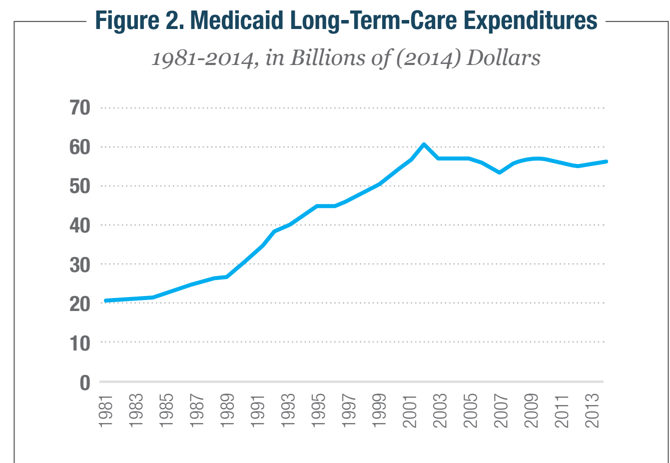
Of course, opponents of arbitration argue that resolving claims through arbitration rather than in court might reduce the incentives of defendant companies to comply with legal rules. If that were true, it would be particularly troubling in the context of nursing homes, given the importance of preventing negligence in offering patient care.

Empirical studies, however, suggest that nursing-home litigation does not improve the quality of care. A 2011 study in the *New England Journal of Medicine* found that "levels of litigation were only fractionally lower for the best-performing nursing homes than for their worst-performing counterparts,"[68] and a follow-up study by some of the same authors in the journal *Medical Care* found that "tort litigation does not increase the quality performance of nursing homes, and may decrease it slightly."[69] Instead, according to a 2003 study by the U.S. Department of Health and Human Services, the principal effect of the explosion in nursing-home litigation in the 1990s—which significantly enriched the plaintiffs' attorneys who developed this line of business, like Jim Wilkes (see *The Nursing-Home Lawsuit King* nearby)—was to prompt insurance companies to hike the price of litigation insurance across the board.[70] This hike in prices resulted in major financial burdens for many nursing homes—and higher costs borne by consumers (through insurance premiums) and taxpayers (through higher costs charged to Medicare and Medicaid).

These higher costs are not insignificant. Nursing-home costs constitute 5% of all U.S. health-care expenditures.[71] Short-term nursing-home stays constitute 5% of Medicare expenditures, and long-term-care spending represents one-third of Medicaid annual expenditures—a percentage likely to increase with an aging population.[72] Fortunately, such Medicaid costs peaked in 2002 in inflation-adjusted terms (**Figure 2**). Although the leveling off of nursing-home costs is due to many factors—including substituting other forms of care, including at-home care, given escalating costs—the peak year of nursing-home cost to Medicaid is perhaps not coincidentally the year when arbitration clauses in nursing-home contracts began to become standard.[74] The median annual cost charged for private-room nursing-home care in 2015 was a hefty $92,345,[75] but the growth rate in such costs has slowed significantly in recent years, after decades of substantially outpacing inflation (**Figure 3**). Substantial evidence indicates that the Obama administration's proposed nursing-home arbitration rule will impose substantial costs on providers and drive up insurance premiums.[76]

Figure 2. Medicaid Long-Term-Care Expenditures

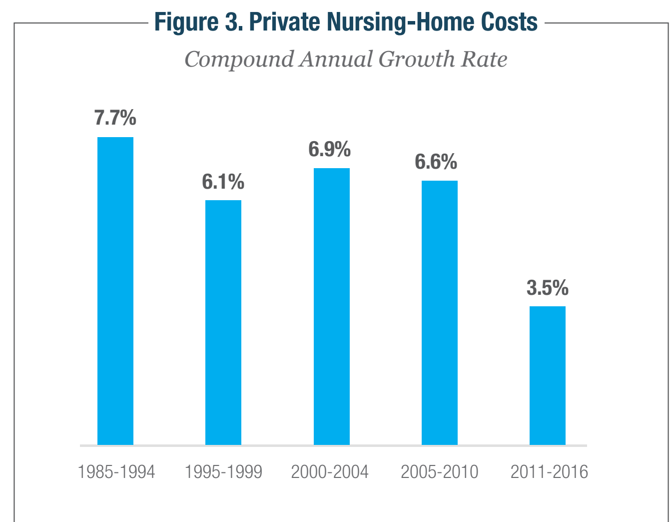
1981-2014, in Billions of (2014) Dollars



