U.S. CHAMBER Institute for Legal Reform
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the ILR Research REVIEW
Volume 5, Issue 1

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

FROM THE TOP:

The President's Perspective

One of ILR's greatest strengths is our adaptability. This is reflected across all of our program areas, but it is especially apparent when it comes to our research.

As the plaintiffs' bar continues to find new avenues for lucrative lawsuits, it is imperative that we focus on the evolving nature of the law. By investing time and effort to explore both long-standing and emerging liability issues, ILR is helping legislators, policymakers, and the business community understand, confront, and reverse civil justice abuses.

From artificial intelligence to the West Virginia court system, and from asbestos bankruptcy to state false claims acts, this issue of the *ILR Research Review* represents the depth and breadth of our commitment to civil justice reform and the integrity of the law. Happy reading.

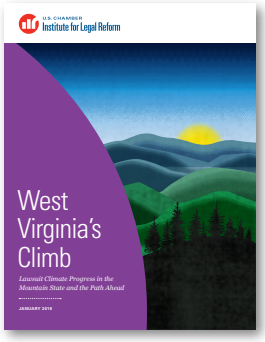
- Lisa A. Rickard

ILR IN THE MEDIA

The release of this paper coincided with West Virginia Governor Jim Justice's State of the State address, in which he highlighted the tremendous legal reform progress achieved in his state over the past three years. Soon after the paper's release, West Virginia Senate President Mitch Carmichael penned an op-ed for the *Charleston Gazette* echoing the governor's praise, referring to this paper as a proof point.

In the following weeks, ILR's stance on legal reform issues covered in this paper was documented in state outlets such as the *West Virginia Record* and *The State Journal*.

An additional, in-depth examination of West Virginia's legal reform progress and further opportunities for change will be published in the *West Virginia Law Review* in the winter of 2018/2019.



STATE LEGAL REFORM

West Virginia's Climb

Lawsuit Climate Progress in the Mountain State and the Path Ahead

Author: *Cary Silverman* | *Shook, Hardy & Bacon L.L.P.*

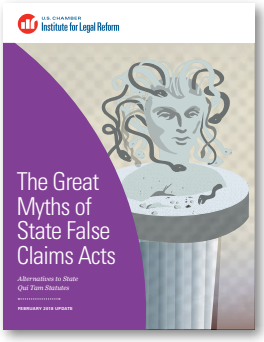
Over three short years, West Virginia has transformed itself from a litigation outlier to an inspiring example of change. With the support of its governor, the legislature brought West Virginia's liability laws into the mainstream, adopting commonsense reforms ranging from curbing joint and several liability to product liability reform. With the help of a new attorney general, the legislature adopted good government legislation ending pay-to-play hiring of private contingency-fee lawyers to enforce state law. It also restored balance to West Virginia tort law by responding to court decisions that had endorsed novel theories of liability, eliminated longstanding defenses, and allowed inflated damage awards.

These advances were reflected in the most recent edition of ILR's *Lawsuit Climate Survey*, in which West Virginia achieved its highest ranking in the 15-year history of the survey, moving from 50th to 45th. While a jump of five places may seem like a small step, West Virginia Secretary of Commerce Woody Thrasher rightly praises it as the "kind of incremental progress that shows the business community we are starting to get our act together in the Mountain State."

This research documents the most serious flaws in the Mountain State's civil justice system, the steps West Virginia has recently taken to address them, and the route forward to a more rational legal climate for business.

Suggested reforms include:

- Establishing an intermediate appellate court that provides all litigants with full appellate review.
- Requiring that recoveries in actions seeking future medical monitoring costs be placed in court-supervised funds, rather than paying out such recoveries in cash.
- Amending West Virginia law to provide that use or nonuse of a seatbelt by any driver or passenger is admissible in any civil action as evidence of comparative negligence or failure to mitigate damages.
- Revisiting the state's venue law to curb the filing of lawsuits in West Virginia that lack a substantial connection to the state.
- Adapting the rule governing class actions in West Virginia's courts to reflect changes occurring at the federal level, with an eye to ensuring that class actions truly serve class members, and not just their lawyers (see ILR's 2017 paper *Unstable Foundation: Our Broken Class Action System and How to Fix It* for more information on this issue).
- Subjecting lawsuit lending to the same types of safeguards governing other businesses that provide consumer loans or credit.
- Prohibiting common misleading practices in lawsuit advertising, including presenting lawsuit ads as "public service announcements," displaying the logos of government agencies in a manner that suggests affiliation with those agencies, and using the word "recall" when referring to a product that has not in fact been recalled.



The Great Myths of State False Claims Acts

OVER-ENFORCEMENT

Alternatives to State *Qui Tam* Statutes

Author: *Jonathan Diesenhaus* | *Hogan Lovells US LLP*

In 2013, ILR published *Great Myths of State False Claims Acts*, a research paper pointing out that states were paying an unexpected price for implementing state *qui tam* False Claims Acts (FCAs).

They're still paying in 2018.

The 2018 update to *Great Myths* shows that the whistleblowers' bar is still capitalizing on state *qui tam* FCAs, harvesting windfall awards from states and the federal government every time they win a suit under a state FCA statute.

