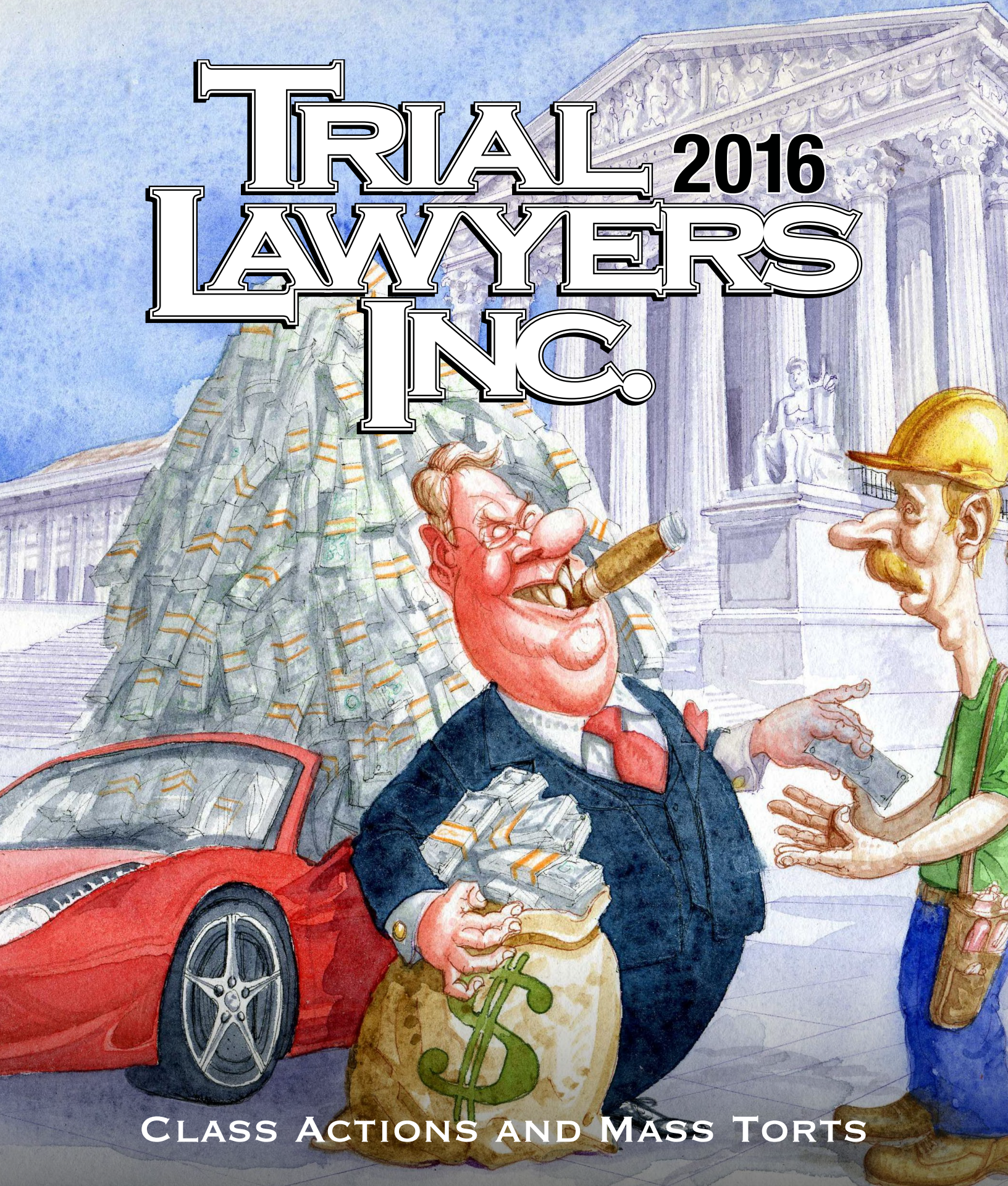


# TRIAL 2016 LAWYERS INC.



CLASS ACTIONS AND MASS TORTS

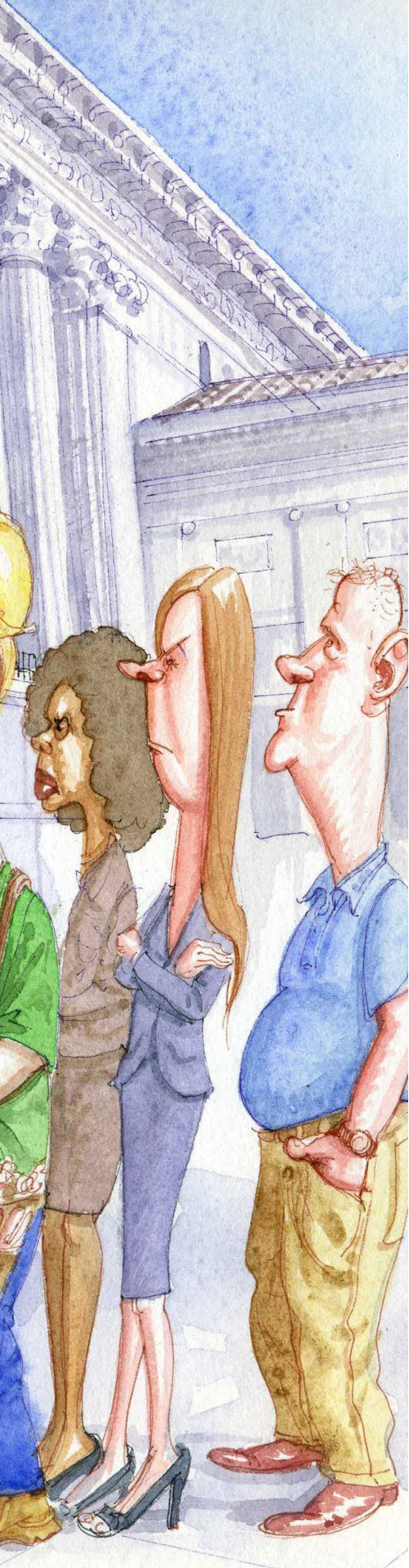


## MESSAGE FROM THE DIRECTOR

This is the 20th publication in the Manhattan Institute's *Trial Lawyers, Inc.* series of publications,<sup>1</sup> launched in 2003, shortly after I assumed duties directing the Institute's legal-policy efforts. Lawsuits play a major role in the American economy: the direct costs of tort litigation alone are roughly one-tenth the entire health care sector,<sup>2</sup> and that's excluding various settlements and classes of litigation, not to mention forgone research and investment and wasteful practices encouraged by litigation risk, including defensive medicine. Although the lawsuit industry is massive, information on it can be scarce: law firms, unlike publicly traded corporations, do not disclose business and financial results in 10-Ks or proxy statements.<sup>3</sup> Our reports—stylized as annual reports of the plaintiffs' bar, which we call Trial Lawyers, Inc.—are intended to help fill that gap by shedding light on the size, scope, and inner workings of the lawsuit industry.

Over the last 12 years, the players and targets of litigation have changed somewhat, but Trial Lawyers, Inc. continues to earn outside profits from its class-action and mass-tort lines of business. Many former members of the Trial Lawyers, Inc. "leadership team" are gone—in some cases, due to death; but in more, due to disbarment or conviction: Dickie Scruggs,<sup>4</sup> Mel Weiss,<sup>5</sup> and Bill Lerach<sup>6</sup> all went to federal prison, and the trial lawyers' top legislative ally, former senator John Edwards, escaped the same fate only after indictment and trial.<sup>7</sup> But new leaders have emerged. Weiss and Lerach no longer have a stranglehold over federal securities litigation, but new firms have taken their place. They include New York's Bernstein Litowitz Berger & Grossman,<sup>8</sup> which has funneled large sums of campaign contributions to out-of-state elected officials who have contracted with the firm to sue companies in class-action lawsuits against corporations.<sup>9</sup> Scruggs and the late Ron Motley and Fred Baron no longer lead Trial Lawyers, Inc.'s asbestos-litigation mass-tort business line, but other players have filled their shoes, among them Weitz & Luxenberg,<sup>10</sup> a firm that has dominated New York City's asbestos courts—in part owing to the efforts of former firm counsel Sheldon Silver, the state's long-standing Assembly speaker, who was recently convicted in federal court of frauds, including the allocation of state dollars to benefit the firm.<sup>11</sup>

This report tells these newer tales, offering a look at Trial Lawyers, Inc.'s class-action and mass-tort business lines as they have evolved. In some respects, things have improved: in addition to prosecutors stopping some of the worst frauds,<sup>12</sup> the U.S. Supreme Court and other judicial decision makers have modified some rules for the better,<sup>13</sup> state legislatures have continued to modify laws to deter litigation abuse,<sup>14</sup> and Congress passed the landmark Class Action Fairness Act of 2005,<sup>15</sup> which prevented class-action lawyers from shopping large national cases to the most favorable state courts. But stopping Trial Lawyers, Inc.'s predations is a bit like the arcade game Whac-a-Mole<sup>16</sup>—when you end one abusive practice, another pops up to take its place. In some ways, trial lawyers have become more sophisticated in their strategies. Rather than paying individuals to serve as plaintiffs—the tactic that brought down Weiss and Lerach<sup>17</sup>—class-action lawyers now make perfectly legal



contributions to politicians who control litigation for public-employee pension funds. Rather than chasing ambulances to find clients, mass-tort lawyers have developed sophisticated marketing strategies that take advantage of the Internet and social-media platforms to attract the people whose claims constitute their books of business.

While many of the names and faces have changed, Trial Lawyers, Inc. remains a potent force. In its most profitable form, it is a volume business. The litigation industry's top earners are those who represent large numbers of plaintiffs, either through class-action lawsuits or mass-tort product-liability suits. I hope you will find that this report offers a useful—if alarming—snapshot of the world of mass litigation today.

**James R. Copland**

*Senior Fellow and Director, Legal Policy  
Manhattan Institute for Policy Research*



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# MANY PLAINTIFFS, MANY PROFITS

The litigation industry’s biggest margins come from class action and mass tort litigation.

When it comes to lawsuit abuse, most Americans instantly think of Stella Liebeck, the elderly woman initially awarded millions by a jury for injuries related to her spilling McDonald’s hot coffee on herself in her automobile<sup>18</sup>—a verdict that, though ultimately reduced, was popularized by a spoof on the hit 1990s television series *Seinfeld*.<sup>19</sup> But to make its truly outsize profits, the litigation industry prefers not individual plaintiffs, such as Liebeck, but cases that pull together lots of individuals who do little to oversee the lawsuits: class actions and mass torts.

In class-action lawsuits, plaintiffs’ lawyers don’t have to wait for clients to approach them with a prospective case. Rather, class-action lawyers themselves typically conceive of a purported injury or wrongdoing and reach out to a known individual to serve as the “named” or “lead” plaintiff in the suit.<sup>20</sup>

All other plaintiffs with similar alleged injuries are included, by definition, in the class.<sup>21</sup> When such plaintiffs number in the thousands—or even millions—relatively small alleged injuries become extremely valuable to Trial Lawyers, Inc.

Mass torts also involve large numbers of plaintiffs with a similar alleged injury. Common cases involve lung ailments claimed to be due to asbestos exposure or physical harms purportedly caused by a drug or medical device. Because such cases involve a great deal of variation among plaintiffs—owing to differences in exposure or personal medical histories—they do not typically qualify for class-action treatment. Thus, for mass-tort

litigation, Trial Lawyers, Inc. aggressively recruits clients—most commonly, through advertisements on television, radio, the Internet, and mass transit. By bundling lots of cases together—particularly in friendly jurisdictions—mass-tort lawyers, such as class-action attorneys, create tremendous pressure on companies to settle claims.

