



U.S. CHAMBER  
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# The Trial Lawyer Underground

*Covertly Lobbying the Executive Branch*

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**U.S. CHAMBER**  
**Institute for Legal Reform**

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# Table of Contents

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<b>Executive Summary</b> .....	1
<b>Early Rewards for the Plaintiffs' Bar</b> .....	4
<b>Lawsuits Trump Government Safety Standards</b>	
Trial Lawyers Manage to Preempt 'Preemption' .....	4
<b>Turning Trial Lawyer Lead into Gold</b>	
Call for Medical Liability Reform Becomes a Trial Bar Gift.....	8
<b>Recent Plaintiffs' Bar Favors</b> .....	12
<b>More Lawsuits, Less Arbitration</b>	
AAJ Works to Chip Away at Binding Pre-Dispute Arbitration	
through Executive Branch Lobbying .....	12
<b>Avoiding the Bill for Repaying Medicare</b>	
CMS Withdraws Rule that Would Require Plaintiffs to	
Repay Taxpayer-Funded Future Medical Expenses .....	16
<b>Protecting the Litigation Status Quo</b>	
Agency Inaction Allows Abusive Lawsuits to Continue Unimpeded.....	19
<b>Parting Gifts?</b> .....	23
<b>Tax Breaks for Trial Lawyers</b>	
AAJ Nearly Secured a Billion Dollar Boost from Treasury .....	23
<b>Litigation More Important than Affordable Drugs</b>	
FDA May Dramatically Alter Longstanding Generic Drug Policy.....	27
<b>Conclusion</b> .....	32

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# Executive Summary

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As opportunities for advancing their liability-expanding agenda in Congress have dimmed, plaintiffs'-lawyer lobbyists have focused their influence on the Executive Branch, starting with the current Administration. Very quietly, but rather successfully, the lawsuit industry has pursued its policy goals through federal agencies while attracting very little attention. We call this effort the Trial Lawyer Underground. The purpose of this report is to shine a public light on a hidden practice that affects all Americans.

## Early Rewards for the Plaintiffs' Bar

The lobbying efforts of the American Association for Justice (AAJ), the organization that protects and works to grow the profits of plaintiffs' lawyers, have paid dividends.

An early victory for the trial bar was keeping any substantive medical liability reform out of the comprehensive healthcare bill. Howard Dean, the former Vermont Governor and chairman of the Democratic National Committee, observed the "plain and simple truth" as to why the Administration's healthcare reform bill failed to address excessive liability exposure for doctors: "the people who wrote it did not want to take on the trial lawyers."<sup>1</sup> Plaintiffs' lawyers and law firms, after all, are the number one source of funds for Democratic candidates today.<sup>2</sup>

While President Obama committed to fund "demonstration projects" to explore ways

of reducing medical liability, he promptly assigned the task to then-Health and Human Services (HHS) Secretary Kathleen Sebelius, a former plaintiffs' lawyer lobbyist.<sup>3</sup> Unsurprisingly, HHS did not even consider the effectiveness of liability reforms. Instead, the agency only funded projects that would point a dubious finger at doctors and hospitals as the source of any liability problems.

Another early reward for the trial bar was an Executive Memorandum issued from the President to agency heads warning them to avoid new regulations that could preempt lawsuits by establishing definitive federal standards for health and safety.<sup>4</sup> It also required agencies to consider reversing rules that had such an effect. As a result of the memo, several agencies altered regulations, encouraging lawsuits even when product manufacturers have done exactly what the federal government has told them to do.

## Recent Plaintiffs' Bar Favors

More recently, the trial bar has made progress with the Administration in reducing a considerable threat to the lawsuit industry: pre-dispute arbitration agreements. Naturally, the trial bar favors lengthy and expensive litigation over less formal and faster dispute resolution that works efficiently in the interests of both consumers and businesses. Last year, President Obama issued an Executive Order prohibiting federal contractors from using arbitration to resolve employment disputes.<sup>5</sup> This year, the Consumer Financial Protection Bureau (CFPB) chimed in, publishing a study that could lay the groundwork for the CFPB to restrict arbitration of disputes involving consumer financial contracts.<sup>6</sup> Most recently, in July 2015, the Centers for Medicare and Medicaid Services (CMS) slipped an anti-arbitration provision into a proposed overhaul of nursing home regulations.<sup>7</sup>

Taxpayers are on the hook, too. CMS planned to clarify obligations to account for and reimburse the Medicare program for costs of medical care that are ultimately paid by defendants after litigation for clarification.<sup>8</sup> But plaintiffs' lawyers did not like the reimbursement requirement and pressed to have it killed—at taxpayers' expense.<sup>9</sup>

Federal agencies are also preserving the pro-lawsuit status quo. Even at the request of three federal judges for clarification,<sup>10</sup> the Food and Drug Administration (FDA) refused to provide a coherent definition of the term "natural"<sup>11</sup> that might ease the flood of plaintiffs'-lawyer orchestrated class actions alleging that consumers are misled by the term. The Federal Communications Commission (FCC) similarly foot-dragged on petitions to clarify regulations under the

*“As the Administration moves into its closing days, the trial bar is likely to shift its underground efforts into high gear.”*

Telephone Consumer Protection Act (TCPA), which has also given rise to a cottage industry for plaintiffs' lawyers.<sup>12</sup> When the FCC did finally act this year, it issued a ruling that is likely to usher in a new era of class action lawsuits.<sup>13</sup>

## Parting Gifts?

As the Administration moves into its closing days, the trial bar is likely to shift its underground efforts into high gear. AAJ has not given up on its goal of having the Treasury Department allow plaintiffs' lawyers to deduct expenses they advance during, rather than at the conclusion of, contingency fee litigation, which could give them a billion dollar tax break over a decade.<sup>14</sup> This effort was initially derailed in 2010 when an AAJ official prematurely bragged about it at the organization's secretive annual conference.<sup>15</sup>

The plaintiffs' bar also is seeking to change national policy governing generic prescription drugs. It has lobbied the FDA to dramatically alter longstanding federal law on the labeling of such products. The change is not driven solely by the FDA's traditional goal of protecting public safety, but by the trial

*“ While on occasion a perceptive reporter has focused on a single instance of trial lawyer lobbying, the broad story of the trial lawyer underground has not been told. ”*

bar’s desire to bring failure-to-warn lawsuits. In fact, in a 2014 Congressional hearing, an FDA official admitted that her office never met with pharmaceutical companies, pharmacists, or physicians before issuing the proposal. Shockingly, the FDA met only with trial-lawyer lobbyists.<sup>16</sup>

### The Trial Lawyer Underground

The doors to the White House and federal agencies are eagerly held open for those representing America’s lawsuit industry. Linda Lipsen, AAJ’s Chief Executive Officer, for example, has visited the White House an impressive 31 times during this Administration for meetings with high-level staff (excluding larger meetings, social events, and a West Wing tour).<sup>17</sup> Of course, many meetings between trial-lawyer lobbyists and government officials likely occur in coffee shops, restaurants, and agency cafeterias.

This report is not comprehensive, but it highlights examples of the quiet and effective influence the plaintiffs’ bar exerts within the Executive Branch. It brings together information from publicly available, if not widely reported, sources, such as lobbying reports filed by AAJ staff and retained lobbyists, and failed AAJ-supported legislation that gave rise to its underground alternative. While on occasion a perceptive reporter has focused on a single instance of trial lawyer lobbying,<sup>18</sup> the broader story of the trial lawyer underground has not been told. It is in the public interest to critically examine whether the trial bar’s influence on federal agencies is contrary to public health and safety, hurts the economy, and makes this country an even more litigious society.



# Lawsuits Trump Government Safety Standards

## Trial Lawyers Manage to Preempt 'Preemption'

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Immediately after his election and before President Obama took office, the plaintiffs' bar began its lobbying effort to eliminate federal preemption of state tort law. These efforts paid off when the Obama Administration issued a memorandum to the heads of all Executive departments and agencies, cautioning them against preemption and requiring them to reconsider a decade of policy and regulations. Immediately thereafter, several agencies changed course, placing the preservation of litigation above the protection of public safety.

Congress has charged federal regulators with protecting the public interest by approving practices and setting standards in a variety of industries. For example, the National Highway Traffic Safety Administration (NHTSA) has closely researched and developed Federal Motor Vehicle Safety Standards that require vehicles to meet crashworthiness standards. Its regulations require seatbelts, airbags, windshields, headlights and signals, door beams, roofs, steering columns, tires, and door locks, latches and hinges to meet certain safety performance standards. Another example is the FDA review and approval processes for prescription drugs and medical devices, which can span thousands of hours over many years.

Preemption comes into play when a federal law instructs a business to do one thing (design a product in a certain manner or provide certain warnings), but a state law (including obligations imposed through a lawsuit) tells that business to do something else. In such circumstances, the U.S. Constitution's Supremacy Clause provides that state standards that directly conflict with federal law, pose an obstacle to Congress' objectives, or are expressly forbidden by a federal statute or regulation are preempted. The alternative to preemption is to permit lawsuits that focus on a single person's circumstances rather than a broader analysis of the benefits and risks of a product. Such lawsuits can undermine an agency's carefully reasoned decisions and public safety.

Plaintiffs' lawyers view nearly any government regulation, no matter how detailed, as merely providing a "minimum standard." Full compliance with the law, in their view, should still leave the door wide open to lawsuits and the potential for punitive damage awards.<sup>19</sup> AAJ's ongoing war against preemption rages in Congress, the courts, and the Administration.

## The Initial Lobbying Effort

Even before President Obama took office, there was a substantial lobbying effort by the plaintiffs' bar and its allies to eliminate federal preemption of state tort law.

In the waning days of the Bush Administration, the plaintiffs' bar was already hard at work. The very month of the 2008 general election, the Center for Progressive Reform, with support from AAJ, published a report intended to influence the new president entitled, "Limiting Federal Agency Preemption: Recommendations for a New Federalism Executive Order."<sup>20</sup> At the same time, the Center also published a separate report, urging the new president, "by the stroke of a presidential pen," to assert a strong presumption against preemption, particularly with respect to tort claims, and to impose new hurdles before an agency may find that its regulations, not state law, govern a health or safety issue.<sup>21</sup> In January 2009, AAJ sent President Obama's transition team a detailed agenda for overturning preemption by federal agencies and stopping such assertions in the future.<sup>22</sup>

## The President Responds

In response to the lawsuit industry, the Administration acted quickly after taking office.

First, the President issued a memorandum to agency heads cautioning them against asserting preemption.<sup>23</sup> The May 2009 memorandum instructed agencies that they should not address the preemptive effect of regulations unless expressly stated in the text of the regulation itself. Agencies were also warned to refrain from asserting that their regulations preempt state law in the text of their regulations. The memo charged agencies with undertaking a 10-year retrospective review of government regulations that contained a preemptive element for the purpose of potentially reversing such positions.

Two former general counsels of the Office of Management and Budget (OMB) pointed out the flaws in the anti-preemption policy reflected in the Executive Memorandum. In an op-ed in the *Washington Post*, they cautioned:

It may all sound very technical, but the consequences of Obama's new policy are broad and serious. When federal health and safety regulators issue rules, they base them on scientific analysis and conduct cost-benefit analyses of their overall impact. By contrast, state court juries may establish rules based on the unusual facts of a single case that could have terribly detrimental implications if applied more broadly.



It is important, therefore, that the work of government health and safety experts has actual legal effect and not be just for "show." Taxpayers are footing the bill for these regulators, and the national standards they issue are supposed to be effective and binding.<sup>24</sup>

Second, President Obama reinstated and funded the Administrative Conference of the United States (ACUS) in March 2010. Among its first projects was to explore the issue of agency preemption of state tort law. In fact, the ACUS's very first recommendation, issued in December 2010, addressed "Agency Procedures for Considering Preemption of State Law."<sup>25</sup> Initially, the Committee appeared poised to take an aggressive anti-preemption position. It retained Catherine Sharkey as a consultant, a respected N.Y.U. law professor who was already on record as critical of agency preemption, to draft its report.<sup>26</sup> Ultimately, the ACUS approved a series of largely procedural recommendations intended to require agencies to closely consider any proposed regulation that may have a preemptive effect on state law.<sup>27</sup> It also recommended that the Office of Information and Regulatory Affairs (OIRA), a part of OMB, police agency compliance with the 10-year retrospective review of preemptive rulemaking.<sup>28</sup>

## Agencies Reverse Course

Following the issuance of the Executive Memorandum, NHTSA abruptly changed course in two rulemakings in which it had found preemption necessary to protect public safety. In the first, NHTSA reversed its finding that its strengthened roof crush resistance standards preempted state law. In 2005, NHTSA carefully explained why it believed that tort claims "requiring a more stringent level of roof crush resistance for all vehicles could increase rollover propensity of many vehicles and thereby create offsetting adverse safety consequences."<sup>29</sup>

Four years later, and four months after a new administration, NHTSA did a 180-degree turn. Upon President Obama naming Charles Hurley to head NHTSA, AAJ called on the Administration to remove preemption language from the regulation, permitting unrestricted lawsuits.<sup>30</sup> One month later, the agency offered a two-sentence explanation for reversing its position: "We have reconsidered the tentative position presented in the NPRM [Notice of Proposed Rulemaking]. We do not foresee any potential State tort requirements that might conflict with today's final rule."<sup>31</sup>

NHTSA took the same approach with respect to a 2008 regulation mandating a certain number of seat belts in vehicles based on a calculation of the passenger space available. Earlier, NHTSA cautioned that requiring more seat belts than mandated by its calculation

would reduce safety because cramped seating discourages the use of seatbelts by everyone.<sup>32</sup> Nevertheless, future tort claims may suggest that particular cars are defective because they should have included additional seatbelts than that required by NHTSA. For that reason, NHTSA found such claims should be preempted. In response to a petition filed by AAJ<sup>33</sup> just fourteen months later, NHTSA reversed its position.<sup>34</sup> The agency's explanation for this wild U-turn was only that it now found such conflicts "unlikely," speculating that manufacturers would reduce seat width or install an impediment or void in vehicles rather than undertake the additional expenses of providing an additional seat belt.<sup>35</sup>

Other agencies also changed course, such as the Occupational Safety and Health Administration (OSHA) with respect to the design, labeling, and use of respirators in the workplace at the direct request of AAJ<sup>36</sup> and the Mine Safety and Health Administration (MSHA) with respect to the safety of miners during an emergency.<sup>37</sup> More recently, OSHA gave plaintiffs' lawyers a gift when

it made what it characterized as "two small changes" to a pending regulation.<sup>38</sup> Just before issuance, OSHA amended a provision that had for nearly two decades recognized that comprehensive federal regulations preempted state legal obligations regarding chemical labeling. Instead, OSHA restricted preemption to "legislative or regulatory enactments" and eliminated the regulation's reference to preemption "through any court or agency."<sup>39</sup> In other words, OSHA carved out the ability of the plaintiffs' bar to bring lawsuits. These eleventh-hour changes were not included in the proposed regulation, raised in subsequent public comments, or considered in public hearings during the five years of development of the rule.<sup>40</sup> Unsurprisingly, AAJ defended the change when it was challenged in court.<sup>41</sup>

Regardless of the merits of whether preemption should or should not apply in such instances, it is disconcerting that agencies, in response to plaintiffs' lawyer lobbying, have reversed positions related to public health and safety so quickly, so casually, and with so little explanation.

