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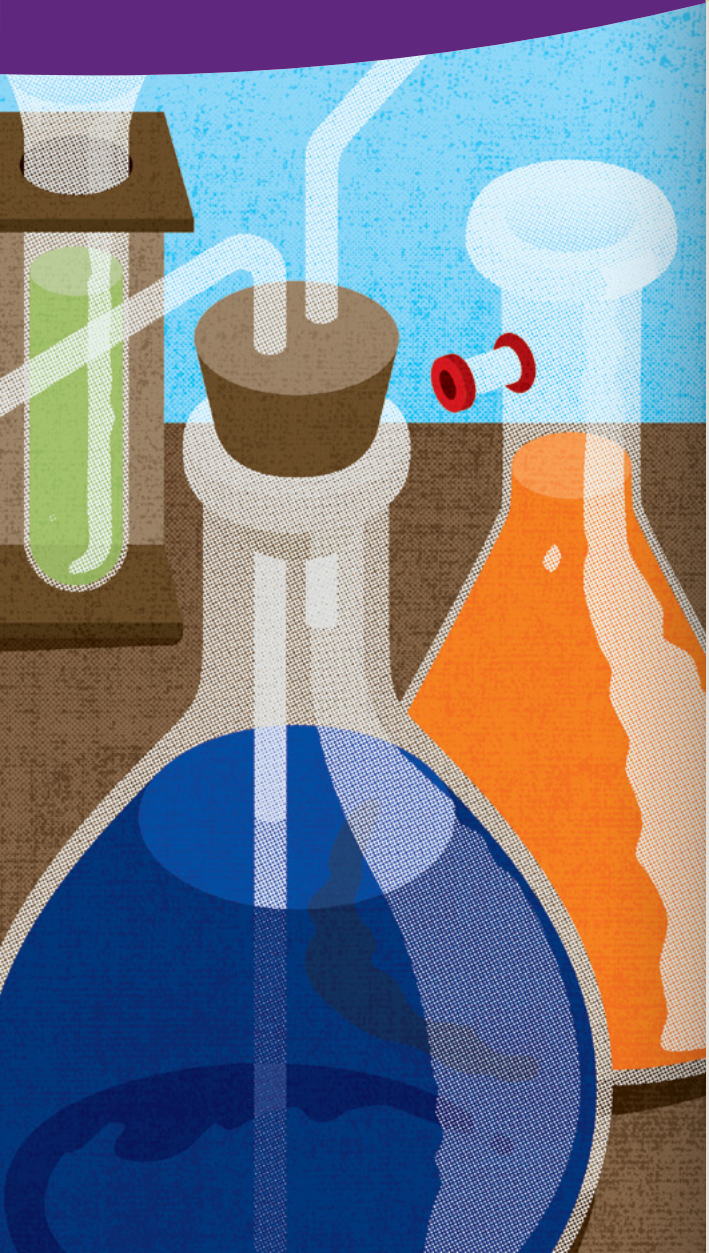
Institute for Legal Reform

the ILR Research
REVIEW
Volume 2, Issue 1

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



FROM THE TOP:

The President's Perspective

ILR's rigorous, academic-quality research addresses the most critical issues impacting our legal system. It is the intellectual bedrock of ILR's program—in Washington, in the states and around the globe.

As highlighted in this issue of the ILR Research Review, the plaintiffs' bar continues to identify new profit centers, and businesses face an ever-widening spectrum of lawsuit abuse. Meanwhile, state high court decisions outside the mainstream are creating a continuous guessing game for the business community in terms of how states will enforce their laws. And finally, federal and state prosecutors are winning billions of dollars in enforcement settlements against businesses. And troubling legal trends aren't just unique to the United States; class action litigation is thriving in Canada, for example.

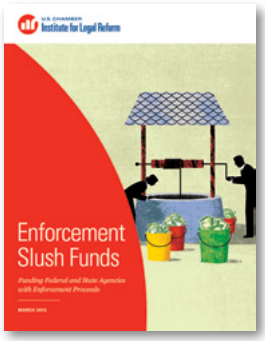
All of these issues, and more, are addressed in recent ILR research, highlighted in this latest edition. Our research is aimed at laying the groundwork for reforms, whether through legislation, administrative action, or judicial review.