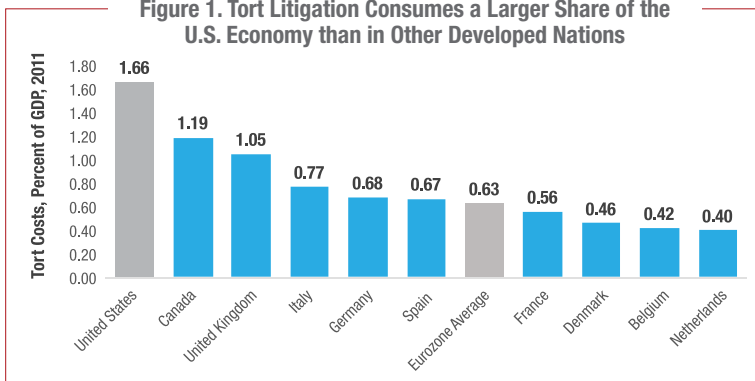
## The Rise of Mass Litigation

The cost of lawsuits in America, as a share of the economy, is significantly higher than in other developed nations—almost 40 percent higher than in neighboring Canada and more than 2.6 times higher than in the Eurozone (Figure 1).<sup>22</sup> Although the U.S. has always had a reputation for being litigious,<sup>23</sup> the cost of tort litigation grew quickly after World War II (Figure 2) due to a series of substantive and procedural changes to the law that made it easier to sue.<sup>24</sup>

*Nine of the top ten “keywords” purchased from Google to attract web searchers are tied to potential legal claims.*

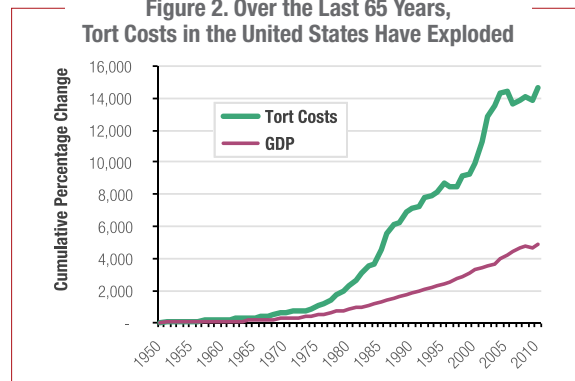
The modern era of mass litigation was essentially born in 1966, when the Federal Rules of Civil Procedure were amended so that members of a class in class-action lawsuits had to “opt out” to avoid being included in a lawsuit;<sup>25</sup> previously, plaintiffs had to “opt in” to be included in a class.<sup>26</sup> Suddenly, enterprising attorneys could conceptualize claims that affected broad arrays of citizens, work with a single plaintiff, and pull large numbers of individuals into their lawsuit without ever meeting them.

Figure 1. Tort Litigation Consumes a Larger Share of the U.S. Economy than in Other Developed Nations



Source: NERA Economic Consulting

Figure 2. Over the Last 65 Years, Tort Costs in the United States Have Exploded



Source: Towers Watson

Mass-tort litigation's seeds also were planted in the mid-1960s, particularly once the American Law Institute revised its "restatement" of torts in 1965 to make it much easier to sue over product defects and inadequate warnings.<sup>27</sup> By the mid-1970s, pioneering lawyers, such as Richard Glasser and Ron Motley, launched the first major asbestos lawsuits.<sup>28</sup> But modern mass-tort litigation was truly jump-started in 1977, when the U.S. Supreme Court, in deciding *Bates v. State Bar of Arizona*,<sup>29</sup> ruled that attorney advertising was commercial speech protected by the First Amendment to the U.S. Constitution. Bar associations' ethics rules had long barred attorneys from advertising for clients as a form of solicitation;<sup>30</sup> but in one fell swoop, such barriers were eliminated.

As a result of *Bates*, mass-tort lawyers now aggressively advertise for clients. In 2015, lawyers spent almost \$900 million on television ads; trial lawyers' TV advertising has grown six times as fast as all other advertising over the last six years.<sup>31</sup> The Internet has afforded lawyers the ability to troll for clients in far more targeted ways. Today, nine of the top ten and 23 of the top 25 most expensive "keywords" purchased from Google to attract web searchers are tied to potential legal claims.<sup>32</sup>

## The Need for Reform

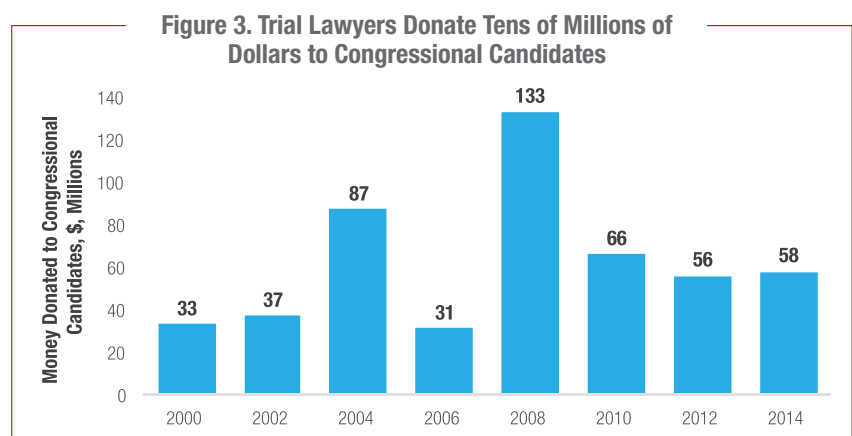
The cost of class-action and mass-tort abuse is more than merely a matter of economic harms imposed on companies being sued—though such suits doubtless cost jobs for workers, increase prices for consumers, hurt pension and retirement savings, and force many small businesses and entrepreneurs to close shop. The near-certainty that new drugs and medical devices will generate mass lawsuits if a previously unknown defect surfaces is a major drag on new research and development—costing lives.<sup>33</sup> Had Congress not stepped in to block lawsuits against vaccine manufacturers in the 1980s, vaccine manufacturing and sale in the U.S. would have ceased;<sup>34</sup> but many other products have never been brought to market because of fear of litigation.<sup>35</sup>

Moreover, Trial Lawyers, Inc.'s relentless pursuit of profits has largely severed the tie between lawyer and client, at least in the class-action and mass-tort arena, which means that lawyers' gains often come at their clients' expense. When class-action lawyers settle their suits for pennies on the dollar, enriching themselves at the expense of the clients they purportedly represent, plaintiffs with legitimate claims are inadequately compensated for their injuries.<sup>36</sup> The same applies to mass-tort lawyers who recruit uninjured clients to bundle into large settlements, in order to increase their fees: those

with real injuries get paid too little to make them whole, while other plaintiffs recruited—and their lawyers—are paid a windfall.<sup>37</sup>

Fortunately, over the last 40 years, various states have enacted tort reforms that have helped slow the growth of the lawsuit industry. In addition to its vaccine law in the 1980s, in 1995 and 2005 Congress enacted legislation to curb class-action abuses.<sup>38</sup> In recent years, the U.S. Supreme Court has also made rulings that have set outer bounds on the use of the class-action device and that have permitted private parties to agree to arbitration clauses in contracts that preclude class-action litigation.<sup>39</sup>

The ability to reform the system, however, is limited by trial lawyers' aggressive government-relations efforts. The lawyers' political and lobbying arm, the American Association for Justice,<sup>40</sup> is among the most powerful interest groups in Washington, with auxiliaries that work similarly across the states. Lawyers flood congressional campaign coffers with cash, with spending on the rise (Figure 3).<sup>41</sup> (The 2004 and 2008 campaigns were outliers because sitting Democratic senators were running for president in each year.) Indeed, in every campaign cycle this century, lawyers have given more to congressional campaigns than any other interest group has given—notwithstanding that the trial bar concentrates its money heavily on Democratic candidates.<sup>42</sup> Trial lawyers similarly



Source: OpenSecrets.org

exert influence at the state level<sup>43</sup>—not only over legislators but over judges (where elected) and state officials who have the power to contract with them for additional business.<sup>44</sup> Because Trial Lawyers, Inc.'s business model is uniquely dependent on government for survival—its revenue streams come not from paying customers but from unwilling defendants forced to pay through judicial threat—it will always spend heavily to defend its class-action and mass-tort cash cows.



# LAWYERS WITHOUT CLIENTS

Reform efforts have stymied but not ended class-action lawsuit abuse.

**B**ill Lerach, at one time arguably America's most successful securities class-action attorney, once boasted to *Forbes* magazine: "I have the greatest practice of law in the world. I have no clients."<sup>45</sup> Lerach's statement is ironic—he ultimately went to federal prison after being charged with bribing individuals to be his clients<sup>46</sup>—but is also an apt description of how class-action litigation functions. Once a plaintiff class is defined by an attorney and certified by a court, any individual falling under the definition is automatically a plaintiff unless he affirmatively opts out.<sup>47</sup> Thus, people are commonly plaintiffs in class-action lawsuits that they know nothing about.

Conceived as a vehicle for allowing individuals who have suffered small injuries from a common source to adjudicate their claims expeditiously in a single cause of action, class-action lawsuits are, more than any other type of litigation, conceived by and for the benefit of attorneys. The problem with such litigation goes well beyond lawyers raking in millions while plaintiffs collect small sums: in many cases, plaintiffs collectively walk away with virtually nothing, while their attorneys—and, sometimes, charities favored by the attorneys or the corporate defendant—take home all the money.<sup>48</sup>

## The Cost and Shape of Class-Action Litigation

While typically benefiting attorneys but not plaintiffs, class-action lawsuits have a major economic cost. According to a 2015 class-action survey, 54 percent of major corporations faced a class-action lawsuit in 2014; and more than one in three such companies faced multiple lawsuits, with the average such company facing five.<sup>49</sup> The threat to corporations from class-action litigation is growing: in 2014, more than 16 percent of these lawsuits were high-risk, "bet the company" cases—more than triple the percentage in 2011.<sup>50</sup>

Three in ten class-action lawsuits involve consumer fraud (**Figure 4**). These cases are particularly attractive to Trial Lawyers, Inc. because they are "harm-less" lawsuits,<sup>51</sup> or what the American Tort Reform Association calls "empty-suit litigation";<sup>52</sup> under many states' consumer-fraud laws, the plaintiffs in such lawsuits do not have to show that they were actually harmed by the alleged fraud.

Federal law does not generally permit private plaintiffs to sue for consumer fraud, vesting enforcement authority with the Federal Trade Commission (of late, the opportunity for various private suits has been radically expanded, including through the 2010 Dodd-Frank financial reform law<sup>53</sup> and its creation, the Consumer Financial Protection Bureau). However, all 50 states, plus the District of Columbia, allow for private suits to enforce consumer frauds; 38 state consumer-protection acts allow for class-action litigation.<sup>54</sup> Eleven states' laws permit plaintiffs to recover without a showing of injury, and 22 establish minimum "statutory" damages for each offense, regardless of actual harms.<sup>55</sup> As state laws became more permissive, lawsuits predictably multiplied: one study found that the number of court decisions involving fraud actions filed under state consumer-protection acts increased 119 percent during 2000–07.<sup>56</sup>

*54 percent of major corporations faced a class-action lawsuit in 2014, and more than one in three such companies faced multiple lawsuits.*

By structuring lawsuits as consumer frauds rather than those involving actual physical injuries, plaintiffs' lawyers can make class actions out of product-liability suits, which normally must be resolved as individual claims in mass-tort proceedings owing to variations in exposure or health profiles. For instance, lawyers filed a class-action consumer-fraud suit against Merck over its sale of its drug Vioxx, alleging not that plaintiffs were injured but that they would not have bought the product were harms differently disclosed.<sup>57</sup> In that suit, the lawyers sought \$220 million, the estimated total sales of the product in the state of Missouri; Merck settled for \$39 million.<sup>58</sup> Other suits are more fanciful but still impose significant costs on targeted firms—including regulation-by-litigation suits that fault the producers of common processed foods, such as Pop-Tarts, Froot Loops, and Fruit Roll-Ups, for improperly implying that the products were "healthy" owing to the use of a generic or specific "fruit" in the product packaging.<sup>59</sup>

After consumer fraud, labor and employment lawsuits are most frequently filed. Pension-related lawsuits filed under the federal Employee Retirement Income Security Act (ERISA) alone netted 1.3 billion in settlement dollars in 2014.<sup>60</sup> Another growth industry of lawsuits—one often abetted by the Obama administration's Equal Opportunity Employment Commission—alleges that employees are "misclassified" and owed different labor-market