# Turning Trial Lawyer Lead into Gold

## Call for Medical Liability Reform Becomes a Trial Bar Gift

In a speech to a Joint Session of Congress, while seeking support for healthcare reform, President Obama acknowledged what many medical professionals have said for years: excessive liability leads doctors to protect themselves by engaging in “defensive medicine,” which raises the cost of healthcare for all Americans. While President Obama did not view liability reform as a “silver bullet,” he suggested it was one of a range of ideas that could improve the system.<sup>42</sup> He then put a former trial lawyer lobbyist in charge of studying the issue and developing reform options. The resulting studies, paid for by tax dollars, point to a variety of “causes” of medical liability and its costs. Remarkably, the studies do not point to the obvious need for substantive liability reform—another underground victory for the trial lawyers.

Prior to joining the Administration and serving as both the Governor and Insurance Commissioner of Kansas, former Health and Human Services (HHS) Secretary Kathleen Sebelius served for nearly a decade as the executive director of the Kansas Trial Lawyers Association. In September 2009, President Obama directed Secretary Sebelius to consider the merits of medical liability reform options. In a memorandum entitled, “Demonstration Grants for the Development, Implementation, and Evaluation of Alternatives to the Current Medical Liability System,” President Obama

stated, “[W]e must ensure that patients are compensated in a fair and timely manner for medical injuries, while also reducing the incidence of frivolous lawsuits. And we must work to reduce liability premiums.”<sup>43</sup>

There was a sense of cautious optimism that President Obama’s commitment to examining the issue might bolster the chance for federal medical liability reform. The Administration could finally propose or endorse measures designed to ease the fear of doctors that an unexpected or unfortunate outcome would result in a lawsuit and an unwarranted or excessive

damage award or settlement. It could urge Congress to adopt laws that would allow doctors to more closely focus on diagnosing and treating patients, rather than reducing the risk of lawsuits. The Administration might build support for measures that would help doctors afford to serve patients by practicing in high-risk specialties, rather than avoid certain practices or states as a result of the cost of medical liability insurance premiums.

The Administration went in none of these directions. Rather, it used the demonstration project proposal as a convenient way to claim that it addressed medical liability reform in the 2,000-page Patient Protection and Affordable Care Act when it was signed into law on March 23, 2010, even though the bill contained no meaningful change. What the bill did was authorize HHS to allocate up to \$50 million in demonstration grant money to states for development, implementation, and evaluation of alternatives to current tort litigation over a five-year period.<sup>44</sup> That money would ultimately be used for everything but considering the effectiveness of liability reform.

## Evidence Supporting Liability Reform

As the Secretary went about her task of considering potential healthcare reforms, evidence of the value of addressing medical liability mounted.

President Obama's bipartisan National Commission on Fiscal Responsibility and Reform issued a report in late 2010 that expressed support for many medical liability reforms, including modifying the collateral source rule, imposing a one- to three-year statute of limitations, eliminating joint and

several liability, creating specialized "health courts," and providing doctors who follow best practices with a "safe haven" from liability.<sup>45</sup> Many of the members also felt that limiting subjective pain and suffering awards and capping punitive damages in medical liability cases should be explored.<sup>46</sup> The Commission found that medical liability reform would have saved taxpayers \$2 billion in 2015 and \$17 billion through 2020.<sup>47</sup>

Three months later, the Congressional Budget Office (CBO) conservatively estimated that nationwide implementation of medical liability reforms would reduce federal budget deficits by \$62.4 billion over 10 years.<sup>48</sup> The CBO found that because employers would pay less for health insurance for employees, more of their employees' compensation would be in the form of taxable wages and other fringe benefits, leading to an additional \$12.9 billion in federal revenue over the next 10 years.<sup>49</sup> Medical liability reform would reduce discretionary spending on federal programs by about \$1.6 billion over a decade, according to the CBO.<sup>50</sup>

In addition to reducing the deficit, the CBO found that medical liability reform would lead to lower medical liability premiums.<sup>51</sup> As a result, patients would benefit from lower prices for healthcare services.<sup>52</sup> Reducing liability pressures would lead doctors to engage in less defensive medicine, saving the cost of expensive but unnecessary services, the CBO said.<sup>53</sup> Estimates of the annual nationwide costs of defensive medicine conservatively begin at \$50 billion.<sup>54</sup> Other credible studies place the cost of defensive medicine closer to \$200 billion,<sup>55</sup> or more.<sup>56</sup>

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### Turning Trial Lawyer Lead Into Gold

Despite her history of working for the trial lawyers, Secretary Sebelius said she was up to the task of evaluating potential medical liability reforms. “I think I am just the person to do it, because I think I understand the system of litigation very well,” she responded to the concern. “[T]here are lots of strategies that we can put in place” to address defensive medicine, she added.<sup>57</sup>

To no one’s surprise, those strategies did not include liability reform. Sebelius initiated a “Patient Safety and Medical Liability Initiative,” which, in October 2009, solicited applications for demonstration projects that would develop and evaluate approaches that “put patient safety first and work to reduce preventable injuries; foster better communication between doctors and their patients; ensure that patients are compensated in a fair and timely manner for medical injuries, while also reducing the incidence of frivolous lawsuits; and reduce liability premiums.”<sup>58</sup> Applicants, HHS said, would “have wide discretion and flexibility in designing their patient safety

and medical liability innovations” to meet these goals. One month later, HHS issued a “clarification” instructing potential applicants that “[a]pplications that do not address both patient safety/risk management and medical liability will not be considered responsive.”<sup>59</sup> HHS had sent the message that proposals focusing on the effectiveness of liability reform were not welcome. The agency would only read applications that included studies of patient safety or healthcare management, any of which would arguably only indirectly impact liability.

Before the ink had dried on the request for proposals, HHS used its newfound authority to give the trial bar another gift, a U.S. government-endorsed report casting doubt on the effectiveness of numerous medical liability reforms adopted by the states.<sup>60</sup> The authors were intellectually honest in acknowledging “there are studies that support the finding that tort reforms affect malpractice costs” and “there is evidence that tort reforms affect the frequency and severity of malpractice awards.”<sup>61</sup> But the report instead focused on “limitations” of some prior studies.<sup>62</sup> The HHS study characterized evidence that liability reforms reduce insurance rates as “anecdotal.”<sup>63</sup> It cast a shadow on liability reforms, calling their effect on patient safety “inconclusive” and in need of “more research.”<sup>64</sup> The agency reached these conclusions after just three months of study.

Ultimately, HHS awarded \$19.7 million in funding for seven demonstration projects.<sup>65</sup> None of these projects funded by HHS considered the many types of reforms that have proven effective in states across



the country in focusing the legal system on cases with merit, reducing liability premiums, and protecting the public's access to specialists.

The HHS-selected projects instead focused on preventing medical errors, disclosing possible negligence to patients, and discussing adverse outcomes with patients and their families.<sup>66</sup> Only one project, which involved use of alternative dispute resolution, directly considered medical malpractice litigation. That project explored whether judges in the state's specialized courts for addressing medical malpractice claims can more quickly lead the parties to settlement by taking an active role in negotiations.<sup>67</sup> Most of the projects concluded in 2014.<sup>68</sup> HHS's Agency for Healthcare Research and Quality (AHRQ) is expected to release the final results before President Obama's term ends, providing another opportunity for the Administration to give a parting gift to the trial bar. The demonstration projects are likely to suggest that the best way to reduce medical liability costs is to enhance programs to teach doctors about medical safety, not curb meritless lawsuits or excessive liability.

## No Sign Of Movement

To date, the Administration has not proposed or supported any substantive medical liability reforms. This is unfortunate, but not unexpected. Medical malpractice litigation is big business for the plaintiffs' bar. AAJ has consistently opposed medical liability reform proposals in Congress with its own lobbyists and outside firms.<sup>69</sup>

At best, the demonstration projects could provide lessons that, if implemented, *may* indirectly reduce litigation or lead to faster settlements. At worst, the plaintiffs' bar may use the taxpayer-funded studies as a tool to block medical liability reform efforts not only in Congress, but also in the states. The plaintiffs' bar also may use the studies to suggest that doctor carelessness or a lack of communication among healthcare providers, not lawsuits and excessive liability, are to blame for the medical malpractice liability problem.

Thus, the only thing demonstrated by HHS's "demonstration projects" is that trial lawyers can get their way, even in the face of bipartisan calls for liability reform.

*“ The demonstration projects are likely to suggest that the best way to reduce medical liability costs is to enhance programs to teach doctors about medical safety, not curb meritless lawsuits or excessive liability. ”*



# More Lawsuits, Less Arbitration

## AAJ Works to Chip Away at Binding Pre-Dispute Arbitration through Executive Branch Lobbying

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A top legislative priority of the plaintiffs' bar is to prevent consumers and businesses from agreeing to resolve disputes that may arise between them through binding arbitration. Congress, however, has repeatedly rejected AAJ's proposals, prompting an effort within the Executive Branch to limit required arbitration in specific types of contracts. There, AAJ has had a series of successes, including an Executive Order limiting the use of binding pre-dispute arbitration by government contractors and a Consumer Financial Protection Bureau (CFPB) study that could lead to broader regulation of arbitration provisions in consumer financial services contracts. Most recently, the Centers for Medicare and Medicaid Services (CMS) tucked an anti-arbitration provision in a proposed overhaul of nursing home regulations, which could achieve a long-sought AAJ goal.

Few issues are as fundamental to AAJ's agenda than the elimination of binding pre-dispute arbitration in employment and consumer contracts. The issue impacts virtually every AAJ member because having disputes resolved through an arbitration process that is often less costly and faster than traditional litigation is less lucrative for plaintiffs' lawyers. For years, AAJ has argued that individuals should not have the ability to enter agreements providing for arbitration, even if it means lower prices for countless products and services and provides an easier, fairer, way to resolve disputes. AAJ's

position is contrary to longstanding federal law favoring dispute arbitration. For nearly a century, the Federal Arbitration Act and U.S. Supreme Court decisions have recognized arbitration agreements as "valid, irrevocable and enforceable."<sup>70</sup>

### Legislation Goes Nowhere in Congress

One of AAJ's early proposals to limit the use of binding pre-dispute arbitration was the Arbitration Fairness Act.<sup>71</sup> This legislation, for which the organization has lobbied consistently

for almost a decade, would broadly invalidate any pre-dispute arbitration provision of an employment or consumer contract.<sup>72</sup> The legislation has broadened over time to invalidate contract provisions requiring arbitration of any antitrust or civil rights dispute.<sup>73</sup> The bill has failed to gain traction in the past four Congresses; no version of it has ever passed either the House or Senate under the control of either party.

Undeterred, AAJ modified its lobbying strategy to pursue more targeted legislation that would bar required arbitration of disputes involving parties perceived as vulnerable or sympathetic. This effort has included proposals such as the Fairness in Nursing Home Arbitration Act, which would generally prohibit the use of binding pre-dispute arbitration provisions in nursing home contracts,<sup>74</sup> and multiple bills that would restrict the enforcement of binding pre-dispute arbitration provisions in agreements involving military service members.<sup>75</sup>

AAJ fashioned these narrower proposals as the proverbial camel's nose under the tent, hoping for still broader restrictions on arbitration. But AAJ's Plan B, gradually chipping away at binding pre-dispute arbitration, has also largely failed to advance in Congress.

## AAJ Lobbies Administration for Executive Order

After years of unsuccessful attempts to convince Congress to ban the use of binding pre-dispute arbitration, AAJ has gone underground, pushing the Administration to give it what it wants.<sup>76</sup>

In July 2014, AAJ's efforts bore fruit in the form of President Obama's Fair Pay and Safe Workplaces Executive Order.<sup>77</sup> This Order prohibits companies with federal contracts of \$1 million or more from requiring use of

*“Undeterred, AAJ modified its lobbying strategy to pursue more targeted legislation that would bar required arbitration of disputes involving parties perceived as vulnerable or sympathetic.”*

arbitration for employment disputes arising out of alleged discrimination or sexual assault or harassment. Rather, the Order states that government contractors may only seek consent to arbitration after a dispute arises. AAJ heralded the Order as “a tremendous victory.”<sup>78</sup>

By establishing such a requirement through an Executive Order, AAJ could bypass Congress and directly affect how thousands of government contractors, including many of the nation's largest employers,<sup>79</sup> draw up their employment contracts.<sup>80</sup> This direct action could, in turn, pressure other private employers to limit their use of binding pre-dispute arbitration provisions and potentially change industry-wide employment policies.

The head of the employment law section at Baron and Budd, a prominent plaintiffs' firm whose members have held leadership roles with AAJ, declared the Order “not just a little step, it was a big step” toward eliminating arbitration of employment disputes.<sup>81</sup> That lawyer referred to the Fair Pay and Safe Workplaces Order as “a profound piece of *legislation*,” inadvertently recognizing that AAJ had achieved a legislative goal unattainable through Congress via the Obama Administration.<sup>82</sup> Soon after adoption of the Executive Order, Charles Lovelace, a labor-

union lobbyist who has visited the White House over 100 times since 2010, disclosed advocating in support of the Executive Order for AAJ.<sup>83</sup>

Most recently, AAJ continued its celebration with the Department of Labor proposed guidance, and the Federal Acquisition Regulatory (FAR) Council issuance of a proposed rule, which would implement the Order.<sup>84</sup> Indeed, the Administration's actions could have AAJ's desired effect of providing a predicate for broader attempts to restrict the use of binding pre-dispute arbitration.

## CFPB Study May Be Precursor to Regulation

Another byproduct of AAJ's failed efforts to drive legislation that either broadly or selectively bars the use of binding pre-dispute arbitration has been to push federal agencies to adopt regulations that would have the same practical effect as legislation. AAJ views the CFPB as an important federal agency in this regard given its potential authority to adopt new anti-arbitration rules governing consumer financial agreements.<sup>85</sup>

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress authorized the CFPB to study the use of binding pre-dispute arbitration provisions in consumer financial agreements, and to provide a report to Congress.<sup>86</sup> AAJ lobbied Congress for such an agency study, recognizing its potential to result in rulemakings that might bar or restrict the use of binding pre-dispute arbitration. AAJ has since lobbied the CFPB with the goal of having the agency oppose the use of required arbitration in any consumer financial agreement.<sup>87</sup>

During the CFPB's development of its arbitration study, AAJ filed multiple comments

with respect to its proposed scope, methods, and data sources.<sup>88</sup> AAJ's purpose in doing so was to devise a study with a pre-determined outcome that glossed over the benefits of pre-dispute arbitration in terms of cost, convenience, and efficiency for the parties, and focused only on the arguments of those in favor of more litigation.