There is scarce evidence that these statutes, ostensibly created to empower states to more effectively detect and seek recovery from Medicaid fraud, are accomplishing their goals.

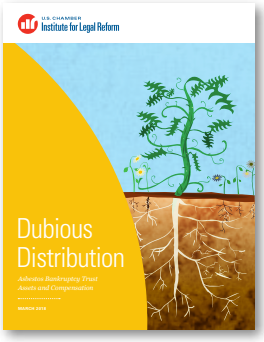
On the contrary: there are strong indications that states with *qui tam* statutes may actually recover less from the average Medicaid fraud settlement than those without, given the state's obligation to pay out a share of the settlement to the suit's relator under such statutes.

The paper also points out that the dubious benefits of implementing a state FCA turn into a clear financial net negative when states allow their FCAs to fall out of compliance with federal standards—which, as the paper points out, has happened both easily and often.

Ultimately, the research contends that states should be careful in considering whether *qui tam* makes sense and, if so, should draft their statutes in a way that aligns the goals of business and government in preventing, detecting, and punishing fraud.

SUPPORTING INFORMED DECISIONS

Making sure that states are well-informed about the pros and cons of adopting state *qui tam* FCAs has been an ILR priority for many years. In the months following this research release, three states (Louisiana, Mississippi, and California) either considered introducing an FCA for the first time and chose not to do so, or re-evaluated key previsions of their existing statutes. Going forward, ILR will continue to provide high-quality research on this issue to help inform the decisions of legislators and policymakers.



Dubious Distribution

ASBESTOS

Asbestos Bankruptcy Trust Assets and Compensation

Authors: *Peter Kelso and Marc Scarcella* | *Roux Economic and Complex Analytics Practice*

This paper shows that of $40 billion contributed to asbestos trusts between 2004 and 2016, only $25 billion remain. **In fact, of the 35 asbestos trusts operating as of early 2008, 21 of them are currently paying an average of only 60 percent of what they paid that year.** The report also points out that most trusts have no contingency-fee caps, and allow plaintiffs' attorneys to collect 40 percent or more of claims paid out.

This research delves into the details of asbestos trust expenses and claim payment. Among other things, the paper reveals that the asbestos trust system spends an average of only 2.5 cents per dollar on verifying the legitimacy of asbestos claims; that non-malignant claims have received 22 percent of trust claim payments since 2004; and that when attorneys' fees and payments to other disease categories are taken into account, it is likely that less than 50 percent of all trust assets are paid to mesothelioma claimants.

The paper concludes that the depletion of trust assets will result in the systematic under-compensation of legitimate asbestos victims in the future if left unabated.

A TIMELY RELEASE

This paper was released to coincide with the annual Perrin Conference on "Cutting-Edge Issues in Asbestos Litigation," an event predominantly attended by the asbestos plaintiffs' bar. ILR issued a press release to announce the paper and ensure that Perrin attendees were aware of its publication and its central message.

ILR EVENT

In April, ILR partnered with the Chamber's Technology Engagement Center to host a sequel to last year's "Emerging Technologies and Torts of the Future" event. At the half-day conference in Seattle, ILR released its updated research on emerging technology and hosted panel discussions on how to approach emerging liability issues in a way that protects consumers while avoiding a chilling effect on innovation. The event was reported in legal news outlets such as *Forbes* and *Law.com*, as well as industry publications such as *Autobody News*.

Torts of the Future II

LIABILITY

Addressing the Liability and Regulatory Implications of Emerging Technologies

Authors: *Cary Silverman, Jonathan Wilson, and Sarah Goggans | Shook, Hardy & Bacon L.L.P*
In collaboration with: *Robert McKenna, Orrick partner and former Washington State Attorney General*

The primary challenge with emerging technologies is to develop a liability and regulatory framework that simultaneously promotes innovation, economic growth, safety, and privacy. Each of the areas profiled in this report—from robotics to 3D printing—promises to bring significant benefits to the public. Excessive liability or heavy-handed regulation, however, can derail or significantly delay new products and services.

The second edition of ILR's Torts of the Future research examines evolutions in the regulatory and litigation landscapes and future liability trends associated with four primary emerging technology groups: (1) robotics and artificial intelligence; (2) virtual and augmented reality; (3) wearable devices; and (4) 3D printing.

In each area, the report considers questions such as: What types of claims are businesses in these markets likely to face? Are courts likely to alter these principles and expand liability? And do traditional liability principles adequately address risks stemming from the new technology?

The paper concludes with a set of guiding principles of liability and regulation to guide courts, legislators, and policymakers as they grapple with the challenges presented by emerging technologies. Among other things, these principles contend that:

- Traditional principles of liability adequately address most claims that arise from emerging technologies;
- Courts should apply constitutional principles of standing to preclude lawsuits seeking recovery for speculative fear of future harm;
- State and local governments should avoid imposing regulations on an emerging technology when federal agencies have acted on or are actively considering the issue; and
- When regulation is warranted, it should be developed in collaboration with stakeholders who fully understand the emerging technology.

In response to growing interest from legislators, regulators, and businesses, ILR has combined the autonomous vehicles content of our Torts of the Future I & II papers into a single special edition supplement, which may be found on our website (listed below).

UPCOMING EVENT

2018 LEGAL REFORM SUMMIT

OCT. 24TH | 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.