

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



## FROM THE TOP:

### *The President's Perspective*

At ILR's 16th Annual Legal Reform Summit on October 27th, attendees explored the "Liability Odyssey" that defines the new world of litigation – one that is evolving and connected by rapidly-changing technology. Business commentators have noted that technology is now considered a basic human need, along with food and shelter. And technology is how everyone in the modern economy does virtually everything.

But what does this mean for the legal community?

With every website, every app, every piece of data, every e-transaction, there are litigation threats that didn't exist even a few years ago.

Data privacy is an emerging area of litigation, and one that concerns all companies. But data privacy isn't the only concern for 2015 and beyond. Technology has also opened the doors for unprecedented levels of trial lawyer marketing and advertising. These trial lawyer efforts – soliciting class action litigation or advancing the overall cause of lawsuits – reach millions of people every day. Technology allows for the commercialization of litigation across the globe.

Now more than ever, businesses are making important decisions based on the lawsuit climate in areas in which they operate. How will this growing landscape of liability and litigation impact economic growth?

*- Lisa A. Rickard*



## ILR EVENT

### ILR and Illinois Governor Bruce Rauner Release Lawsuit Climate Survey in Chicago

The *2015 Lawsuit Climate Survey* was released on September 10th in Chicago alongside Illinois Gov. Bruce Rauner, and business and civil justice reform groups from across the state. Illinois' legal environment has worsened in recent years, hitting an all-time low in this year's survey as the third-worst state nationally. More than a third of the survey respondents identified either Chicago/Cook County, or Madison County as the city or county court with the "least fair and reasonable litigation environment for both defendants and plaintiffs" nationwide.



## 2015 Lawsuit Climate Survey — Ranking the States

A Survey of the Fairness and Reasonableness of State Liability Systems

Authors: *The Harris Poll/Nielsen*

*2015 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 tenth time ILR has highlighted the best and worst state liability climates in the country. Participants in the survey were comprised of a national sample of 1,203 in-house general counsel, senior litigators or attorneys, and other senior executives.

The *2015 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
- Having and enforcing meaningful venue requirements

- Treatment of class action suits and mass consolidation suits
- Damages
- Timeliness of summary judgement or dismissal
- Discovery
- Scientific and technical evidence
- Judges' impartiality
- Judges' competence
- Juries' fairness

The Survey found that **75 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 18 percent increase from eight years ago, and an all-time high.**

## ILR IN THE MEDIA

### Media Coverage from Lawsuit Climate Survey Release

The *2015 Lawsuit Climate Survey* generated 271 articles and was covered by 27 national outlets, including the Associated Press, *Wall Street Journal*, New York Times, *Forbes*, Fox News, Reuters, Washington Post, and Sirius XM Satellite Radio.

ILR's op-eds, co-authored with state chamber presidents, ran in papers in *Arkansas*, *Florida*, *Louisiana*, *Illinois*, and *West Virginia*. There were 32 radio interviews on the study, reaching over 1,500 outlets nationwide.

ILR also released a [national television ad](#), titled "2015 Rankings: Where Does Your State Rank?"



## 101 Ways to Improve State Legal Systems

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 liability that is disproportionate to responsibility, inconsistent outcomes, and jackpot verdicts.

*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 key issues confronting policymakers. For

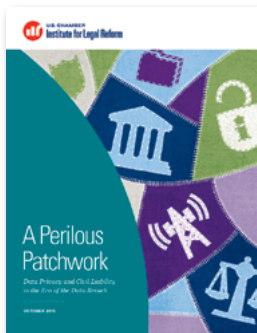
example, when government officials hire contingency fee lawyers, what safeguards will ensure that law enforcement is driven by the public interest, not the financial interest of attorneys with a stake in the litigation? How can the law address damages that exceed actual losses, pain and suffering awards that have become the largest part of tort damages, and punitive damages "run wild"? This report answers these questions and more.

