

Featuring the latest of
ILR's groundbreaking
research on pressing
legal issues

FROM THE TOP: *The President's Perspective*

Plaintiffs' lawyers are increasingly testing out new theories of liability, targeting innovations and new products with vague and outdated laws stretched beyond their original intent. In this issue of the *ILR Research Review*, we look at the latest trends in litigation, and the tactics and strategies these entrepreneurial plaintiffs' firms are using to expand their business models and bring more lawsuits.

Some of these lawsuits target the latest and greatest ideas coming out of Silicon Valley, such as drones and self-driving cars. These technologies are developing faster than public policy, and while local, state, and federal government are looking at how best to address potential liability, plaintiffs' firms are using the uncertainty to their advantage and threatening innovation with lawsuits.

While creativity is vital for tech innovation, it will also get you far in bringing a meritless lawsuit. Grocery store aisles have led to inspiration for lawsuits, with a growing number of plaintiffs' firms using food labeling, such as "natural," the packaging of products, and the advertising to bring frivolous lawsuits on behalf of consumers.

Another area where plaintiffs' lawyers are testing novel theories of liability is data privacy. They are using headlines and the websites of state attorneys general to track down instances of a data breach in order to bring suit on behalf of the individuals involved, regardless of whether or not the consumers' information was compromised or any injury was suffered.

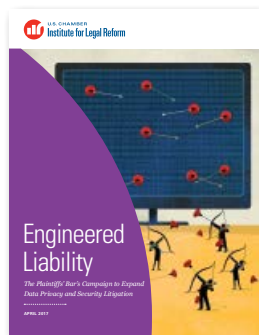
Finally, we look at litigation trends in the EU, where U.S. plaintiffs' firms are increasingly entering the market and third party litigation funding is expanding without any government oversight. With class action models proliferating throughout EU Member States and few, if any, safeguards in place, the civil justice systems there are open to abuse.

While plaintiffs' lawyers are looking for new sectors, and even new continents, to bring lawsuits, ILR is tracking these trends and encouraging discussion of solutions to curb the tide of abusive litigation.

- Lisa A. Rickard

ILR EVENT

In April, ILR released *Engineered Liability* at the International Association of Privacy Professionals' (IAPP) Global Privacy Summit. The Summit featured a panel discussion on "Lessons in Liability: The U.S. Privacy Landscape and Proposals for Reform," during which ILR presented the paper's findings and also the results of our data privacy focus groups and national poll. The findings from the poll and focus groups revealed that 81% of consumers feel a company should not be sued if it takes prudent steps after a data breach, and furthermore, a majority of consumers support a proposal for a more stringent definition of "harm" in data breach cases.



Engineered Liability

The Plaintiffs' Bar's Campaign to Expand Data Privacy and Security Litigation

DATA PRIVACY

Authors: *Divonne Smoyer and Kimberly Chow, Reed Smith LLP*

When the prospect of large monetary settlements is on the table, no business sector is secure from plaintiffs' attorneys. In this pattern, there is a growing campaign by the plaintiffs' bar to target data privacy and security.

The plaintiffs' bar appears to be taking advantage of the unfortunate reality that data breaches are becoming more commonplace, privacy laws and regulations in the U.S. are in flux, federal and state regulators are hungry for a new privacy framework, and consumers and citizens are confused about what protections, if any, apply to their information. In doing so, plaintiffs' attorneys are undertaking to

expand regulation of and legal exposures for businesses in this area. They are also stretching old laws in unintended ways in order to bring lawsuits over privacy issues.

ILR's research addresses how the plaintiffs' bar is adapting to and taking advantage of the ever-changing data privacy and security legal landscape. It explores major privacy cases and settlements, showing how the plaintiffs' bar is targeting breaches and other privacy violations. It also profiles the major firms that bring a large proportion of the cases—including Edelson PC and Lief Cabraser Heimann & Bernstein LLC—along with the tactics they are employing to create privacy cases and take aim at defendants, and the theories that they have been testing in the courts. The paper also includes a suggested framework for reform.

