

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

FROM THE TOP: *The President's Perspective*

ILR's research drives common-sense civil justice reform around the globe. Our 18th annual Legal Reform Summit demonstrated the ongoing need for that research as we explored the "Litigation Jungle," a forest of established and emerging threats to the fairness of the world's litigation environment.

Abusive litigation remains the rule rather than the exception in the United States. While Congress and many states have signaled a willingness to confront flagrant abuses of civil justice, businesses of all stripes continue to operate under the threat of predatory class action suits manufactured by entrepreneurial plaintiffs' firms.

Across the Atlantic, many EU Member States are updating their collective redress systems in light of the safeguards recommended by the European Commission and supported by large majorities of European citizens. We are working with our European partners to ensure that businesses won't face the same kind of exploitation of those systems in the EU as they do in the US.

This double-issue of the *ILR Research Review* is a great example of our commitment to a fairer civil justice environment for American businesses, at home and abroad.

- Lisa A. Rickard

AMICUS

On October 10th, 2017, the U.S. Chamber of Commerce joined a dozen other national and regional civil justice and business organizations in filing an amicus brief with the New York Supreme Court's Appellate Division, First Department, to oppose a recent decision that lifted deferral of punitive NYCAL damages claims and opened the floodgates for inflated awards.



On the Edge

New York County Asbestos Litigation at a Tipping Point

Authors: *James L. Stengel and C. Anne Malik, Orrick, Herrington & Sutcliffe LLP*

The New York County Asbestos Litigation (NYCAL) unit of New York City's state trial court has consistently

been one of the most active asbestos courts nationally. After years in a steady state, NYCAL is currently in a period of potentially substantial change. Following extensive negotiations prompted by the reintroduction of punitive damages to NYCAL and a new presiding judge, a new CMO (Revised CMO) was recently issued.

The reexamination of the CMO has raised questions about what factors drive NYCAL's high verdicts and has shed light on some procedural mechanisms in NYCAL that may result in inequities among

the parties to the litigation. These large verdicts represent a substantial percentage of asbestos litigation costs, verdicts, and settlement values nationwide. **As a result, the approach adopted by NYCAL takes on a significance that extends beyond the borders of Manhattan.**

The research explains the history and current state of NYCAL, including descriptions of the jurisdiction itself, the First CMO, the CMO revision process, and the Revised CMO. In particular, the paper analyzes four procedural elements of NYCAL under the First and Revised CMOs and notes the cumulative effects of these four areas on the due process rights of defendants in NYCAL.

ILR IN THE MEDIA

TCPA Litigation Sprawl Covered by Legal Press

Released in response to the remarkable spike in TCPA lawsuits filed since July 2015, *TCPA Litigation Sprawl* was covered in numerous legal industry publications, including *Law 360*, *Reuters*, *Lexology*, and *JD Supra*.

ILR President Lisa A. Rickard issued a statement calling on Congress to update the TCPA, contending that the law in its current form is far too easily exploited by ambitious plaintiffs' firms with a penchant for abusive and costly lawsuits.



TCPA Litigation Sprawl

A Study of the Sources and Targets of Recent TCPA Lawsuits

Author: *Becca Wahlquist, Snell & Wilmer LLP*

In recent years, American businesses have been besieged by litigation under the Telephone Consumer Protection Act (TCPA).

A central theme of the unchecked expansion of the TCPA's prohibitions is that it is not the unscrupulous scam telemarketers that are being targeted by TCPA litigation, but rather legitimate domestic businesses.

This research reviews over 3,000, primarily federal, TCPA lawsuits from a 17-month period after the Federal Communications Commission (FCC) issued its July 2015 Omnibus Declaratory Ruling.

The data shows that these lawsuits rarely involve claims brought against spam telemarketers or blast faxes. **Rather, most of the lawsuits examined seek aggregated statutory damages from legitimate American companies not engaged in the kinds of cold-call telemarketing the TCPA was designed to limit.** The research also confirms that after the FCC's July 2015 Declaratory Ruling, TCPA litigation boomed, increasing by 46 percent.