President George W. Bush signs Class Action Fairness Act. ©whitehouse.gov

## CONGRESS FIGHTS FOR FAIRNESS

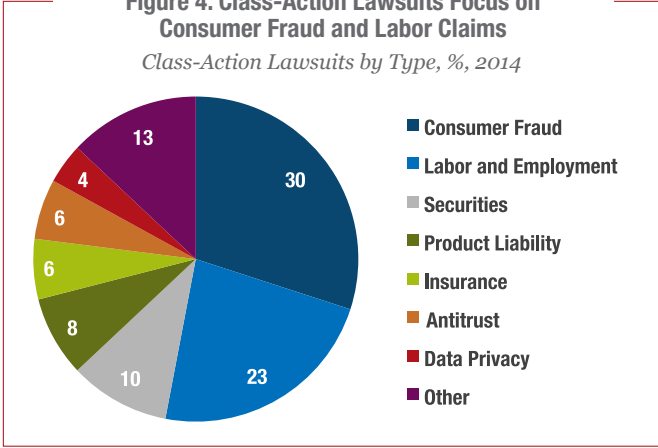
One problem with class-action litigation is that, by its very nature, it tends to involve plaintiffs from multiple jurisdictions. In normal lawsuits, courts can insist that plaintiffs file their claim where they live or where their injury occurred. Yet Trial Lawyers, Inc. is able to “shop” class-action suits in search of the most favorable jurisdiction<sup>66</sup>—places that the American Tort Reform Association calls “judicial hellholes.”<sup>67</sup> Dickie Scruggs, the mastermind of the multibillion-dollar multistate tobacco settlement, candidly described such jurisdictions:

*[W]hat I call the “magic jurisdiction” . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . The cases are not won in the courtroom. They’re won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or the law is.*<sup>68</sup>

(The largesse that Scruggs described may not be limited solely to political campaigns: the tobacco-suit magnate was subsequently disbarred and spent time in federal penitentiary following a federal investigation of an alleged judicial bribery scheme.)<sup>69</sup>

In the early part of the twenty-first century, Congress grew concerned that such judicial “forum shopping” in class-action litigation was affecting national commerce, as state courts beholden to Trial Lawyers, Inc. made decisions in national class-action lawsuits, with sweeping implications.<sup>70</sup> In response, Congress enacted the Class Action Fairness Act (2005),<sup>71</sup> which permitted defendants to remove national lawsuits above a certain dollar threshold to federal court.<sup>72</sup> The legislation passed with a large bipartisan majority, including then-senator Barack Obama.<sup>73</sup>

Figure 4. Class-Action Lawsuits Focus on Consumer Fraud and Labor Claims  
*Class-Action Lawsuits by Type, %, 2014*



Source: 2015 Class Action Survey

protections, are improperly deemed independent contractors, or are victims of discrimination. Lawsuits involving the application of labor laws to telecommunications are on the rise, too.<sup>61</sup>

One area of class-action litigation that attorneys expect to be a growth industry is data privacy, as more transactions are conducted—and more information is stored—online and as hackers become more sophisticated and data breaches become more common. Such lawsuits constituted only 4 percent of class-action lawsuits in 2014, but 29 percent of corporate counsel expect the share of such lawsuits to grow, more than any other class-action line of business.<sup>62</sup>

### The Supreme Court Intervenes

Like Congress (see box, “Congress Fights for Fairness”), the U.S. Supreme Court has taken steps to rein in class-action abuse. In 2011, the court considered a massive class-action employment lawsuit alleging that all female employees at the consumer retailer Wal-Mart had been the victims of discrimination—pointing to aggregate variations in pay at the company, buttressed by various statistical models.<sup>63</sup> In *Wal-Mart v. Dukes*,<sup>64</sup> as in a subsequent decision,<sup>65</sup> the court determined that the plaintiffs’ case could not proceed as a class action because their individual situations were too different to constitute a common class.

Although *Dukes* has certainly put an outer bound on class-action litigation, its practical application may be limited, given that appellate courts have been increasingly unwilling to review lower courts' decisions to certify a class of plaintiffs: according to a 2014 study, federal appellate courts granted review in only 25 percent of defendant challenges to class certification during 2006–13, down from 45 percent in 1998–2006.<sup>74</sup> But the Supreme Court continues to take a keen interest in class-certification issues. A case currently before the court, *Tyson Foods v. Bouaphakeo*,<sup>75</sup> involves an all-too-typical “wage and hour” class-action lawsuit on behalf of former workers at the company’s plant: the court is interested in whether such a case is appropriately brought as a class action, given that workers’ treatment varied, with some workers not allegedly injured at all.

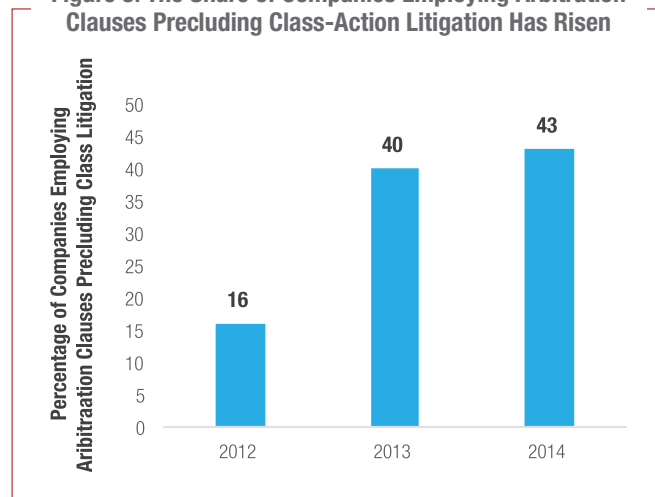
In another 2011 decision, *AT&T Mobility v. Concepcion* (also subsequently reaffirmed in a later case),<sup>76</sup> the Supreme Court held that private arbitration clauses that precluded class litigation were enforceable under the Federal Arbitration Act.<sup>77</sup> Because arbitration is a significantly cheaper and faster mechanism for resolving small consumer claims than class-action litigation—with savings that are passed on to consumers—companies began adopting more such provisions (Figure 5).<sup>78</sup>

Trial Lawyers, Inc. and its allies predictably howled—and found receptive ears at the *New York Times*<sup>79</sup> and in the Obama administration, whose new Consumer Financial Protection Bureau proposed new rules in October 2015 that would bar contracts from substituting private arbitration for class-action litigation in agreements governing credit cards, checking accounts, and other financial products.<sup>80</sup> (The CFPB’s director, Richard Cordray, was formerly Ohio’s attorney general, where he was tasked with hiring outside law firms to lead the state pensions’ securities class-action litigation;

out-of-state plaintiffs’ firms gave more than \$800,000 to the Ohio Democratic Party during his 2008 election campaign.)<sup>81</sup>

By and large, arbitration tends to be fair to claimants—particularly when compared with class-action litigation. The Searle Civil Justice Institute at Northwestern University found that, after controlling for variations in case characteristics, consumers were more likely to prevail in arbitration than in court and that there was “no statistical difference in the amount they were awarded as a percentage of the amount sought.”<sup>82</sup> A 2014 survey by the Office of the Independent Administrator of the Kaiser Foundation Health Plan, a nonprofit public-benefit corporation with mandatory arbitration clauses in its health plans, found that 90 percent of parties that had gone through arbitration found the process to be at least as good as the court system.<sup>83</sup>

**Figure 5. The Share of Companies Employing Arbitration Clauses Precluding Class-Action Litigation Has Risen**



Source: 2015 Class Action Survey

## THE CLASS-ACTION AVENGER



Ted Frank © Manhattan Institute

A central reason that abuses in class-action litigation are so rampant is that no one has an incentive to monitor the plaintiffs’ attorneys for their clients’ benefit. Attorneys who bring class actions regularly reach agreements that undervalue the value of plaintiffs’ claims while pouring millions into their own pockets. Because no individual plaintiff has enough money at stake to monitor the lawyers—and defendant companies have every incentive to minimize their total payouts, regardless of where the money goes—class-action plaintiffs’ lawyers structure settlements to pay most of the awarded dollars to themselves. Some plaintiffs’ lawyers with class-action practices are undoubtedly scrupulous, but their practices are less profitable than their peers—who cut corners to settle claims to maximize their own benefits, at the expense of their clients.

Although judges have to sign off on settlements, they have active dockets and tend to be hesitant to review settlements agreed to by both parties—even if one party is really the lawyer, not the clients.<sup>84</sup> In practice, judges almost never question settlements unless an objector—a member of the plaintiff class, represented through counsel—challenges the settlement terms as unfair.<sup>85</sup> Unfortunately, because plaintiffs’ individual interests in class-action cases tend to be small, the likelihood of a plaintiff investing significant resources to challenge a settlement is similarly small.

To help remedy this, attorney Ted Frank formed the nonprofit Center for Class Action Fairness (CCAF) to file strategic challenges to unfair class-action settlements.<sup>86</sup> (Frank is a longtime adjunct fellow with the Manhattan Institute, which publishes this report; but CCAF and its litigation are wholly distinct, organized under the auspices of a different nonprofit organization, the Competitive

Enterprise Institute.)<sup>87</sup> CCAF has been quite successful in winning court victories, such as the 2011 *Bluetooth Headset Product Liability Litigation*,<sup>88</sup> in which the Ninth Circuit Court of Appeals overturned a settlement that paid plaintiffs nothing but awarded hefty fees to the plaintiffs’ lawyers, along with a modest charitable contribution. Although such cases have opened up new avenues to challenging class-action settlements, a case-by-case challenge to class actions can go only so far. CCAF’s resources are limited. It is effective only because of leadership that eschews effective “payoffs” from class counsel to walk away.<sup>89</sup>



# STOCK-MARKET SHAKEDOWNS

Litigation industry thwarts securities class-action reforms with political largesse.

Among the most commonly filed of all class-action lawsuits are those alleging “securities fraud.” Within days of a drop in a company’s stock price, Trial Lawyers, Inc. swoops in to file a claim, despite often lacking proof of corporate wrongdoing.<sup>90</sup> These lawsuits inevitably attribute the price decline to purported misstatements in company filings or in executives’ public utterances.<sup>91</sup> Because defending against securities class-action lawsuits involves expensive document production and the risk of unfavorable verdicts in the millions or even billions of dollars, these suits almost always settle.<sup>92</sup>

Naturally, the litigious attorneys profit handsomely. In 2013, plaintiffs’ securities class-action lawyers netted more than \$1 billion in fees in published federal securities settlements.<sup>93</sup> Since 2000, plaintiffs’ attorneys have earned nearly \$3 billion from the ten largest settlements.<sup>94</sup> Yet these lawsuits merely redistribute wealth from one class of shareholders to another: investors who bought securities in a certain period are paid out of company coffers (i.e., all remaining shareholders’ money). Because considerable evidence suggests that this litigation does not deter management abuses,<sup>95</sup> critics have dubbed these suits “legal extortion.”<sup>96</sup> A Florida judge once compared securities class-action lawyers to “squeegee boys” who . . . run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.<sup>97</sup>

## The Rise and Reform of Securities Class Actions

States have long allowed shareholders to file lawsuits challenging alleged breaches of fiduciary duties.<sup>98</sup> Until recently, state courts—particularly in Delaware, where most large, publicly traded companies are incorporated<sup>99</sup>—somewhat limited the ability to file such suits. Today, however, they are a growth business for Trial Lawyers, Inc. that imposes a significant tax on corporate mergers and acquisitions. In 2013, among corporate mergers valued at over \$100 million, 94 percent faced a shareholder lawsuit challenging the deal, up from 44 percent in 2007.<sup>100</sup>

Today’s securities class-action industry is centered at the federal level, premised on alleged violations of the federal securities laws.<sup>101</sup> In 1988, the U.S. Supreme Court ruled that it was possible to infer

*In 2013, among corporate mergers valued at over \$100 million, 94 percent faced a shareholder lawsuit challenging the deal.*

“reliance” based on the “fraud-on-the-market” theory,<sup>102</sup> which held that even if an individual shareholder did not personally rely on a fraud, the fraud was presumably impounded into the security’s market price. In short order, plaintiffs’ law firms developed

securities class-action practices in which they monitored stocks for sharp price movements, which would quickly trigger a lawsuit alleging that some fraud had caused the stock to move.