In March 2015, the CFPB released a 728-page arbitration study.<sup>89</sup> While purporting to be empirical, the report has a noticeably anti-arbitration slant. For example, the study finds that consumers may recover less through arbitration than litigation, even though a growing body of evidence shows that few consumers even file claims for recovery in a class action and those that do usually receive miniscule amounts.<sup>90</sup> Concern expressed in the CFPB study that arbitration may make consumers less likely to bring claims is rebutted by the Financial Industry Regulatory Authority's (FINRA) arbitration program, in which investors resolve thousands of complaints each year, and receive significant sums.<sup>91</sup> The CFPB study does recognize that consumers obtain relief through arbitration much faster than class action litigation, five months versus two years, but gives short shrift to the importance to consumers of quick resolution.<sup>92</sup>

AAJ recognizes the CFPB study as a vital step toward its ultimate goal of convincing regulators to bar or limit the use of pre-dispute arbitration in consumer financial agreements. The study is expected to be a precursor to at least some form of agency regulatory effort.<sup>93</sup> Immediately after the study's release, AAJ (through its affiliated "Take Justice Back" campaign) began a grassroots letter writing campaign directed at CFPB Director Richard Cordray.<sup>94</sup> In July 2015, Director Cordray indicated to Congress that his agency is indeed "moving ahead" with a rulemaking effort targeting arbitration.<sup>95</sup>

## CMS Slips Anti-Arbitration Provision in Nursing Home Regulation Overhaul

AAJ has lobbied Congress to enact the Fairness in Nursing Home Arbitration Act since 2008, and continues to do so,<sup>96</sup> even though the legislation has not been reintroduced in Congress since 2012.<sup>97</sup> Frustration in achieving this legislative goal through Congress likely led AAJ to refocus on the Executive Branch. AAJ has indicated that it is broadly lobbying on the issue of "arbitration clauses in nursing home residency contracts,"<sup>98</sup> without indicating any specific legislation.

The focus of its lobbying was likely CMS. In July 2015, CMS released a proposed rule that would overhaul regulations governing long-term care facilities.<sup>99</sup> Tucked into that lengthy document is an anti-arbitration provision. The proposed rule would place significant constraints on the use of such agreements by nursing homes and create new grounds for challenging their enforceability. CMS has also indicated that it would consider taking an even more restrictive approach that would prohibit long-term care facilities from using binding pre-dispute arbitration altogether—precisely what the Fairness in Nursing Home Arbitration Act would accomplish—and has invited comments suggesting the agency take this path.<sup>100</sup> The proposed rule, therefore, provides AAJ with a major opportunity to bypass Congress and achieve its goal of restricting or barring the use of binding pre-dispute arbitration in nursing home contracts.

## Executive Branch Successes Used to Rejuvenate Legislative Efforts

AAJ's lobbying successes both with the Administration and the CFPB have provided new momentum for the organization's lobbying in Congress. AAJ continues to lobby in support of broad proposals such as the Arbitration Fairness Act and more targeted proposals such as the Servicemember Employment Protection Act.<sup>101</sup> The organization has also expanded these efforts to include several newer bills.

In the 114<sup>th</sup> Congress, AAJ has reported lobbying on The Investor Choice Act, which would amend securities laws to restrict the use of binding pre-dispute arbitration provisions in agreements between customers and a securities broker or dealer.<sup>102</sup> The organization has additionally lobbied for the A Voice for Victims Act, which would render unenforceable any employer's binding pre-dispute arbitration of a civil tort claim arising out of rape.<sup>103</sup> AAJ's legislative strategy, again, has been to target vulnerable parties, such as those who have been victims of sexual abuse or who have allegedly been taken advantage of when receiving investment advice.

At the same time, AAJ is likely continuing to work behind the scenes to find ways to restrict the use of binding pre-dispute arbitration through the activities of other federal agencies. Each victory within the Executive Branch can, in turn, make more palatable AAJ's desired end game of prohibiting completely the use of what it characterizes as "dangerous" contract provisions.<sup>104</sup> The fact that numerous studies have shown the benefits for many consumers of required arbitration provisions appears to be of little consequence to AAJ;<sup>105</sup> the organization seems bent on expanding litigation opportunities for its members.

# Avoiding the Bill for Repaying Medicare

## CMS Withdraws Rule that Would Require Plaintiffs to Repay Taxpayer-Funded Future Medical Expenses

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When a Medicare beneficiary is injured, the Medicare program often steps in to make conditional payments of medical expenses, even though the beneficiary might later receive funds from other sources. Under the Medicare Secondary Payer (MSP) law, Medicare is able to recoup those conditional payments from settlements or judgments paid to its beneficiary. The Centers for Medicare and Medicaid Services (CMS) is charged with developing rules for how these repayments are handled, including who is expected to ultimately reimburse Medicare and for how much. For years, AAJ has lobbied CMS to ensure that such reimbursement rules do not end up taking money out of plaintiffs' lawyer pockets.

AAJ has charged both its in-house team of lobbyists and at least three outside lobbying firms with ensuring that CMS does not adopt rules that could impair the recoveries of the organization's plaintiffs' lawyer members.<sup>106</sup> This lesser known government agency makes the rules for how the MSP reimbursement system operates.<sup>107</sup> AAJ's quiet lobbying efforts have been successful in pressuring CMS to withdraw a key MSP rule proposal involving reimbursement of future medical expenses by Medicare beneficiaries.<sup>108</sup>

### MSP System's Basic Purpose and Rules

The MSP Act was adopted in 1980 as a means to protect the fiscal solvency of the Medicare program.<sup>109</sup> It provides a way for Medicare to facilitate medical care for elderly beneficiaries through the program by making conditional payments to healthcare providers for medical expenses that the federal government can later recover from insurers or other entities that bear the "primary" payment responsibility.<sup>110</sup> Through subsequent amendments to the MSP Act, Congress requires parties in litigation to notify CMS of any judgments,



“ Since mid-2013, the organization’s largest retainer with an outside lobbying firm has been exclusive to MSP issues. ”

payments, or settlements involving Medicare beneficiaries and authorizes CMS to recover taxpayer dollars Medicare spends as a “secondary” payer.<sup>111</sup>

Although this reimbursement system may appear relatively straightforward, it can be challenging to implement in practice. The existence of multiple types of insurance, different liability and workers’ compensation programs, and the potential liability of defendant tortfeasors can make the determination of who needs to report or repay Medicare’s expenses uncertain. In addition, repayment amounts may not always be clear, particularly when a future medical expense is at issue. CMS’s role is to help streamline this process by providing greater clarity for each party’s obligations.<sup>112</sup>

AAJ has assembled a small army of lobbyists dedicated to steering MSP initiatives in a way that benefits the financial interests of plaintiffs’ lawyers.<sup>113</sup> Since mid-2013, the organization’s largest retainer with an outside lobbying firm has been exclusive to MSP issues.<sup>114</sup>

## AAJ’s ‘Huge’ Lobbying Victory on CMS’s Withdrawn Proposed Future Medicals Rule

For years, AAJ has had an interest in how CMS would determine amounts of future medical expenses (often referred to as “future medicals”) that litigants must repay to Medicare. Determining the amount and responsibility for these potentially nebulous future costs is a major issue for AAJ’s plaintiffs’ lawyer members because it may require splitting a portion of a settlement or judgment with the government. As a result, lawyers’ contingency fees may be reduced.

CMS began developing regulations to address the topic of future medicals in mid-2012 by issuing an Advanced Notice of Proposed Rulemaking.<sup>115</sup> The agency proposed a series of options, each of which would place responsibility on the beneficiary (and his or her lawyer) to account for and repay future medicals. Businesses and their insurers generally supported the proposed rule because it could provide more clarity in the settlement of claims and facilitate the finality of litigation.<sup>116</sup>

AAJ, however, submitted lengthy comments in opposition to this proposed rulemaking.<sup>117</sup> In fact, the organization challenged CMS’s basic authority to require reimbursement of future medical expenses.<sup>118</sup> AAJ also argued that it was “possibly impossible to develop an adequate policy” regarding future medicals, so CMS should refrain from even trying.<sup>119</sup>



In October 2014, after over two years of consideration (and persistent AAJ lobbying), CMS abruptly withdrew its proposed rule for future medicals.<sup>120</sup> The trial lawyers heralded this decision as a “huge victory that AAJ achieved.”<sup>121</sup> The organization said it “lobbied hard against the proposed rule” and boasted that there is presently no rule pending that would require AAJ’s members to repay the Medicare program for conditional payments of future medicals.<sup>122</sup>

Withdrawal of the rule is a disappointment to litigants, insurers, and those attorneys who are looking for clarity from CMS so they can fairly and efficiently settle litigation involving future medical expenses. AAJ’s lobbying victory may also come at the expense of taxpayers, who are left to make up the shortfall in monies advanced to Medicare beneficiaries for future medical expenses that are never repaid.

### **AN MSP EXEMPTION FOR ASBESTOS TRUSTS**

In 2009, Joe Rice, a founding member of one of the largest plaintiffs’ law firms, Motley Rice, had a private meeting with HHS Secretary Kathleen Sebelius and the agency’s legal counsel.<sup>123</sup> The goal: obtain an exemption from the MSP reporting obligations for asbestos personal injury trusts.

Companies that have entered bankruptcy due to asbestos litigation transfer their assets to these trusts to pay asbestos claims. The trusts, whose trustees are plaintiffs’ lawyers, pay out billions each year to asbestos claimants who meet basic medical and exposure criteria.

Soon after the meeting with Mr. Rice, Secretary Sebelius granted his wish. She issued a letter interpreting the MSP law as inapplicable to asbestos trusts, relieving the trusts of any reporting obligation.<sup>124</sup>

As a result, unlike in settlements of ordinary personal injury litigation, trusts that pay asbestos claims have no obligation to report payments that could be used to reimburse Medicare.

# Protecting the Litigation Status Quo

## Agency Inaction Allows Abusive Lawsuits to Continue Unimpeded

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Federal agencies, when presented with opportunities to give needed clarity to regulatory obligations, have chosen to sit on the sidelines. Such foot dragging, despite calls for federal intervention, does not serve consumers. It protects and defends the business of the plaintiffs' bar, which takes advantage of ambiguity and confusion in the law to bring an endless string of lucrative lawsuits. Recent FDA and FCC actions provide prime examples.

### FDA Keeps the "All Natural" Gravy Train on the Tracks

In recent years, there has been a surge of consumer class actions targeting food products.<sup>125</sup> These lawsuits are driven by a relatively small cadre of plaintiffs' attorneys.<sup>126</sup> A review of the litigation makes some names quite familiar, indicating that some law firms recycle the same individuals to serve as representative plaintiffs in class actions brought against different manufacturers for different types of food products.<sup>127</sup> Thus far, it appears that manufacturers have settled each lawsuit that a judge has not been willing to dismiss rather than undertake the expense of a trial and risk of liability.<sup>128</sup> When cases settle, the lawyers who bring the claims may receive millions in fees.<sup>129</sup> Those whom the lawyers purportedly represent, consumers

who may have been perfectly happy with their purchase, find themselves eligible for coupons, freebies, or a small check that may not be worth the effort to cash or deposit.

The most popular style of these claims alleges that a product is misleadingly advertised as "natural." Because consumers may have different views of what is natural, and because federal law does not define the term,<sup>130</sup> there are myriad possibilities for lawsuits. For example, plaintiffs' lawyers say that numerous products do not qualify as natural because ingredients such as soy, wheat, corn, and canola are often genetically-modified.<sup>131</sup> They even claim that orange juice is not natural because of the way it is processed. The near inevitability of such lawsuits has led several companies to stop using the term altogether.<sup>132</sup>

In 2013, two federal judges entered six-month stays and another judge administratively terminated claims alleging that manufacturers could not label products as natural when they contain genetically-modified ingredients.<sup>133</sup> The judges took the highly uncommon step of asking the FDA—pleading with it—to address the issue so that they could consider the lawsuits in a rational and consistent manner.<sup>134</sup>

In a January 2014 letter directed to the judges, plaintiffs' lawyers, and defendants, an FDA official "respectfully declined" to answer.<sup>135</sup> Leslie Kux, the FDA's Assistant Commissioner for Policy responded that defining "natural" would require the FDA to examine the "relevant science; consumer preferences, perceptions, and beliefs; the vast array of modern food production technologies in addition to genetic engineering (e.g., use of different types of fertilizer, growth promotion drugs, animal husbandry methods); the myriad food processing methods (e.g., nanotechnology, thermal technologies, pasteurization, irradiation); and any strictures flowing from the First Amendment."<sup>136</sup> This was too complex for the FDA's experts to take on, even as courts are repeatedly called upon to do so in a haphazard way in individual lawsuits.

Ms. Kux, who was among the officials who met with AAJ lobbyists prior to the FDA's release of a proposed rule expanding the liability of generic drug makers,<sup>137</sup> concluded that, "in a world with limited resources" and given the agency's higher priorities, the FDA would not define "natural."<sup>138</sup> AAJ lobbied

*“The gap left by the FDA’s unwillingness to act leaves the plaintiffs’ lawyer litigation gravy train chugging along the tracks.”*

against legislation, introduced soon after the FDA's non-answer, that would have directed the FDA to set standards for natural claims on food labels.<sup>139</sup>

The gap left by the FDA's unwillingness to act leaves the plaintiffs' lawyer litigation gravy train chugging along the tracks. The informal letter virtually eliminated the ability of food makers to assert defenses such as "primary jurisdiction" (that the court should defer to a federal agency charged with regulating the conduct) or federal preemption (that the federal standard precludes conflicting obligation imposed through state law) in numerous "all natural" class actions. Plaintiffs' lawyers will continue to bring such claims on behalf of consumers who were not misled, bought the product for reasons unrelated to such labeling, and enjoyed their food and drinks.