*101 Ways* also considers fair, effective measures that would improve the litigation process, promote rational liability rules, and rein in excessive awards. In addition, the report addresses the latest trend in legal abuse: over-enforcement. By summarizing approximately 101 legal reform bills enacted within the past several years, *101 Ways* presents legal reform options in a conceptual manner and demonstrates how legislators can move the proposals in this guide from theory to practice.

LEGAL REFORM

LEGAL REFORM





# A Perilous Patchwork

DATA PRIVACY

Data Privacy and Civil Liability in the Era of the Data Breach

Authors: *Liisa M. Thomas, Robert H. Newman, and Alessandra Swanson, Winston & Strawn LLP*

After a data breach, companies are often

accused of having failed to adequately protect their customers' information, with that failure – so the argument goes – having led to the breach. Who brings these allegations? Many think that they are brought by "the government." However, there is no single agency charged with enforcing data protection. Instead, there is a patchwork of regulatory agencies handling these issues, depending on both the nature of the company's business and the activities in which it engages.

Historically, the Federal Trade Commission has taken the lead in privacy law enforcement, largely bringing privacy violation actions under an unfair or deceptive trade practice theory. Now, however, with the rise of security breaches and an ever-increasing ability for companies to collect, store, and make use of consumer data, state attorneys general and the

class action bar are bringing privacy-related actions under varied legal theories.

**This medley of enforcers and laws, coupled with the evolving nature of privacy concerns generally, means that companies face significant compliance challenges both when developing new products and technology and when establishing or refining programs to protect existing data and information systems..**

This paper addresses the multifaceted enforcement landscape confronting companies as they face the reality that they may be the next victims of a data breach. The paper also discusses how companies can prepare themselves for the additional legal challenges that could follow, and how to navigate differing court interpretations and a complex collection of data-privacy-related laws.

## ILR EVENT

### ILR Hosts 16th Annual Legal Reform Summit – 2015: A Liability Odyssey

The 16th Annual Legal Reform Summit was held on October 27, 2015 at the U.S. Chamber Headquarters. This year's Summit, *2015: A Liability Odyssey*, featured a new event format with modified panels, interviews, and TED Talk-style speakers on a variety of topics, including data privacy liability, the global spread of class actions, regulatory over-enforcement, and trial lawyer advertising tactics. John Stossel, Host of *Stossel on Fox Business Network*, delivered the [keynote address](#).



# Trial Lawyer Marketing

TRIAL LAWYERS

Broadcast, Search and Social Strategies

Authors: *Ken Goldstein, University of San Francisco and Dhavan V. Shah, Sherpa Metrix LLC*

Legal advertising and marketing

communications are a multi-prong, highly sophisticated undertaking by trial lawyers that spans broadcast and digital venues. This is not a resource-starved, grassroots effort but very much a well-funded and coordinated endeavor. The plaintiffs' firm marketing explored in this report takes advantage of a full set of network, cable, syndicated and spot television options and a full range of digital tools and systems, including Internet search and social media.

This report seeks to address: (1) who the major players are in trial lawyer messaging; and (2) what their strategies are for reaching potential litigants. Additionally, the report explores the scope, placement, and messaging of these strategies, and how they compare to other industries with large advertising presences.

The report finds that **lawyer spending on television advertising is growing faster than all others – a rate six times faster than all other television ad spending – and online legal key word advertising is among the most expensive in America. In 2015, lawyers are projected to spend \$892 million on television advertising alone, 68% more than they spent in 2008.** The report also finds that 23 of the top 25 Google key words linking ads to user searches are for personal injury law firms.

The marketing strategies of law firms are increasingly sophisticated and localized in terms of broadcast ad buying, search keyword purchases, and search engine optimization. In short, they comprise a highly coordinated and targeted set of localized campaigns in terms of broadcast and digital presence.

## ILR IN THE MEDIA

### Media Coverage of Trial Lawyer Marketing Study at Legal Reform Summit

The Trial Lawyer Marketing Study was covered by national outlets such as ABA Journal, Bloomberg BNA, Forbes, Global Legal Post, JDJournal, Law360, Overlawyered.com, Patch.com, Reuters, the Wall Street Journal Law Blog, and Ware (advertising publication). State-based outlets covering the study included the Florida Business Review, Houston Chronicle, The Daily Record (MD), Orlando Business Journal, Orlando Sentinel, Orlando Weekly, Tampa Bay Times, and Texas Lawyer. Alison Frankel from Reuters also wrote a piece skeptical of the study.