Finally, ILR's research shows how TCPA litigation is no longer limited in geographical scope, and how a relatively small number of TCPA lawyers are responsible for bringing the majority of TCPA cases during the time period studied.





Ranking the States

STATE LEGAL REFORM

A Survey of the Fairness and Reasonableness of State Liability Systems

Author: *Harris Poll*

The 2017 Lawsuit Climate Survey: Ranking the States explores how fair

and reasonable the states' tort liability systems are perceived to be by U.S. businesses. This survey marks the eleventh time ILR has highlighted the best and worst state liability climates in the country.

The Survey found that **85 percent of attorneys at U.S. companies say a state's lawsuit environment is likely to impact important business decisions at their company, including where to locate or expand—an all-time high.**

Participants in the survey were comprised of a national sample of 1,321 in-house general counsel, senior litigators or attorneys, and other senior executives. *The 2017 Lawsuit Climate Survey* quantifies how corporate attorneys view the state systems by measuring and synthesizing their perceptions of key elements of each state's liability system into a 1-50 ranking.

Respondents were asked to grade the following elements:

- Overall treatment of tort and contract litigation
- Enforcing meaningful venue requirements
- Treatment of class action suits and mass consolidation suits
- Damages
- Proportional discovery
- Scientific and technical evidence
- Trial judges' impartiality
- Trial judges' competence
- Juries' fairness
- The quality of appellate review

1–10

1. South Dakota
2. Vermont
3. Idaho
4. Minnesota
5. New Hampshire
6. Alaska
7. Nebraska
8. Wyoming
9. Maine
10. Virginia

11–20

11. Delaware
12. Utah
13. Iowa
14. Massachusetts
15. Indiana
16. Connecticut
17. North Dakota
18. Kansas
19. Maryland
20. Wisconsin

21–30

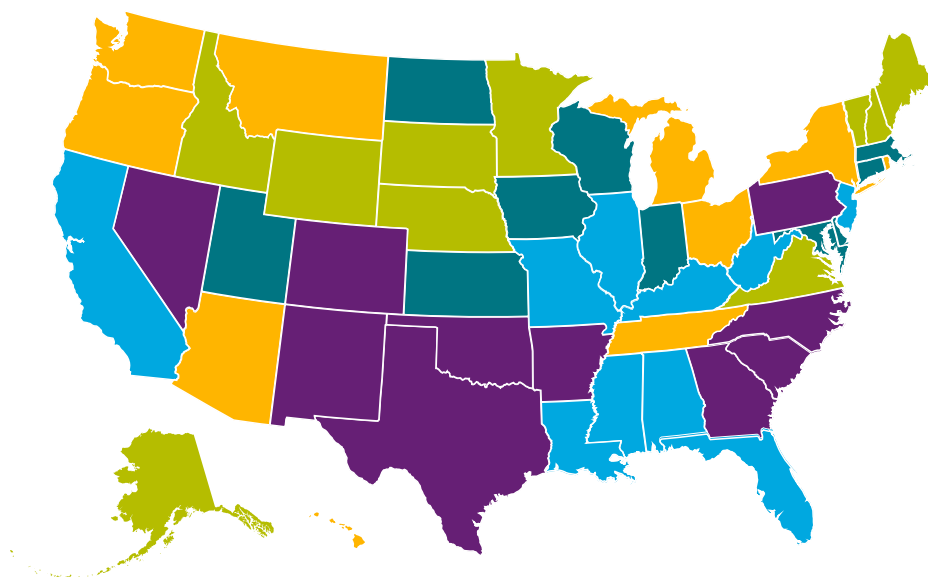
21. Oregon
22. Michigan
23. Hawaii
24. Rhode Island
25. Arizona
26. Ohio
27. Montana
28. Washington
29. New York
30. Tennessee