**FATTENING LAWYER WALLETS?**

In June 2015, the FDA ordered the elimination of partially hydrogenated oils, the main source of trans fat, from food products within three years. The only group more thrilled than public health advocates are plaintiffs' lawyers. *Politico* reports that "class-action attorneys are eager to use the ruling—before it takes effect—to file lawsuits against deep-pocketed food companies that have continued to use trans fat, even as the rest of the industry has masterfully reduced its use of trans fat by some 85 percent."<sup>140</sup> And according to DLA Piper's food and beverage practice group co-chair Stefanie Fogel, "The class action lawyers have got their forks and knives out."<sup>141</sup>

## The FCC Finally Picks Up the Phone, and the News is Not Good

Plaintiffs' lawyers have transformed a law enacted in 1991 to address aggressive cold-call telemarketing into one that generates "gotcha" claims against well-intentioned companies attempting only to communicate with their own customers.<sup>142</sup> And the Federal Communications Commission (FCC), which is in a position to clarify the law's application and stem abusive litigation, has delayed and only made the situation worse.

The Telephone Consumer Protection Act (TCPA) has given rise to a new cottage litigation industry.<sup>143</sup> While just 14 TCPA cases were filed in 2008, lawyers filed 1,908 such suits in the first nine months of 2014—an increase of 560%.<sup>144</sup> Plaintiffs' lawyers came to realize that the federal law provides the perfect combination of a private right of action, an uncapped per-violation (per call, text, or fax) penalty of \$500 (\$1,500 for a "willful" or "knowing" violation), no affirmative defenses, and uncertain application since it was developed before widespread use of cell phones, caller ID, and routine reassignment of telephone numbers. These class actions have forced legitimate businesses that are simply trying to communicate with their customers to enter multi-million dollar settlements, providing big paydays for plaintiffs' lawyers.<sup>145</sup>

Businesses turned to the FCC for assistance, urging the agency to explain how the archaic statute applies to today's technology and clarify their obligations.<sup>146</sup> The FCC, however, was slow to act and left dozens of petitions pending, some for years,<sup>147</sup> as the litigation continued.

The ultimate irony came when AAJ itself, after educating its members on bringing TCPA lawsuits,<sup>148</sup> was hit with a TCPA suit in November 2014 by some of its own members. A Miami lawyer brought a claim against the organization after a third-party vendor sent faxes to AAJ members promoting its sponsored health insurance plan without including a required opt-out notice.<sup>149</sup>

AAJ is now among those asking the FCC to grant it a retroactive waiver of the opt-out requirement that would excuse its alleged infraction due to ambiguity in the law.<sup>150</sup>

AAJ has filed a motion to dismiss the federal class action lawsuit, arguing that the plaintiff “does not allege that he suffered any actual harm,” that the obligation to provide opt-out notices is subject to “considerable debate,” and that the FCC is “virtually certain” to grant AAJ’s waiver request.<sup>151</sup> “To proceed with litigation at this time would not only create the potential for inconsistent rulings in TCPA cases and risk wasting the time and resources of the court and parties, it would also be highly prejudicial to defendants and provide no benefit to plaintiff,” the plaintiffs’ bar-turned-defendant wrote.<sup>152</sup> U.S. District Court Judge James Lawrence King denied AAJ’s motion to dismiss on June 1, 2015, ordering discovery on whether the plaintiff ever consented to receive faxed advertisements, as AAJ claims and the plaintiff disputes.<sup>153</sup> Despite this experience, AAJ maintains its position that lawyers should have free rein to bring TCPA lawsuits.<sup>154</sup>

The FCC finally acted on 21 of the pending petitions by releasing an omnibus declaratory ruling on July 10, 2015,<sup>155</sup> but the new rules are viewed as a potential gold mine for plaintiffs’ lawyers.<sup>156</sup> The Commission issued the order along partisan lines with a 3-2 vote, and the rules became effective immediately upon publication and are retroactive in nature. In his dissent, FCC Commissioner Ajit Pai warned that the ruling will “make abuse of the TCPA much, much easier” and “the primary beneficiaries will be trial lawyers, not the American public.”<sup>157</sup> FCC Commissioner Michael O’Rielly echoed these sentiments, pointing out how the new rules will not protect consumers from abusive robocalls made by bad actors, but will “penalize[ ] businesses and institutions acting in good faith to reach their customers using modern technologies.”<sup>158</sup> Overall, the Commission action fails to distinguish between abusive telemarketers and businesses seeking to contact their customers for legitimate purposes. Additionally, the language used is often vague, confusing, and occasionally contradictory, leading to a growing concern that it will accelerate the growth of abusive and costly class action lawsuits.<sup>159</sup>

*“The ultimate irony came when AAJ itself, after educating its members on bringing TCPA lawsuits, was hit with one in November 2014.”*

# Tax Breaks for Trial Lawyers

## AAJ Nearly Secured a Billion Dollar Boost from Treasury

After the plaintiffs' bar repeatedly failed to convince Congress to change the Internal Revenue Code in a way that would save plaintiffs' lawyers millions in taxes each year, AAJ stealthily focused its efforts on the Treasury Department. Had AAJ kept quiet, the tax break might be law today.

The Treasury Department, backed by federal courts,<sup>160</sup> has consistently treated expenses advanced by plaintiffs' lawyers during contingency fee litigation as loans to clients.<sup>161</sup> These expenses become deductible as business expenses when the case concludes. They offset the taxable income from the lawyer's share of a settlement or judgment. If the case results in no recovery, then the expenses incurred can be written off as a bad debt. This tax treatment recognizes that when a plaintiffs' lawyer decides to take a case on a contingency fee basis, he or she has a high expectation of recovery. In most cases, expenses incurred in the litigation will be reimbursed by the client. Expenses incurred in litigation are not the type of "sunk costs" that businesses experience when purchasing office supplies, or paying salaries or rent.

The alternative sought by the plaintiffs' bar is to allow contingency fee lawyers to not wait until the end of a case, but immediately deduct travel expenses, deposition costs, filing fees, and expert witness fees when incurred. The ability to immediately write

off litigation expenses would make lengthy lawsuits more profitable for plaintiffs' lawyers. It would particularly reward contingency fee lawyers who take on speculative cases that are likely to result in years of litigation and remove a deterrent from bringing marginal cases. It would require taxpayers to share the cost and risk of litigation.

### The Above-Ground Effort Fails

In 2007, AAJ first reported lobbying Congress in support of several bills that would amend the Internal Revenue Code to allow a deduction for attorneys' fees and costs advanced by plaintiffs' lawyers to their clients.<sup>162</sup> The late Senator Arlen Specter (R-Pennsylvania), known for his occasional support of the plaintiffs' bar, introduced a bill that year, but it did not move forward.<sup>163</sup> AAJ lobbyist Linda Lipsen (now the Association's CEO) reportedly acknowledged to her members, "You cannot have a stand-alone bill to help lawyers . . . so we have to tuck it into something."<sup>164</sup>



That is precisely what AAJ worked with its allies in Congress to do. A provision that would have accomplished AAJ's goal was slipped into the Energy and Tax Extenders Act of 2008, on page 156 of a 174-page bill, which included, among other items, tax credits for use of electric vehicles and wind energy.<sup>165</sup> The Joint Committee on Taxation valued the AAJ-backed provision as benefiting plaintiffs' lawyers and costing taxpayers approximately \$1.57 billion over 10 years.<sup>166</sup>

As the *Wall Street Journal* editorialized, "Allowing these big deductions now would mean that future reimbursements are taxed, but with some monster class actions, the lawyers could avoid the tax bill for a decade or more. Naturally, this would be an incentive to file more class-action suits, because the lawyers could write off their up-front expenditures to pursue them."<sup>167</sup> The package of tax reforms passed both chambers, but did not become law because differences between the two versions were not resolved.

By early 2009, AAJ had committed virtually its entire lobbying team to pushing for the tax break.<sup>168</sup> It also engaged two outside lobbying firms to press the issue, Patton Boggs<sup>169</sup> and the Palmetto Group.<sup>170</sup> But the legislation lacked public support. Another stand-alone bill introduced that year went nowhere.<sup>171</sup>

## The Underground Effort

As it became clear to AAJ that its above-ground, light-of-day legislative efforts had little chance of success, the organization tunneled its way into the new Obama Administration by way of the Treasury Department. Trial

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lawyer lobbyists understood that if the Internal Revenue Service (IRS) reversed its longstanding interpretation of expenses incurred in contingency fee litigation as non-deductible loans to clients, such a regulatory change would be just as good as Congressional action.

AAJ had already laid the groundwork. Immediately after President Obama's election, it provided the incoming administration with a plan for changing IRS policy.<sup>172</sup> It asked the Administration to revise its "Attorneys Audit Technique Guide" and publish a memorandum to "clear up" the law.<sup>173</sup>

AAJ officials not only believed that they would be successful but, by 2010, predicted that success was imminent. At the organization's annual meeting on July 16, 2010, in Vancouver, British Columbia,

its Director of Federal Relations, John Bowman, boasted that plaintiffs' lawyers would have the desired deduction soon.<sup>174</sup> The summer conference presented a prime opportunity to tout AAJ's lobbying prowess to members. A meeting attendee said that Bowman cautioned AAJ members not to go public with news that the rule change would soon be issued, for fear of rousing opposition.<sup>175</sup> But the comment leaked, the media reported it, and a firestorm ensued over the billion dollar trial lawyer tax break negotiated behind closed doors.<sup>176</sup>

The Treasury Department refused to comment in response to inquiries from the media about Bowman's ill-advised counting of chickens before they had hatched.<sup>177</sup> "There is no public process for administrative rulings and really nothing else to comment on," said Treasury Department spokeswoman Sandra Salstrom.<sup>178</sup>

The *National Law Journal* reported, however, that in April 2010, about three months before the AAJ conference, Senators Max Baucus (D-Montana) and Richard Durbin (D-Illinois) had sent a letter to the Treasury Department supporting the AAJ-sought change.<sup>179</sup> In a May 6 response, Assistant Secretary for Tax Policy Michael Mundaca confirmed that the agency was considering the issue.<sup>180</sup> When the advocacy effort was revealed, the ranking members of the Senate Committee on Finance and House Committee on Ways and Means asked Secretary of the Treasury Timothy Geithner for, among other items, "[c]opies of all communications, including e-mails, letters and records of conversations between Treasury and

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“ Since the embarrassing disclosure of AAJ’s effort to obtain a massive tax break from Treasury officials became public, AAJ has become more careful and tight-lipped about its underground lobbying efforts. ”

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outside parties regarding the issuance of such regulations or guidance.”<sup>181</sup> They and other members of Congress who later wrote to the Department reportedly received no response.<sup>182</sup>

For its part, AAJ unapologetically owned up to the stealth advocacy effort. “Obviously, we are exploring all avenues to clarify this confusing tax code,” said Ray De Lorenzi, an AAJ spokesman, who refused to discuss any meetings or exchanges with agency officials.<sup>183</sup>

The Treasury Department has not moved forward on what could be called the Personal Injury Lawyers’ Enrichment Act, likely as a result of the sunlight and media scrutiny.

## The Aftermath

Since the embarrassing disclosure of AAJ’s effort to obtain a massive tax break from Treasury officials became public, AAJ has become more careful and tight-lipped about its underground lobbying efforts.

The organization clamped down on any leaks of information that may arise from membership meetings. Those meetings were already off limits to the media and lawyers who did not have a predominantly plaintiff-oriented practice, with exceptions for government lawyers, judges, professors, law students, or trial lawyer association staff. AAJ also had tight restrictions for attending practice-group meetings in which plaintiffs' attorneys share and coordinate lawsuit strategies. Since 2010, however, AAJ's conference registration form has required attendees to sign a secrecy pledge. This pledge reads:

As an attendee at this convention, I understand that I may have access to confidential, privileged, or proprietary information, including information concerning AAJ's legislative and/or regulatory advocacy. I agree not to disclose or disseminate such information without the written permission of AAJ, except to persons I know to be plaintiff attorney members of AAJ or members of an AAJ-affiliated trial lawyer organization. Additionally, I agree that I will not record, by audio, visual, or other means, any portion of any meeting or event during the convention without the permission of AAJ.<sup>184</sup>

Those who might consider discussing what they learn about the Association's legislative advocacy at the conference's lunches, receptions, and meetings with anyone other than like-minded individuals are threatened with, aside from a revocation of AAJ

membership, the filing of disciplinary charges against them with state licensing boards. The secrecy pledge even suggests that AAJ will take action against law students who talk by going to their schools or otherwise threatening their careers.<sup>185</sup>

Meanwhile, AAJ continues to lobby for its trial lawyer tax break.<sup>186</sup> Legislation to accomplish this goal was not introduced in the last Congress and has not moved forward in this session, suggesting that AAJ's lobbying efforts are underground in the Executive Branch. Will the trial bar's wish for a major tax break be granted in the Administration's waning days?

#### **TAX TREATMENT OF PUNITIVE DAMAGES**

AAJ also continues a decade-long lobbying effort to change the IRS's treatment of punitive damages as ordinary and necessary business expenses. Such a change would benefit plaintiffs' lawyers by increasing pressure on businesses to settle lawsuits with them on favorable terms to avoid the potential for an unpredictable, non-tax deductible punitive damages judgment.<sup>187</sup> Since AAJ's legislative efforts have repeatedly failed,<sup>188</sup> the organization has likely turned its attention to the Administration. In fact, the Treasury Department has slipped AAJ's punitive damages tax change into the agency's revenue proposal every year since 2009.<sup>189</sup>

# Litigation More Important Than Affordable Drugs

## FDA May Dramatically Alter Longstanding Generic Drug Policy

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As the Food and Drug Administration (FDA) considered altering its regulations governing the labeling of generic drugs, it did not meet with prescription drug makers. Nor did it meet with groups representing doctors or pharmacists. The FDA met with just one stakeholder: lobbyists representing the plaintiffs' lawyers of America. Their mission: overturn a U.S. Supreme Court case that had curbed lawsuits against generic drug makers. The proposed change was not motivated solely by health or safety concerns, but by the trial bar's desire to bring lawsuits against companies that make generic drugs.

### The Supreme Court Ruling

In 2011, the U.S. Supreme Court ruled in *PLIVA, Inc. v. Mensing* that federal law does not permit people who take generic drugs to sue the manufacturers of those drugs for allegedly inadequate warnings of risks.<sup>190</sup> The Court recognized that FDA regulations require generic drug manufacturers to use the labeling of the brand-name version of that drug. Since generic drug manufacturers cannot independently alter product labeling, the Court found that federal law made it impossible for them to fulfill an obligation, imposed as a result of a judgment in a state

tort lawsuit, to change the warnings indicated for a drug. The Court contrasted the generic drug makers' situation to that of brand-name drug manufacturers, which can make such a change. Just two years earlier, the Court had found that brand-name companies typically cannot successfully assert a preemption defense because they can change the label without prior FDA approval.<sup>191</sup>

### Plaintiffs' Lawyers Respond

AAJ, appreciating that the Supreme Court's ruling would effectively block lawsuits by its members against generic drug

makers, promptly lobbied Congress to pass legislation that would overrule the basis of the decision.<sup>192</sup> Neither the House nor the Senate took any action on legislation jointly introduced in the 112<sup>th</sup> Congress on April 18, 2012.<sup>193</sup> Legislators did not even introduce such a bill in the 113<sup>th</sup> Congress, yet AAJ continued “general lobbying” on preemption of state causes of action involving drug manufacturers in 2013.<sup>194</sup>

When it became clear that Congress would not support the legislation, AAJ shifted its focus to the Administration. Immediately after the Supreme Court’s ruling, Public Citizen, often an AAJ ally, had already filed a petition with the FDA. It requested that the agency change its rules in a way that would eliminate the primary basis for a generic drug maker’s preemption defense by authorizing generic drug makers to make labeling changes.<sup>195</sup> With its own efforts in Congress stalled, AAJ took up the mission of pushing the FDA to act on the Public Citizen petition, which had sat on the agency’s desk for 18 months.