Source: Truven Health Analytics, Centers for Medicare & Medicaid Services (2016)[73]

Figure 3. Private Nursing-Home Costs

Compound Annual Growth Rate



Source: Medical Care (2009); Genworth Financial (2016)[77]

THE NURSING-HOME LAWSUIT KING

Photo by Mark Wemple

▲ *Jim Wilkes*

Nursing-home litigation was pioneered in the 1980s by Florida lawyer Jim Wilkes, a former mobile-home salesman and lounge singer, and his Stetson Law School classmate Tim McHugh.

Wilkes and McHugh discovered that a Florida law governing nursing-home standards enabled lawyers suing successfully to collect legal fees—and soon found that those fees could be hefty indeed. Wilkes and McHugh have netted fees from some half-billion dollars in verdicts over the years, on top of much more from settlements.[78]

Today, Wilkes flies around the country (the law firm has offices in several states) on a private jet. And like most leaders of Trial Lawyers, Inc., he gives generously to politicians who protect his business. Public records show that donors from Wilkes & McHugh have given more than $1.5 million to federal politicians over the years[79] and more than $1.6 million to state politicians.[80]

These sums probably understate the total amount of his political largesse: in 2000, Wilkes boasted to the local press that he had given almost $1 million of his own funds in that political cycle alone.[81]

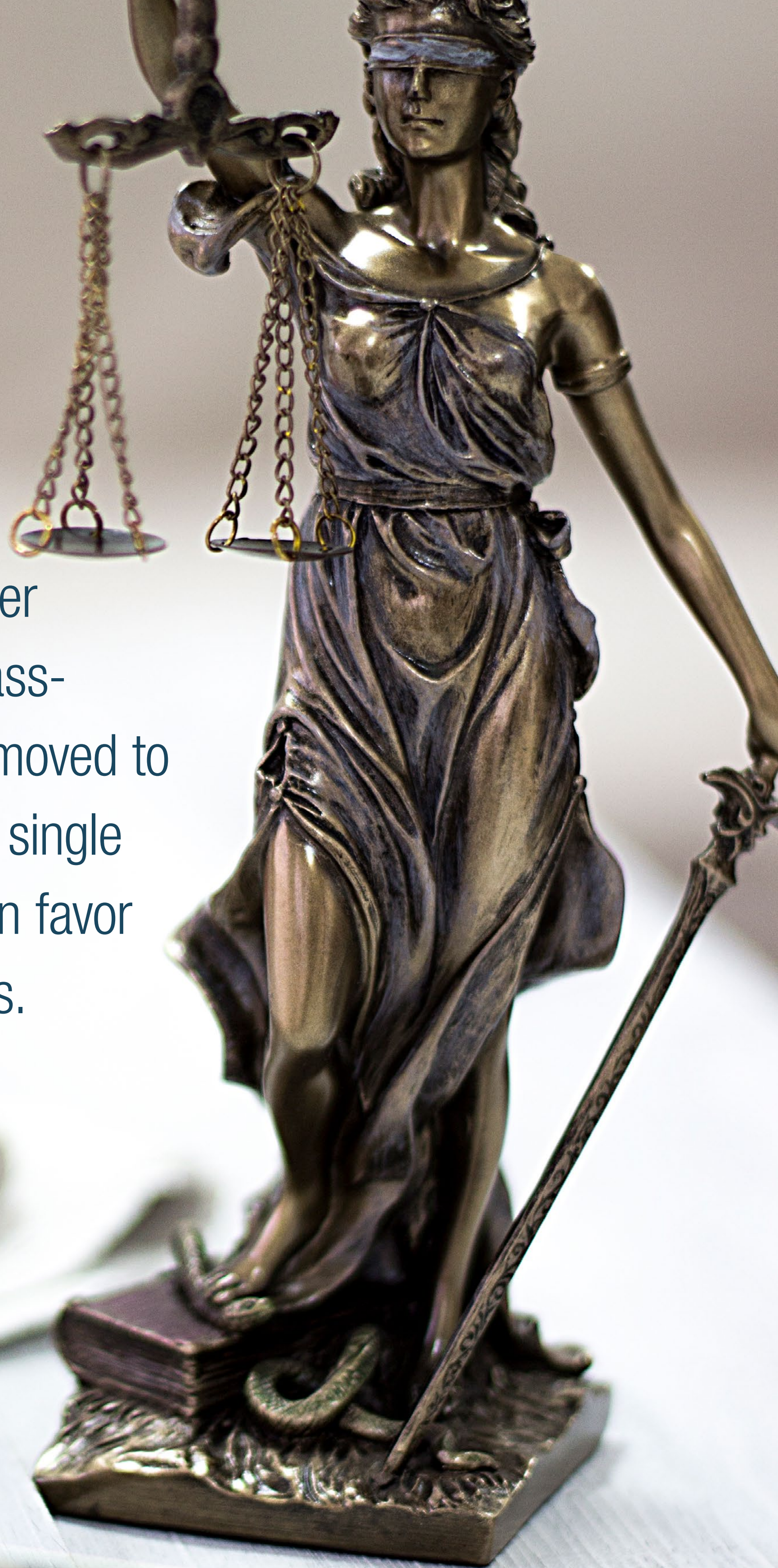
Wilkes is so chummy with Harry Reid that the Senate minority leader hired him to be his attorney when he got injured using exercise bands and decided to sue the company.[82]