In 1995, in response to the proliferation of securities class-action lawsuits, Congress passed the Private Securities Litigation Reform Act.<sup>103</sup> PSLRA

required more in-depth pleading standards to support a securities claim and forced judges to select, as the lead plaintiff in such cases, the investor most likely to protect the class of claimants’ interests (typically, the largest investor), rather than permit the first plaintiff filing suit to control the litigation.<sup>104</sup>

## Buying Plaintiffs

Though PSLRA did deter bare-bones filings, the number of annual securities class-action filings has remained relatively constant (**Figure 6**),<sup>105</sup> while the cost of such litigation continues to rise (**Figure 7**). Since 2000, the average securities litigation settlement (adjusting for inflation and excluding multibillion-dollar outlier cases) has more than doubled.<sup>106</sup>

One reason that PSLRA did not fix securities class-action abuses is that some lawyers were apparently involved in a scheme to funnel cash to “named” plaintiffs in an effort to generate claims. Indeed, in the Manhattan Institute’s original *Trial Lawyers, Inc.* report (2003),

the two individuals deemed “presidents” of the litigation industry’s securities class-action division, Mel Weiss and Bill Lerach, formerly of Milberg Weiss Bershad Hynes & Lerach,<sup>107</sup> were later convicted of such behavior and served time in federal prison.<sup>108</sup>



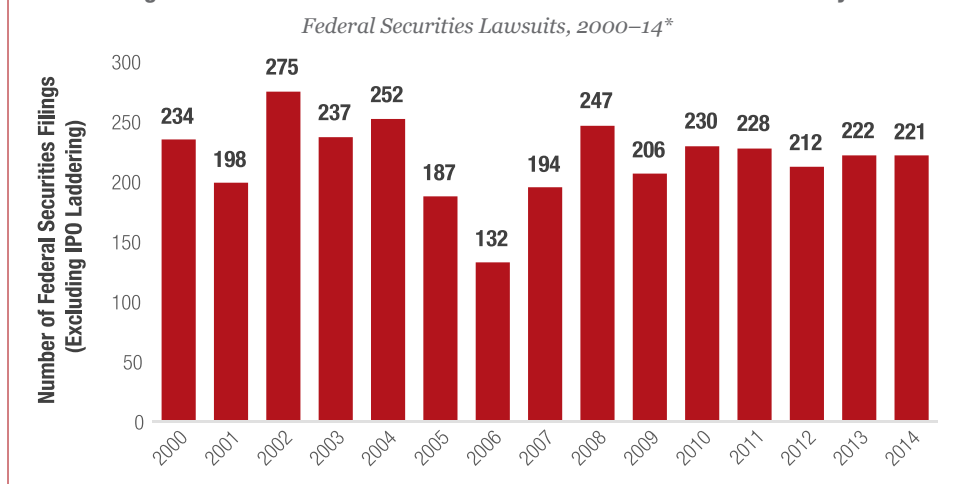
▲ Bill Lerach ©Mario Tama / Getty Images



Mel Weiss ©Palm Beach  
County Sheriff's Office

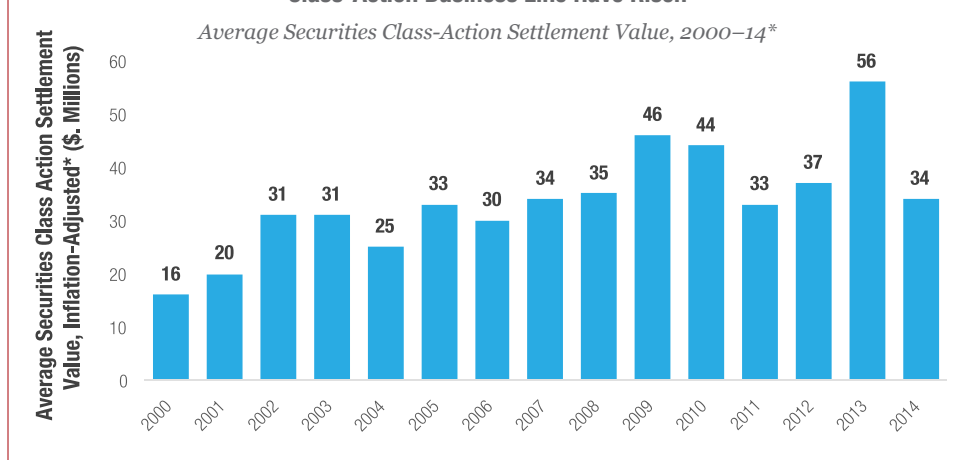
PSLRA's requirement that the shareholder with the biggest stake be the lead plaintiff also had the unintended effect of enabling plaintiffs' lawyers to engage in a perfectly legal "plaintiff buying" scheme by donating money to the campaign coffers of publicly elected officials with fiduciary or management roles relating to public-employee pensions (see box, "A Good Political Investment").<sup>109</sup> In recent years, as donations to officials with power over contracting firms have swelled, one-third to one-half of all federal securities lawsuits have been led by public-employee pensions (Figure 8).<sup>110</sup>

Figure 6. The Number of Securities Class-Action Suits Has Held Steady



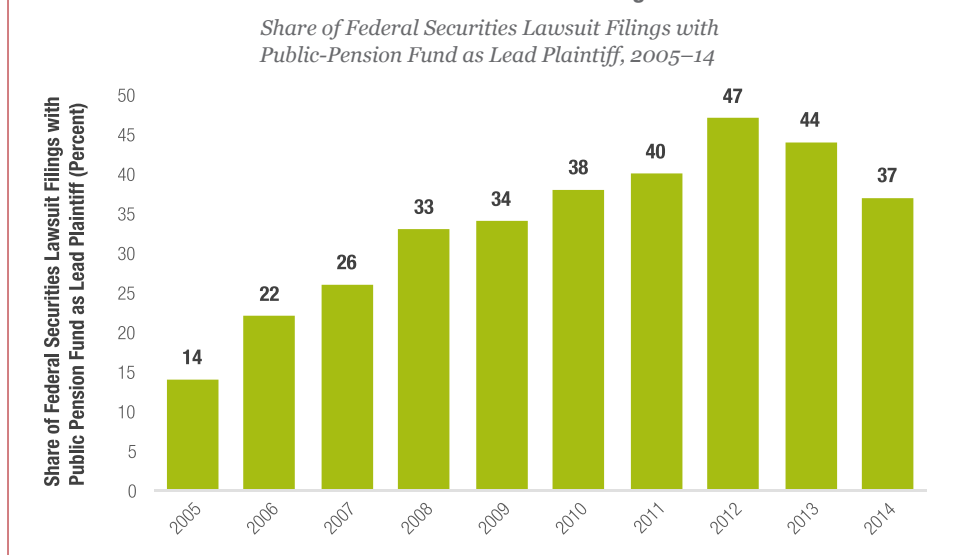
\*Excludes IPO laddering  
Source: NERA

Figure 7. Trial Lawyers, Inc.'s Profits from Its Securities Class-Action Business Line Have Risen



\*Adjusted for inflation; excludes settlements of more than \$1 billion, settlements awarding \$0 to class, IPO-laddering claims, and merger objections  
Source: NERA

Figure 8. Public Pension Funds Have Played an Increasing Role in Securities Class-Action Litigation



Source: Stanford Securities Class Action Clearinghouse/Cornerstone Research (2014)



## A GOOD POLITICAL INVESTMENT

Many securities class-action law firms have taken an outsize interest in various state and local political campaigns. Such state and local officials are often responsible for making decisions on whether public-employee pension funds serve as lead plaintiffs in securities class-action lawsuits—and which outside firms to hire to handle the suits. In New York, Thomas DiNapoli, the elected comptroller,<sup>111</sup> is the sole fiduciary for the New York State Common Retirement Fund,<sup>112</sup> the third-largest state-employee pension plan in the United States.<sup>113</sup> DiNapoli has received tens of thousands of dollars in contributions to his campaigns from attorneys at plaintiffs' securities firms that were also selected by the fund as lead plaintiff in securities class-action litigation (**Figure 9** and **Figure 10**).<sup>114</sup>

### Figure 9. Profitable Political Investments?

**Elected Official:** Thomas DiNapoli, Democrat

**Contributions Received:**

\$47,500 (Labaton Sucharow, LLP)

\$30,000 (Entwistle & Cappucci, LLP)

**Case Settlements:**

\$624,000,000 (Labaton Sucharow, LLP)

In re Countrywide Financial Corporation Securities Litigation

\$4,250,000 (Entwistle & Cappucci, LLP)

*DiNapoli v. Merrill Lynch & Co.*

**Elected Official:** Jim Hood, Democrat

**Contributions Received:**

\$121,006 (Bernstein Litowitz Berger & Grossmann, LLP)

**Case Settlements:**

\$1,637,100,000 (Bernstein Litowitz Berger & Grossmann, LLP)\*

\*BLBG has represented the Mississippi PERS in 9 of its 16 securities cases since 2005. This sum is the collective settlement amount for those cases. This information is recent as of 2014.

In Mississippi, litigation filed by the state's Public Employees' Retirement System ultimately resides with the state's elected attorney general.<sup>115</sup> The large New York securities firm Bernstein Litowitz Berger & Grossman<sup>116</sup> has taken a keen interest in the political fortunes of Mississippi attorney general Jim Hood: its lawyers have given well over \$100,000 to his campaigns.<sup>117</sup> The Mississippi pension system hired Bernstein Litowitz for nine of the fund's 16 settled securities cases, netting the firm hefty revenues off a total settlement value exceeding \$1.6 billion.<sup>118</sup>

Source: Public contribution filings; Stanford Securities Class Action Clearinghouse

### Figure 10



Source: Manhattan Institute

## Reforms Interrupted

In 2014, the U.S. Supreme Court and the Delaware Supreme Court each considered a case that could have significantly worked to stem the tide of securities class-action abuse.<sup>119</sup> Although one of these cases did come out against the interests of the litigation industry, Trial Lawyers, Inc. ultimately flexed its legislative lobbying muscle to undo the shift in law that threatened to cut off one of its major profit centers.

In *Halliburton v. Erica P. John Fund*,<sup>120</sup> the U.S. Supreme Court reconsidered its 1988 decision that had enshrined into federal securities law the fraud-on-the-market theory and led to the explosion of securities class-action lawsuits. A rejection of this theory by the court would not have eliminated securities-fraud suits altogether: a hedge fund or pension fund that lost money after actually relying on a fraud could still file suit to recover damages and would have plenty of economic incentive to do so. Unfortunately, the court ultimately declined to reconsider its earlier legal precedent.<sup>121</sup>

In *ATP Tour v. Deutscher Tennis Bund*,<sup>122</sup> the Delaware Supreme Court decided that it was legally permissible, under the state's corporate law, for a company to include in its bylaws a provision for shareholder litigation that would require a shareholder suing the corporation to reimburse the company's legal fees if the lawsuit were unsuccessful. Such a requirement would effectively require shareholder suits to be managed by a large, well-funded plaintiff with "skin in the game" and would weed out cases that were little more than shakedowns. Almost all developed countries other than the U.S. have such "loser pays" requirements for most litigation—an important reason that these countries experience significantly less litigation than does the United States.

Although the *ATP Tour* decision offered hope that companies might be able to rein in abusive shareholder litigation, at least at the state level, such hope was short-lived. Less than a month after the *ATP Tour* decision, a bill was introduced in the Delaware legislature to undo the court's central holding.<sup>123</sup> In 2015, after an intense lobbying campaign from both the plaintiffs' bar and the Delaware corporate bar (which profits handsomely by defending against such lawsuits), the Delaware legislature enacted a law preventing fee-shifting bylaws for companies incorporated in the state.<sup>124</sup>





## TROLLING FOR CLIENTS

Trial lawyers aggressively advertise to build mass-tort case portfolios.