The FDA welcomed the AAJ request. On February 15, 2013, the FDA held a “listen-only session” with AAJ’s regulatory counsel Sarah Rooney, AAJ-retained lobbyist Michael Forscey, and AAJ Board of Governors member Ed Blizzard, a personal injury lawyer focused on drug and medical device lawsuits.<sup>196</sup> The Agency rolled out the red carpet with high-level officials eager to hear what AAJ had to say, including Elizabeth Dickinson, the FDA’s Chief Counsel; Denise Esposito, Deputy Chief Counsel; Leslie Kux, Assistant Commissioner for Policy; Donald Beers, an FDA staff attorney; and Daniel Sigelman, a policy advisor.<sup>197</sup> The meeting was logged as “Mensing Follow-up.”<sup>198</sup>

Two weeks after the meeting, AAJ filed a public comment with the FDA in support of the Public Citizen petition.<sup>199</sup> It was the last group to file a comment supporting the Petition and the only group to support granting it.<sup>200</sup>

## Ears Only for AAJ

FDA officials certainly did “listen.” In fact, it had ears only for AAJ, Dr. Janet Woodcock, the Director of the FDA’s Center for Drug Evaluation and Research (CDER), admitted when questioned under oath during a Congressional hearing that the only group the FDA met with before announcing a proposed rule dramatically altering generic drug regulation was the personal injury bar.<sup>201</sup>

“So you did not meet with physicians, you didn’t meet with pharmacists, you didn’t meet with branded-drug companies, you did not meet with generic drug companies, but you met with the trial lawyers?” asked Representative Jim Shimkus (R-Illinois).<sup>202</sup> Woodcock responded, “part of the agency did meet with the trial lawyers, yes.”<sup>203</sup>

The FDA’s Deputy Commissioner of Operations and Chief Operating Officer, Walter Harris, later confirmed that while the agency generally “declined requests for meetings related to [the generic drug labeling] issue” and “generally does not participate in a dialogue during the development of proposed rules,” the FDA made an exception for AAJ.<sup>204</sup>



Some lawmakers have expressed concern that the FDA's meeting with AAJ may have violated an Executive Order issued by President Obama that instructs that an agency, before initiating a rule "where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking."<sup>205</sup> Yet the FDA, despite requests from the generic drug trade association, declined to meet with the very companies it intended to regulate.

### Lawsuit-Driven Health Policy

The FDA proposed its rule on November 8, 2013, months after meeting with AAJ. If adopted, the rule will accomplish exactly what AAJ and its allies have sought.<sup>206</sup> The agency would "clarify procedures" to "create parity" between the drug labeling responsibilities of brand name and generic drug makers. "If this proposed regulatory change is adopted," the FDA recognized in the preamble to the proposed rule, "it may eliminate the preemption of certain failure-to-warn claims with respect to generic drugs."<sup>207</sup>

The period for public comment initially closed on March 13, 2014 and AAJ, unsurprisingly, submitted comments urging the FDA to adopt the proposed rule.<sup>208</sup> After controversy erupted when it was revealed that the FDA met with trial lawyer lobbyists before the agency proposed the rule, the FDA announced, perhaps as a face-saving measure, a day-long public meeting for the agency to listen to comments from other members of the public on the rule change.<sup>209</sup> As a result, the FDA reopened the public comment period. AAJ wasted no time on April 27, 2015, when the extended comment period ended. It issued a press release<sup>210</sup> and filed additional comments along with a petition to the FDA,<sup>211</sup> calling on the agency to finalize the lawsuit-driven rule as proposed. AAJ also urged the FDA to reject a regulatory alternative that would require all drug makers to submit labeling changes to the agency and require the FDA to perform an expedited review to determine whether the proposed change is backed by sound science and should accompany both brand-name and generic versions of the drug.

*“Some lawmakers have expressed concern that the FDA’s meeting with AAJ may have violated an Executive Order issued by President Obama that instructs that an agency, before initiating a rule ‘where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.’”*



## Potential Impact on Patients

Today, 8 in 10 prescription drugs are filled by generic versions, a proportion that is expected to continue to rise.<sup>212</sup> If AAJ has its way, the FDA will undermine a regulatory system that has vastly expanded the availability of lower-cost generic drugs. It will do so not because of a demonstrated, compelling public health need, but in the name of protecting and expanding the interest of personal injury lawyers in lucrative pharmaceutical litigation.

Longstanding FDA regulations allow brand-name manufacturers to independently change drug labeling and require generic drug makers to use the *same* design and labeling of the brand-name drug for two public policy reasons: to protect public safety and to preserve the affordability of generic drugs. These public policy goals underlie the bipartisan Hatch-Waxman Act,<sup>213</sup> the landmark law that ushered in today's era of widely available generic drugs.

A brand-name manufacturer has primary responsibility for labeling changes because it developed the drug after years of research and clinical testing, and it has significant experience selling and monitoring it. A generic drug maker, by contrast, copies the formula for the drug after it goes off patent, and obtains approval from the FDA through an abbreviated process for a drug that is considered equivalent to an approved product. Generic drug makers share an obligation to alert the agency when it learns of adverse events, but they use the warnings developed by the brand-name manufacturer with FDA approval.

*“ If AAJ has its way, the FDA will undermine a regulatory system that has vastly expanded the availability of lower-cost generic drugs. It will do so not because of a demonstrated, compelling public health need, but in the name of protecting and expanding the interest of personal injury lawyers in lucrative pharmaceutical litigation. ”*

Allowing both brand name and generic drug companies to change labels would cause confusion for doctors, pharmacists, and their patients, as the same drug could have multiple or contradictory warnings. The rule change could result in drug companies, in an effort to avoid liability, rushing to be the first to adopt additional or stronger warnings, lest they have to explain in court why another manufacturer warned of a potential risk before they did. This “defensive labeling,” much like defensive medicine, is not in the best interests of patients.

In addition, the liability exposure resulting from the proposed rule change could cost generic drug makers as much as \$4 billion per year.<sup>214</sup> The cost of defending product liability lawsuits will inevitably be reflected in generic drug pricing, hurting the patients who need them and further increasing the cost of the American healthcare system.

The plaintiffs' bar counters with its own equivalence argument, one that is based on rhetoric rather than empirical research: it predictably equates more lawsuits with greater drug safety. AAJ suggests that, without private lawsuits, the FDA is incapable of effectively monitoring and responding to concerns. It marginalizes the agency's intensive pre-marketing approval process, which is followed by analyzing reports of adverse reactions, engaging in post-market risk identification

and analysis, communicating potential new risks to doctors and patients as they emerge, requiring labeling changes, and, when warranted, conducting recalls and imposing fines for violations of the law.<sup>215</sup> The plaintiffs' bar believes their ability to file lawsuits must be unrestricted, even when the FDA continues to recognize that a drug improves (or saves) the lives of people with illnesses or other conditions.

The FDA is poised to provide the plaintiffs' lawyers—particularly those who specialize in suing pharmaceutical companies—with an influx of new business. Ultimately, if the FDA finalizes the rule as drafted, courts will be left to determine whether the agency's radical change to generic drug regulation is permitted by the Hatch-Waxman Act's requirement of "sameness" between brand-name and generic drugs.<sup>216</sup>

# Conclusion

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This report is intended to shine sunlight where much high-level trial lawyer lobbying now takes place: in the dark underground away from the American public and out of the media's sight.

Trial lawyer lobbying will continue. Its successes, combined with dimming federal legislative prospects and the opportunity for parting gifts from the outgoing Administration, will make its practice more widespread. The public interest will be served if the media and others closely

monitor the plaintiffs' bar, discover its underground efforts within the Executive Branch, and expose them. Then, debate about the merits of such proposals can occur in an open, aboveground manner that fosters sound public policy.

# Endnotes

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- 1 At a town hall meeting in 2009, Dean responded to a question from an audience member as to why the healthcare legislation omits liability reform by saying: “The reason tort reform is not in the [health care] bill is because the people who wrote it did not want to take on the trial lawyers in addition to everybody else they were taking on, and that is the plain and simple truth.” Representative Jim Moran (D-Virginia), now retired, agreed. Editorial, *Health Care Run by Trial Lawyers*, Wash. Times, Aug. 27, 2009; *see also* Ed Morrissey, Video: Dean Says No Tort Reform Because Trial Lawyers Too Intimidating, Hot Air, Aug. 27, 2009 (providing a video of the exchange); Dr. Anthony Youn, *Health Care Act’s Glaring Omission: Liability Reform*, CNN.com, Oct. 5, 2012 (suggesting that the lack of medical liability reform in the healthcare bill was a result of the \$36.8 million in contributions that AAJ gave to Democrats since 1990).
- 2 *See* Center for Responsive Politics, *Overall Spending Inches Up in 2014: Megadonors Equip Outside Groups to Capture a Bigger Share of the Pie*, Oct. 29, 2014, at <https://www.opensecrets.org/news/2014/10/overall-spending-inches-up-in-2014-megadonors-equip-outside-groups-to-capture-a-bigger-share-of-the-pie/>.
- 3 Memorandum for the Secretary of Health And Human Services, *Demonstration Grants for the Development, Implementation, and Evaluation of Alternatives to the Current Medical Liability System*, Sept. 17, 2009, at <https://www.whitehouse.gov/the-press-office/presidential-memorandum-concerning-medical-liability-reform>.
- 4 White House, Office of the Press Secretary, *Memorandum to the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 24,693 (May 20, 2009).
- 5 Exec. Order No. 13673, *Fair Pay and Safe Workplaces*, § 6, 79 Fed. Reg. 45,309, 45,314 (July 31, 2014).
- 6 CFPB, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Mar. 2015).
- 7 *See* Centers for Medicare & Medicare Services (CMS), *Proposed Rule, Medicare and Medicaid Programs. Reform of Requirements for Long-Term Care Facilities*, 80 Fed. Reg. 42,168 (July 16, 2015).
- 8 *See* Centers for Medicare & Medicaid Services, *Advance Notice of Proposed Rulemaking*, 77 Fed. Reg. 35,917 (June 15, 2012).
- 9 *See* Office of Information and Regulatory Affairs, Office of Management and Budget, *Medicare Secondary Payer and “Future Medicals”* (CMS-6047-P), at <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201410&RIN=0938-AR43> (noting withdraw of rule on Oct. 8, 2014).
- 10 *Cox v. Gruma Corp.*, No. 12-cv-6502 YGR, 2013 WL 3828800, at \*2 (N.D. Cal. July 11, 2013); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at \*8-9 (N.D. Cal. July 25, 2013); *In re Gen. Mills, Inc. Kix Cereal Litig.*, Civ.A. No. 12-249 KM, 2013 WL 5943972, at \*1 (D. N.J. Nov. 1, 2013).
- 11 Letter from Leslie Kux, Assistant Commissioner for Policy, U.S. Food & Drug Admin., to The Hon. Yvonne Gonzalez Rogers, The Hon. Jeffrey S. White, and The Hon. Kevin McNulty, Jan. 6, 2014, at <http://www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf>.
- 12 *See generally* Becca J. Wahlquist & Marjorie A. Witter, *Lawsuit Ecosystem II: New Trends, Targets and Players*, Telephone Consumer Protection Act (U.S. Chamber Inst. for Legal Reform 2014).
- 13 *See* Jimmy Hoover, *FCC Expands TCPA to Robocalls Despite Litigation Fears*, Law 360, June 18, 2015.

- 14 See Joint Comm. on Taxation, Estimated Revenue Effects of H.R. 6049, The “Renewable Energy and Job Creation Act of 2008,” Scheduled for Consideration by the House of Representatives on May 21, 2008, at 6 (May 21, 2008).
- 15 See Editorial, Pushback on Trial-lawyer Tax Breaks, Wash. Times, July 27, 2010.
- 16 Energy & Commerce Committee, U.S. House of Representatives, Hearing, Examining Concerns Regarding FDA’s Proposed Changes to Generic Drug Labeling, Apr. 1, 2014, at <http://energycommerce.house.gov/hearing/examining-concerns-regarding-fdas-proposed-changes-generic-drug-labeling>.
- 17 See White House, Visitor Access Records, at <https://www.whitehouse.gov/briefing-room/disclosures/visitor-records> (last visited July 13, 2015) (excluding attendance at meetings or events with over 50 participants). Other AAJ lobbyists visiting the White House include John Bowman, AAJ’s chief federal lobbyist (15 visits logged as John R. Bowman) and Sarah Rooney, AAJ’s regulatory counsel (7 visits logged as Sarah E. Rooney), and retained lobbyists Jonathan Yarowsky (20 visits) and Michael Forscey (8 visits). See *id.*
- 18 See, e.g., Paul Barrett, House GOP Demands the FDA Explain Plaintiffs’-Lawyer Lobbying, Bloomberg, July 22, 2014.
- 19 What is a “higher” or “stricter” standard in the product liability context is often not black and white. Nearly any aspect of a product or warning can be made “safer” or “stronger” in some respect. Often, measuring safety is a complex judgment. A product that is safer in some situations may become more dangerous in others. Adding a warning about a low or scientifically unproven risk may lead the reader to overlook or ignore warnings about significant risks.
- 20 William Funk et al., Limiting Federal Agency Preemption: Recommendations for a New Federalism Executive Order (Center for Progressive Reform, Nov. 2008). In the report, the Center for Progressive Reform expresses its gratitude to AAJ “for its support of this project.” *Id.*
- 21 Rebecca M. Bratspies et al., Protecting the Public Health and the Environment by the Stroke of a Presidential Pen: Seven Executive Orders for the President’s First 100 Days 27-31 (Center for Progressive Reform Nov. 2008).
- 22 See Letter to Peter Orszag & Cass Sunstein, Executive Office of the President-Elect signed by fifteen groups including the American Association for Justice, dated Jan. 13, 2009, at [http://www.citizen.org/documents/Preemption\\_letter\\_to\\_orszag\\_sunstein\\_20090114.pdf](http://www.citizen.org/documents/Preemption_letter_to_orszag_sunstein_20090114.pdf) (providing as an attachment a draft Executive Order amending Executive Order 13132 on Federalism); Am. Ass’n for Justice, Transition Notebook – Executive Summary, Submitted to Obama-Biden Transition Project (2008), at <http://energycommerce.house.gov/hearing/examining-concerns-regarding-fdas-proposed-changes-generic-drug-labeling> (focusing entirely on preemption issues, including a recommended executive order, and attaching Center for Progressive Reform report among supporting materials); see also Christine Caulfield, Trial Lawyers Call For Preemption Overhaul, Law360, Jan. 12, 2009; Am. Ass’n for Justice, Press Release, AAJ Sends Obama Team Strategies to Reverse Bush “Complete Immunity” Regulations, Jan. 12, 2009.
- 23 See White House, Office of the Press Secretary, Memorandum to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009).
- 24 Jeff Rosen & Jay Lefkowitz, A Little-Noted Memorandum Undercuts Health and Safety Rules, Wash. Post, Aug. 6, 2009.
- 25 See Admin. Conf. of U.S., Agency Procedures for Considering Preemption of State Law, Recommendation 2010-1 (adopted Dec. 9, 2010), published at 76 Fed. Reg. 81 (Jan. 3, 2011).
- 26 See, e.g., Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227 (2007).
- 27 See Recommendation 2010-1, *supra*.
- 28 See *id.*