The benefit for companies employing arbitration clauses that foreclose class-action lawsuits is obvious, but consumers don't give up much in the process—and benefit from lower costs that are passed on. Individual plaintiffs' small stakes in class-action litigation mean that no one has any incentive to monitor class-action attorneys, who regularly reach agreements that undervalue plaintiffs' claims while pouring millions into their own pockets. A study by the law firm Mayer Brown found that among class-action lawsuits filed in or removed to federal court in 2009, not a single case was resolved in court in favor of the plaintiffs on the merits.[83] One-third of cases settled, but most delivered little to the class: "of the six cases in our data set for which settlement distribution data was public, five delivered funds to only minuscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%."[84]

Ted Frank, founder of the Center for Class Action Fairness (which challenges unfair class-action settlements), notes that "in some cases, the problem of under-compensation [for the class] and self-dealing [by the class counsel] is so severe that class settlements unambiguously harm class members by putting them in a worse position than they were in before the litigation began."[85] For example, in the settlement in *Kamilewicz* v. *Bank of Boston,* an Alabama state court subtracted attorney fees from escrow accounts for members of the plaintiff class, leaving some members of the class with less money than before the litigation.[86]

There is also good evidence that the absence of arbitration clauses that foreclose class-action litigation leads to higher costs. In the CFPB's own study justifying its proposed rule, it found that after a legal settlement eliminated arbitration clauses that foreclosed class-action remedies for credit-card holders, average annual fees significantly increased for all consumers within 24 months; and the annualized percentage rate for borrowing increased almost 2% for consumers with lower credit scores.[87] After another class-action settlement with banks and consumers involving overdraft fees eliminated the possibility of arbitration clauses that foreclosed class actions, free checking accounts essentially became "a thing of the past" as banks moved to charge fees to all customers who failed to maintain hefty bank balances.[88] Such marketplace changes will doubtless affect the percentage of Americans who are unbanked or underbanked—already 30% of all households.[89]

The potential costs of the Obama administration's agency actions to eliminate arbitration are thus very real—and would, if put into practice, start turning back the clock on U.S. litigation abuse. The beneficiaries, of course, would be the nursing-home lawyers and class-action kingpins of Trial Lawyers, Inc. With a new administration set to take office, however, the Obama administration's efforts to roll back arbitration and benefit its litigation-industry allies may be short-lived. On the campaign trail, President-elect Trump pledged to "put an end to" what he called "the regulation industry" on his first day in office.[90] Unwinding these agency actions will take more time than that and requires new leadership at the Department of Health and Human Services, the CFPB, and the NLRB. But once such new leadership is in place, it will be positioned to stop the assault on arbitration and continue the positive U.S. trends in reducing litigation costs and lawsuit abuse.