- Lisa A. Rickard

ILR EVENT

Panel at the U.S. Chamber Capital Markets Summit

The *Enforcement Slush* Funds paper was released to coincide with an enforcement panel at the Chamber's Capital Markets Summit, which featured the primary authors of the paper, John Beisner of Skadden Arps and Andy Pincus of Mayer Brown. In addition, *Corporate Counsel* magazine published an article about the study.



Enforcement Slush Funds:

OVER-ENFORCEMENT

Funding Federal and State Agencies with Enforcement Proceeds

Authors: John H. Beisner, Geoffrey M. Wyatt and Jordan M. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP, and Andrew J. Pincus and Sean P. McDonnell, Mayer Brown LLP

There is a growing practice threatening core constitutional, legal and ethical norms that undergird our legal system: the use of public settlement money by federal and state prosecutors absent legislative approval. Whether it is federal law enforcement officials retaining the proceeds of enforcement actions for their own use or state attorneys general steering public money generated from litigation settlements to their preferred projects and charities, the practice raises serious constitutional, statutory and ethical issues that require careful attention.

The first piece featured in this paper, *Profit Over Principle: How Law Enforcement for Financial Gain Undermines the Public Interest and Congress's Control of Federal Spending,* focuses on federal law enforcement officials' use of public money for their own agency purposes, as well as the growing practice of doling out public money to favored charitable organizations.

The second piece, *Undoing Checks and Balances: State Attorneys General and Settlement Slush Funds,* explores the practice by which state attorneys general are spending public settlement money on their favored projects and donating money to hand-picked charitable organizations, as well as enhancing their office budgets.

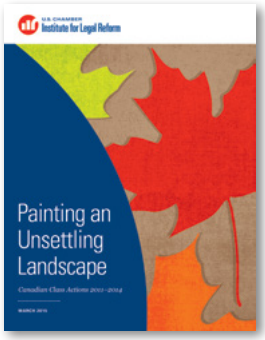
As both of these pieces highlight, these practices—which involve the expenditure of public money—are being carried out with virtually no legislative oversight. Federal law enforcement officials and state attorneys general are spending public money without legislative approval, thereby contravening the separation of powers firmly rooted in the federal and state constitutions. **By permitting prosecutors to retain billions of dollars in enforcement settlement money, a clear message is being sent that private profit motives trump the public interest.**

ILR EVENT

ILR Co-Hosts Event with the Canadian Chamber of Commerce

On March 23, ILR co-hosted an event with the Canadian Chamber of Commerce and released *Painting an Unsettling Landscape* in Toronto. The event featured a panel discussion which shined a spotlight on a troubling trend of lax certification standards in Canadian class actions that have created fertile ground for frivolous and abusive litigation. The paper was also released in French in Montreal at a national conference on class actions.

The paper received significant media attention, including an article from Corporate Counsel, a story from Law Times, and an article by the *Financial Post*.



Painting an Unsettling Landscape

CLASS ACTIONS

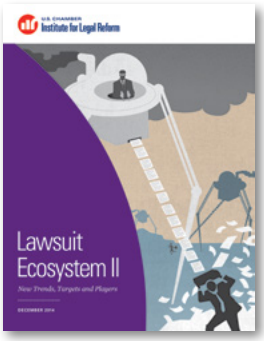
Canadian Class Actions 2011-2014

Authors: *John H. Beisner, Gary A. Rubin and Jordan Schwartz, Skadden, Arps, Slate, Meagher & Flom, LLP, and Gordon McKee and Will Morrison, Blake, Cassels & Graydon, LLP*

After giving defendants a glimmer of hope that Canadian class action law would become less plaintiff-friendly, Canadian courts have recently returned to their longstanding approach favoring class actions. The trend in favor of class certification as the default culminated in the Supreme Court of Canada's recent pronouncement that class certification is governed by "low" standards. Specifically, Canadian courts may not probe conflicting facts and evidence at the class certification stage, leading courts to ignore important complexities presented by plaintiffs' claims. In some provinces, only plaintiffs have the automatic right to immediately appeal a class certification decision.

As a result of these trends, more class actions are being resolved on the merits in "common issues" trials. **Although some defendants have fared better defending against class action trials in Canada than in the U.S., they still entail long periods of time and large sums of money.** The trend in favor of more lax class certification standards has also been accompanied by a palpable increase in third-party litigation funding.