**T**rial Lawyers, Inc.'s mass-tort division is a dominant presence on the airwaves and Internet, as its attorneys work to attract clients for lawsuits and to develop new targets for litigation. Mass-tort cases tend to involve product-liability claims—essentially that a product defect or an inadequate warning caused an actual injury.<sup>125</sup> These cases are not suitable for class-action treatment but can become so numerous and so expensive to defend that companies typically attempt to settle them en masse, rather than risk bankruptcy.<sup>126</sup>

Industries threatened or leveled by mass-tort lawsuits are legion. Numerous companies were forced into bankruptcy from asbestos

litigation, America's longest-running mass tort, including leading manufacturer Johns Manville (**see box, "Asbestos Lawsuits' Big Apple Blaze"**).<sup>127</sup> Though the link between asbestos and the deadly cancer mesothelioma is firm, many other companies have been forced into bankruptcy by phantom risks unsupported by science,<sup>128</sup> such as Dow Corning, which produced silicone breast implants that mass lawsuits alleged had caused connective-tissue disorders—allegations subsequently disproved in multiple peer-reviewed academic studies.<sup>129</sup> In the 1980s, as noted, mass-tort litigation was considered such a threat to America's vaccine industry that Congress created a special compensation fund, outside the legal system, for possible vaccine-related injuries.<sup>130</sup>

### ASBESTOS LAWSUITS' BIG APPLE BLAZE

The latest "magnet court" for asbestos litigation is in New York City—named America's worst "judicial hellhole" in 2014 by the American Tort Reform Association.<sup>131</sup> In April 2014, Justice Sherry Heitler, who oversees the New York City Asbestos Litigation (NYCAL) docket, reversed a 20-year rule by permitting plaintiffs to apply for punitive damages.<sup>132</sup> Such damages—which serve to "punish" companies for wrongdoing, above and beyond injury to the plaintiff in the case<sup>133</sup>—are barred in federal multidistrict litigation (MDL) largely because they would deplete resources available to multiple plaintiffs seeking redress from the same company for the same injury, as well as because it makes little sense to punish the same company repeatedly for the same offense.<sup>134</sup>

Punitive damages are particularly inappropriate in asbestos cases, which involve long-dormant injuries from products sold decades ago by companies typically under different corporate structures and managements. For instance, in 1964, Irving Selikoff released his pioneering study linking asbestos exposure to cancer;<sup>135</sup> in 1982, Johns Manville, America's preeminent asbestos manufacturer, was bankrupted by asbestos lawsuits.<sup>136</sup> Justice Helen Freedman, who, in 1996, implemented New York's rule *against* punitive damages in its asbestos courts, wrote:

**To charge companies with punitive damages for wrongs committed 20 or 30 years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong.**<sup>137</sup>

In addition to opening asbestos litigation to punitive damages, Justice Heitler, in 2012, revised the interpretation of New York's trust-transparency provision governing disclosure of multiple asbestos exposures and claims<sup>138</sup> by adding an intent standard that would make it easier for plaintiffs' lawyers not to disclose expected future claims against other defendants.<sup>139</sup> Because asbestos exposure typically happened long ago, a messy trail—of what company may be responsible for any given plaintiff's claim—is common in such litigation.<sup>140</sup> Numerous companies, most of which never manufactured the product in question,<sup>141</sup> have also been targeted with lawsuits, with more than 50 bankruptcy trusts funded from formerly solvent companies that made asbestos payout monies to claimants.<sup>142</sup>



Sherry Heitler @nycourts.gov ▲



Plaintiffs' attorneys thus have an incentive to double-dip claims to recover full payments for injury from multiple sources. In a landmark 2014 ruling in federal bankruptcy court, *In re Garlock Sealing Technologies, LLC*,<sup>143</sup> Judge George Hodges documented that plaintiffs' lawyers had endeavored "to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."<sup>144</sup> Unfortunately, Justice Heitler's revised interpretation of New York's trust-transparency rules threatens to empower precisely these practices in NYCAL.

Further emboldening Trial Lawyers, Inc. in the Big Apple was a more recent judicial decision<sup>145</sup>—subsequently affirmed by an appellate court<sup>146</sup>—to consolidate asbestos cases involving different worksites, occupations, plaintiff diseases, and even legal theories.

New York City's asbestos courts also depart from standard practice elsewhere, in allowing defendants to be sued not only for their own products but for *other manufacturers'* products, under a "duty-to-warn" theory.<sup>147</sup> This practice, combined with New York's rule attaching up to full liability to any solvent defendant, means that tertiary defendants with an attenuated connection to asbestos can assume liability for staggering awards.<sup>148</sup>

In 2012, the heirs of Ronald Dummitt, who had died of mesothelioma, won a \$32 million jury award against Crane Company, a valve manufacturer, after Dummitt's lawyers claimed that his disease was caused by exposure to asbestos while working as a U.S. Navy boiler technician from 1960 to 1977.<sup>149</sup> While Dummitt worked with valves manufactured by Crane, such valves contained no asbestos; insulation and replacement materials made by third parties did. Dummitt's lawyers argued that Crane should have foreseen these risks and warned Dummitt.<sup>150</sup> However, after reducing the award to \$8 million, the court upheld the verdict,<sup>151</sup> one subsequently sustained on appeal.<sup>152</sup>

New York's asbestos-litigation rules have thus created a climate highly favorable to Trial Lawyers, Inc. According to Bates White Economic Consulting, the average asbestos award in New York City soared from \$7 million in 2010 to \$24 million in 2014.<sup>153</sup> During the same period, average awards in NYCAL were more than double those in other jurisdictions.<sup>154</sup>

What made New York's courts so favorably disposed to Trial Lawyers, Inc.'s asbestos lawyers? Judges, notably, are selected by individuals favorably disposed to asbestos litigation.

For example, in 2008, Sheldon Silver, the former New York State Assembly speaker, appointed Arthur Luxenberg to the judicial screening committee that forwards possible judicial nominees to the governor.<sup>155</sup> Luxenberg happens to be one of the primary partners of Weitz & Luxenberg<sup>156</sup>—New York City's most prominent asbestos-litigation firm<sup>157</sup>—which had Silver on its payroll for many years. In 2013, the firm paid Silver an "of counsel" fee of \$650,000–\$750,000.<sup>158</sup> As it also happens, Luxenberg's partner, Perry Weitz, previously persuaded Justice Heitler to modify the NYCAL punitive-damages rule.<sup>159</sup>

In addition to placing asbestos lawyers on the judge-selection panel, Silver blocked legislative efforts to implement even modest tort reforms. Frustrated by his inability to reform New York's "scaffold law" that impedes development projects,<sup>160</sup> Governor Andrew Cuomo told *Crain's New York Business*: "The trial lawyers are the single most powerful political force in Albany."<sup>161</sup>

Whether trial lawyers' stranglehold on Albany will remain equally strong going forward is in doubt.<sup>162</sup> In February 2015, as noted, Silver resigned as speaker of the State Assembly, following a federal indictment on fraud and corruption charges, including an allegation that he funneled hundreds of thousands of state grant dollars to a doctor who, in turn, referred patients to Weitz & Luxenberg for asbestos lawsuits.<sup>163</sup> In November 2015, Silver was convicted on all counts.<sup>164</sup>



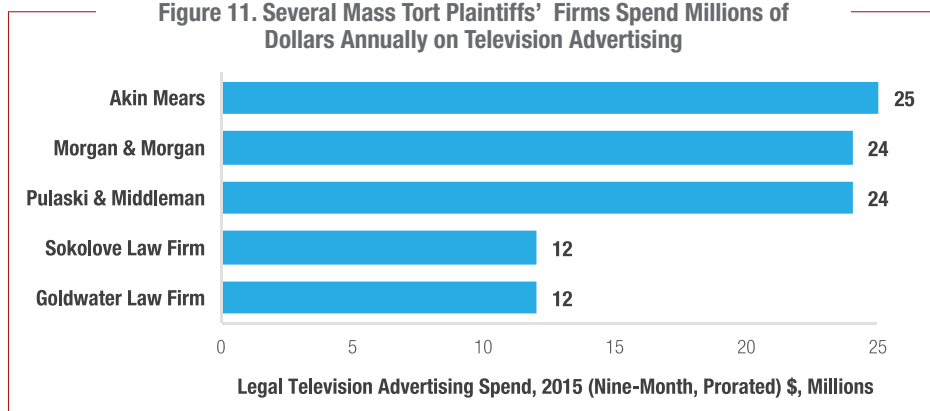
▲ Sheldon Silver ©Donald Bowers / Getty Images



## The Mass-Tort Mass-Media Blitz

While class-action lawyers “define” their clients, mass-tort lawyers must recruit them. In 2015, legal advertising on TV totaled \$892 million, up 68 percent since 2008.<sup>165</sup> During 2008–15, lawyers’ annual spending on TV ads outpaced the broader TV ad market.<sup>166</sup> Although trial lawyers purchase a relatively small percentage of ads during national-network broadcasts, legal advertising constitutes almost 4 percent of local TV spot ads and 2 percent of syndicated TV programming ads.<sup>167</sup>

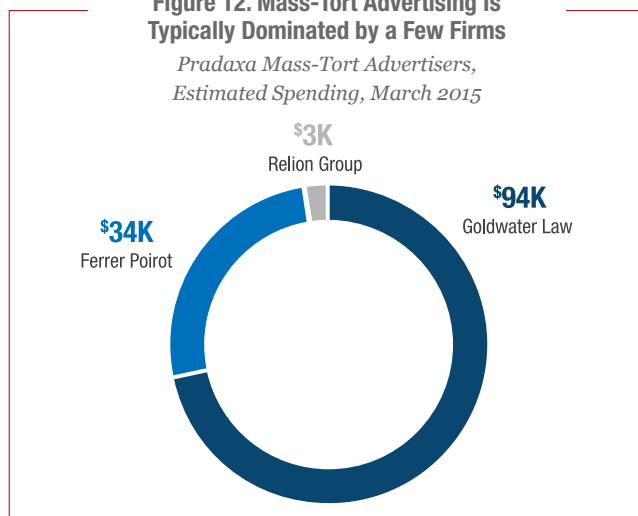
**Figure 11. Several Mass Tort Plaintiffs’ Firms Spend Millions of Dollars Annually on Television Advertising**



\*Annual spending based on January–September 2015 data Source: Institute for Legal Reform

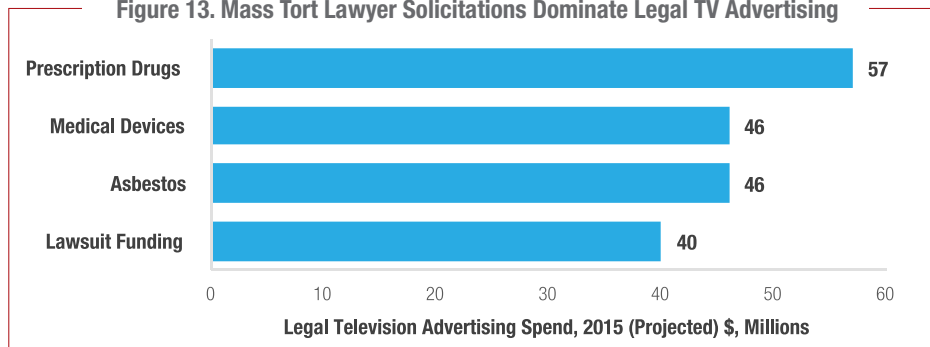
**Figure 12. Mass-Tort Advertising Is Typically Dominated by a Few Firms**

*Pradaxa Mass-Tort Advertisers, Estimated Spending, March 2015*



Source: Silverstein Group

**Figure 13. Mass Tort Lawyer Solicitations Dominate Legal TV Advertising**



Source: Institute for Legal Reform

In 2015, mass-tort law firms were five of the top six legal advertisers (Legalzoom.com was the other), led by Texas law firm Akin Mears (Figure 11).<sup>168</sup> But firms that appear on TV are not necessarily the ones that take cases to trial or that try to negotiate a settlement. Many, such as Goldwater Law Firm—which spent almost three-fourths of all advertising dollars in March 2015 seeking plaintiffs alleging that they had been injured by Boehringer Ingelheim’s blood-thinning drug Pradaxa (Figure 12)—largely offload cases that they sign up to other plaintiffs’ firms, which contract for control of the case (with the initial firm sharing in any ultimate contingency fee).<sup>169</sup>

Lawyers’ TV advertising typically seeks plaintiffs suing over injuries related to pharmaceuticals, medical devices, and asbestos (Figure 13) and flows to established product lines, as well as to speculative new business lines. In 2015, of the top five pharmaceutical and medical-device targets (Figure 14), pelvic mesh and Pradaxa were long-established while Xarelto, Zofran, and testosterone-replacement hormones represented new lines of business. In 2013, more than 1,500 Pradaxa claims and more than 30,000 pelvic-mesh claims

were pending in federal MDL courts.<sup>170</sup> Xarelto and testosterone-replacement MDLs were first formed in 2014, and TV advertising that sought plaintiffs alleging that GlaxoSmithKline’s anti-nausea drug Zofran was linked to infant birth defects skyrocketed last year, from \$24,000 in January 2015 to \$2 million in February 2015 (Figure 15).<sup>171</sup>

