

the ILR Research Volume 1, Issue 1
REVIEW



U.S. CHAMBER
Institute for Legal Reform

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

FROM THE TOP:

The President's Perspective

The U.S. Chamber Institute for Legal Reform (ILR) is the country's most influential and successful advocate for civil justice reform, both in the United States and abroad. ILR works tirelessly to advocate for meaningful and effective solutions to curb lawsuit abuse, and integral to this mission is ILR's groundbreaking research on pressing legal issues. ILR's research forms the basis of our reform efforts at the state, federal, and international levels.

To further disseminate our research, I am pleased to unveil the first issue of the *ILR Research Review*, which offers valuable highlights from the most recent ILR research.

This inaugural issue features an overview of ILR research finding that securities class action litigation imposes huge costs on investors. Also included is a discussion of ILR's best practices for state unclaimed property administrators when hiring private firms to conduct audits on behalf of the state. This issue also summarizes our proposed reforms to the federal class action regime model in Australia.

Our goal for this publication is to highlight research that will be useful for your business or legal practice. We hope you enjoy this inaugural issue.

- Lisa A. Rickard



ILR EVENT

Erica P. John Fund & Beyond: The Past, Present, and Future of Securities Class Actions

Capitalizing on the publicity surrounding the U.S. Supreme Court's consideration of *Erica P. John Fund v. Halliburton*, ILR co-hosted a securities litigation symposium on February 28, which explored the impact of securities class actions from the perspective of the shareholder, boardroom, and courtroom as well as the importance of investor protections and policing fraud. The symposium featured prominent practitioners, academics and other experts, including former SEC Commissioner Troy Paredes, who spoke of the tremendous costs imposed on the economy as a result of securities class actions, with little to no tangible benefit for investors.



Economic Consequences

The Real Costs of U.S. Securities Class Action Litigation

Author: Navigant Economic Consulting

The U.S. Supreme Court ruling in *Erica P. John Fund*

v. Halliburton has revived the questions about the societal utility of securities fraud class action lawsuits. The defenders of the current securities class action regime claim that injured shareholders benefit by receiving billions of dollars in recoveries through settlements.

To the contrary, a recent Navigant study, *Economic Consequences: The Real Cost of U.S. Securities Class Action Litigation*, exposes the fallacy that these class actions actually benefit shareholders.

While many academics have criticized securities class actions as a "pocket-shifting exercise" in which one set of innocent investors pays another (with significant transaction costs in the form of legal fees), the study finds that these lawsuits, in fact, impose billions of dollars in additional costs on innocent investors.

Looking at all securities class action settlements since December 1995, the study finds that the mere announcement of the filing of the lawsuit caused shareholders to lose \$39 billion annually, compared to only \$5 billion per year received through related settlements. Also, because these lawsuits typically are filed shortly after the end of the "class period", the majority of the investors harmed by the lawsuits will also be members of the plaintiff class.

In aggregate, the study finds that shareholders have lost at least \$701 billion in investment value, while the settlement recoveries received (including expected payments in settlements not yet finalized) totaled \$90 billion. The more than seven-to-one cost-benefit ratio precludes any argument that these suits are good for investors.

SECURITIES CLASS ACTION LITIGATION

ILR IN THE MEDIA

Media Coverage from Erica P. John Fund & Beyond

ILR's key research from the *Erica P. John Fund* securities litigation symposium—*Economic Consequences* and *Frequent Filers*—attracted significant media attention prior to the March 5 oral arguments held before the Supreme Court. *Economic Consequences* was cited in both a [news story](#) and [editorial](#) in the *Wall Street Journal*, as well as additional stories in the *Economist*, *Forbes*, *Global Legal Post*, and *Corporate Counsel* and an [op-ed](#) authored by ILR President Lisa Rickard for *Investor's Business Daily*. *Frequent Filers* was also the subject of an [editorial](#) in the *Washington Examiner*.



Frequent Filers

The Problems of Shareholder Lawsuits and the Path to Reform

Authors: Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard

This report examines the phenomenon of professional plaintiffs in federal securities

class actions. Focusing on securities class actions filed by two frequent filers, Mississippi and Louisiana, the report reveals that frequent filing is fueled by campaign contributions from class action attorneys to state politicians. This pay-to-play culture gives those attorneys an advantage in being selected as class counsel.

