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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

The core of ILR's value to our members is our ability to spot destructive legal trends in time to do something about them. This edition of the *ILR Research Review* showcases excellent examples of these efforts.

Over the last six months, ILR has released research that highlights deeply troubling trends in the world's legal environment: record-setting sums are being spent in the U.S. tort system, U.S. securities class actions have reached an all-time high, and the European Union is poised to implement a class action system even worse than the one we have here.

Our research also demonstrates the progress that has been made to address some of the worst long-standing litigation trends, including the Supreme Court's role in discouraging forum shopping and the Department of Justice's efforts to clamp down on meritless qui tam lawsuits.

These papers should serve as a call to action for the entire legal reform movement, and as a reminder that progress is possible when we work together.

With your help, ILR will continue to spot what's trending and stay ahead of it.

- Lisa A. Rickard

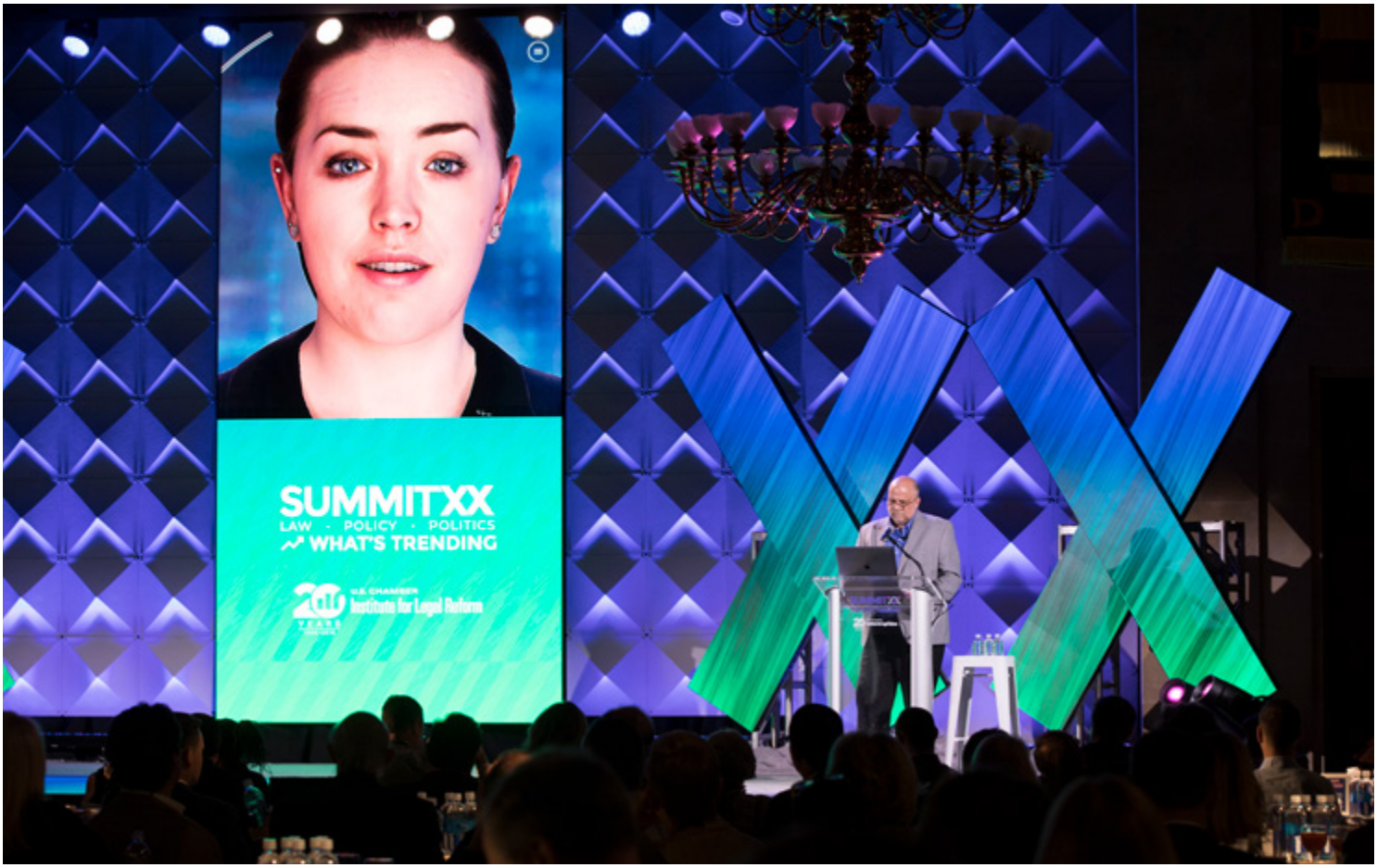
SUMMITXX
LAW · POLICY · POLITICS

On October 24, 2018, ILR hosted Summit XX, where we looked at what's trending in law, policy, and politics. In particular, we examined the shocking cost of the U.S. tort system, as well as a variety of new and established legal trends such as securities litigation, data privacy, corporate compliance, locality litigation, third party litigation funding, and the European Commission's proposal to introduce class actions in the European Union.

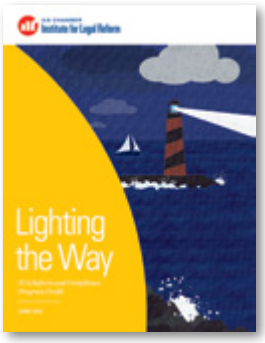
Research released at the summit received extensive press coverage from outlets such as *Reuters*, *Law.com*, and the *New York Post*.

The event also included remarks from Florida Attorney General Pam Bondi, and from IBM distinguished engineer Richard Darden and Rachel, the world's first digital human.

ILR President Lisa A. Rickard gave the opening address, and ILR Executive Vice President Harold Kim closed the event.



Above: ILR Executive Vice President Harold Kim calls on Summit attendees to keep up the fight for legal reform.
Below: IBM Distinguished Engineer Richard Darden interviews Rachel, the world's first digital human.



Lighting the Way

OVER-ENFORCEMENT

FCA Reform and Compliance Program Credit

Authors: *Robert Huffman, Smith Davis, Robert Salcido, Stacey Mitchell, and Caroll Skehan | Akin Gump Strauss Hauer & Feld LLP*