ILR EVENT

In March, ILR hosted an event with the Chamber's Technology Engagement Center, titled "Emerging Technologies and Torts of the Future." At the day-long conference in Silicon Valley, ILR released its new research on emerging tech and hosted panel discussions on how to prevent liability issues from threatening the growth of these rapidly expanding technologies. The event was picked up by the *Recorder*, *Inside Cybersecurity*, *Corporate Counsel*, and others. Additionally, Lisa Rickard penned an opinion piece on emerging technologies and potential liabilities for *LegalTech News*.



Torts of the Future

Addressing the Liability and Regulatory Implications of Emerging Technologies

EMERGING TECHNOLOGIES

Authors: *Cary Silverman, Phil Goldberg and Jonathan Wilson, Shook, Hardy & Bacon L.L.P.*

New technologies are changing how we live, travel, and buy goods and services. If the pace of this transformation continues as expected, in 2025, it may be common for a refrigerator to reorder our food and a drone to deliver it, while a driverless car takes us to the spaceport for a flight into low-earth orbit. **New technologies will undoubtedly improve lives, but they also come with new risks. How can courts and policymakers address legitimate safety and privacy concerns without derailing or delaying progress?**

While there are many emerging technologies worthy of consideration, ILR's research

focuses on autonomous vehicles, commercial use of drones, private space exploration, the "sharing economy," and the Internet of Things.

For each area, the research reviews where the new technology stands in its development, opportunities for advancement, the existing regulatory and liability frameworks, how Congress, state legislatures, and government agencies are addressing these emerging technologies, and the potential liabilities that could result in litigation. The research also offers twelve "guiding principles" for the consideration of courts and policymakers as they address these new technologies.



The Food Court FOOD & BEVERAGE LITIGATION

Trends in Food and Beverage Class Action Litigation

Authors: Cary Silverman and James Muehlberger, Shook, Hardy & Bacon L.L.P.

If you eat, then you are probably a member of a class action. In fact, it is likely that without your knowledge, plaintiffs' lawyers have told courts that they represent you in dozens of lawsuits.

Plaintiffs' lawyers are increasingly targeting the food and beverage industry, claiming that consumers are misled by the labeling, packaging, and advertising of food and beverage products. Cases are brought against products marketed as natural, or where the lawyers allege images of fruits and vegetables might somehow mislead a consumer to believe the product is more healthful than it is.

Some meritless cases are quickly thrown out, others are settled, but many more are

litigated for years, reaching multimillion dollar settlements that line the pockets of plaintiffs' lawyers, but provide little or no benefit to consumers. Furthermore, three-quarters of food class actions in federal courts are in four states: CA (36%), NY (22%), FL (12%), and IL (7%). In these states, attorneys have found that consumer protection statutes and vague laws allowing them to challenge business practices as "unfair" or "deceptive," make these courts ideal venues for class actions.

ILR's paper documents the big picture of food marketing lawsuits, and makes concrete recommendations for reform, outlining the role that the courts, legislatures, and regulatory agencies all have in restoring common sense to food class action litigation.

ILR IN THE MEDIA

ILR released *The Food Court* in conjunction with the Grocery Manufacturers Association's (GMA) Legal Conference. The report was covered by the *New York Post*, *Florida Business Daily*, *Chicago City Wire*, and several industry publications. Lisa Rickard also penned an opinion piece on food litigation for the *Food Dive*, and a podcast on the research featuring ILR's Harold Kim aired on *Soup-to-Nuts*.



The Growth of INTERNATIONAL CLASS ACTIONS Collective Redress in the EU

A Survey of Developments in 10 Member States

Author: Ken Daly, Sidley Austin LLP

Collective redress or "class action" models are

proliferating across the EU, with a significant majority of Member States now having at least one way for claimants to combine their claims and sue for injunctive relief and/or damages before national courts. A significant EU policy decision may be made in 2017 as the European Commission evaluates how Member States have, or have not, implemented its 2013 Recommendation on Collective Redress. The Recommendation invited Member States to adopt a collective redress framework by July 2016.

To contribute to this evaluation, ILR released a study on the growth of collective action mechanisms and troubling litigation trends

in key EU Member States, including Austria, Belgium, Bulgaria, France, Germany, Italy, the Netherlands, Poland, Spain, and the UK.

