

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

FROM THE TOP: *The President's Perspective*

The rule of law. That's a phrase that most people either take for granted or don't think much about, but it's a foundational concept for free enterprise to thrive. Without the consistent and objective application of clear, well-written law, the ability for individuals and businesses to understand their obligations to society begins to erode. As this happens, uncertainty grows, liability expands, and the trial lawyers and lawsuit funders prosper, taking advantage of all the legal pitfalls and tripwires they can find.

From where we stand at the end of 2019, our civil justice system looks very muddled indeed, increasingly saturated with byzantine statutes and practices that impose huge burdens on companies without granting them the clarity and predictability they need to be sure of their own compliance. And at the same time, more mechanisms are being created for lawyers and funders to profit from the uncertainty.

The papers included in this edition of the *ILR Research Review* contain a thorough exploration of this problem, with a focus on multidistrict litigation, data privacy, and the spread of third party litigation funding around the world. Also featured in this issue are the twelfth edition of ILR's flagship survey of state lawsuit climates and the sixth edition of our handbook for curbing abusive litigation in the states.

So as we close 2019, we offer a blend of cutting-edge problem analysis and actionable solutions to help prepare the business community for the new year. It promises to be a busy one.

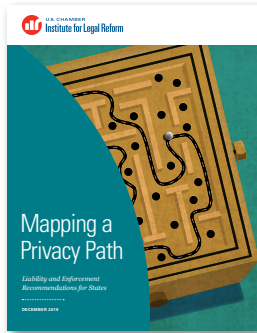
Happy Holidays,

Lisa A. Rickard



ILR COMMENTS

The release of *Mapping a Privacy Path* comes soon after ILR and the Chamber's Technology Engagement Center (C_TEC) filed comments in response to a call for input from California Attorney General Xavier Becerra as he promulgates rules under the state's new data privacy law, the California Consumer Protection Act (CCPA). Modeled explicitly on the European Union's General Data Protection Regulation (GDPR), the CCPA is currently the most expansive data privacy law in the United States, and civil justice advocates fear that it will lead to a wave of litigation when it goes into effect on January 1, 2020. ILR's comments to AG Becerra advocate for the inclusion of a safe harbor provision that would make compliance with the CCPA somewhat more achievable for companies challenged by the many ambiguities and complex technical requirements of the law.



Mapping a Privacy Path

Liability and Enforcement Recommendations for States

Authors: *Megan Brown and Kat Scott, Wiley Rein LLP*

For consumers to reap the benefits

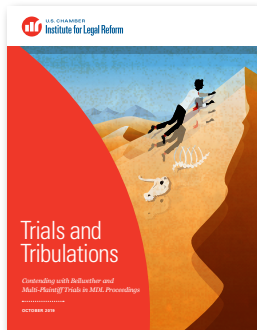
of data-driven innovation, it is important that they can trust that their personal information is being protected. There is clearly a need for a unified national data privacy framework; but, to date, the U.S. Congress has not yet acted. Meanwhile, states are not waiting on the federal government. Over half of state legislatures introduced or considered data privacy laws in 2019, and that number is likely to increase in 2020.

Recognizing this reality, ***Mapping a Privacy Path* offers state legislators a guide to limit unintended consequences of**

state privacy and security laws by preventing unnecessary litigation.

Among the guidance for state legislators included in the research are suggestions to:

- preclude private rights of action;
- include notice and cure periods;
- offer safe harbors;
- include damage and civil penalty caps;
- define enforcement actors;
- limit attorneys' fees; and
- curtail municipality litigation.



Trials and Tribulations

Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings

Authors: *John Beisner, Jessica Miller, Nina Rose, and Jordan Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP*

Multidistrict litigation (MDL) proceedings are an invaluable mechanism for consolidating and resolving pretrial proceedings, sometimes involving thousands of similar cases against the same defendant(s). **Unfortunately, this mechanism is deeply flawed in a way that puts defendants at a distinct disadvantage.**

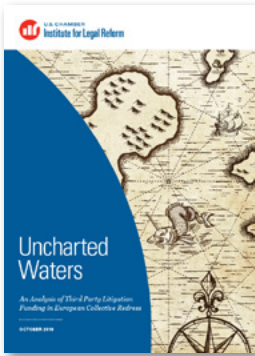
Trials and Tribulations delves into the growing issues with the MDL mechanism by examining 135 mass tort MDL proceedings. Among other findings, our paper shows how some judges are forcing defendants to participate in "bellwether trials," sometimes including multiple plaintiffs, with the express purpose of encouraging settlement.

Furthermore, our research shows that **juries in multi-plaintiff MDLs are far more likely to decide in favor of the plaintiffs than they are in single-plaintiff trials.**

This paper concludes by calling on Congress to address this clear imbalance by adopting one of two reforms:

1. passing legislation to expressly prohibit MDL courts from conducting trials without the consent of all parties to the particular case proposed to be tried; or
2. revising the U.S. code to create that prohibition, as well as barring the consolidation of multiple plaintiffs' claims for trial.





Uncharted Waters

THIRD PARTY LITIGATION FUNDING

An Analysis of Third Party Litigation Funding in European Collective Redress

Authors: *Mag. Marko Djinović, Secretary General, Ljubljana Arbitration Centre; Dr. Ana Vlahek, Associate Professor, Faculty of Law, University of Ljubljana*

Third party litigation funding is spreading to Europe, and its growth is set to be amplified by the upcoming passage of the first EU-wide collective redress (class action) law. **Unfortunately, consumers and businesses remain almost completely unprotected.**

This ILR research paper details the proliferation of TPLF in the EU and around the world, and breaks down how regulators in a number of countries are grappling with the challenge that the industry poses for the transparency and integrity of their civil justice systems.