**Figure 14. Top Five Drug and Device Ad Targets in 2015**

- Pelvic Mesh
- Xarelto
- Zofran
- Pradaxa
- Testosterone

Source: X Ante

## Consolidating Cases

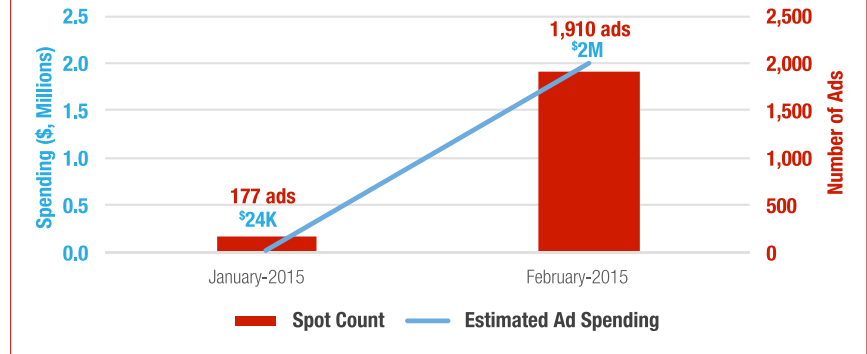
Once mass-tort lawyers acquire their cases—through their own efforts or in contract with a heavy-advertising law firm—they file them in the most favorable jurisdiction. In federal court, mass-tort claims get funneled into MDL courts designed to centralize and coordinate pretrial proceedings when multiple cases involve “one or more common questions of fact.”<sup>172</sup> Many lines of product-liability litigation have thousands of cases pending in federal MDL courts, led by pelvic-mesh and hip-replacement lawsuits, as well as pharmaceutical suits over diabetes medication Actos, cholesterol-lowering drug Lipitor, testosterone-replacement medications, and birth-control pill Yaz (Figure 16).<sup>173</sup>



▲ Judge Joseph Goodwin ©U.S. District Court, Southern District of West Virginia



Figure 15. Zofran Mass-Tort TV Advertising Exploded in 2015

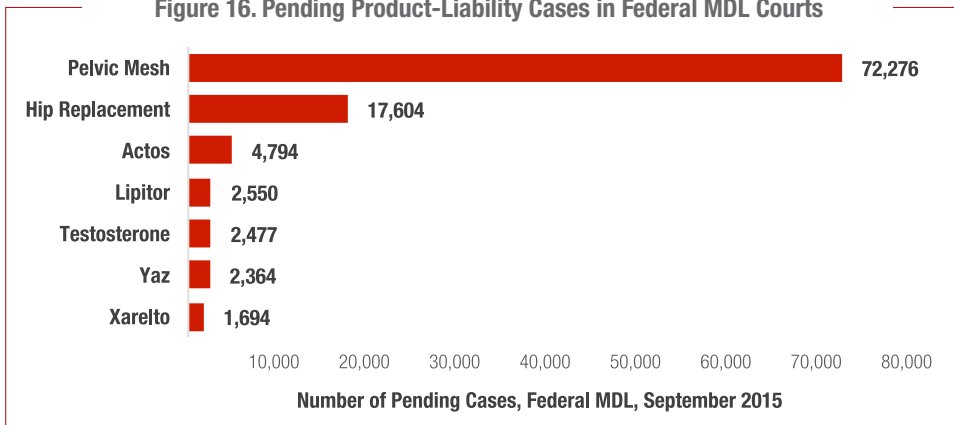


Source: Silverstein Group

In theory, these courts are efficient: they permit a single court to consider common pretrial issues and to hold bellwether trials to let both parties to the litigation determine appropriate settlement values.<sup>174</sup> In practice, by flooding thousands of claims into a common court, plaintiffs' lawyers earn significant payoffs from recruiting dubious claims and bundling them with other claims that may be more meritorious. Overwhelmed by the sheer volume of cases, courts pressure defendants to settle.<sup>175</sup> Consider Judge Joseph Goodwin, who oversees more than 72,000 pelvic-mesh cases in West Virginia. He cannot, of course, give all such cases full trials.<sup>176</sup> Judge Goodwin's docket is not the largest in MDL history, either: more than 192,000 asbestos cases have moved through a federal MDL court.<sup>177</sup> Yet when bad cases are not weeded out, defendants pay money to undeserving plaintiffs and fail to give meritorious claims sufficient consideration.

Mass-tort lawsuits in state courts face numerous other problems. As noted, lawyers focus their litigation on jurisdictions with favorable rules that encourage case consolidation and settlements, as well as jurisdictions with jury pools likely to award extravagant compensation for damages. Cases have long clustered in Illinois courts in Madison and St. Clair Counties (East St. Louis) and Cook County (Chicago).<sup>178</sup> When tort-reform passes or judges change, lawyers follow the money to more lucrative locales. After Texas passed tort reforms under Governors George W. Bush and Rick Perry, law firms that had previously flourished in the state quickly shipped their business to California.<sup>179</sup> More recently, asbestos lawyers have descended on New York City, after a series of favorable rulings there (see box, "Asbestos Lawsuits' Big Apple Blaze").<sup>180</sup>

Figure 16. Pending Product-Liability Cases in Federal MDL Courts



Source: Institute for Legal Reform

## THE C-\$UITE

These heavy hitters lead the way for Trial Lawyers, Inc.'s class-action and mass tort business.

While the plaintiffs' bar lacks an organizational structure akin to that of an actual corporation, leading plaintiffs' attorneys and other players in the litigation industry dominate business to such a degree that one might consider them to be "division presidents." As such, the parties below constitute the leadership team for Trial Lawyers, Inc.

### Joe Rice

#### *Chairman and CEO*

Longtime partner of the late Ron Motley, Trial Lawyers, Inc.'s founding chairman, Rice is a renowned negotiator in his own right. Rice chaired the plaintiffs' steering committee for litigation stemming from the BP oil spill and currently serves on committees overseeing lawsuits against Pfizer (involving Lipitor) and General Motors (faulty ignition switches).<sup>181</sup>



### Perry Weitz and Arthur Luxenberg

#### *Presidents, Asbestos*

The founders of the eponymous mass-tort plaintiffs' firm, Weitz and Luxenberg lead a practice that dominates asbestos litigation,<sup>186</sup> especially in the "judicial hellhole" of New York.<sup>187</sup> Their firm famously employed Sheldon Silver, the New York State Assembly speaker, who was convicted in 2015 of corruption charges related to his role at the firm.<sup>188</sup>



### Elizabeth Cabraser

#### *President, Class Actions (General)*

Cabraser, who heads one of Trial Lawyers, Inc.'s biggest moneymakers, helped win a combined \$850 million in settlements as chair of the plaintiffs' steering committee in the Bextra/Celebrex marketing practices and products-liability litigation.<sup>182</sup>



### Mark Lanier

#### *President, Drugs/ Medical Devices*

A Texas attorney who moonlights as a Baptist preacher, Lanier won national acclaim in the first Vioxx case to go to trial, where the jury awarded his client more than \$250 million.<sup>189</sup> In 2014, Lanier secured a staggering \$9 billion verdict against Eli Lilly and Takeda Pharmaceuticals over diabetes drug Actos,<sup>190</sup> earning Lanier *The Trial Lawyer* magazine's "Trial Lawyer of the Year" award.<sup>191</sup>



### Max Berger

#### *President, Class Actions (Securities)*

When a company's stock falls, Berger's rises. Berger has negotiated six of the largest securities-fraud settlements, including multibillion-dollar settlements with Bank of America / Merrill Lynch, JPMorgan Chase, and Citigroup.<sup>183</sup>



### Ralph Nader

#### *President, Public Relations*

Nader, consumer advocate and sometime presidential candidate, doubles as the litigation industry's longest-serving public-relations flack. Recently, he realized his dream of opening a museum dedicated to Trial Lawyers, Inc.: the American Museum of Tort Law, in Winsted, Connecticut.<sup>192</sup>



### Ashley Keller and Aaron Katz

#### *Chief Financial Officers*

Lawyers turned financiers, Keller and Katz head up, respectively, Gerchen Keller Capital<sup>184</sup> and Parabellum Capital<sup>185</sup>—two of America's largest litigation-financing outfits—which have each raised hundreds of millions of dollars to fund lawsuits across the United States.

### Linda Lipsen

#### *President, Government Relations*

As CEO of the American Association for Justice, the leading lobbying arm of Trial Lawyers, Inc.,<sup>193</sup> Lipsen helps the litigation industry get the biggest bang for the millions of bucks that it spends on "government outreach."



1. For the original *Trial Lawyers, Inc.* Report, see MANHATTAN INSTITUTE CENTER FOR LEGAL POL'Y, TRIAL LAWYERS, INC.: A REPORT ON THE LAWSUIT INDUSTRY IN AMERICA, 2003, available at <http://www.triallawyersinc.com/html/part01.html>. All earlier reports are available at <http://www.triallawyersinc.com/>.
2. Compare Towers Watson, 2011 Update on U.S. Tort Cost Trends, <https://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2012/01/2011-Update-on-US-Tort-Cost-Trends> (showing U.S. tort costs of \$265 billion in 2010) with Kaiser Family Foundation, Health Spending Explorer, <http://www.healthsystemtracker.org/interactive/health-spending-explorer/> (last visited Jan. 24, 2016) (showing U.S. health costs of \$2.6 trillion in 2010).
3. Under federal law, publicly traded companies must make periodic disclosures under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* For more information on the proxy process and shareholder activism, see generally the Manhattan Institute's website [www.ProxyMonitor.org](http://www.ProxyMonitor.org).
4. See Richard Fausset, *Bribery Case Brings Down Legal Legend*, L.A. TIMES, Mar. 15, 2008.
5. See Jonathan D. Glater, *High-Profile Trial Lawyer Agrees to Guilty Plea*, N.Y. TIMES, Mar. 21, 2008.
6. See Michael Parrish, *Leading Class-Action Lawyer Is Sentenced to Two Years in Kickback Scheme*, N.Y. TIMES, Feb. 12, 2008.
7. See Neil A. Lewis, *For Edwards, Drama Builds Toward a Denouement*, N.Y. TIMES, Sept. 19, 2009.
8. See generally BLB&G, <http://www.blbglaw.com/index>.
9. See, e.g., Y'all Politics, Hopkins Accuses Hood of Pay for Play—And Provides His Evidence, <http://www.yallpolitics.com/index.php/yp/post/5075/> (last visited Jan. 23, 2016).
10. See generally Weitz & Luxenberg, <http://www.weitzlux.com/>.
11. See Benjamin Weiser & Susanne Craig, *Sheldon Silver, Ex-New York Assembly Speaker, Is Found Guilty on All Counts*, N.Y. TIMES, Nov. 30, 2015, A1 (“Testimony and other evidence showed that Mr. Silver had arranged to have the State Health Department award two grants totaling \$500,000 to Dr. Taub, whose research focused on mesothelioma, a deadly form of cancer related to asbestos exposure. In return, Dr. Taub sent mesothelioma patients with potentially lucrative legal claims to Weitz & Luxenberg, which then shared a portion of its fees with Mr. Silver.”).
12. For example, see the prosecutions of Scruggs, Weiss, Lerach, and Silver, discussed *supra*.
13. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (pleading standards); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (arbitration clauses); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 277 (2011) (class-action certification); *Standard Fire Insurance Co. v. Knowles* (2012) (class-action jurisdiction).
14. For a listing of enacted state-level tort reforms, see the American Tort Reform Association's Tort Reform Record Archive, <http://www.atra.org/Publications/tortreformrecordarchives>.
15. S. 5, 109th Cong. (2005) (codified as 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2006)).
16. See Whac-A-Mole, <https://en.wikipedia.org/wiki/Whac-A-Mole>.
17. The information forming the factual predicate underlying Mr. Lerach's plea agreement is available at [http://graphics8.nytimes.com/packages/pdf/business/19legal\\_pleaagreement.pdf](http://graphics8.nytimes.com/packages/pdf/business/19legal_pleaagreement.pdf). Exhibits A and B to Mr. Weiss's plea agreement outline similar facts, and are available at [http://www.abajournal.com/files/Plea\\_agreement.pdf](http://www.abajournal.com/files/Plea_agreement.pdf).
18. See generally *Stella Liebeck v. McDonald's Restaurants, P.T.S., Inc. and McDonald's International, Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. 1994). After a New Mexico jury awarded the 81-year-old Ms. Liebeck \$2.9 million for injuries related to burns from a coffee spill, against the McDonalds that served her the coffee, the case garnered significant press attention, see, e.g., Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, A1, and the anecdote formed the basis for much subsequent discussion about tort reform, see Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 CAP. U.L. REV. 701.
19. See Seinfeld Season 7, Ep. 3, *The Maestro*, Oct. 5, 1995, as recounted in <http://www.imdb.com/title/tt0697726/> (“Kramer is pursuing his lawsuit against a coffee shop for selling him coffee that was too hot. Jackie Chiles represents him and thinks they're going to make a fortune.”). Subsequently, trial lawyers and their defenders have tried to rehabilitate the Liebeck case, owing to the fact that Liebeck suffered serious injuries, there had been prior episodes of coffee-spill injury involving McDonalds, McDonalds refused to settle the claim, and the jury award was ultimately reduced. Prominent among these defenses is Susan Saladoff's documentary film, *Hot Coffee*, <http://www.hotcoffeethemovie.com/Default.asp>. Critics of the Liebeck verdict have attacked Saladoff's film as misleading and maintained that the Liebeck verdict was a good example of lawsuit abuse. See, e.g., Ted Frank, Questions for Susan Saladoff about “Hot Coffee”, <http://www.pointoflaw.com/archives/2011/10/questions-for-s.php> (Oct. 31, 2011); U.S. Chamber of Commerce Institute for Legal Reform, <http://www.hotcoffeetruth.com/>.
20. See, e.g., Daniel Fisher, *Lawsuit Against Class-Action Firm Offers Unusual Detail On How It Finds Plaintiffs*, FORBES.COM, Dec. 11, 2015, <http://www.forbes.com/sites/danielfisher/2015/12/11/lawsuit-against-class-action-firm-offers-unusual-detail-on-how-it-finds-plaintiffs/#2871a6d21e9f> (“It is hardly a secret that plaintiff lawyers often decide who they're going to file a class action against and then try to find a plaintiff to represent the class.”).
21. See generally Fed R. Civ. Pro. 23; see also *Phillips Petroleum v. Shutts*, 472 U.S. 797, 810-13 (1985) (defining notice rights under Rule 23(c)(2)).
22. See David L. McKnight and Paul J. Hinton, International Comparisons of Litigation Costs, NERA Economic Consulting for the U.S. Chamber of Commerce Institute for Legal Reform 2 (June 2013), at [http://www.instituteforlegalreform.com/uploads/sites/1/ILR\\_NERA\\_Study\\_International\\_Liability\\_Costs-update.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf).
23. See generally JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).
24. See Towers Watson, *supra* note 2. As a matter of substantive law, tort liability in the product liability context expanded substantially, prodded on by California Justice Roger Traynor and professor William Prosser. See Escala