ILR's study demonstrates that sufficient collective redress mechanisms exist in the Member States to provide access to the courts, however, Member States have failed to implement or maintain important safeguards for collective redress, despite being called for by the EU Recommendation. As such, ILR's study lays out the essential safeguards, for both collective actions and for third party litigation funding, that will protect these systems from abuse, while still allowing access to justice.

ILR EUROPEAN ROAD SHOW

ILR released its new research this spring at events in Brussels, The Hague, Amsterdam, and Paris, alongside prominent European business groups. At the main launch event in Brussels, Lisa Rickard gave remarks on European collective redress and lessons learned from the U.S. class action system. The event also included a presentation on the paper's findings, a panel discussion on the growth of class actions, and remarks from Renate Nikolay, Head of Cabinet for EU Commissioner Věra Jourová. The report was picked up by *Metropolitan Corporate Counsel* and *D&O Diary*.



Covering the Contractors

The Current State of the Government Contractor Defense

GOVERNMENT CONTRACTORS

Authors: *John B. Bellinger III, Reeves Anderson, and Sally Pei, Arnold & Porter LLP*

The federal government is increasingly using private contractors to carry out a variety of tasks, including military operations, border protections, equipment manufacturing, and countless

others. **As these tasks grow in number and size, the issue becomes how to allow contractors to carry out work for the government without exposing them to litigation, while still holding them accountable.** The Supreme Court has not

ruled in this area in almost three decades and decisions from lower courts have not been uniform. ILR's research provides an overview of the current state of the government contractor defense, describing the established principles and some of the unsettled questions that continue to percolate through the courts, as well as the role of the federal government in lawsuits against government contractors.

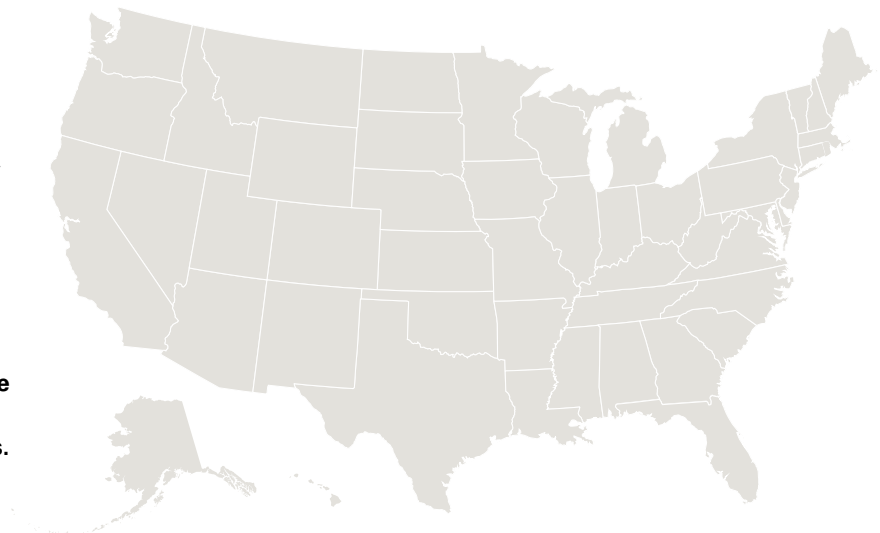
others. **As these tasks grow in number and size, the issue becomes how to allow contractors to carry out work for the government without exposing them to litigation, while still holding them accountable.** The Supreme Court has not

COMING SEPTEMBER 2017

2017 Lawsuit Climate Survey: Ranking the States

The 2017 edition of ILR's Lawsuit Climate Survey will rank the states on the fairness and reasonableness of each of their liability systems. This study has played a central role in informing policymakers and has become the preeminent standard by which companies, policymakers, and the media judge state legal climates.

To find out where your state ranked in the 2015 Lawsuit Climate Survey visit www.instituteforlegalreform.com/states.



UPCOMING
EVENT

2017 LEGAL REFORM SUMMIT OCT. 25TH | WASHINGTON, D.C.

Join business and industry leaders and preeminent issue experts to discuss the current state of legal reform.

ILR'S RESEARCH IS AVAILABLE ON OUR WEBSITE AT www.INSTITUTEFORLEGALREFORM.com.

