



# the ILR Research REVIEW

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

## FROM THE TOP: *The President's Perspective*

Many have written about the unprecedented nature of the challenges facing our country. I hold the view that the word "unprecedented" is rarely justified, perhaps because as a lawyer, precedent is always on my mind.

But in this case, I think that description is accurate. From the pandemic, to the economic crisis, to the surge of momentum to correct historical inequalities, never have we been called on to face such an intensity and variety of challenges all at the same time.

And this is what makes ILR's mission more important than ever: we champion a fair legal system that promotes growth and opportunity. Without those two things—growth and opportunity—every other challenge becomes vastly more difficult.

Since early spring, pursuing that mission has meant working to build a levy against the inevitable flood of COVID-19 lawsuits already lapping at the steps of courthouses around the country.

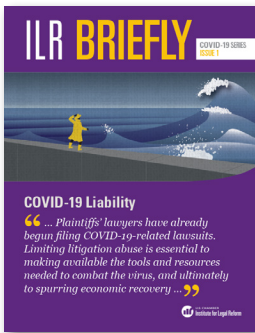
In that spirit, this *ILR Research Review* features the debut of *ILR Briefly*, a short-form research product developed by ILR to document fast-moving changes in the litigation environment. Four of the *Briefly* papers profiled below detail different streams of liability flowing from COVID-19 and explore a series of timely, targeted, and temporary liability reforms that should be adopted at the federal and state levels to help safeguard the economic recovery.

Also in this edition of the *Review*, you'll find research on three long-standing legal reform issues: securities litigation, trial lawyer advertising, and third party litigation funding. Even before COVID-19 these issues were running out of control, and the pandemic has only heightened the urgency of necessary reforms.

As I heard recently from legendary journalist and thought-leader Scott Pelley, times of crisis cause people to discover the deeper currents of meaning in their lives. I believe the same is true of organizations like ILR and our member companies. All of us feel the weight of the current moment in different ways, but all of us must draw on our deepest reserves of integrity and purpose to come out the other side stronger than ever. The research profiled in this document represents ILR's effort to do just that.

*Stay safe, stay healthy, and happy reading,*

*—Harold H. Kim*



# ILR Briefly: COVID-19 Liability

COVID-19 SERIES ISSUE 1

Author: *Institute for Legal Reform*

A tsunami of COVID-19 litigation is already starting to form, and it's up to Congress, the administration, state legislatures, and governors to

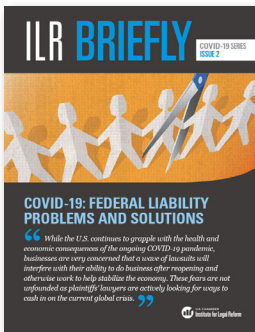
**shelter businesses from the storm and enable the economy to recover.**

This edition of *ILR Briefly* looks at the primary types of litigation emerging from the COVID-19 pandemic, including:

- Common law, including negligence, public nuisance, contract claims, and product liability.
- Labor and employment.

- The False Claims Act.
- Data privacy, including virtual meetings, health information, and big data.
- Financial services.
- Consumer claims, including the Telephone Consumer Protection Act, false advertising and deceptive marketing, and price gouging.
- Securities.

The research also looks at early trial lawyer advertising trends and third party litigation funding activity in the context of COVID-19.



# ILR Briefly: Federal Liability Problems and Solutions

COVID-19 SERIES ISSUE 2

Authors: *John Beisner and Jordan Schwartz | Skadden, Arps, Slate, Meagher & Flom*

While the focus of an overwhelming majority of Americans has been on mitigating the health

consequences of the COVID-19 pandemic, some **plaintiffs' lawyers have made clear that they have different plans: burdening American businesses with meritless and abusive civil litigation.**

This edition of *ILR Briefly* details four main areas of law that the plaintiffs' bar is expected to target or, in some cases, is already targeting:

- Exposure liability, where essential businesses that have stayed open during the pandemic and businesses that have begun to reopen are sued for allegedly exposing a customer, employee, or member of the public to the coronavirus.
- Product liability, where manufacturers of products designed to protect against, treat, or test for the coronavirus are sued when these products fail to perform perfectly.

- Medical liability, where frontline responders to the coronavirus are sued for care decisions they made or did not make when rendering COVID-19-related medical services.
- Securities litigation, where companies are sued for allegedly failing to give sufficient warning of the economic fallout of the coronavirus to investors in time for them to avoid related losses.