- v. Coca-Cola Bottling Co., 24 Cal.2d 453, 461–68 (1944) (Traynor, J., concurring); Greenman v. Yuba Power Products, Inc. 59 Cal. 2d 57 (1963); Restatement (Second) of Torts § 402A (1965). Procedurally, Yale Law School dean Charles Clark substantially loosened pleading requirements in crafting the Federal Rules of Civil Procedure under the Rules Enabling Act, Pub.L. 73–415, 48 Stat. 1064 (1934), *see* Fed. R. Civ. P. 8(a)(2); a 1966 amendment to the Federal Rules created the modern opt-out class action, *see* Fed. R. Civ. P. 23(c)(3)(B). Meanwhile, federal Supreme Court decisions undid more than a century’s precedent in eliminating federal common law, then significantly expanded personal jurisdiction—thus enabling forum shopping. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (federal common law); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (personal jurisdiction).
25. *See* Fed. R. Civ. P. 23(c)(3)(B).
  26. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615 (1997) (“Rule 23(b)(3) ‘opt-out’ class actions superseded the former ‘spurious’ class action, so characterized because it generally functioned as a permissive joinder (‘opt-in’) device.”).
  27. *See* Restatement (Second) of Torts § 402A (1965).
  28. *See, e.g.*, PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 136 (1985); BARRY L. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 493 (5th ed. 2005); Bill Burke, *Lawyers Go to Court for Asbestos Victims*, VIRGINIAN-PILOT (Norfolk, Va.), May 10, 2001.
  29. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).
  30. *See id.* at 402 (Powell, J., dissenting) (“The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself.”).
  31. *See* Ken Goldstein & Dhavan V. Shah, Trial Lawyer Marketing: Broadcast, Search and Social Strategies, U.S. Chamber Institute for Legal Reform 2 (Oct. 2015).
  32. *See id.* at 13.
  33. *See generally* PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).
  34. *See* National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300 (2004); *see generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 142–70 (2002).
  35. *See* Huber, *supra* note 33.
  36. *See, e.g.*, Lester Brickman, Anatomy of a Madison County (Illinois) Class Actions: A Study of Pathology, Manhattan Institute Civ. Justice Rpt. No. 6 (Aug. 2002).
  37. *See, e.g.*, Marie Gryphon, *Unjust Deserters: Money-hungry Vioxx Lawyers Leave Many Clients in the Lurch*, CITY J., Jan. 28, 2008, <http://www.city-journal.org/2008/eon0128mg.html>.
  38. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, 109 Stat. 737; Class Action Fairness Act of 2005, Pub. L. 109–2, 119 Stat. 4–14.
  39. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 277 (2011); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).
  40. *See* American Association for Justice, <https://www.justice.org/>.
  41. *See* Center for Responsive Politics, <https://www.opensecrets.org/>.
  42. *See id.*
  43. *See* National Institute on Money in State Politics, <http://www.followthemoney.org/industry-influence>.
  44. *See generally* MANHATTAN INSTITUTE CENTER FOR LEGAL POL’Y, TRIAL LAWYERS, INC.: ATTORNEYS GENERAL—A REPORT ON THE ALLIANCE BETWEEN STATE AGs AND THE PLAINTIFFS BAR, 2011, *available at* <http://www.triallawyersinc.com/ag/ag01.html>; Hon. Robert Young, Reflections of a Survivor of State Judicial Election Warfare, Manhattan Institute Civ. Justice Rpt. No. 2 (June 2001),
  45. Neil Weinberg, *Shakedown Street*, FORBES.COM, Feb. 11, 2008, [http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz\\_nw\\_0211lerach.html](http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html).
  46. *See* Parrish, *supra* note 6.
  47. *See* Fed. R. Civ. P. 23.
  48. *See* Ted Frank, Class Actions, Arbitration, and Consumer Rights: Why Concepcion is a Pro-Consumer Decision, Manhattan Institute Legal Pol’y Rpt. No. 16 (Feb. 2013), *available at* <https://www.manhattan-institute.org/html/class-actions-arbitration-and-consumer-rights-why-concepcion-pro-consumer-decision-5896.html>.
  49. *See* Carlton Fields & Jordan Burt, The 2015 Carlton Fields Jordan Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 11, <http://classactionsurvey.com/>.
  50. *See id.* at 15.
  51. *Cf.* Ted Frank, A Billion Dollar “Harm-Less” Lawsuit, American Enterprise Institute, 2007, *available at* <https://www.aei.org/publication/a-billion-dollar-harm-less-lawsuit/>.
  52. *Cf.* Victor E. Schwartz & Cary Silverman, *The Rise of “Empty Suit” Litigation. Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. (2015).
  53. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, 124 Stat. 1376–2223.
  54. *See* Joanna M. Shepherd-Bailey, Consumer Protection Acts or Consumer Litigation Acts? A Historical and Empirical Examination of State CPAs, ATR Foundation 18 & tbl. 1 (2014), *available at* [http://atra.org/sites/default/files/documents/Shepherd-Bailey%20White%20Paper%20-%20FINAL\\_0.pdf](http://atra.org/sites/default/files/documents/Shepherd-Bailey%20White%20Paper%20-%20FINAL_0.pdf).
  55. *See id.*
  56. Searle Civil Justice Institute, State Consumer Protection Acts: An Empirical Investigation of Private Litigation 20 (2009), *available at* [http://www.masonlec.org/site/rte\\_uploads/files/CPA%20Prelim%20Report%20Dec%202009.pdf](http://www.masonlec.org/site/rte_uploads/files/CPA%20Prelim%20Report%20Dec%202009.pdf).
  57. *See* ATR Foundation, State Consumer Protection Laws: Unhinged—It Is Time to Restore Sanity to the Litigation 13 (2013), *available at* [https://docs.google.com/viewerng/viewer?url=http://www.consumerlawsunhinged.org/wp-content/uploads/UNHINGED\\_2013.pdf](https://docs.google.com/viewerng/viewer?url=http://www.consumerlawsunhinged.org/wp-content/uploads/UNHINGED_2013.pdf).
  58. *See id.* at 13.

59. *See id.* at 18.
60. *See* Nick Thornton, *ERISA Settlements Top \$1 Billion*, BENEFITSPRO, Jan. 6, 2015, available at <http://www.benefitspro.com/2015/01/06/erisa-settlements-top-1-billion>.
61. *See* Fields & Burt, *supra* note 49.
62. *See id.* at 7–9.
63. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 277 (2011).
64. *Id.*
65. *See* Comcast Corp. v. Behrend, 569 U.S. \_\_\_, 133 S. Ct. 1426 (2013).
66. *See generally* John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Manhattan Institute Civ. Just. Rpt. No. 5 (2002); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civ. Just. Rpt. No. 3 (2001).
67. *See* the ATR Foundation's website, <http://www.judicialhellholes.org/>.
68. Richard Scruggs, *Asbestos for Lunch*, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in *Industry Commentary* (Prudential Securities, Inc., New York), June 11, 2002, at 5.
69. *See* Fausset, *supra* note 4.
70. *See generally* Beisner & Miller, *supra* note 66.
71. Pub. L. 109-2, 119 Stat. 4–14.
72. *See id.*
73. The roll call vote is available at <https://www.govtrack.us/congress/votes/109-2005/s9>.
74. *See* John H. Beisner et al., *Study Reveals U.S. Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings*, Apr. 29, 2014, at <https://www.skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings>.
75. The docket information and oral argument are available at <https://www.oyez.org/cases/2015/14-1146>.
76. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. \_\_\_, 133 S. Ct. 2304 (2013).
77. *See id.*
78. *See generally* Frank, *supra* note 48.
79. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, A1.
80. *See* Press Release, CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers, Oct. 7, 2015, available at <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/>.
81. *See* Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, WALL ST. J., Feb. 3, 2010.
82. *See* Interim Report on Creditor Claims in Arbitration and in Court, Searle Center on Law, Regulation, and Economic Growth at Northwestern Law 1 (2009).
83. *See* Annual Report of the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System for Disputes with Health Plan Members, 2014, available at <http://www.oia-kaiserarb.com/pdfs/2014-Annual-Report.pdf>.
84. *See generally* Frank, *supra* note 48.
85. *See id.*
86. *See* Ted Frank and CCAF profile at Competitive Enterprise Institute, <https://cei.org/content/ted-frank>.
87. *See* Ted Frank profile at Manhattan Institute, <https://www.manhattan-institute.org/expert/ted-frank>.
88. 654 F.3d 935 (9th Cir. 2011).
89. If class-action objectors are wholly self-interested, then the plaintiff and defense lawyers in a settlement that undercompensates the class can “buy off” the objector with a cash payment—out of the excess benefit paid to the plaintiffs’ attorneys and defendants, at the class’s expense—to eliminate the underlying legal challenge.
90. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review—Record Number of Cases Being Filed Faster than Ever with the Shortest Alleged Class Periods*, NERA Economic Consulting, Jan. 25, 2016, available at [http://www.nera.com/content/dam/nera/publications/2016/2015\\_Securities\\_Trends\\_Report\\_NERA.pdf](http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf).
91. *See id.* at 5 & fig. 4.
92. *See id.* at 38 (noting that among more than 4,300 securities class action suits filed since the enactment of the PSLRA, only 21 have gone to trial).
93. *See* Andrew J. Pincus, *Securities and M&A Litigation, in LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS* 39 (U.S. Chamber Institute for Legal Reform, Dec. 2014) (citing NERA Economic Consulting).
94. *See* Starykh & Boettrich, *supra* note 90, at 31 & tbl. 2.
95. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (concluding that the settlement value in securities fraud cases is not function of merit).
96. *See* H. Rep. 104-50, Part I (1995), available at <http://thomas.loc.gov/bss/d104/d104laws.html>.
97. *Judge Compares Milberg Weiss Case to the Squeegie Man*, N.Y. LAW., Apr. 18, 2002, available at <http://www.nylawyer.com/news/02/04/041802e.html>.
98. *See generally* Model Business Corporation Act § 7.42.
99. *See* Robert E. Wright, *How Delaware Became the King of U.S. Corporate Charters*, BLOOMBERG VIEW, June 8, 2012, at <http://www.bloomberglaw.com/articles/2012-06-08/how-delaware-became-the-king-of-u-s-corporate-charters>.
100. *See* Robert M. Daines & Olda Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M&A Litigation at 2* (2014 update).
101. *See generally* Pincus, *supra* note 93.
102. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).
103. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737.