The research also urges EU legislators to take up several specific reforms to protect consumers and businesses, including:

- a requirement to disclose funding arrangements to courts, and possibly to all parties to litigation;
- measures empowering courts to resolve conflicts of interest between funders, attorneys, and parties to litigation; and
- rules establishing the court's ability to prevent funders from exerting excessive influence over the course of litigation.

ILR IN THE EU

In mid-October, ILR's Lisa Rickard traveled to Brussels to co-host an event with AmCham EU and Business Europe on the European Commission's proposed directive on collective (class) actions, which at that time had just been stripped of all mention of TPLF regulation. Rickard reminded attendees of the urgency of addressing TPLF at the event, whether in the proposed directive or in standalone legislation, and announced the release of *Uncharted Waters*.

ILR IN THE NEWS

On September 18, 2019, ILR's Harold Kim announced the release of the twelfth edition of our *Lawsuit Climate Survey: Ranking the States* alongside Florida Governor Ron DeSantis and Florida Chamber of Commerce President Mark Wilson at the state Capitol in Tallahassee. In the course of his remarks, Kim praised the progress made by the governor, pro-business legislators, and the Florida business community in 2019.

Media widely covered the release of the *Lawsuit Climate Survey*, as well as its companion paper, *101 Ways to Improve State Legal Systems*. Reporters from ten local and national media outlets were in the room for the release event, including *Politico*, the *Associated Press*, and the *Orlando Sentinel*. Immediately following the release, Kim gave radio interviews to 20 local and national outlets including NBC News Radio, the USA Radio Network, and the Lars Larson Show. To date, the 2019 *Survey* has been featured in nearly 60 stories in publications around the country.



2019 Lawsuit Climate Survey

STATE LEGAL REFORM

Ranking the States

Author: *The Harris Poll*

The 2019 *Lawsuit Climate Survey: Ranking the States*

States was conducted for ILR by The Harris Poll to explore how fair and reasonable the states' liability systems are perceived to be by U.S. businesses. These perceptions matter, because a **record high number of respondents in this survey (89%) report that a state's litigation environment is likely to impact important business decisions** at their companies, such as where to locate or to do business. This number has increased over time, up from 85% in 2017 and 75% in 2015.

Participants in the survey were comprised of a national sample of 1,307 in-house general counsel, senior litigators or attorneys, and other senior executives at companies with at least \$100 million in annual revenues who indicated they are: (1) knowledgeable about litigation matters at companies; and (2) have first-hand litigation experience within the last five years in each state they evaluate. The 2019 ranking builds on previous years' work where in 11 prior surveys (since 2002) all 50 states were ranked by those familiar with the litigation environment in that state.



101 Ways to Improve State Legal Systems

STATE LEGAL REFORM

A User's Guide to Promoting Fair and Effective Civil Justice - Sixth Edition

Authors: Victor E. Schwartz and Cary Silverman, Shook, Hardy & Bacon LLP

The companion paper to the *Lawsuit Climate Survey*, this sixth edition of *101 Ways to Improve State Legal Systems* offers a user's guide to state legal reform. As in every edition, *101 Ways* has been updated to take into account the most pressing trends in civil justice and litigation today.

Among the new legal reform options included in this edition of the report are proposals that:

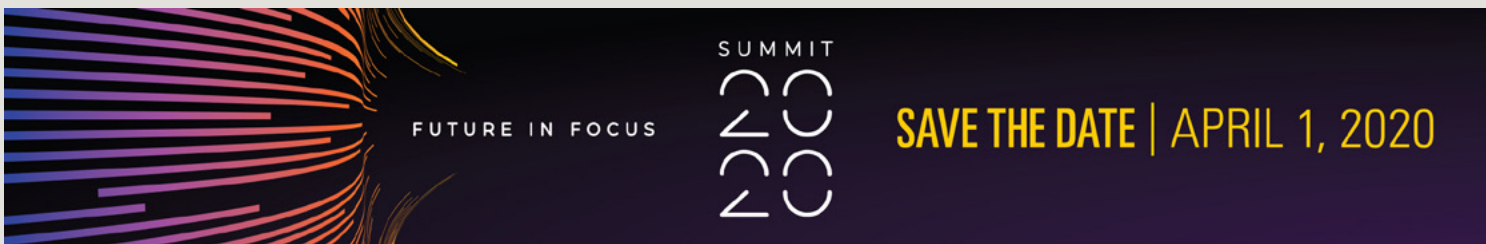
- enable states to discourage or control litigation brought by local governments when those actions duplicate or threaten to impede state enforcement efforts;
- stem the proliferation of misleading lawsuit advertising that may needlessly frighten people into ceasing or modifying their prescriptions or deter them from seeking treatment altogether; and
- encourage the adoption of meaningful data privacy and security safeguards that protect sensitive consumer information without enabling no-injury class action lawsuits or discouraging the development of useful, innovative technologies.



ILR's Lisa Rickard addresses panelists and audience members at a panel on the state of collective redress in the European Union. The event was co-hosted by ILR, AmCham EU, and Business Europe on October 15, 2019, in Brussels, Belgium. *Photo credit: AmCham EU*



ILR's Harold Kim announces the release of the 12th Edition of ILR's signature research product, the *Lawsuit Climate Survey: Ranking the States*. Kim spoke alongside Florida Gov. Ron DeSantis and Florida Chamber President Mark Wilson at the launch event, which took place at the state Capitol in Tallahassee, Florida on September 18, 2019. *Photo credit: Florida Chamber*



Access the full range of ILR research publications at www.instituteforlegalreform.com/research.