The recent developments in Canadian class action law are unwelcome news for defendants. However, defendants can take solace that some courts have grown more skeptical of class counsel fee applications when reviewing proposed class settlements. In addition, multijurisdictional class settlements are increasingly being resolved in an efficient manner pursuant to the Canadian Bar Association's Protocol for Multijurisdictional Class Actions. Finally, the Law Commission of Ontario (LCO) is examining many aspects of Ontario's class action regime. Because other Canadian provinces are paying close attention to this review, the outcome of the LCO will likely influence legislative and judicial efforts on class actions throughout the country.



Lawsuit Ecosystem II

LEGAL REFORM

New Trends, Targets and Players

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

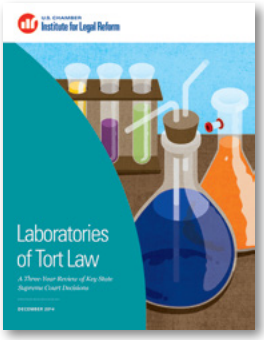
What are the latest trends in American litigation? Where are opportunistic plaintiffs' lawyers prospecting for lawsuit gold? How are some state attorneys general delegating unprecedented powers to profit-driven lawyers? Are targeted businesses pushing back? These key questions, and more, are examined in *The Lawsuit Ecosystem II: New Trends, Targets, and Players.*

This report explores the evolving lawsuit "ecosystem" and how creative plaintiffs' lawyers are developing new theories and identifying new targets to increase their profits.

Highlighted trends include:

- The creation of mass tort litigation through extensive business models;
- The expansion of product liability lawsuits;
- The plaintiff-initiated discovery disputes to discredit defendants and initiate court sanctions;
- The debate over what constitutes a certifiable class action;
- The evolution of asbestos litigation;
- The unabated continuation of securities litigation and its subsequent harm to investors;
- The filing of class action lawsuits within weeks of every merger and acquisition announcement;
- The near record filings of federal FCA lawsuits;
- The abusive litigation practices used by patent trolls;
- The targeting of employer social media use for labor and employment lawsuits;
- The rise of litigation against energy producers;
- The exploitation of the Telephone Consumer Protection Act (TCPA); and
- The delegation of government power by state attorneys general to private lawyers through contingency fee arrangements.

Rather than treating baseless lawsuits as a cost of doing business, however, companies are fighting back, through civil RICO actions against plaintiffs' lawyers, challenges to the constitutionality of contingency fee arrangements between state AGs and private lawyers, and appeals to the public to protect their brand and address meritless lawsuits.



Laboratories of Tort Law

LEGAL REFORM

A Three-Year Review of Key State Supreme Court Decisions

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

State supreme courts shape American tort law. They have the primary role in developing rules governing liability, causation, the scope of defenses, and calculation of damages. These case-by-case rulings not only impact the individuals before the court, they have a broader impact on the law, the economy, and the public.

Laboratories of Tort Law finds that some courts adhere to traditional principles or carefully evolve the law to meet changing times, but other courts have experimented with unprecedented expansions of liability. The paper explores recent key decisions in this research, highlighting stark contrasts in judicial philosophy between sister courts. The profiled rulings span a wide range of issues, including: an Alabama decision holding drugmakers liable for alleged injuries caused by products they did not manufacture; Nevada and West Virginia decisions that unreasonably expand the duties of businesses to protect visitors and even trespassers on their property; and a Wisconsin ruling in support of inflated personal injury awards.

State legislatures typically step in to set tort law rules only when court-made law becomes highly imbalanced. "Tort reform," the authors find, is the exception, not the rule. State supreme courts often respect the policy choices of elected officials, but some have nullified rationally-based legislative judgments.

State supreme courts should develop tort law in a sound, reasonable, and predictable manner. They can do so by adhering to precedent, maintaining objective rules, carefully considering the broader impact of proposed expansions of liability, and valuing the role of the legislature.

ILR ADVOCACY

ILR Seeks TCPA Reforms

As identified in ILR's *Lawsuit Ecosystem II* report, the number of Telephone Consumer Protection Act (TCPA) lawsuits has grown rapidly in recent years — by 560% between 2010 and 2014. In 2014 alone, 1,908 TCPA lawsuits were filed, which marked an increase of 29.9% over same period in 2013. Businesses large and small are being faced with expensive lawsuits to defend, or expensive settlements to pay out.

