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

FROM THE TOP:

The President's Perspective

Over-criminalization and over-enforcement in the civil context are of great concern to American business. Taking stock of them together shows that the very same, very troubling, enforcement overreach occurs in both the civil and criminal arenas.

It is essential that we look at over-enforcement broadly, to increase awareness of disturbing trends that push the limits of fairness and due process, such as the use of statutory penalties to secure settlements, or the use of threats of criminal prosecution to get civil settlements.

And then, to add insult to injury, we have the piling-on phenomenon. Where we see multiple, simultaneous, duplicative investigations by numerous federal agencies, state attorneys general, and even international authorities, all focused on the same objective — extorting as much money as possible in a settlement.

Genuine wrongdoers whose actions have violated the law should face consequences. But government enforcement actions, whether civil or criminal, have increasingly become unhinged from reasoned enforcement practices and the concept of justice. And the impact of these actions have real consequences on American business.

- Lisa A. Rickard

ILR EVENT

ILR and NACDL Co-Host Symposium — *The Enforcement Maze: Over-Criminalizing American Enterprise*

On May 26, 2016, ILR and the National Association of Criminal Defense Lawyers (NACDL) co-hosted a joint symposium — ***The Enforcement Maze, Over-Criminalizing American Enterprise*** — which explored the rise of over-criminalization, the inappropriate criminalization of what are truly civil or regulatory/administrative problems, and the pressures associated with enforcement against businesses and corporate individuals. David Ogden, Former Deputy Attorney General, Senator Orrin Hatch, Chairman of the Senate Finance Committee, and Representative Bob Goodlatte, Chairman of the House Judiciary Committee, provided keynote remarks.

ILR IN THE MEDIA

Media Coverage from *The Enforcement Maze*

The Enforcement Maze event garnered significant media attention, with coverage by both Bloomberg and Bloomberg BNA, The Wall Street Journal, Law 360, National Law Journal, and others.

ILR also released a new Faces of Lawsuit Abuse video at the event, featuring the story of Kurt Mix, the BP engineer scapegoated by federal prosecutors who were under pressure from the Department of Justice to get criminal convictions in the Deepwater Horizon oil spill case.

OVER-CRIMINALIZATION

DOJ's New Threshold for "Cooperation":

Challenges Posed by the Yates Memo and USAM Reforms

Author: *Matthew Miner, Morgan, Lewis & Bockius LLP*

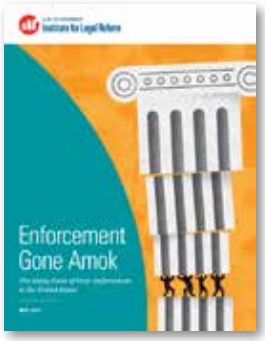
In September 2015, U.S. Deputy Attorney General Sally Yates issued a policy memorandum to Department of Justice attorneys, directing them to focus enforcement efforts on holding individuals accountable for corporate malfeasance. Recognizing the challenge of doing so, the Department's new policy seeks to leverage a corporate entity's knowledge and access to information to bring cases against their own employees by making corporate cooperation credit conditional on the disclosure of all relevant facts as to any individuals involved in the misconduct.

Although it is too soon to measure the full impact of the new policy, it is clear that the new threshold for cooperation credit has upset the expectations of businesses historically inclined to cooperate with the government.

By focusing so much attention on identifying culpable individuals, the new policy risks alienating personnel whose cooperation and knowledge of facts are essential to any corporate internal investigation, and complicating compliance.

The "all-or-nothing" nature of the new cooperation standard also risks creating even more uncertainty for corporate decisions regarding the benefits of voluntary self-disclosure of suspected unlawful conduct. **Paradoxically, in seeking to make it easier to bring cases against culpable individuals in corporate investigations, the Department has complicated the mix for individuals, the corporate community—and ultimately, for the Department itself.**

This paper explores the policy directive in the Yates Memo and addresses its implementation in the United States Attorneys' Manual. It also addresses how corporations may find themselves at odds with their employees' interests in the course of internal investigations and the new realities faced by corporate counsel conducting internal investigations in a post-Yates Memo world.