## ILR EVENT

### Panels at the 16th Annual Legal Reform Summit

The Summit featured the following panels:

- [New Technologies, New Liabilities – The Problems and The Solutions – Part I](#)
- [New Technologies, New Liabilities – The Problems and The Solutions – Part II](#)
- [The Magna Carta, 800 Years Later – Rule of Law or Rule of Lawyers?](#)
- [The Next Frontier: Solutions for the New Generation of Class Actions](#)
- [Regulators Gone Rogue](#)
- [The Future is Now: Hot Topics in Litigation](#)
- [Show Me the Money: Trial Lawyer Advertising and Online Networks](#)

## ILR EVENT

### ILR Summit Blog Series Highlights Q&A with Research Authors

Prior to their release at the Legal Reform Summit, ILR sat down with our Summit research authors for a guided Q&A session regarding the legal issues addressed in their respective reports. *The Summit Series* also offered attendees a “sneak peak” at some of their key findings.

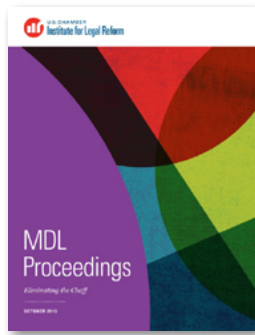
- [Might excessive government fines be unconstitutional? Q&A with Paul Clement](#)
- [Is data privacy the next lawsuit megatrend? Q&A with Liisa Thomas and Kari Rollins](#)
- [Has Multidistrict Litigation become a Lawsuit Magnet? Q&A with John Beisner](#)
- [How are trial lawyers marketing themselves? Q&A with Ken Goldstein and Dhavan Shah](#)

## MDL Proceedings

CLASS ACTIONS

### Eliminating the Chaff

Authors: *John H. Beisner, Jessica D. Miller and Jordan M. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP*



Multidistrict proceedings are supposed to enhance the fair and efficient litigation and resolution of large controversies. In theory, they concentrate multiple lawsuits involving the same subject before one court, and the court helps the parties streamline the litigation. Through the use of bellwether trials, these courts can help the parties obtain the information they need about the strength of the claims pool and thereby facilitate a more efficient resolution of all claims.

Unfortunately, multidistrict litigation (MDL) practice is not living up to the theory: **MDL proceedings are morphing from a procedural device intended to create efficiencies in civil litigation into lawsuit magnets.** This is, in large part, because plaintiffs’ counsel have increasingly been able to turn the chief virtue of MDL – the efficiencies gained from resolving pretrial matters in the aggregate – into a significant vice.

Through aggressive advertising and sophisticated client recruitment strategies, plaintiffs’ counsel have used the existence of multidistrict proceedings to attract claims of dubious merit. And because multidistrict proceedings by design have tended to prioritize global issues over individual ones, plaintiffs’ counsel have successfully warehoused meritless claims and shielded them from judicial scrutiny in a way they never could if all the cases were tried individually.

This paper addresses the aggressive solicitation of clients by lawyers and outside groups; the frivolous (and sometimes fraudulent) nature of many lawsuits filed in MDL proceedings; the settlement pressure inherent in MDL proceedings that defendants face; and meaningful reform proposals under which plaintiffs’ counsel would be barred from parking meritless lawsuits in MDL proceedings.

## Constitutional Constraints

OVER-ENFORCEMENT

### Provisions Limiting Excessive Government Fines

Authors: *Paul D. Clement, Bancroft PLLC*



In the past decade, federal and state government officials have increasingly imposed massive fines against companies and individuals as a means of punishing perceived misconduct. In the United States, both the federal government and the states have long employed criminal and civil fines to deter conduct and exact retribution.