31–40

31. Oklahoma
32. New Mexico
33. North Carolina
34. South Carolina
35. Colorado
36. Arkansas
37. Nevada
38. Pennsylvania
39. Texas
40. Georgia

41–50

41. New Jersey
42. Kentucky
43. Alabama
44. Mississippi
45. West Virginia
46. Florida
47. California
48. Illinois
49. Missouri
50. Louisiana



USCC EVENT

ILR Releases 2017 Lawsuit Climate Survey at U.S. Chamber Small Business Summit

The 2017 Lawsuit Climate Survey was released on September 12th in Washington, DC at the U.S. Chamber of Commerce Small Business Summit. ILR President Lisa Rickard delivered opening remarks unveiling the state rankings, followed by keynote remarks by former U.S. Senator from New Hampshire, John E. Sununu, and a panel discussion on the effects of a state's lawsuit climate on small businesses.

2017 Legal Reform Summit: The Litigation Jungle

On October 25th, 2017, ILR hosted its 18th annual Legal Reform Summit: The Litigation Jungle. The Summit explored the complex and evolving legal landscape, including trial lawyer advertising, class action litigation, emerging technologies liability and universal solutions to global liability problems.

The event included keynote remarks by Deputy Attorney General Rod Rosenstein, Rudy Giuliani, and U.S. Chamber President Thomas J. Donohue.

ILR President Lisa A. Rickard delivered the opening address.



Bad for Your Health

Lawsuit Advertising Implications and Solutions

Author: *Cary Silverman, Shook, Hardy & Bacon LLP*

The public is inundated with advertisements on television and the internet soliciting them to file lawsuits. These ads often present prescription drugs and medical devices as dangerous. In dire terms, the ads exaggerate the risks of

products that remain approved by the U.S. Food and Drug Administration (FDA) and that doctors prescribe to help their patients.

While the purpose of such ads may be to inform injured people of their legal rights, misleading information frightens viewers into stopping their medications and may deter others from seeking treatment.

Bad for Your Health includes a recent survey of patients who took one or more of twelve medications to treat conditions ranging from diabetes to depression, which found:

- Four out of five respondents would be concerned after viewing a lawsuit ad targeting a medication they were taking.

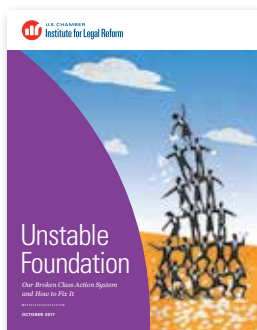
- Nearly 60% of respondents taking a targeted medication who were shown a lawsuit ad regarding that drug said they would reduce the amount of medication below what their physicians prescribed.

Bad for Your Health then explores additional evidence that the misleading information and exaggerated claims made in these ads discourage people from seeking treatment and lead patients to stop taking a prescribed medication without consulting a doctor, sometimes with tragic results.

- According to the FDA, doctors have submitted 61 reports of patients stopping their prescribed anticoagulant after viewing a lawsuit ad, resulting in six deaths and a wide range of other adverse events, the most frequent of which was a stroke.

This research concludes with a call to action, urging the FTC to prohibit common misleading practices employed in lawsuit ads targeting prescription drugs and medical devices, and recommending that Congress empower the FDA to intervene when misleading information disseminated in lawsuit ads results in injuries or jeopardizes public health.

TRIAL LAWYER ADVERTISING



Unstable Foundation

Our Broken Class Action System and How to Fix It

Author: *Andrew J. Pincus, Mayer Brown LLP*

Our current class action system was created more than half a century ago, and it has drifted far from its intended purpose.

Class actions are supposed to provide compensation to class members and to

deter wrongful conduct. But all too often, they fail at both tasks.