ILR has submitted several comments to the Federal Communications Commission (FCC) requesting much-needed guidance and clarification on the intent and scope of the TCPA. In addition, ILR is coordinating with dozens of business groups to urge the FCC to update and modernize its TCPA regulations.

ILR IN THE MEDIA

ILR Reports Garner Media Coverage

ILR's *Lawsuit Ecosystem II* and *Laboratories of Tort Law* reports received great media coverage following their release at the end of 2014. Articles were published by Legal Times, Claims Journal, and Bloomberg BNA. Additionally, ILR held a well-received webinar on both reports in January, which focused on developments in class and mass tort actions, the growing alliance between state attorneys general and plaintiffs' lawyers, and the rapid rise of litigation exploiting the TCPA.

ISSUE SPOTLIGHT

Class Action Reform at Ten Years

Author: Lisa A. Rickard

On February 27th, the House Judiciary Committee held a hearing commemorating the tenth anniversary of the passage of the Class Action Fairness Act. This measure, largely known by its acronym, CAFA, does not make for easy reading—civil procedure rarely does. But behind the dense language were far-reaching reforms meant to curb a very real problem—abusive class action lawsuits filed in trial lawyer-friendly state courts.

Indeed, it is easy to forget how awful the lawsuit environment was prior to CAFA. A decade ago, huge class action lawsuits would be filed in tiny jurisdictions like Madison County, Illinois, where neither the defendant company nor the overwhelming majority of the class of plaintiffs resided.

For example, toy maker and California-based Mattel was accused of violating California's consumer protection law by manufacturing too many special-edition Barbie Dolls. But instead of filing the lawsuit in California, the plaintiffs' lawyer brought the case in Madison County, where judges were closely allied with plaintiff's lawyers. Faced with a hostile court and a huge class of plaintiffs, Mattel and most other class action defendants chose to settle rather than go to trial and risk a massive judgment against the company.

These settlements were often structured in a way that benefited the plaintiffs' lawyers rather than the actual plaintiffs. In one notorious case, brought against the Massachusetts-based Bank of Boston in an Alabama state court, the plaintiffs' lawyers walked away with $8.2 million from a settlement. And the actual plaintiffs? They received $2-3 in back interest—and *lost* $90 from their checking accounts for attorneys' fees.

Congress passed CAFA to address these abuses. Its key provision allowed defendants to move most large interstate class actions out of state courts to more neutral federal courts. And the law has largely worked.

But CAFA's success doesn't mean there aren't still improvements to be made. Congress has a chance to build on CAFA's success by passing modest reforms aimed at the remaining class action abuses, such as cases where most of the class members suffered no demonstrable injuries.

For example, plaintiffs' lawyers convinced the Sixth and Seventh Circuit Courts of Appeals to allow class actions over allegedly defective washing machines to proceed—despite the fact that very few class members actually had problems with the machines.

These rulings are at odds with decisions in other circuits as well as the Supreme Court's 2013 decision in *Comcast v. Behrend*. They are also at odds with two fundamental principles—that plaintiffs in a class action should have suffered the same injury, and that the justice system should be reserved for plaintiffs with actual injuries. But the Supreme Court declined to review the rulings—opening the door to more "no-injury" class actions in the Sixth and Seventh Circuits.

Congress can resolve this problem by passing legislation that requires all class members to allege the same injury. This simple, commonsense change would preserve the class action option for truly injured plaintiffs, while stopping meritless lawsuits that only line the pockets of plaintiffs' lawyers. It will also build on CAFA's landmark reforms—which have done so much to stop abusive lawsuits that harm American workers, consumers and businesses.

Lawsuit Climate Survey to be released in 2015

In 2015, ILR will conduct its seminal Lawsuit Climate survey to highlight the best and worst state liability climates in the country. This study, the tenth of its kind, will survey over 1,500 in-house general counsel and senior litigators.

It has become the preeminent standard by which companies, policymakers and the media judge state legal climates. Where does your state rank?

SAVE THE DATE

OCTOBER 27

16th Annual Legal Reform Summit