- 29 Federal Motor Vehicle Safety Standards; Roof Crush Resistance, Notice of Proposed Rulemaking, 70 Fed. Reg. 49,223, 49,245-46 (daily ed. Aug. 23, 2005).
- 30 See Am. Ass'n for Justice, Press Release, *AAJ Calls on New NHTSA Chief to Address Roof Crush Standard*, Apr. 9, 2009, at <https://www.justice.org/news/aa-j-calls-new-nhtsa-chief-address-roof-crush-standard>.
- 31 Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements; Final Rule, 74 Fed. Reg. 22,348, 22,349 (daily ed. May 12, 2009).
- 32 Designated Seating Positions and Seat Belt Assembly Anchorages, Final Rule, 73 Fed. Reg. 58,887 (Oct. 8, 2008).
- 33 Am. Ass'n for Justice, Petition, Nov. 24, 2008, Docket No. NHTSA-2008-0059 (requesting that NHTSA remove language supporting preemption from the preamble and rule text).
- 34 Federal Motor Vehicle Safety Standards; Designated Seating Positions, 74 Fed. Reg. 68,185 (Dec. 23, 2009).
- 35 *Id.* at 68,188.
- 36 See U.S. Dep't of Labor, Occupational Safety & Health Admin., Standard Interpretations, OSHA's Position on Conflict Preemption Precluding State Court Filings with Regard to Defective NIOSH-certified Respirators, Jan. 9, 2009 ("To allow juries to enforce their own views of respirator design specifications and labeling for which NIOSH, as an expert agency, has already created standards and requirements, would directly conflict with OSHA's mandate that employers only use respirators designed and manufactured in accordance with NIOSH requirements."). In February 2010, DOL accepted AAJ's invitation to reverse itself. See Letter of Deborah Greenfield, OSHA Acting Deputy Solicitor, to Les Weisbrod, President of American Association for Justice, Feb. 3, 2010, at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28049](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28049). In doing so, DOL found that the position the agency had taken on preemption just months earlier "did not take full account of relevant jurisprudence regarding preemption principles at the time it was written," and was also out of step with recent Supreme Court jurisprudence and the policy of the current Administration. *Id.*; see also Victor E. Schwartz & Cary Silverman, Preemption: Department of Labor Reversal and Ruling By Washington Supreme Court Could Impact Respirator Availability, Bloomberg BNA, Nov. 5, 2012.
- 37 See Mine Safety & Health Admin., Refuge Alternatives for Underground Coal Mines, 74 Fed. Reg. 61,531 (Nov. 25, 2009) (rescinding a portion of the agency's intent stated in the preamble to the rule issued in 2008 concerning preemption of tort claims with respect to the agency's approval of specifications for a refuge alternative that requires that coal mine operators provide an environment that can sustain miners unable to escape during an underground emergency for as long as 96 hours, as "at best, interpretive guidance").
- 38 Final Rule, Hazard Communication, 77 Fed. Reg. 17,574, 17,694 (Mar. 26, 2012).
- 39 See *id.* at 17,694, 17,786 (providing revised text of 29 C.F.R. § 1910.1200(a)(2)).
- 40 The American Tort Reform Association challenged OSHA's failure to provide notice and consider comments on the change as a violation of the Administrative Procedures Act and the agency's authority to make such a change consistent with the Occupational Health and Safety Act of 1970. See generally Final Brief of Petitioner, *Am. Tort Reform Ass'n v. OSHA*, No. 12-1229 (filed June 27, 2013); Reply Brief of Petitioner, *Am. Tort Reform Ass'n v. OSHA*, No. 12-1229 (filed June 6, 2013).
- 41 See Brief of the American Association for Justice as *Amicus Curiae* in Support of Respondents and Dismissal, *Am. Tort Reform Ass'n v. OSHA*, No. 12-1229 (filed May 23, 2013). Ultimately, the D.C. Circuit upheld the regulatory change, but found OSHA's view of the preemptive effect of the regulation is no more than an "interpretive statement" that has no legal effect and is not due deference by courts. See *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387 (D.C. Cir. 2013).

- 42 Remarks by the President to a Joint Session of Congress, Sept. 9, 2009, at <https://www.whitehouse.gov/video/President-Obama-Address-to-Congress-on-Health-Insurance-Reform>.
- 43 Memorandum for the Secretary of Health And Human Services, Demonstration Grants for the Development, Implementation, and Evaluation of Alternatives to the Current Medical Liability System, Sept. 17, 2009, at <https://www.whitehouse.gov/the-press-office/presidential-memorandum-concerning-medical-liability-reform>.
- 44 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10607, 124 Stat. 119, 804, 1009-14 (2010).
- 45 See Nat'l Comm'n on Fiscal Responsibility & Reform, 111th Cong., The Moment of Truth 39-40 (2010).
- 46 *Id.* at 40.
- 47 *Id.* at 39-40.
- 48 See Cong. Budget Office, Reducing the Deficit: Spending and Revenue Options 35-36 (2011) (estimated savings per year from limiting medical malpractice torts which total \$62.4 billion). CBO has also provided various other estimates of cost savings, which may vary based on the methodology and types of reforms considered. See Cong. Budget Office Cost Estimate, H.R. 5: Help Efficient, Accessible, Low Cost, Timely Healthcare (HEALTH) Act of 2011 at 4 [hereinafter Budget Office Cost Estimate] (estimating H.R. 5, as reported by the House Judiciary Committee on February 16, 2011, would reduce the federal deficit by \$40 billion over the next decade); Letter from Douglas W. Elmendorf, Dir. Cong. Budget Office to the Honorable Orrin G. Hatch, Senator (Oct. 9, 2009), at [https://www.cbo.gov/sites/default/files/10-09-tort\\_reform.pdf](https://www.cbo.gov/sites/default/files/10-09-tort_reform.pdf) (estimating that nationwide implementation of medical liability reforms would reduce federal budget deficits by \$54 billion over ten years).
- 49 Reducing the Deficit: Spending and Revenue Options, *supra*, at 35-36.
- 50 *Id.* at 36.
- 51 *Id.* at 35-36.
- 52 *Id.* at 36.
- 53 See *id.* (explaining that physicians typically order fewer medical services when they are not worried about medical malpractice claims).
- 54 See Michelle M. Mello et al., National Costs of the Medical Liability System, 29 Health Aff. 1569, 1574 (2010) (estimating \$45.6 billion defensive medicine costs in 2008).
- 55 See PricewaterhouseCoopers' Health Research Inst., The Price of Excess: Identifying Waste in Healthcare Spending 6 (2008) (estimating the cost of defensive medicine to be \$210 billion); Lawrence J. McQuillan & Hovannes Abramyan, The Facts about Medical Malpractice Liability Costs, Health Pol'y Prescriptions, Oct. 2009, at 1, 2 (estimating costs of \$191 billion).
- 56 See, e.g., BioScience Valuation, The Economics of Defensive Medicine and No-Fault Compensation Systems 30 (2012) (estimating the cost of defensive medicine at \$480 billion).
- 57 Transcript, Voices of Power: Secretary of Health and Human Services, Kathleen Sebelius, Wash. Post, Sept. 15, 2009.
- 58 Agency for Healthcare Research and Quality, Medical Liability Reform and Patient Safety Demonstration Projects (R18), Request for Applications (RFA), No. RFA-HS-10-021 (Oct. 20, 2009).
- 59 Agency for Healthcare Research and Quality, Clarification and Update Notice for AHRQ Medical Malpractice Funding Opportunity Announcements (FOAs): RFA-HS-10-021 and RFA-HS-10-022 (Nov. 20, 2009), at <http://grants.nih.gov/grants/guide/notice-files/NOT-HS-10-004.html> (emphasis in original).
- 60 See Fred J. Hellinger, & William E. Encinosa, Review of Reforms to Our Medical Liability System (Agency for Health Care Research and Quality Dec. 2009).

- 61 *Id.*
- 62 *Id.*
- 63 *Id.*
- 64 *Id.*
- 65 See Agency for Healthcare Research & Quality, Patient Safety and Medical Liability Initiative: Summary of Findings (Oct. 2014), at [http://www.ahrq.gov/professionals/quality-patient-safety/patient-safety-resources/resources/liability/liability\\_initiative.html](http://www.ahrq.gov/professionals/quality-patient-safety/patient-safety-resources/resources/liability/liability_initiative.html).
- 66 See Agency for Healthcare Research and Quality, Medical Liability Reform and Patient Safety Initiative Progress Report (2012).
- 67 AHRQ reports that the preliminary results of the New York City study show that a judge-led mediation reduced the time to resolve medical malpractice claims by approximately 50%. See *id.*
- 68 AHRQ reports that it has launched two additional projects under the Patient Safety and Medical Liability Initiative, one involving perinatal care and the other providing hospitals with a “toolkit” for communication and resolution programs. See *id.*
- 69 For example, in the fourth quarter of 2009, when President Obama addressed Congress on healthcare reform and Secretary Sebelius solicited proposals for demonstration projects, AAJ paid \$160,000 to Patton Boggs, \$50,000 to NVG, Inc., \$50,000 to Forscey & Stinson, and \$50,000 to Andrew Cochran, to lobby on issues that included medical malpractice. These amounts were in addition to the \$1,330,000 the Association itself reported for lobbying its agenda, including medical malpractice liability, that quarter. Am. Ass’n for Justice, Lobbying Report 4Q 2010, at 1 (Jan. 14, 2010).
- 70 See Federal Arbitration Act, 9 U.S.C. § 2. Arbitration agreements may be invalid if there are “grounds [that] exist at last or in equity for the revocation of any contract.” *Id.* The Supreme Court has ruled that such grounds many not single-out an arbitration clause but must apply equally to any contract. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).
- 71 S. 1782, 110th Cong. (introduced July 12, 2007); H.R. 3010, 110th Cong. (introduced July 12, 2007); S. 931, 111th Cong. (introduced Apr. 29, 2009); H.R. 1020, 111th Cong. (introduced Feb. 12, 2009); S. 987, 112th Cong. (introduced May 12, 2011); H.R. 1873, 112th Cong. (introduced May 12, 2011); S. 878, 113th Cong. (introduced May 7, 2013); H.R. 1844, 113th Cong. (introduced May 7, 2013); S. 1133, 114th Cong. (introduced Apr. 29, 2015); H.R. 2087, 114th Cong. (introduced Apr. 29, 2015).
- 72 See, e.g., Am. Ass’n for Justice, Lobbying Report, Q2 2015, at 2 (June 17, 2015); Am. Ass’n for Justice, Lobbying Report, Midyear 2007, at 3 (July 25, 2007).
- 73 S. 1133, 114th Cong. (introduced Apr. 29, 2015); H.R. 2087, 114th Cong. (introduced Apr. 29, 2015).
- 74 See, e.g., Am. Ass’n for Justice, Lobbying Report Q3 2012, at 3 (Oct. 19, 2012) (reporting lobbying on H.R. 6351, 112th Cong. (introduced Aug. 2, 2012)); Am. Ass’n for Justice, Lobbying Report Q2 2010, at 6 (July 17, 2010) (reporting lobbying on H.R. 1237, 111th Cong. (introduced Feb. 26, 2009) and S. 512, 111th Cong. (introduced Mar. 3, 2009)); Am. Ass’n for Justice, Lobbying Report Q2 2008, at 6 (July 8, 2008) (reporting lobbying on H.R. 6126, 110<sup>th</sup> Cong. (introduced May 22, 2008) and S. 2838, 110<sup>th</sup> Cong. (introduced Apr. 9, 2008)).
- 75 See, e.g., Am. Ass’n for Justice, Lobbying Report Q2 2014, at 2 (July 18, 2014), at (reporting lobbying on the SCRA Rights Protection Act, S. 1999, 113th Cong. (introduced Feb. 18, 2014) and the Servicemember Employment Protection Act, S. 2393, 113th Cong. (introduced May 22, 2014)).
- 76 See, e.g., Am. Ass’n for Justice, Lobbying Report Q1 2014, at (listing “[g]eneral lobbying with regard to the enforceability of mandatory, predispute arbitration provisions in employment and consumer contracts, including financial