OVER-ENFORCEMENT

Enforcement Gone Amok:

The Many Faces of Over-Enforcement in the United States

Authors: *John H. Beisner, Geoffrey M. Wyatt, and Jordan M. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP*

American society benefits when the legal system is used as intended by our Founders—to prosecute and punish genuine wrongdoers whose actions have violated the law and caused injury or damage, guided by due process and the Eighth Amendment principle that the punishment should fit the crime.

However, **recent events have shown that government enforcement actions increasingly overstep reasonable bounds.**

Over-enforcement occurs when individual government agencies exercise unfettered discretion to rely on novel or expansive interpretations of laws to coerce settlements. Targeted companies cannot be certain that the courts will set aside these actions, given the often vague and broad statutory language that confers authority on these agencies.

Over-enforcement also occurs when the prosecution of wrongdoing is carried out by multiple regulators conducting duplicative investigations and legal actions, either simultaneously or in succession, which are directed at the very same conduct. Faced with these multiple assaults, companies often have little choice but to agree to settle, even if the company has meritorious arguments against the underlying charges.

This paper highlights over-enforcement examples to shine much needed light on the wide-ranging and often interrelated ways in which the government has taken advantage of those who find themselves in the cross-hairs of an enforcement action. From overreach and coercion employed by unbridled federal and state prosecutors, to "piling-on" by multiple federal and state government entities seeking their piece of the settlement pie, to punishment in the form of excessive fines and penalties, this paper examines the ways in which the enforcement process is being misused to the detriment of business and society as a whole.

THIRD-PARTY LITIGATION FUNDING

Before the Flood:

An Outline of Oversight Options for Third Party Litigation Funding in England & Wales

Authors: *Ken Daly and Steven Pitt, Sidley Austin LLP*

Third party litigation funding ("TPLF") is the arrangement through which litigation costs are paid for by a party unconnected to a dispute, in exchange for an agreed percentage of any recovery.

As the TPLF industry in England and Wales continues to rapidly expand, it still lacks safeguards and any government oversight. The top sixteen TPLF providers in the United Kingdom now have approximately £1.5 billion in assets under management. The TPLF industry is also steadily diversifying.

While proponents of TPLF tout advantages for claimants, the industry also gives rise to complex ethical and legal concerns. Funders who finance litigation for profit have an interest in the protection of their investments. But allowing this practice to become a dominant interest in litigated cases will distort justice, and lead to unjust and undesirable outcomes.

It is clear that appropriate safeguards and meaningful oversight of the TPLF industry are needed so that litigation funders' investments are balanced against a number of other equally, if not more important interests, such as the need for a just outcome, fairness to both parties, transparency, and respect for the court's role.

This paper explores some of the overarching themes and issues regarding TPLF and why meaningful oversight is desirable and could be achieved; considers specific ethical and practical issues related to the use of TPLF in litigation, including: 1) capital adequacy; 2) ethical issues: fiduciary duties, control, conflicts of interest and withdrawal; 3) incentives and limits on recovery; 4) responsibility for adverse costs; and 5) disclosure and transparency; and finally, considers issue-specific legislation alternatives and identifies options for an oversight structure.

ASBESTOS

Insights & Inconsistencies:

Lessons from the Garlock Trust Claims

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

The recent unsealing of asbestos bankruptcy trust claim forms from the Garlock bankruptcy reveals a pattern of inconsistent claiming from one trust to another. This pattern, together with evidence of fraud that has plagued these trusts and the perverse incentives created by their structure, underscores the critical need for oversight and reform of the asbestos bankruptcy trust system.

The report examines a subset of 100 claims from the Garlock database and analyzes the dates, places, products, and descriptions of exposure provided by each claimant to each trust to determine what effect, if any, the trust system's flawed design might have in practice.