A study by the law firm Mayer Brown found that among class-action lawsuits filed in or removed to federal court in 2009, not a single case was resolved in court in favor of the plaintiffs on the merits.

Endnotes

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2. *See* David L. McKnight & Paul J. Hinton, *International Comparisons of Litigation Costs*, NERA Economic Consulting for the U.S. Chamber of Commerce Institute for Legal Reform (June 2013).
3. *See* Towers Watson, *2011 Update on U.S. Tort Cost Trends* (Jan. 2012).
4. *See* James R. Copland, *Why the Trial Bar and Its Friends Detest Arbitration*, Wall St. J., Dec. 25, 2015. In addition to increased use of arbitration agreements, the reduced rate of growth in tort costs in the U.S. is due to: (1) state and federal tort-reform legislation; *see, e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. 104-67, 109 Stat. 737; Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, 119 Stat. 4–14; American Tort Reform Association (ATRA), Legislation; (2) various judicial rulings; *see, e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) (applying constitutional limit to state punitive damage awards); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003) (same); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007) (requiring more specific pleading standard); *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (same); *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011) (requiring more rigorous class-certification standard); and (3) prosecutions of corrupt leaders of the plaintiffs' bar; *see, e.g.*, Debra Cassens Weiss, *Scruggs Pleads Guilty; Plus a Profile of the "King of Torts,"* ABA J. (Mar. 14, 2008); Carrie Johnson, *Lerach Enters Guilty Plea In Class-Action Conspiracy*, Washington Post (Oct. 30, 2007); Jonathan D. Glater, *Class-Action Lawyer Gets 30 Months in Prison*, N.Y. Times (June 3, 2008).
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7. *See* The White House, Executive Order—Fair Pay and Safe Workplaces, Jul. 31, 2014; Carmen Germaine, *Why Plaintiffs Firms Will Love DOL's New Fiduciary Rules*, LAW360.COM, Apr. 6, 2016; Press Release, U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions, Oct. 28, 2016.
8. *See* OpenSecrets.org, Center for Responsive Politics, *Top Interest Groups Giving to Members of Congress*.
9. OpenSecrets.org Center for Responsive Politics, *Sen. Harry Reid: Top Donors*.
10. *See, e.g.,* Dan Collins, *Bush Pushes for Tort Reform*, CBS News (Jan. 5, 2005); Terry Carter, *Tort Reform Texas Style*, ABA J. (Oct. 24, 2006) ("Tort reform was one of the major issues pushed by George W. Bush in his successful run for Texas governor in 1994").
11. *See* Fairness in Nursing Home Arbitration Act, H.R. 1237, 111th Cong. (2009); S. 512, 111th Cong. (2009).
12. *See* Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. (2009).
13. *See* Payday Loan Reform Act, H.R. 1214, 111th Cong. (2009); Taxpayer Abuse Prevention Act, S. 585, 111th Cong. (2009).
14. *See* Consumer Fairness Act, H.R. 991, 111th Cong. (2009).
15. *See* Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).
16. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
17. *See* Petition for Writ of Certiorari, *NLRB* v. *Murphy Oil USA, Inc.*
18. *See* Press Release, CFPB, CFPB Proposes Prohibiting Mandatory Arbitration Clauses That Deny Groups of Consumers Their Day in Court (May 5, 2016).
19. *See* Andy Slavitt & Kate Goodrich, Commitment to Person-Centered Care for Long-Term Care Facility Residents, CMS Blog (Sep. 28, 2016).
20. *See Am. Health Care Ass'n* v. *Burwell*, No. 3:16-CV-00233 (N.D. Miss. Nov. 7, 2016); Virgil Dickson, *Federal Judge Grants Nursing-Home Arbitration Injunction*, Modern Healthcare (Nov. 7, 2016).
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24. *See* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1202, at 68 (2d ed. 1990).
25. *See* Fed. R. Civ. P. 8(a)(2).
26. *See, e.g., Arcambel* v. *Wiseman*, 3 U.S. (3. Dall.) 306 (1796). For a discussion of the policy relevance of this rule, see Marie Gryphon, Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System, Manhattan Inst. Civ. J. Rep. 36 (2008).
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28. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).
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32. *See* Fed. R. Civ. P. 23(c)(3)(B).
33. 433 U.S. 350.
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35. *See, e.g.*, Institute of Medicine, Information for Women About the Safety of Silicone Breast Implants (Martha Grigg et al., eds., Nat'l Academy Press 2000) ("There is no evidence that silicone implants are responsible for any major diseases of the whole body. . . . The committee found no increase in either primary or recurrent breast cancer in women with breast implants. Some studies even suggest lower rates of breast cancer in implanted women.").