The U.S. Department of Justice (DOJ) is serious about reforming its corporate enforcement policies, and is well-positioned to continue its recent False Claims Act (FCA) reform efforts by focusing on credits for companies that implement effective compliance and ethics programs. Many companies already have such programs, but if the DOJ formalizes a policy to offer credit, it will provide a significant incentive to companies that have not yet taken that step.

This paper addresses how DOJ can help companies make the business case for implementing effective compliance and ethics programs, enabling them to create and sustain a culture of compliance that prevents, detects, and mitigates wrongdoing on the front end.

Costs and Compensation

U.S. TORT SYSTEM

of the U.S. Tort System

Authors: *Paul Hinton and David McKnight | The Brattle Group* and *Lawrence Powell | Director, Alabama Center for Insurance Information and Research at the Culverhouse College of Business*

This study looks at the total costs and compensation paid in the U.S. tort system, using data on liability insurance premiums and estimates of the liability exposure of businesses and individuals that are uninsured or self-insured. The result? **$429 billion spent in the U.S. tort system in 2016 alone.**

That figure was equivalent to 2.3 percent of U.S. gross domestic product, or $3,329 dollars per household in America. However, despite the high price tag, Americans are getting a system that is extremely inefficient at delivering justice. Only 57 percent of the money spent in the tort system goes to plaintiff compensation, including contingency fees.

ILR's research also illustrates that tort costs vary widely from state to state, ranging from just over $2,000 per household in the least expensive states such as Maine and North Carolina, to over $6,000 in New York.

This paper and its reliable, transparent methodology should serve as a foundation for reforms that improve the performance of the tort system.

CONCRETE PROGRESS

Lighting the Way was released soon before *Bloomberg Law* and *Law.com* published articles documenting the increasing impact of the DOJ's recent pro-compliance policy shifts. The Department's "Granston Memo," which encourages U.S. Attorneys to proactively seek dismissal of meritless qui tam cases, has resulted in several dismissal attempts since its release, while the "Brand Memo," which limits the authority of agency guidance documents, has narrowed the range of potential targets for meritless qui tam relators. This paper makes the argument for expanding DOJ's enforcement reform efforts—especially as they relate to the False Claims Act—to reward progress and remediation rather than maximizing punishment. In late September 2018, the DOJ took a major step in that direction by including the Granston Memo in the Justice Manual (previously called the "U.S. Attorney's Manual").