The paper goes on to recommend **timely, targeted, and temporary liability protections** that Congress should enact for businesses within each of these areas, to ensure that the economic restart doesn't face headwinds from lawsuits, and that companies and professionals are encouraged—rather than punished—in their actions to mitigate the impact of the virus.

Finally, this *Briefly* paper explores additional legal frameworks that are likely to attract litigation and ripe for administrative solutions, including the False Claims Act, the Telephone Consumer Protection Act, the WARN Act, and the securities laws.



# ILR Briefly: State Liability Problems and Solutions

COVID-19 SERIES ISSUE 3

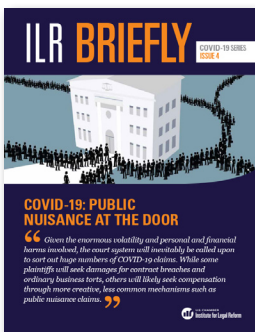
Author: *Institute for Legal Reform*

As Congress considers how to establish liability protections at the federal level, it is **essential that state lawmakers**

**take up the complementary task of creating protections tailored to meet local needs.** States like New York, Illinois, and Michigan have led the way with a combination of executive orders and legislation aimed at protecting frontline healthcare providers and other services. Since then, more than 20 states have adopted similar protections, and some have expanded such protections beyond the healthcare context to address exposure and product liability.

This edition of *ILR Briefly* details how states can implement core liability protections in the areas of exposure, healthcare, and product liability (taking differing constitutional realities into account), and explores additional litigation hotspots like insurance litigation, state False Claims Acts, and data privacy and security concerns.

Additionally, this research examines some of the primary litigation drivers that have already sparked what may be a historic glut of pandemic litigation, and suggests different procedural reforms that states can implement to discourage frivolous lawsuits and improve efficiency in addressing legitimate cases.



# ILR Briefly: Public Nuisance at the Door

COVID-19 SERIES ISSUE 4

Authors: *Joshua K. Payne and Jess R. Nix | Spotswood, Sansom & Sansbury*

COVID-19 has resulted in illness, injury, and financial destruction on a scale unseen in the United States since the

1918 flu pandemic. **As a consequence, courts will inevitably be called upon to sort out huge numbers of COVID-19 claims.** While some plaintiffs will seek damages for contract breaches and ordinary business torts, others will likely seek compensation through more creative, less common mechanisms such as public nuisance claims.

This edition of *ILR Briefly* includes insights into the history and recent practice of public nuisance, including the tort's roots in 12<sup>th</sup> century English law, its evolution over time, and the significant shifts in practice that have occurred in recent years as plaintiffs' lawyers and issue activists attempt to harness the tort for the dual purposes of making a profit and changing policy, while circumventing the legislative process. The paper foreshadows how **COVID-19 may yet become a major target for the nascent public nuisance bar** and makes the argument that such claims should be subject to dismissal.



# ILR Briefly: An Update on Securities Litigation

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

Previous ILR research has highlighted **the primary drivers of the ongoing crisis in securities**

**litigation: merger and acquisition challenges and event-driven litigation**, both of which are exacerbated by rising numbers of parallel federal and state filings following the U.S. Supreme Court's 2018 *Cyan* ruling. *ILR Briefly: An Update on Securities Litigation* examines how these trends evolved in 2019 and are playing out in 2020, with additional analysis of how the ongoing coronavirus pandemic

may drive securities litigation moving forward.

**This edition of *ILR Briefly* also puts the spotlight on abusive practices by some securities class action plaintiffs' firms** by detailing the resolution of the long-running *State Street* litigation. According to the federal district court opinion that concluded the investigation into plaintiffs' lawyer fee requests in *State Street*: "[T]his case demonstrates that not all lawyers can be trusted when they are seeking millions of dollars in attorneys' fees and face no real risk that the usual adversary process will expose misrepresentations that they make."

## Socially-Distanced Legal Reform: ILR Briefly Live Events

ILR has adapted to COVID-19 in a variety of creative ways, and our research program stands at the forefront. From the earliest days of the crisis, we reimagined our traditional research release events as a series of live, interactive panels and interviews conducted by ILR senior staff, each of which provides the same level of discussion and substance as our in-person events while greatly expanding ease of access to attendees. In the year to date, *ILR Briefly* Live Event

speakers on the research topics described above have included U.S. Deputy Attorney General Jeffrey Rosen and presidents of state chambers of commerce, veteran litigators, former regulators, and legal industry analysts. The events have drawn hundreds of attendees from ILR member companies and they represent a successful first foray into this new format, which we will continue to refine, improve, and expand for the remainder of the crisis period and beyond.