- consumer contracts,” among other issues, lobbied within both Congress and the Executive Office of the President).
- 77 See Exec. Order No. 13673, Fair Pay and Safe Workplaces, § 6, 79 Fed. Reg. 45,309, 45,314 (July 31, 2014).
- 78 Am. Ass’n for Justice, Press Release, AAJ Statement on the Fair Pay and Safe Workplaces Executive Order, July 31, 2014, at <https://www.justice.org/news/aa-j-statement-fair-pay-and-safe-workplaces-executive-order>.
- 79 See Federal Procurement Data System, Top 100 Contractors Report (2014), at <https://www.fpds.gov/fpdsng/cms/index.php/en/reports/62-top-100-contractors-report>.
- 80 See White House, Office of the Press Secretary, FACT SHEET: Fair Pay and Safe Workplaces Executive Order (July 31, 2014) (“The Department of Labor estimates that there are roughly 24,000 businesses with federal contracts, employing about 28 million workers.”).
- 81 See Allen Vaught, What Obama Did: How Our President is Helping Fight Back Against Forced Arbitration, Baron & Budd blog, Sept. 15, 2014 (last visited July 10, 2015).
- 82 *Id.*
- 83 See NVG, Inc., Lobbying Report Q1 2015 (Apr. 20, 2015); NVG, Inc., Lobbying Report Q4 2014 (Jan. 20, 2015).
- 84 See Am. Ass’n for Justice, Press Release, AAJ Statement on Implementation of the Fair Pay and Safe Workplaces Executive Order, May 27, 2015, at <https://www.justice.org/news/aa-j-statement-implementation-fair-pay-and-safe-workplaces-executive-order>.
- 85 See Am. Ass’n for Justice, Press Release, Consumer Financial Protection Bureau Will Protect Americans from Abusive Forced Arbitrations, July 21, 2010, at <https://www.justice.org/news/consumer-financial-protection-bureau-will-protect-americans-abusive-forced-arbitrations>.
- 86 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law 111-203, § 1028(a) (adopted July 21, 2010).
- 87 See Am. Ass’n for Justice, Press Release, CFPB Hearing to Address Forced Arbitration, Banks’ License to Steal, Dec. 12, 2013, at <https://www.justice.org/news/cfpb-hearing-address-forced-arbitration-banks%20%80%99-license-steal>; Am. Ass’n for Justice, Press Release, AAJ: Protect Consumers From Secretive Forced Arbitration, June 25, 2012, at <https://www.justice.org/news/aa-j-protect-consumers-secretive-forced-arbitration>.
- 88 See Am. Ass’n for Justice et al., Comment on Agency Information Collection Activities; Proposals, Submissions, and Approvals, Docket No. CFPB-2014-011 (July 3, 2014); Center for Constitutional Litigation Comment on behalf of the American Association for Justice on Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017 (June 22, 2012).
- 89 See CFPB, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (Mar. 2015).
- 90 See, e.g., *Concepcion*, 131 S. Ct. at 1753 (recognizing that consumers are “better off under their arbitration agreement” than they would be “as participants in a class action, which ‘could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.’”) (internal citation omitted); Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions, Mayer Brown, at 1 (2013) (studying outcomes of consumer class actions and concluding that the “vast majority of cases produced no benefits to most members of the putative class”); Alison Frankel, A Smoking Gun in Debate Over Consumer Class Actions?, Reuters, May 9, 2014 (reporting that claims rates by consumers in class actions are “almost always” less than one percent); Ted Frank, Class Actions, Arbitration, and Consumer Rights: Why *Concepcion* is a Pro-Consumer Decision, at 6-7 (Manhattan Inst., Ctr. for Legal Pol’y, 2013)

- (concluding that “class settlements frequently provide little or no meaningful compensation to consumers”).
- 91 See Financial Industry Regulatory Auth., Dispute Resolution Statistics; *see also* Securities Arbitration Commentator, Securities Arbitration Award Awards Survey 2013 (July 30, 2014) (discussing general rise in average securities arbitration award).
- 92 See Jason Scott Johnson & Todd Zywicki, The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique, Mercatus Working Paper (Geo. Mason Univ. Aug. 2015) (highlighting shortcomings in CFPB study and concluding that it presents no foundation for imposing new restrictions or prohibitions on mandatory arbitration clauses in consumer contracts); *see also* Evan Weinberger, CFPB Signals End To Financial Services Arbitration Clauses, Law 360, Mar. 10, 2015 (noting criticisms that CFPB study “gives short shrift to the benefits of [predispute arbitration] clauses”).
- 93 See Nicholas M. Gess et al., CFPB and the Future of Arbitration Clauses: Consumer Financial Protection Bureau, Nat’l L. Rev., Mar. 12, 2015 (“further regulatory action based on the study would appear to be quite likely”); James Kim et al., Flawed CFPB Study and the Future of Arbitration Clauses, Corp. Counsel, Mar. 24, 2015.
- 94 See Revoke Banks License to Steal, Petitioning Director of the Consumer Financial Protection Bureau Richard Cordray, Take Justice Back, at <http://www.takejusticeback.com/node/301>; Revoke Corporations’ License to Steal. Stop Forced Arbitration, at <https://www.change.org/p/revoke-banks-license-to-steal-stop-forced-arbitration> (initiated Mar. 2015); *see also* Julia Duncan & Michelle Kimmel, Joining Forces to Stop Mandatory Arbitration, Trial (Aug. 2015) (discussing AAJ’s lobbying of federal agencies on arbitration issues).”
- 95 Testimony of the Hon. Richard Cordray, Director, CFPB, Before the Senate Comm. on Banking, Housing & Urban Affairs, July 15, 2015 (response to question from Ranking Member Sherrod Brown at minute 42:30 to 43:30).
- 96 See Am. Ass’n for Justice, Lobbying Report Q2 2015, at 2 (July 17, 2015).
- 97 See H.R. 6351, 112th Cong. (introduced Aug. 2, 2012).
- 98 See Am. Ass’n for Justice, Lobbying Report Q2 2015, at 3 (July 17, 2015).
- 99 See Centers for Medicare & Medicaid Services (CMS), Proposed Rule, Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42,168, 42,172, 42,211, 42,241-42, 42,264-65 (July 16, 2015).
- 100 See *id.* at 42,242 (“[W]e are concerned that despite the protections we have proposed in this rule, some nursing home residents and potential residents may feel pressured to sign these agreements.... Thus, we have also requested comments on whether agreements for binding arbitration should be prohibited.”).
- 101 See Am. Ass’n for Justice, Lobbying Report Q1 2015, at 2 (Apr. 17, 2015).
- 102 See *id.* at 2-3; *see also* H.R. 1098, 114th Cong. (introduced Feb. 26, 2015).
- 103 See *id.* at 3; *see also* S. 852, 114th Cong. (introduced Feb. 26, 2015).
- 104 Am. Ass’n for Justice, Forced Arbitration, at <https://www.justice.org/what-we-do/advocate-civil-justice-system/issue-advocacy/forced-arbitration-0>.
- 105 See, e.g., Christopher R. Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitration, 25 Ohio J. on Disp. Resol. 843, 892-96 (2010); Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 820 (2010); Peter B. Rutledge, Who can be Against Fairness? The Case Against the Arbitration Fairness Act, 9 Cardozo J. Confl. Resol. 267 (2008); Theodore St. Antoine, Mandatory Arbitration: Why It’s Better Than It Looks, 41 U. Mich. J.L. Reform 783 (2008).
- 106 See Am. Ass’n for Justice, Lobbying Report Q1 2015, at 6 (Apr. 17, 2015) (reporting lobbying “with regard to the Medicare Secondary Payer



- Program,” “with regard to the implementation of the SMART Act (Public Law 112-242),” and “with regard to the Medicare Third Party Liability Program”); Wilmer Cutler Pickering Hale and Dorr LLP, Lobbying Report Q1 2015, at 2 (Apr. 20, 2015) (reporting lobbying for AAJ on “Medicare secondary payer issue”); NVG LLC, Lobbying Report Q1 2015, at 2 (Apr. 20, 2015) (reporting lobbying for AAJ on “Medicare Secondary Payer Futures”); Forscey PLLC, Lobbying Report Q1 2015, at 3 (Apr. 13, 2015) (reporting lobbying for AAJ “to modify proposed CMS regulation that would apply to Medicare Secondary Payer Act to liability settlements”).
- 107 See Centers for Medicare and Medicaid Services, Medicare Secondary Payer, at <http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Medicare-Secondary-Payer/Medicare-Secondary-Payer.html>.
- 108 See Am. Ass’n for Justice, Press Release, Regulatory Victory: Future Medicals Rule Withdrawn (Oct. 13, 2014), at <https://www.justice.org/news-members/regulatory-victory-future-medicals-rule-withdrawn-0>.
- 109 See 42 U.S.C. § 1395y(b)(2).
- 110 See Centers for Medicare and Medicaid Services, Medicare Secondary Payer, *supra*.
- 111 See *id.*
- 112 See Am. Ass’n for Justice, Press Release, CMS Issues New Medicare Secondary Payer Guidance (Oct. 6, 2011), at <https://www.justice.org/blog/cms-issues-new-medicare-secondary-payer-guidance> (stating that “AAJ continues to push for... improvements [at CMS] while also supporting the Strengthening Medicare and Repaying Taxpayers (SMART) Act in Congress”).
- 113 See *supra* note 105.
- 114 See Wilmer Cutler Pickering Hale and Dorr LLP, Lobbying Report Q3 2013, at 2 (Oct. 21, 2013) (reporting \$80,000 in quarterly lobbying income from AAJ for “Medicare secondary payer issue”). This quarterly lobbying arrangement has been virtually unchanged since 2013. See Wilmer Cutler Pickering Hale and Dorr LLP, Lobbying Report Q1 2015, at 2 (Apr. 20, 2015).
- 115 See Centers for Medicare & Medicaid Services, Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 35,917 (June 15, 2012).
- 116 See, e.g., U.S. Chamber of Commerce, Comments on Advanced Notice of Proposed Rulemaking: Medicare Secondary Payer and “Future Medicals,” CMS-6047-ANPRM, (Aug. 14, 2012).
- 117 See Mary Alice McLarty on behalf of the Am. Ass’n for Justice, Comments on CMS-6047-ANPRM (RIN 0938-AR43) (Aug. 14, 2012); see also Am. Ass’n for Justice, AAJ Opposes CMS Proposed Rulemaking on Medicare Repayment System (Aug. 15, 2012), at <https://www.justice.org/blog/aaj-opposes-cms-proposed-rulemaking-medicare-repayment-system>.
- 118 See *id.* at 1 (“AAJ believes that CMS may not have authority in the area of future medicals and liability insurance.”).
- 119 *Id.* at 2.
- 120 See Office of Information and Regulatory Affairs, Office of Management and Budget, Medicare Secondary Payer and “Future Medicals” (CMS-6047-P), at <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201410&RIN=0938-AR43> (stating withdraw of rule on Oct. 8, 2014); see also Sara Hansard, CMS Withdraws Medicare Secondary Payer Proposed Rule, Bloomberg BNA (Oct. 22, 2014).
- 121 Am. Ass’n for Justice, Press Release, Regulatory Victory: Future Medicals Rule Withdrawn (Oct. 13, 2014), at <https://www.justice.org/news-members/regulatory-victory-future-medicals-rule-withdrawn-0>.
- 122 *Id.*
- 123 See Letter from Joseph F. Rice to Sally Howard, Esq., Deputy General Counsel, U.S. Dep’t of Health & Human Services, re: Asbestos Trust/Application of Section 111 of

- the Medicare, Medicaid and SCHIP Extension Act of 2007, dated Mar. 18, 2011 (referring to submission of October 2009 position paper, subsequent meeting, and HHS determination of inapplicability of reporting to asbestos trusts) (on file with ILR).
- 124 See Letter from Kathleen Sebelius, Secretary of Health & Human Services to Sue A. Erhart (counsel to Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust) dated Nov. 2, 2009 (on file with ILR).
- 125 See Cary Silverman, *The New Lawsuit Ecosystem: Trends, Targets and Players*, Food Class Action Litigation 88-95 (Inst. Legal Reform 2013) (reporting 150 food class actions filed between 2011 and 2013, up from about 18 in 2008).
- 126 *Id.* at 96-98 (identifying about 25 plaintiffs' law firms that have brought most of such litigation).
- 127 See *id.* at 91; see also Victor E. Schwartz & Cary Silverman, *The Rise of Empty Suit Litigation: Where Should Tort Law Draw the Line*, 80 Brook L. Rev. 599, 657 n. 337 (2015).
- 128 See *id.* at 669.
- 129 See *id.* at 669-72 (documenting multi-million dollar settlements of food class actions).
- 130 The FDA's informal current policy leaves a large grey area. It is that the term "natural" with respect to food means "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993); see also U.S. Dep't of Agric., *Food Standards and Labeling Policy Book* (Aug. 2005) (permitting natural claims for meat and poultry if the product contains (1) no artificial flavor, color, chemical preservative, or other artificial or synthetic ingredient; (2) is minimally processed; and (3) the label includes a brief statement explaining the meaning of the term natural).
- 131 The Grocery Manufacturers Association estimates that 70 to 80 percent of foods on store shelves contain genetically-modified ingredients. See Grocery Manufacturers Association Position on GMOs, factsaboutgmos.org, at <http://factsaboutgmos.org/disclosure-statement> (noting that food grown using such technology require fewer pesticides and less water, reducing the price of food and the need for chemicals).
- 132 See Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, Wall St. J., Nov. 6, 2013.
- 133 *Cox v. Gruma Corp.*, No. 12-cv-6502 YGR, 2013 WL 3828800, at \*2 (N.D. Cal. July 11, 2013) (order staying litigation for six-months); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at \*8-9 (N.D. Cal. July 25, 2013) (order staying litigation for six-months); *In re Gen. Mills, Inc. Kix Cereal Litig.*, Civ.A. No. 12-249 KM, 2013 WL 5943972, at \*1 (D. N.J. Nov. 1, 2013) (order administratively terminating case); see also *Astiana v. Hain Celestial Grp., Inc.*, 905 F.Supp.2d 1013, 1016-17 (N.D. Cal. 2012) (declining to make an independent determination on whether manufacturer's use of "natural" on cosmetic labels was false or misleading in absence of FDA rules, regulations, or informal policy guidance on the issue).
- 134 See *id.*
- 135 Letter from Leslie Kux, Assistant Commissioner for Policy, U.S. Food & Drug Admin., to The Hon. Yvonne Gonzalez Rogers, The Hon. Jeffrey S. White, and The Hon. Kevin McNulty, Jan. 6, 2014, at <http://www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf>.
- 136 *Id.* at 2.
- 137 See FDA, *Meetings, Conferences, & Workshops, Past Meetings With FDA Officials*, Public Calendar: February 11-15, 2013.
- 138 Letter from Leslie Kux, *supra*.
- 139 See Safe and Accurate Food Labeling Act of 2014, H.R.4432, 113th Cong. (2014); Am. Ass'n for Justice, *Lobbying Report Q2 2014* (July 18, 2014).