ILR ACROSS THE ATLANTIC

The week of July 9, ILR President Lisa Rickard visited Brussels to rally the coalition of business leaders, EU officials, and Members of the European Parliament who oppose the current draft of the European Commission's proposal on collective redress. ILR released this survey during the visit, highlighted its findings in a *Politico EU* op-ed, and received strong positive feedback from allies who can now point to statistical evidence when arguing that the Commission's proposal is neither well thought-out nor popular.

EU COLLECTIVE REDRESS

A 'Fair Deal' for Consumers?

An Update on EU Consumer Attitudes Towards Collective Actions and Litigation Funding

Authors: *WorldThinks*

Collective redress or collective actions in Europe are a form of civil litigation used to group together plaintiffs, often consumers, who have all allegedly been harmed in the same way. These lawsuits are similar to class actions commonly used in the United States. Some form of collective redress can now be found in almost every Member State of the European Union. On April 11, 2018, the European Commission released a comprehensive consumer protection policy package known as the "New Deal for Consumers." This package contains a proposal for a directive on representative actions, which would introduce an EU-wide system for consumer collective actions.

The proposal also includes two oversight measures for third party litigation funding (TPLF), a practice by which financial firms (such as investment firms running 'hedge funds') invest money to bring lawsuits in exchange for a percentage of the settlement or judgment if the case is successful.

This survey report, released in Brussels on July 11, 2018, captured the views of over 5,000 consumers across five EU Member States (France, Germany, the Netherlands, Spain, and Poland) on the Commission's proposal and safeguards against litigation abuse. Each survey respondent was provided with balanced background information on collective actions and TPLF. Respondents were then asked about specific protections, commonly known as safeguards, that have been suggested to ensure that collective action lawsuits and the funding of these cases operate in consumers' best interests.

Among other results, the survey revealed that:

- only 13 percent of European consumers support the proposal as currently drafted;
- 67 percent agree that without the introduction of safeguards, the European Commission should not introduce collective actions in the EU; and
- 82 percent agree that collective action safeguards should be made consistent across the EU.

In addition, **significant majorities of EU consumers expressed support for specific safeguards not currently included in the proposal.** These safeguards would:

- ensure consumers "opt in" to these cases rather than allow lawyers to include consumers in lawsuits without their knowledge (77 percent);
- require cases to meet some minimum standards before a judge will allow them to go forward (75 percent);
- obligate parties in the dispute to show they have tried to resolve their differences before bringing a lawsuit (74 percent);
- mandate that only legitimate consumer interest groups can initiate cases (65 percent); and
- require that all third party litigation funders be accredited or licensed and overseen by a government agency (72 percent).

BMS Battlegrounds

PERSONAL JURISDICTION

Practical Advice for Litigating Personal Jurisdiction After *Bristol-Myers*

Authors: *Anand Agneshwar, Paige Sharpe* | *Arnold & Porter Kaye Schole LLP*

The *Bristol-Myers Squibb Co. v. Superior Court* case signifies the culmination of the Supreme Court's paradigm shift in personal jurisdiction jurisprudence. It marks the Court's clearest statement yet that jurisdictional forum shopping and verdict chasing are disfavored, and that courts should carefully evaluate personal jurisdiction challenges to ensure fairness and predictability for defendants.

Notwithstanding the Supreme Court's decree, plaintiffs' lawyers continue to try and chip away at *BMS*, given its potential impact on their previously tried-and-true strategies. And although most courts have recognized the paradigm shift, some courts—particularly at the trial level—have not. Accordingly, defendants must remain diligent in litigating personal jurisdiction issues in lower courts, particularly those courts historically skeptical of such arguments, to ensure that the Supreme Court's directives in *Bristol-Myers* are implemented nationwide. Among other actions, the paper encourages defendants to:

- urge judges to demand a connection between a defendant's actions and the forum in question;
- support the equal application of *BMS* to mass torts and national class actions;
- resist "fishing expedition" requests for jurisdictional discovery; and
- move quickly to challenge improper venue claims in ongoing cases that pre-date *BMS*.

EXPERT PANEL

ILR launched this research with an expert panel discussion on personal jurisdiction moderated by ILR Executive Vice President Harold Kim. Panelists included Anand Agneshwar, the paper's lead author, and Archis Parasharami, who litigated *Bristol-Myers* in the Superior Court of California. The discussion covered the full breadth of topics included in the paper, as well as predictions from the panelists on how lower courts and the plaintiffs' bar will respond to *Bristol-Myers* in the coming years. Media outlets covering the release event included *Reuters*, *Law.com*, and *Legal Newsline*.