104. See *id.* at § 21D(b); § 21D(a)(3)(B)(i).
105. See Starykh & Boettrich, *supra* note 90, at 3 & fig. 2.
106. See *id.* at 26.
107. See Trial Lawyers, Inc. (2003), *supra* note 1; Jason Hoppin, *Milberg Weiss Firm to Split with Lerach*, THE RECORDER, Jun. 12, 2003.
108. See Parrish, *supra* note 6; Glater, *supra* note 5.
109. See Maremont et al., *supra* note 81.
110. See Cornerstone Research, Securities Class Action Settlements: 2014 Review and Analysis 16 & fig. 15, available at <http://securities.stanford.edu/research-reports/1996-2014/Settlements-Through-12-2014.pdf>.
111. See Office of the State Comptroller, Fiduciary Responsibilities of the Comptroller, <http://www.osc.state.ny.us/pension/fiduciary.htm>.
112. The New York State Common Retirement Fund holds assets in trust for the New York State & Local Retirement System (NYSLRS).
113. See Rob Kozlowski, *Retirement Plan Assets Rise 8.5%, Pass \$9 Trillion*, PENSIONS & INVESTMENTS (Feb. 9 2015), <http://www.pionline.com/article/20150209/PRINT/302099984/retirement-plan-assets-rise-85-pass-9-trillion>.
114. See Danny Hakim, *After Promises of Openness, Comptroller's Pension Fund Moves Draw Scrutiny*, N.Y. TIMES, Mar. 14, 2009. Contribution data are available at National Institute on Money in State Politics, <http://www.followthemoney.org/industry-influence>.
115. See Office of the Attorney General State of Mississippi: Outside Legal Counsel, <http://www.ago.state.ms.us/outside-legal/>.
116. See generally BLB&G, <http://www.blbglaw.com/index>.
117. See Stephen J. Choi et al., Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform, U.S. Chamber Institute for Legal Reform, Feb. 2014, available at [http://www.instituteforlegalreform.com/uploads/sites/1/Frequent\\_Filers\\_Final\\_Version.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Frequent_Filers_Final_Version.pdf).
118. See *id.* at 13 & tbl. 2.
119. Halliburton Co. v. Erica P. Jon Fund, Inc. 134 S.Ct. 2398 (2014); ATP Tour, Inc. v. Deutscher Tennis Bund, No. 534, 2014 WL 1847446 (Del. May 8, 2014).
120. 134 S.Ct. 2398.
121. 134 S.Ct. at 2417.
122. 2014 WL 1847446.
123. See James R. Copland, *Lawyers Descend on Delaware to Kill Shareholder "Tax" Relief*, INVESTORS BUS. DAILY, Jun. 17, 2014.
124. See Samuel J. Adams, *Delaware Ban on Fee-Shifting By Laws Signed Into Law*, POMERANTZ MONITOR, July-Aug. 2015, <http://pomerantzlawfirm.com/publications/2015/8/19/delaware-ban-on-fee-shifting-by-laws-signed-into-law>.
125. See RESTATEMENT (THIRD) OF TORTS § 2.
126. See Class Action vs. Mass Tort—What's the Difference?, CSSFirm.com, Aug. 16, 2010, <http://www.cssfirm.com/2010/08/16/class-action-vs-mass-tort-whats-the-difference/> (last visited Jan. 25, 2016).
127. See, e.g., Mariana S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 L. & CONTEMP. PROBS. 27, 29 (1990).
128. See PETER W. HUBER & KENNETH R. FOSTER, EDs., PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW (1993).
129. See Sherine E. Gabriel et al., *Risk of Connective-Tissue Diseases and Other Disorders after Breast Implantation*, 330 NEW ENG. J. MED. 1697–1702 (June 16, 1994); see also David E. Bernstein, *Breast Implants: A Study in Phantom Risks*, 5 Res. Memo, Manhattan Inst. Center for Legal Pol'y (Apr. 1995), available at [http://www.manhattan-institute.org/html/research\\_memo\\_randum\\_5.htm](http://www.manhattan-institute.org/html/research_memo_randum_5.htm).
130. See generally National Childhood Vaccine Injury Act, Pub. L. No. 99-660, Title III, § 301, 100 Stat. 3755 (1986).
131. See 2014–15 Judicial Hellholes, ATR Foundation, available at <http://www.judicialhellholes.org/2014-2015/executive-summary/>.
132. In re New York City Asbestos Litig., 2014 WL 1767314 (N.Y. Sup. Ct. N.Y. Cnty., Apr. 8, 2014).
133. See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).
134. See, e.g. In re Collins, 233 F.3d 809 (3d Cir. 2000).
135. See Irving J. Selikoff et al., *Asbestos Exposure and Neoplasia*, 188 JAMA 22–26 (1964); Peter Huber, *The Risk Race*, NEW REPUBLIC, Feb. 3, 1986, at 40.
136. See Smith, *supra* note 127, at 29.
137. Helen S. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U.L. Rev. 511, 527 (2008).
138. See In re New York City Asbestos Litig., 966 N.Y.S.2d 347 (N.Y. Sup. Ct. N.Y. Cnty., Nov. 15, 2012).
139. See *id.*, 2012 WL 6554893, at \*9–10.
140. See, e.g., In re Garlock Sealing Techs., LLC, 504 B.R. 71 (W.D.N.C. Bankr. 2014).
141. See Castleman, *supra* note 28, at 729 (noting that by 1981, more than 200 companies and insurers had been sued in asbestos litigation).
142. See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, RAND (2010).
143. 504 B.R. 71.
144. *Id.* at 84.
145. See In re New York City Asbestos Litig., 990 N.Y.S.2d 174 (App. Div. 2014).
146. See *id.*
147. See Berkowitz v. A.C. & S., Inc., 733 N.Y.S.2d 410 (N.Y. App. Div. 1st Dep't 2001).
148. See Victor Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 WIDENER L.J. 59 (2013).
149. See In re New York City Asbestos Litig. (Dummit v. Crane Co.), 990 N.Y.S.2d 174, 189 (1st Dep't 2014).

150. *See id.*
151. *See id.*
152. *See id.*
153. *See* Peggy L. Abelman et al., The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency (May 6, 2015), available at [http://www.bateswhite.com/media/publication/97\\_NYCAL%20Consolidation%20-%20Mealey\\_s%20Litigation%20Report.pdf](http://www.bateswhite.com/media/publication/97_NYCAL%20Consolidation%20-%20Mealey_s%20Litigation%20Report.pdf).
154. *See id.*, at 1.
155. *See* 2014–15 Judicial Hellholes, *supra* note 131, at 12.
156. *See* the firm website at <http://www.weitzlux.com/>.
157. *See* Press Release, W&L Attorneys Named as NYC ‘Super Lawyers,’ Sept. 18, 2015, available at <http://www.weitzlux.com/firm-news/firm-news-2015/wl-attorneys-named-as-nyc-super-lawyers/>.
158. *See* Pat Bailey & Aaron Short, *With Pay Boost from Law Firm, Sheldon Silver Is in the Money*, N.Y. POST, July 2, 2014.
159. *See* 2014–15 Judicial Hellholes, *supra* note 131, at 8.
160. *See* Greg B. Smith, *Sheldon Silver Kills Proposed Changes to City’s Scaffold Law*, N.Y. DAILY NEWS, June 19, 2013.
161. Andrew J. Hawkins, *Cuomo Won’t Push Scaffold-Law Reform This Year*, CRAIN’S N.Y. BUS., Apr. 25, 2014.
162. *See* James R. Copland, *Time to Cut New York’s Sky-High Litigation Costs*, N.Y. POST, Feb. 1, 2015.
163. *See* AP, *Sheldon Silver Resigns as NY Assembly Speaker*, Jan. 30, 2015.
164. *See* Weiser & Craig, *supra* note 11.
165. *See* Goldstein & Shah, *supra* note 31, at 2.
166. *See id.*
167. *See id.* at 6.
168. *See id.* at 7 & exh. 4.
169. Data come from the Silverstein Group, <http://www.silversteingroup.net/mass-tort-ad-watch-blog>. The characterization of Goldwater’s business model was made by Rustin Silverstein in presentation to American Tort Reform Association in Atlanta, Georgia, November 2015.
170. MDL docket information is available at <http://www.jpml.uscourts.gov/pending-mdls-0>.
171. Data come from the Silverstein Group, <http://www.silversteingroup.net/mass-tort-ad-watch-blog/zofran-ad-surge-signal-heightened-litigation-interest>.
172. *See* 28 U.S.C. § 1407.
173. MDL docket information is available at <http://www.jpml.uscourts.gov/pending-mdls-0>.
174. *See* John H. Beisner et al., MDL Proceedings: Eliminating the Chaff 1, U.S. Chamber Institute for Legal Reform, Oct. 2105.
175. *See id.* at 1at 1–2.
176. MDL docket information is available at <http://www.jpml.uscourts.gov/pending-mdls-0>.
177. *See id.*
178. *See generally* Beisner & Miller, *supra* note 66; *Second (Worst) City*, in MANHATTAN INSTITUTE CENTER FOR LEGAL POL’Y, TRIAL LAWYERS INC.: ILLINOIS—A REPORT ON THE LAWSUIT INDUSTRY IN ILLINOIS, 2006, available at <http://www.triallawyersinc.com/IL/il06.html>.
179. *See New Trends; Uncertain Future*, in MANHATTAN INSTITUTE CENTER FOR LEGAL POL’Y, TRIAL LAWYERS INC.: ASBESTOS—A REPORT ON THE ASBESTOS LITIGATION INDUSTRY, 2008, available at <http://www.triallawyersinc.com/asbestos/asb08.html>.
180. *See* 2014–15 Judicial Hellholes, *supra* note 131 (showing New York City as the nation’s worst “judicial hellhole” owing to changes in the courts’ handling of asbestos cases).
181. Mr. Rice’s firm bio is at <http://www.motleyrice.com/attorney/joseph-f-rice>.
182. Ms. Cabraser’s firm bio is at <http://www.lieffcabraser.com/Attorneys/Elizabeth-J-Cabraser.shtml>.
183. Mr. Berger’s firm bio is at [http://www.blbglaw.com/our\\_people/berger\\_max](http://www.blbglaw.com/our_people/berger_max).
184. *See* Claire Bushey, *The Big Boys in Litigation Financing*, CRAIN’S CHICAGO BUS., Jan. 2, 2016.
185. Mr. Katz’s firm bio is at <http://www.parabellumcap.com/#experience>.
186. The firm’s website is <http://www.weitzlux.com/>.
187. *See* 2014–15 Judicial Hellholes, *supra* note 131.
188. *See* Weiser & Craig, *supra* note 11.
189. Mr. Lanier’s firm bio is at [http://www.lanierlawfirm.com/attorneys/w\\_mark\\_lanier.htm](http://www.lanierlawfirm.com/attorneys/w_mark_lanier.htm).
190. *See id.*
191. *See* Press Release, Houston’s Mark Lanier Earns Trial Lawyer of the Year Honor, available at [http://www.lanierlawfirm.com/law\\_firm\\_news/houstons-mark-lanier-earns-trial-lawyer-of-the-year-honor.htm](http://www.lanierlawfirm.com/law_firm_news/houstons-mark-lanier-earns-trial-lawyer-of-the-year-honor.htm).
192. *See* Daniel Fisher, *At Ralph Nader’s Tort Museum, American Lawyers Save the World*, FORBES.COM, Oct. 16, 2015, at <http://www.forbes.com/sites/danielfisher/2015/10/16/at-ralph-naders-tort-museum-american-lawyers-save-the-world/#162f76ba6d2b>.
193. Ms. Lipsen’s bio is at <https://www.justice.org/who-we-are/leadership/senior-staff/linda-lipsen-aaj-ceo>.

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