Every recent study has found that the overwhelming majority of class members receive little or no benefit from these cases. **Most class actions are dismissed by a court or dropped by plaintiffs without obtaining a class settlement. Even when class actions are settled, the percentage of class members who actually receive a benefit is miniscule.**

Furthermore, because virtually every class action in which the class is certified is settled with no judicial assessment of the underlying merits, the message to decision makers is that class action payments are simply an unavoidable cost of doing business, no matter what steps a company takes to comply with the law.

There are solutions. More than 20 years ago, Congress recognized and addressed many of these problems in the context of securities class actions by enacting the Private Securities Litigation Reform Act. The Fairness in Class Action Litigation Act (FICALA) now before Congress would help to ensure that class actions are fulfilling their intended purpose by making several significant improvements, including:

- Requiring judges to determine, as part of cross examination, that “each proposed class member suffered the same type and scope of injury as the named class representative or representatives.”
- Prohibiting lawyers from representing a class when the named plaintiff is a relative of, employee of, or otherwise has a preexisting relationship with the plaintiffs’ counsel.
- Requiring courts to determine that there is an administratively feasible mechanism to identify at least a substantial majority of class members and distribute any monetary relief directly to them.
- Making disclosure of third party funding of cases filed as class actions mandatory.

CLASS ACTIONS





Collective Redress Tourism

Preventing Forum Shopping in the EU

CLASS ACTIONS AROUND THE GLOBE

Authors: *Jeroen Kortmann and Mathilde Vijverberg, Stibbe; Ken Daly and Anne Robert, Sidley Austin LLP*

The EU is experiencing a wave of new “collective redress” or “class action” mechanisms, and more are on the way. However, class actions are being considered for different reasons, at different speeds, and in different forms in

each of the EU’s 28 Member States.

There is little consistency across the EU regarding when or how actions may be brought, and the features of each system are so different that there are many reasons for claimants to want to choose some jurisdictions over others—also known as “forum shopping.”

While there is nothing regrettable about competition between jurisdictions per se, **in circumstances where some Member States may have relatively poor safeguards against**

abusive or opportunistic collective actions and where existing rules create many opportunities to choose between jurisdictions, potentially problematic forum shopping may arise.

Collective Redress Tourism outlines some of the issues with unsafeguarded collective actions, the existing EU rules on jurisdiction, and how these rules are routinely used to permit choices between jurisdictions. It considers whether the increasing prevalence of collective actions and the great diversity in safeguards, coupled with the relative freedom to choose between jurisdictions, warrants a new system to prevent abusive and detrimental forum shopping.

Finally, it considers what such a system might look like and how it could be achieved.



Recipe for Reform

A Proposal for Improving Canadian Class Action Procedures

CLASS ACTIONS AROUND THE GLOBE

Author: *Gordon McKee, Blake, Cassels & Graydon LLP*

In recent years, class action litigation in Canada has become commonplace, growing or threatening to grow in frequency in many areas of law and resulting in an increasingly favorable environment for class actions and many substantial and high profile settlements.

While many accept that class actions will be part of the litigation landscape in Canada for the long term and can be an appropriate procedural vehicle in some cases, they also come with significant costs, particularly when companies face substantial pressures to settle class action cases with little or no merit.

To review whether class actions, and more specifically the Ontario Class Proceedings Act of 1992, are working as intended, the Law Commission of Ontario (LCO) is undertaking a project entitled “Class Actions: Objectives, Experience and Reforms.” To contribute to this project, ILR’s paper gives a detailed description of specific reforms that are needed to achieve a fair and balanced class action litigation system.

While these recommended reforms focus on the Ontario Class Proceedings Act, they are equally warranted in other provinces with similar provisions in their class action legislation. The recommended reforms include:

- Adding a merits assessment as a criterion for class certification.
- Requiring plaintiffs to demonstrate by evidentiary proof that the criteria have been met on a balance of probabilities.
- Requiring judges to consider management of individual cases instead of certifying a class action where the number of potential claimants is small.
- Adopting provisions to address overlapping class proceedings in multiple provinces.
- Codifying transparency and other requirements for third party litigation funding.
- Providing that tolling of limitation period commences only when the claim is certified, but is retroactive to the date the claim commenced.
- Permitting defendants to make offers to settle the claims of a sub-group of class members at any time post-certification.