The report also examines frequent filing in state courts, where individuals dominate because states do not limit the number of lawsuits they are allowed to file. As a result, plaintiffs' lawyers name the same individuals as plaintiffs in their lawsuits, or name themselves or family members.

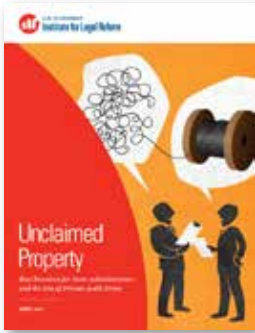
Frequent filers provide little, if any, litigation oversight, which allows class action attorneys to collect substantial contingency fees and bring extortionate suits.

To address these abuses, the paper recommends the following:

1. Potential conflicts of interest between plaintiffs and the class should be disclosed. Elected officials serving as lead plaintiffs should also be required to disclose campaign contributions from class counsel.
2. States should ensure that plaintiffs have a substantial financial interest in the company being sued before a shareholder is authorized to bring suit.
3. States need to ban bonus payments to lead plaintiffs, and both Congress and the states need to restrict the number of lawsuits that can be filed by repeat plaintiffs.

By appointing active shareholder representatives instead of frequent filers, fewer frivolous lawsuits will be filed and shareholders will recover more in meritorious actions.

SECURITIES CLASS ACTION LITIGATION



Unclaimed Property

UNCLAIMED
PROPERTY

Best Practices for State Administrators and the Use of Private Audit Firms

Author: Maeve O'Connor, Debevoise & Plimpton LLP

In recent years, private auditors operating under contingency fee

arrangements have taken an increasingly aggressive approach to the interpretation and enforcement of unclaimed property laws.

Some have gone so far as to de facto legislate on behalf of the state by requiring life insurance companies to cross-reference their policy records against the Social Security Administration's Death Master File—a costly, labor-intensive practice not required under most state laws.

Moreover, there is limited transparency surrounding the selection and contracting of these private audit firms. When government contracting lacks transparency, “pay-to-play” schemes often arise in which lucrative contracts are awarded in exchange for campaign contributions.

The potential for this practice to develop among state financial officers and the current abuses surrounding private audit firms is documented

in *Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms*. The paper identifies best practices to use when hiring private audit firms:

- Prohibiting contingency fees.
- Requiring all state contracts for private audit firms to be subject to an open competitive bidding process.
- Requiring all such contracts be posted on the unclaimed property administrator's website.
- Prohibiting the delegation of state authority to private audit firms for substantive decision making.

The concept of unclaimed property is not new, but new tricks by private profit-motivated auditors are troubling, and unclaimed property should not be taken by states to fill budget holes. Instead, states should take proactive steps and adopt best practices to ensure the fair and transparent enforcement of state unclaimed property laws.

ILR Outreach

Engaging Pro-Business State Financial Officials to Adopt Best Practices

ILR previewed *Unclaimed Property* prior to its official release with the State Financial Officers Foundation Executive Committee, an organization composed of 16 pro-market state financial officers, many of whom have authority over unclaimed property administration.

ILR also continues to engage with targeted state financial officials, both directly and through the State Financial Officers Foundation and the National Association of State Treasurers, to promote ILR's best practices guide.



Ripe for Reform

CLASS
ACTIONS

Improving the Australian Class Action Regime

Authors: Moira Saville and Peta Stevenson, King & Wood Mallesons

This paper considers the adequacy of the current Australian federal class action regime.

While the regime has remained largely unchanged since its introduction in 1992, **recent years have seen an increase in the number and the scale of class action settlements, a result of plaintiffs' lawyers and litigation funders developing a simple, repeatable business model that harnesses the class action mechanism to deliver significant returns.** Considering this development, along with the types of claims being brought and the means by which they are being run and being funded, the paper identifies a number of complications with the operation of the regime that need addressing.

In particular, the present use by the courts of ad hoc approaches to practical issues in managing of class actions risks inconsistent results

unless the regime is improved to meet these new challenges. This paper proposes areas for improvement, including: the introduction of a class certification procedure to reduce costs and the risks of inappropriate actions and safeguard the interests of group members and respondents; a mechanism that encourages opt-out and class closure at the earliest opportunity; and regulation of the use of Third-Party Litigation Financing (TPLF) in class actions to protect the interests of group members and to ensure that the prohibition on the charging of contingency fees by lawyers is not circumvented.