Alarmingly, the subset identifies three widespread inconsistencies in the information provided to different trusts by claimants:

- Sixty-nine percent of claimants did not list every place of employment at which they alleged exposure with every trust.
- Fifteen percent of claimants did not list specific products or brands to which they alleged exposure.
- Over half of the claimants (55%) had date discrepancies across claim forms.

Furthermore, twenty-one percent of the claims displayed even more worrisome inconsistencies, such as incompatible dates for jobs (where the dates for different jobs overlapped), inconsistent job descriptions, and implausible exposure allegations.

The Garlock claims present evidence that asbestos bankruptcy trusts, by design, do not adequately compare the allegations made across trusts. Without strong external oversight and reform of the current system, fraudulent and inconsistent claims will continue.

ILR IN THE MEDIA

Gawker-Hulk Hogan Litigation Turns Public's Attention to TPLF

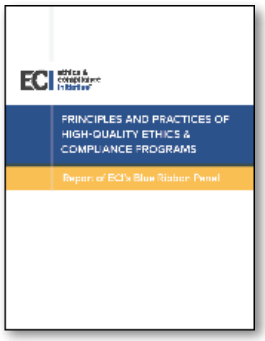
In the wake of Hulk Hogan's victory in a defamation lawsuit against Gawker, it was revealed that Hogan's litigation was funded by an outside non-party — none other than Peter Thiel, Silicon Valley billionaire and entrepreneur — rekindling a debate about the need for transparency in such arrangements. ILR's President Lisa Rickard wrote an op-ed in the New York Times denouncing the use of TPLF, stating "This practice is a cancerous growth on our civil justice system, turning our courts into profit centers, increasing the number of lawsuits in our already over-sued society, shifting control of lawsuit decisions toward funders rather than litigants, and reducing settlement dollars for truly deserving victims."

ILR IN THE MEDIA

Media Coverage of *Insights & Inconsistencies*

On February 3rd, the U.S. Senate Judiciary Committee held a hearing on "The Need for Transparency in the Asbestos Trusts." The hearing was largely focused on the evidence of fraud revealed in the Garlock litigation and the Furthering Asbestos Claim Transparency (FACT) Act introduced by Senator Jeff Flake. Following its release, several outlets highlighted Insights & Inconsistencies as further emphasizing the need for asbestos trust reform, including The Hill and Arizona Business Daily.

ISSUE SPOTLIGHT



Principles and Practices of High-Quality Ethics & Compliance Programs

Authors: *Ethics & Compliance Initiative (ECI)*

On April 25th, the Ethics & Compliance Initiative (ECI) released its final report detailing principles for a robust compliance program. ILR provided a grant to ECI for the creation of a "blue ribbon" panel of former high-ranking DOJ officials and company personnel to outline the principles that constitute a high-performing compliance program. The following briefly outlines the core principles included in the report:

- Principle #1: Ethics and compliance is central to business strategy.
- Principle #2: Ethics and compliance risks are identified, owned, managed, and mitigated.
- Principle #3: Leaders at all levels across the organization build and sustain a culture of integrity.
- Principle #4: The organization encourages, protects, and values the reporting of concerns and suspected wrongdoing.
- Principle #5: The organization takes action and holds itself accountable when wrongdoing occurs.

The ECI report was covered by several outlets, including the Wall Street Journal, Corporate Counsel, the Compliance Exchange, Ethical Leadership, Ethisphere, and Law360.

2016 Legal Reform Summit

This year's Summit — **The Litigation Machine** — will examine the various components and parts that fuel the American "litigation machine," and how these elements, such as third-party litigation financing, data privacy liability, class action litigation, trial lawyer advertising, and government over-enforcement, harm American businesses and consumers alike.

Keynote remarks will be provided by Mitt Romney, 2012 Republican Presidential Nominee and Former Governor of Massachusetts. The Summit will also spotlight a 2016 political landscape discussion featuring Kristen Soltis Anderson, political pollster and author of *The Selfie Vote* and Mark Halperin, managing editor of Bloomberg Politics. The discussion will be moderated by the U.S. Chamber's Senior Political Strategist, Scott Reed