A Rising Threat

The New Class Action Racket That Harms Investors and the Economy

SECURITIES LITIGATION

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

In the 1990s, most securities class action litigation took the form of so-called "stock-drop" suits. Alleging little more than an unexpected drop in company stock, plaintiffs' lawyers were racking up serial settlements from companies who wanted to avoid expensive litigation. Congress attempted to put a stop to this practice with the Private Securities Litigation Reform Act of 1995—but the plaintiffs' bar found a workaround.

Over the last five years, securities class actions have evolved and accelerated. Rather than directly targeting the stock price, plaintiffs' lawyers are pursuing two new lines of attack:

(1) lawsuits objecting to mergers and acquisition deals, which targeted 85 percent of M&A deals worth more than $100 million last year and resulted in two thirds of all payments going to lawyers; and

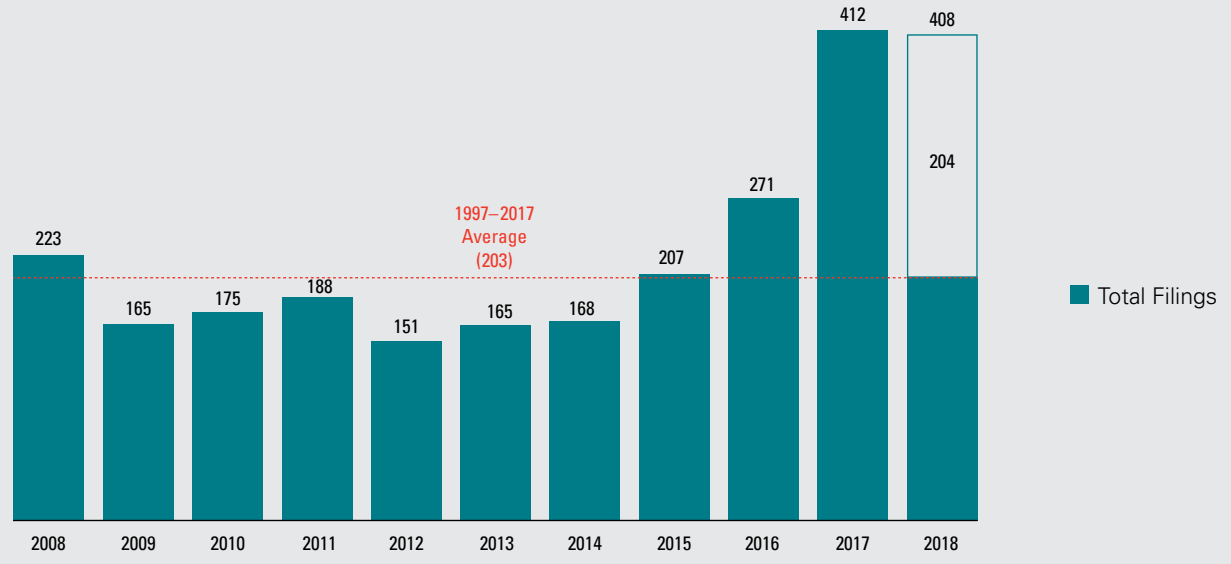
(2) lawsuits alleging that companies defrauded investors by concealing the chance of an adverse event that caused a drop in share price. Eighty-eight lawsuits of this kind were filed last year, a 225% increase from 2012.

This research provides up-to-date analysis of the scope and impact of these lawsuits, explains how the plaintiffs' bar has taken control of litigation out of the hands of the actual plaintiffs, and suggests legislative solutions to reverse this skyrocketing litigation trend.

The research study contends that Congress should enact reforms to:

- deter the filing of meritless cases and encourage the filing of cases involving real fraud;
- ensure that cases are brought because investors injured by fraud seek redress, not because plaintiffs' lawyers need more cases to pressure defendants into unjustified and unwarranted settlements; and
- prohibit abusive practices that undermine the ability of parties and the courts to address the merits of securities class action claims.

Securities Class Action Filings 2008–2018



**Cornerstone Research, Securities Class Action Filings – 2018 Midyear Assessment at 4, https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-ActionFilings%E2%80%942018-Midyear-Assessment.*