These reforms could be carried out either by targeted amendments or as part of a broader, comprehensive reform. This would ensure that the class action regime meets its objectives of providing a mechanism for the efficient resolution of multiple claims sharing common issues, and increasing claimants' access to justice while protecting all parties from the dangers of inappropriate or abusive actions.

ILR Outreach

ILR Meets With Australian Policy, Business, & Legal Leaders

In March 2014, ILR senior staff traveled to Australia and met with key policy, business, and legal leaders on the issue of class actions and TPLF. During this visit, ILR released *Ripe for Reform: Improving the Australian Class Action Regime* proposing specific class action reforms. Most recently, the Australian Productivity Commission, an independent public body, released a report finding that TPLF should be regulated, noting a number of the safeguards advocated by ILR. Meanwhile, ILR generated substantial news coverage on TPLF in major national and legal publications, including stories in the country's top newspaper, *The Australian*.

ISSUE SPOTLIGHT

Kiobel, One Year Later

While some decisions of the U.S. Supreme Court are narrow and affect only the parties in the case, others alter the course of American history. In either instance, even the narrowest of questions can ripple through our court system, creating “aftershock” decisions for years to come.

Case in point: The Court’s April 2013 decision in *Kiobel v. Royal Dutch Petroleum*, in which the Court ruled that U.S. courts do not have jurisdiction under the Alien Tort Statute (ATS) when all conduct took place outside the United States.

The ATS is a federal law allowing aliens to bring civil suits in U.S. courts for international law violations. In *Kiobel*, the Court held that the ATS does not reach alleged misconduct that “took place outside the United States” in most cases.

So what kind of aftershocks has the decision produced in the year since it was rendered?

Over the past year, lower courts have adhered to this precedent by dismissing several high-profile cases. These courts have agreed that *Kiobel* prevents plaintiffs from bringing so-called foreign cubed cases—those involving foreign plaintiffs suing foreign defendants for committing torts in a foreign country.

However, lower courts are still grappling with the lingering question, what happens to ATS cases with a greater connection to the United States? Is a corporation’s mere presence in the United States sufficient to establish ATS jurisdiction?

As Kiobel Turns One, Its Effect Remains Unclear takes an in-depth look at these questions. It finds that rulings from the Second Circuit and a federal court in Alabama suggest that plaintiffs must allege, at a minimum, that U.S. defendants took substantial steps within the United States to execute the unlawful conduct overseas; mere U.S.-based activity does not itself violate international law.

The courts also have generally refused to distinguish between U.S. and foreign defendants in determining whether ATS claims “touch and concern” the United States, focusing instead on the location of the relevant foreign conduct.

U.S. companies may still have to continue defending ATS suits as some courts have allowed plaintiffs to amend their pleadings to allege a sufficient connection to the U.S. And the threshold issue of whether corporations are proper defendants in ATS suits remains unsettled.

However, the most telling result of *Kiobel* is the sound of silence. No new ATS cases have been filed against U.S. companies over the past year.

But the aftershocks are not over, and it remains to be seen the scope other courts will afford *Kiobel*. Plaintiffs’ lawyers may be probing the limits to establish jurisdiction under the ATS, making the outcomes of the pending cases an important directional compass in the future of ATS litigation.

Upcoming ILR Research

On May 1, ILR hosted a first-of-its-kind event, “Latin America: The Legal Environment Through a Business Lens,” in conjunction with the U.S. Chamber’s Americas Department, the Brazil-U.S. Business Council, the Association of American Chambers of Commerce in Latin America, and the U.S.-Mexico Leadership Initiative. International legal experts and business leaders spoke about the need for a strong rule of law in the region and its direct impact on companies’ global investment and operational decisions, and how companies are coping with the current business and legal environments in Latin America.

As a result of the Latin America event, ILR will be releasing two papers related to civil justice trends that may expand—or already are expanding—civil liability in Latin America for businesses. The first paper, *Following Each Other’s Lead: Litigation and Law Reform in Latin America*, explores the significant legal trends in Latin America that are rapidly expanding in the region and impacting individual defendants and the business community alike. The second paper, *Class Action Evolution: Improving the Litigation Climate in Brazil*, explores the current state of class actions in Brazil and describes and analyzes the potential consequences of a recent proposal to modify class actions in the country.

SAVE
THE
DATE

OCTOBER 21
15th Annual Legal
Reform Summit

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