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37. *See* PSLRA, *supra* note 4; CAFA, *supra* note 4.
38. Federal Arbitration Act, Pub. L. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 *et seq.*).
39. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
40. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).
41. Carlton Fields, *The 2016 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 22.
42. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).
43. *See* Jason Scott Johnston, *Preliminary Report: Class Actions and the Economics of Internal Dispute Resolution and Financial Fee Forgiveness* (Manhattan Institute 2016), at 5 ("It is only because banks have invested enormous amounts of money to generate fine-grained information on how different consumers are using financial products—and then have used that information in customer-complaint resolution—that financial products have become a mass product, available to consumers of all income levels rather than just the wealthiest. By forcing bank contracts to permit class-action litigation, the CFPB's proposed rule substantially reduces the incentive to gather such information and serve a broad cross-section of consumers."); *see also* Ted Frank, *Class Actions, Arbitration, and Consumer Rights: Why Concepcion is a Pro-Consumer Decision* (Manhattan Institute 2013), at 14 ("if class actions provide more efficient mechanisms for resolving consumers' complaints than an arbitration agreement, the market will take that into account when pricing products and services. If, however, the arbitration agreement is efficient, the business will be able to pass the cost savings along to consumers in the form of lower prices. In either instance, the market will, without aid from the courts, protect consumer welfare—assuming that consumers have that choice *ex ante* to precommit to arbitration.")
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51. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
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58. *See* Slavitt, supra note 19. Because CMS asserted that it was motivated to change treatment of nursing-home arbitration clauses based on "concerns" raised by "stakeholders," the American Health Care Association (AHCA) filed a Freedom of Information Act request seeking documentation of such concerns. "By letter dated August 25, 2015, CMS informed AHCA that there was only one such document in CMS's files: a three-year-old letter submitted by the organization formerly known as the Association of Trial Lawyers of America (ATLA)." AHCA, Re: CMS-3260-P: Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Proposed Rule, Oct. 25, 2015, at 8.
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[P]laintiffs' attorneys represented a nationwide class against BancBoston over the calculation of interest for escrow accounts. They argued that the benefits to a class member of getting their escrow funds released to them a month earlier was the entire value of the funds. . . . The settlement prohibited BancBoston from objecting to attorneys' fees; the notice sent to the class didn't warn them that their attorneys would seek to use this methodology to calculate fees. Thus, in the resulting fairness hearing, a judge agreed, and awarded funds, to be deducted out of the escrow accounts, based on this exaggerated calculation. The attorneys won up to $8.76 for each of the plaintiffs—and obtained a deduction of 5.32% of each class member's escrow accounts to pay for the attorney fees. Thus an Alabama court dictated that Maine resident Dexter Kamilewicz received a $2.19 credit and a $91.33 debit for attorneys' fees in his Florida bank account.

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