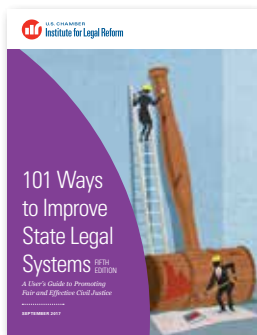
ILR IN THE MEDIA

Lawsuit Climate Survey Receives Wide Coverage

The 2017 Lawsuit Climate Survey generated over 200 articles and was covered by six national outlets, including *AP*, *Reuters*, *USA Today*, *U.S. News and World Report*, *Wall Street Journal*, and the *Washington Post*.

ILR's op-eds, co-authored with presidents of state chambers and civil justice groups, ran in papers in California, West Virginia, Missouri and Illinois. There were 24 radio interviews on the study, reaching eight outlets nationwide.

ILR also released a national television ad featuring a satirical depiction of the states as underperforming contestants on celebrity chef Gordon Ramsay's reality show.



101 Ways to Improve State Legal Systems

STATE LEGAL REFORM

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

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

The American civil justice system

is the most costly in the world and affects the ability of businesses to compete and prosper.

By adding rationality and predictability to the American civil justice system and rooting out unnecessary expenses and abuse, civil justice reform can increase confidence in the economy, help businesses expand, and create jobs.

Such reforms can also increase respect for the judicial system, which is too often characterized by inconsistent outcomes, jackpot verdicts, and liability that is disproportionate to responsibility.

101 Ways to Improve State Legal Systems offers some of the many options available to foster a sound legal system that promotes states'

economies. It considers fair and effective measures that would safeguard the integrity of the litigation process, promote rational liability rules, address over-regulation and enforcement, improve product liability law, and rein in excessive awards.

This user's guide to state legal reforms considers key issues confronting policymakers. For example, when government officials hire contingency fee lawyers, what safeguards will ensure that law enforcement is driven by the public interest, not the financial interest of attorneys with a stake in the litigation? What role should a business's compliance with government safety standards play in product liability litigation? How can the law address damages that exceed actual losses, pain and suffering awards that have become the largest part of tort damages, and punitive damages "run wild"? *101 Ways* answers these questions and more.

ILR EVENT

Six-Nation Consumer Survey Released at ILR Event in Brussels

In a statement given at ILR's Brussels event on September 28th, ILR President Lisa A. Rickard noted that the survey's findings underscore popular support for the European Commission's efforts to ensure that consumers and businesses are protected from trial lawyer excesses as the EU's legal landscape evolves. Rickard also warned against duplicating the highly flawed legal system of the United States.

Keynote remarks were delivered by Ms. Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality.



Supporting Safeguards

CLASS ACTIONS AROUND THE GLOBE

EU Consumer Attitudes Towards Collective Actions and Litigation Funding

Author: WorldThinks

As the European Commission prepares

to make a significant policy decision on collective actions, it is useful to assess how European consumers feel about the development of these collective action mechanisms. This survey captured the opinions of 6,177 consumers in six EU Member States, including France, Germany, the Netherlands, Poland, Spain, and the UK.

The survey indicated that an overwhelming majority of respondents support implementing safeguards for both collective action lawsuits and the growing practice of third party litigation funding (TPLF).

The results of the survey show:

- 85% of respondents support the introduction of safeguards for collective action lawsuits. Only 5% of consumers oppose the introduction of safeguards and 10% 'don't know'.
- A further 69% of consumers do not support the introduction of collective action lawsuits in their country without safeguards.
- Nearly 80% of consumers feel it is important that collective action safeguards are made consistent across the EU.
- Just 5% of consumers believe that TPLF will ensure that collective action cases operate in consumers' best interests.
- 81% of consumers support the introduction of safeguards for TPLF.

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



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