- 140 See Helena Bottemiller Evich, *It's Official: Obama Axes Trans Fats*, Politico, June 16, 2015.
- 141 *Id.*
- 142 See generally Now Is the Time for the FCC to Revisit Outdated TCPA Regulations, U.S. Chamber Inst. for Legal Reform, Feb. 3, 2015.
- 143 See generally Becca J. Wahlquist & Marjorie A. Witter, *Lawsuit Ecosystem II: New Trends, Targets and Players*, Telephone Consumer Protection Act, at 86-94 (U.S. Chamber Inst. for Legal Reform 2014).
- 144 Ajit Pai, *The FCC Shouldn't Enable More TCPA Lawsuits*, Daily Caller, June 16, 2015; see also *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/> (finding that TCPA litigation grew 560% from 2010-2014).
- 145 *Lawsuit Ecosystem II*, *supra*, at 87 (summarizing settlements).
- 146 See *id.* at 88-91 (describing several of the petitions and the FCC's lack of action); see also Letter from a coalition of business groups to the FTC, dated Feb. 2, 2015, in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, available at [http://www.instituteforlegalreform.com/uploads/sites/1/TCPA\\_Multi-Association\\_Ltr\\_2\\_2.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Multi-Association_Ltr_2_2.pdf) (requesting that the FCC expeditiously address the issues raised in the numerous petitions that have been and continue to be filed with the Commission regarding the TCPA).
- 147 See Kelley Drye, *TCPA FCC Petition Tracker*, at [http://www.instituteforlegalreform.com/uploads/sites/1/TCPA\\_Multi-Association\\_Ltr\\_2\\_2.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Multi-Association_Ltr_2_2.pdf) (summarizing 32 pending petitions, and noting an additional 113 petitions seeking a retroactive waiver of the opt-out requirement for fax advertisements as of June 9, 2015).
- 148 See, e.g., *Recent Trends in TCPA Litigation*, Presentation by John Barrett at AAJ's 2014 Annual Meeting on July 24, 2014, at <http://www.playbackaaj.com/414-060>.
- 149 First Amended Complaint, *Blake v. J.L. Barnes Ins. Agency, Inc.*, No. 1:14-cv-23781 (S.D. Fla. Nov. 20, 2014); see also Jessica M. Karmasek, *Miami Attorney Adds Trial Lawyers Group as Defendant in Proposed Class Action Over 'Junk' Faxes*, Legal Newsline, Feb. 9, 2015; Bryan Quigley, *The Trial Lawyer Lobby Discovers a Frivolous Lawsuit*, U.S. Chamber Inst. for Legal Reform, Feb. 4, 2015.
- 150 Am. Ass'n for Justice, *Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket No. 02-278, CG Docket No. 05-338 (filed Nov. 26, 2014), at <http://apps.fcc.gov/ecfs/document/view?id=60000988676>. The FCC appears to have not yet acted on the petition. See Kelley Drye, *TCPA Petitions Tracker*, at [http://www.kelleydrye.com/publications/client\\_advisories/0905](http://www.kelleydrye.com/publications/client_advisories/0905) (last visited July 22, 2015).
- 151 Joint Motion to Dismiss First Amended Complaint, or in the Alternative, to Stay Litigation, With Supporting Memorandum of Law, *Blake v. J.L. Barnes Ins. Agency, Inc.*, No. 1:14-cv-23781 (S.D. Fla. filed Jan. 8, 2015).
- 152 *Id.* at 3.
- 153 Order Denying Motion to Dismiss Without Prejudice, *Blake v. J.L. Barnes Ins. Agency, Inc.*, No. 1:14-cv-23781 (S.D. Fla. June 1, 2015).
- 154 See Andrew Ramonas, *Chamber Seizes on Junk-Fax Suit Against Trial Attorneys*, Legal Times, Feb. 4, 2015.
- 155 Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135 (adopted June 18, 2015, released July 10, 2015).
- 156 Jimmy Hoover, *FCC Robocall Rules a Potential Gold Mine for TCPA Lawyers*, Law 360, June 18, 2015.
- 157 See Dissenting Statement of Commissioner Ajit Pai, *Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135.

- 158 Oral Statement of Commissioner Michael O’Rielly Dissenting In Part and Approving In Part, Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135
- 159 See Jimmy Hoover, FCC Expands TCPA to Robocalls Despite Litigation Fears, Law 360, June 18, 2015; Adonis Hoffman, Sorry, Wrong Number, Now Pay Up, Wall St. J., June 16, 2015; Henry Pietrkowski, Hold the Phone... FCC Has a New Robocall Ruling, and It Doesn’t Look Pretty for Business, Forbes, May 28, 2015.
- 160 Internal Revenue Serv., Attorneys Audit Technique Guide - Chapter 3 (2011); Internal Revenue Serv., Technical Advice Memorandum (TAM) 9432002, 1994 WL 420348 (Mar. 30, 1994).
- 161 See *Humphrey, Farrington & McClain PC v. Commissioner*, T.C. Memo 2013-23 (2013) (“This Court has consistently held that advanced litigation expenses are to be treated as loans and are not ordinary and necessary business expenses, even if eventual recovery of the advances is contingent.”). AAJ has sought to take advantage of an outlier Ninth Circuit decision, *Boccardo v. Commissioner*, 56 F.3d 1016 (9th Cir. 1995), that other courts have not followed and the IRS does not follow beyond that circuit. See IRS 1997 Field Service Advice (FSA) 442.
- 162 Am. Ass’n for Justice, Lobbying Report Midyear 2007, at 16 (July 25, 2007).
- 163 S. 814, 110th Cong. (introduced March 8, 2007).
- 164 Chris Rizo, Lobbyist: AAJ Looking to Quietly Pass Plaintiff Lawyer Tax Break, Legal Newsline, July 29, 2009.
- 165 H.R. 6049, § 311, 110th Cong. (introduced May 14, 2008).
- 166 See Joint Comm. on Taxation, Estimated Revenue Effects of H.R. 6049, The “Renewable Energy and Job Creation Act of 2008,” Scheduled for Consideration by the House of Representatives on May 21, 2008, at 6 (May 21, 2008).
- 167 Editorial, The Bill Lerach Tax Cut, Wall St. J., May 30, 2008, at A14.
- 168 See Am. Ass’n for Justice, Lobbying Report, Q1 2009 (Apr. 16, 2009) (reporting five internal lobbyists supporting S. 437).
- 169 See Patton Boggs, Lobbying Report Q1 2009 (Apr. 19, 2009), (reporting \$150,000 in lobbying for AAJ, including on S. 437 and S. 440); Patton Boggs, Lobbying Report Q2 2009 (July 17, 2009) (reporting \$140,000 in lobbying for AAJ, including on S. 437 and S. 440); Patton Boggs, Lobbying Report Q3 2009 (Oct. 19, 2009) (reporting \$130,000 in lobbying for AAJ, including on S. 437 and S. 440).
- 170 See Palmetto Group, Lobbying Report Q1 2009 (Apr. 1, 2009) (reporting \$30,000 retainer for quarterly lobbying on S. 437 on behalf of AAJ); Palmetto Group, Lobbying Report Q2 2009 (July 9, 2009) (reporting \$65,000 retainer for quarterly lobbying on S. 437 and H.R. 2519 on behalf of AAJ); Lobbying Report Q3 2009 (Sept. 30, 2009) (reporting \$50,000 retainer for quarterly lobbying on S. 437 and H.R. 2519 on behalf of AAJ).
- 171 S. 437, 111th Cong. (introduced Feb. 12, 2009).
- 172 Am. Ass’n for Justice, Internal Revenue Service & Treatment of Attorney Expenses, at [http://otrans.3cdn.net/8f24ea72dda149b116\\_kdm6iv7le.pdf](http://otrans.3cdn.net/8f24ea72dda149b116_kdm6iv7le.pdf) (undated paper submitted to Obama-Biden transition team).
- 173 *Id.* (requesting that the Administration “revise its current Audit Guideline Manual to reflect case law which provides that attorneys can deduct attorney-paid client costs in contingency fee agreements in the year they are incurred” and requesting that the agency “issue a memorandum to address attorney expenses to clear up any further confusion regarding tax treatment”).
- 174 John O’Brien, Sources: Trial Lawyers Expect Tax Break from Treasury Department, Legal Newsline, July 13, 2010.
- 175 *Id.*
- 176 See, e.g., Editorial, Pushback on Trial-lawyer Tax Breaks, Wash. Times, July 27, 2010,

- Editorial, A Bill Lerach Tax Cut, Wall St. J., July 15, 2010; Jay Heflin, Tax Break for Trial Lawyers Raises Eyebrows, The Hill, July 15, 2010; No Special Tax Cuts for Wealthy Trial Lawyers, Wash. Examiner, July 15, 2010; Daniel Fisher, Treasury May Give Trial Lawyers a Sweet Tax Break, Forbes, July 14, 2010.
- 177 John O'Brien, Treasury Not Commenting on Trial Lawyer Tax Break, Legal Newsline, July 14, 2010.
- 178 David Ingram, Treasury Department Mulls Tax Change for Plaintiffs' Bar, Nat'l L.J., July 15, 2010.
- 179 *Id.*; Letter to Treasury Assistant Secretary for Tax Policy Michael Mundaca (Apr. 29, 2010).
- 180 Ingram, *supra*.
- 181 Letter to Timothy F. Geithner, Secretary of the Treasury from Senator Chuck Grassley and Representative Dave Camp (July 22, 2010), available at [http://waysandmeans.house.gov/UploadedFiles/Camp\\_Grassley\\_Letter\\_to\\_Geithner\\_7-22-10.PDF](http://waysandmeans.house.gov/UploadedFiles/Camp_Grassley_Letter_to_Geithner_7-22-10.PDF).
- 182 Senator Grassley was the first of 25 Senators to request such information. See John O'Brien, Treasury Hasn't Offered Trial Lawyer Tax Break Info to Iowa Senator, Legal Newsline, Aug. 31, 2010.
- 183 Ingram, *supra*.
- 184 Am. Ass'n for Justice, 2015 Annual Convention Brochure at 6, at [http://www.justiceannualconvention.org/reg/5586%20AAJ%202015%20Annual%20Convention%20\(Montreal\)%20Brochure%20\(4\).pdf](http://www.justiceannualconvention.org/reg/5586%20AAJ%202015%20Annual%20Convention%20(Montreal)%20Brochure%20(4).pdf).
- 185 See *id.*
- 186 See Am. Ass'n for Justice, Lobbying Report Q1 2015 (Apr. 17, 2015) (disclosing "[I]obbying with regard to deductibility of attorney-advanced expenses and court costs in contingency fee cases" and "[I]obbying with regard to deductibility of punitive damage awards paid by defendants").
- 187 See, e.g., Mark A. Behrens & Christopher E. Appel, Denial of Federal Tax Deduction for Punitive Damages Threatens Job Growth, Legal Opinion Letter (Wash. Legal Found. June 5, 2009).
- 188 See, e.g., H.R. 3445, 113th Cong. (introduced Oct. 30, 2013, no action); H.R. 6700, 112th Cong. (introduced Dec. 20, 2012, no action); S. 727, § 502, 112th Cong. (introduced Apr. 5, 2011, no action); H.R. 5994, 111th Cong. (introduced July 30, 2010, no action); S. 3793, § 422, 111th Cong. (introduced Sept. 16, 2010, no action).
- 189 See Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals 116 (Feb. 2015); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals 101 (Mar. 2014); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2014 Revenue Proposals 95 (Apr. 2013); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals 139 (Feb. 2012); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2012 Revenue Proposals 63 (Feb. 2011); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2011 Revenue Proposals 95 (Feb. 2010); Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals 117 (May 2009).
- 190 *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).
- 191 *Wyeth v. Levine*, 555 U.S. 555 (2009).
- 192 See Am. Ass'n for Justice, Lobbying Report 3Q 2012 (Oct. 19, 2012) (reporting lobbying on S. 2295, Patient Safety and Generic Labeling Improvement Act, 112th Cong. (2012) and H.R. 4384, Patient Safety and Drug Labeling Improvement Act, 112th Cong. (2012)).
- 193 See S. 2295, 112th Cong. (introduced Apr. 18, 2012); H.R. 4384, 112th Cong. (introduced Apr. 18, 2012).
- 194 Am. Ass'n for Justice, Lobbying Report Q1 2013 (Apr. 18, 2013); Am. Ass'n for Justice, Lobbying Report Q2 2013 (July 15, 2013); Am. Ass'n for Justice, Lobbying Report Q3 2013 (Oct. 17, 2013); Am. Ass'n for Justice, Lobbying Report Q4 2013 (Jan. 21, 2014).



- 195 Public Citizen, Citizen Petition, Docket No. FDA-P-0675 (dated Aug. 29, 2011).
- 196 Letter from Walter S. Harris, Deputy Commissioner of Operations and Chief Operating Officer, Food & Drug Admin., to the Hon. Kevin Yoder, dated Jan. 29, 2014, at <http://www.thecre.com/tpsac/wp-content/uploads/2014/03/FDA-response-to-september-2013-generic-labeling-letter.pdf>.
- 197 See FDA, Meetings, Conferences, & Workshops, Past Meetings With FDA Officials, Public Calendar: February 11-15, 2013.
- 198 *Id.*
- 199 Am. Ass'n for Justice, Comment, Docket No. FDA-2011-P-0675 (dated Mar. 2, 2012).
- 200 See Regulations.gov, Docket No. FDA-2011-P-0675.
- 201 See Energy & Commerce Committee, U.S. House of Representatives, Hearing, Examining Concerns Regarding FDA's Proposed Changes to Generic Drug Labeling, Apr. 1, 2014, at <http://energycommerce.house.gov/hearing/examining-concerns-regarding-fdas-proposed-changes-generic-drug-labeling#sthash.KzT7g3rb.dpuf>.
- 202 *Id.* (providing video of testimony, exchange at minute 51:30).
- 203 *Id.*
- 204 Letter from Walter S. Harris, Deputy Commissioner of Operations and Chief Operating Officer, Food & Drug Admin., to the Hon. Kevin Yoder, *supra*.
- 205 Exec. Order 13563 (Jan. 21, 2011).
- 206 Food & Drug Admin., Proposed Rule, Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67,985 (Nov. 13, 2013).
- 207 *Id.* at 67,989.
- 208 See Am. Ass'n for Justice, Comment, Food and Drug Administration (FDA) Proposed Rule: Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, FDA-2013-N-0500, Mar. 13, 2014.
- 209 Food & Drug Admin., Notice of Public Meeting; Request for Comments, Reopening of Comment Period, Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products; Public Meeting; Request for Comments; Reopening of the Comment Period, 80 Fed. Reg. 8577 (Feb. 18, 2015).
- 210 Am. Ass'n for Justice, Press Release, AAJ Calls on FDA to Finalize Proposed Rule on Generic Drug Safety Labeling, Apr. 27, 2015, at <https://www.justice.org/news/aaj-calls-fda-finalize-proposed-rule-generic-drug-safety-labeling>.
- 211 See Am. Ass'n for Justice, Comment and Form Letter, Food and Drug Administration (FDA) Proposed Rule: Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, FDA-2013-N-0500, Apr. 27, 2015; see also Am. Ass'n for Justice, Lobbying Report Q2 2015, at 3 (July 17, 2015) (reporting new lobbying on "updating generic drug labeling responsibilities").
- 212 Food & Drug Admin., Facts about Generic Drugs (2012).
- 213 Food & Drug Admin., Facts about Generic Drugs (2012).
- 214 Alex Brill, FDA's Proposed Generic Drug Labeling Rule: An Economic Assessment (2014).
- 215 Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments), Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified at 21 U.S.C. § 355(j)).
- 216 21 U.S.C. § 355(j)(2)(A).









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