The fines imposed in recent years, however, differ from the fines imposed in the past: because of their sheer immensity, sometimes reaching into the billions of dollars against a single entity, and because they seldom follow a finding of wrongdoing. Instead, fines are increasingly imposed as components of coercive settlements with the government, preceding even formal allegations of misconduct. Moreover, **entities are frequently subject to multiple fines by different government actors for the same conduct; and the fines often inure not to the general benefit of the government,**

**but to the direct benefit of the particular government entities that impose them.**

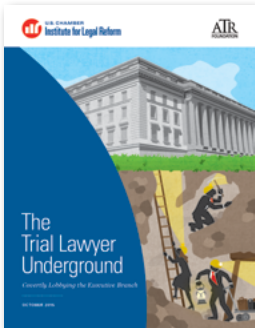
Fortunately, the targets of these government fines have a formidable ally: the Constitution.

This paper offers the Constitution as a defense against government abuses seen in today’s imposition of government fines: arbitrary state action, lack of notice and process, concentration of government power, multiple punishments, and fundamental unfairness. The Constitution contains a number of provisions designed to limit the government’s ability to impose criminal and civil fines. Chief among these constraints are the Excessive Fines Clause and the Due Process Clause. Finally, the paper discusses recent Supreme Court concerns over two problems that permeate the government’s recent enforcement efforts: overcriminalization and questionable exercises of prosecutorial discretion.



## OTHER 2015 RESEARCH RELEASES

### TRIAL LAWYERS



## The Trial Lawyer Underground

Covertly Lobbying the Executive Branch

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

Released in partnership with the American Tort Reform Association (ATRA), this report highlights examples of the quiet and effective influence the American Association for Justice (AAJ), the organization that lobbies on behalf of the plaintiffs' bar, exerts within the Executive Branch, and how AAJ has pursued its policy goals through federal agencies while attracting very little attention.

### ASBESTOS



## The Waiting Game

Delay and Non-Disclosure of Asbestos Trust Claims

Authors: *Peter Kelso and Marc Scarcella, Bates White*

This paper addresses the lack of transparency in asbestos bankruptcy trust systems, and the intentional delay and suppression of trust disclosures by plaintiffs and their counsel. In particular, the report highlights Judge Hodge's ruling determining that *Garlock* repeatedly settled cases in which it had little to no legal liability, and examines the public *Garlock* data to expose the concealment of trust-related disclosures in the tort system.

### TRANSNATIONAL



## As Kiobel Turns Two

How the Supreme Court is Leaving the Details to Lower Courts

Authors: *John Bellinger and Reeves Anderson, Arnold & Porter LLP*

This paper explores the effect of the U.S. Supreme Court's *Kiobel* decision on Alien Tort Statute (ATS) litigation in lower courts, and how lower courts have struggled to determine whether *Kiobel* permits U.S. corporations to be sued under the ATS for alleged torts in foreign countries.

### TRANSNATIONAL



## Should I Stay or Should I Go?

A *Forum Non Conveniens* Checklist

Authors: *John Bellinger and Reeves Anderson, Arnold & Porter LLP*

This paper highlights practice tips that corporate defendants should consider when gauging when and how to seek dismissal on *forum non conveniens* grounds to avoid litigation in U.S. courts in favor of litigation abroad.

# LAWSUIT CLIMATE OVERALL RANKINGS BY STATE

## LEGEND BY RANKINGS

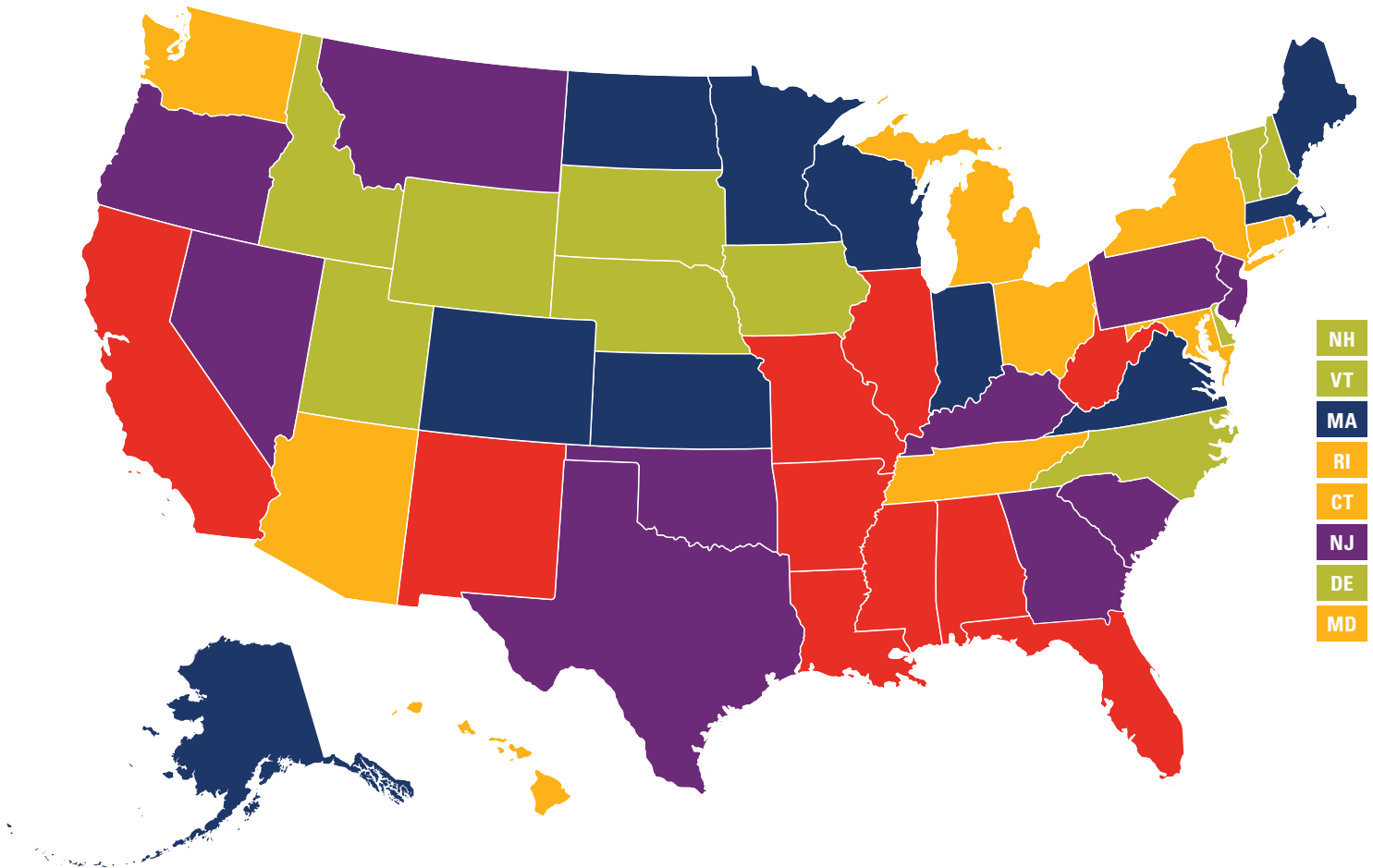
1-10

11-20

21-30

31-40

41-50



## 1-10

1. Delaware
2. Vermont
3. Nebraska
4. Iowa
5. New Hampshire
6. Idaho
7. North Carolina
8. Wyoming
9. South Dakota
10. Utah

## 11-20

11. Virginia
12. Alaska
13. Minnesota
14. Maine
15. North Dakota
16. Colorado
17. Massachusetts
18. Indiana
19. Kansas
20. Wisconsin

## 21-30

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

## 31-40

31. Georgia
32. Oregon
33. Oklahoma
34. Montana
35. Nevada
36. South Carolina
37. Pennsylvania
38. New Jersey
39. Kentucky
40. Texas

## 41-50

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

ILR'S RESEARCH IS AVAILABLE ON OUR WEBSITE AT [www.INSTITUTEFORLEGALREFORM.com](http://www.INSTITUTEFORLEGALREFORM.com).