**Event recordings can be accessed under the Videos tab on the ILR website, [here](#).**

# ILR BRIEFLY LIVE EVENT SPEAKERS



**JOHN ABEGG**

Executive Vice President, U.S.  
Chamber Institute for Legal Reform



**JOHN BEISNER**

Partner, Skadden, Arps,  
Slate, Meagher & Flom



**ROBERT HUFFMAN**

Partner, Akin, Gump,  
Strauss, Hauer & Feld



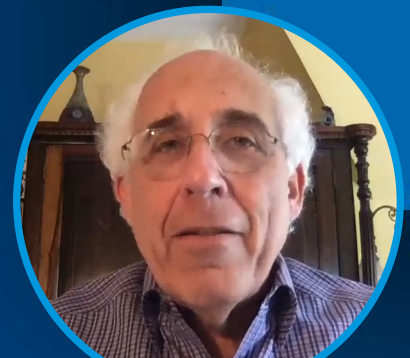
**HAROLD KIM**

President, U.S. Chamber  
Institute for Legal Reform



**KEVIN LACROIX**

Editor, *The D&O Diary*,  
and Executive Vice  
President, RT ProExec



**ANDREW PINCUS**

Partner, Mayer Brown



**JEFFREY ROSEN**

U.S. Deputy Attorney General



**GARY SALAMIDO**

President and CEO, North  
Carolina Chamber of Commerce



**ASHLI WATTS**

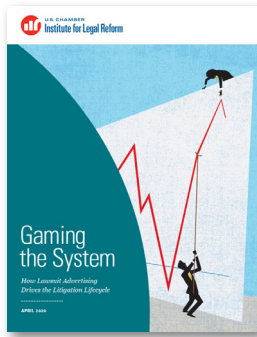
President and CEO, Kentucky  
Chamber of Commerce

## GATHERING MOMENTUM

Since ILR last published research on trial lawyer advertising—*Bad for Your Health*, in 2017—legislators and regulators have taken a series of significant initial steps to curb deceptive and misleading trial lawyer ads, which [our research](#) has shown can pose a public health risk in addition to fueling abusive litigation. Several states have enacted statutes penalizing deceptive lawsuit ads, and the Federal Trade Commission has issued letters to seven lawsuit advertising and aggregator firms warning them that deceptive ad content could be met with enforcement actions. As more decision makers scrutinize the harmful impact of deceptive lawsuit ads and consider corrective measures, *Gaming the System* offers a valuable source of data supporting decisive action.

## TPLF IN THE SPOTLIGHT

When *Selling More Lawsuits* was published at the beginning of 2020, the litigation funding industry was fighting a rear-guard action against all efforts to increase transparency into their largely opaque operations. However, in May 2020 Australian Attorney General Christian Porter announced a formal parliamentary inquiry into the role of litigation funding in class actions, which is expected to produce a report on December 7, and is likely to result in legislation to regulate the practice. The contents of the December 7 report and any resulting regulation will shine a bright spotlight on TPLF and will serve as a guidepost for all other jurisdictions impacted by this industry.



## Gaming the System

How Lawsuit Advertising Drives the Litigation Lifecycle

Author: *Cary Silverman* | *Shook, Hardy & Bacon*

“Have you or a loved one been hurt? You

deserve compensation! Call now to get \$\$\$!” Everyone in America has seen some version of that TV ad. Usually, it comes with scary music, a dramatic voiceover, and some official-sounding language about a “medical alert” or a “drug alert.” The bombastic language and overdramatic visuals can mask the fact that these ads are often part of highly sophisticated campaigns that systematically target key moments in the litigation lifecycle to maximize profits for the plaintiffs’ lawyers.

*Gaming the System* examines five of the biggest mass tort lawsuits in

recent history, documenting how **plaintiffs’ lawyers and lawsuit lead generators deployed over \$400 million to amass clients, pressure settlements, and perhaps even influence juries.**

This sophisticated advertising system can create serious health consequences for vulnerable individuals—as outlined in ILR’s 2017 [research paper](#) and subsequent FDA research—and can confuse juries. The research concludes with a call to action for legislators, regulators, and courts, all of which have a role to play in ensuring that these ads do not mislead the public, harm public health, or jeopardize the right to a fair trial.

TRIAL LAWYER ADVERTISING



## Selling More Lawsuits, Buying More Trouble

Third Party Litigation Funding a Decade Later

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

When ILR [first documented](#) the early development of third party litigation funding (TPLF) in the U.S., the industry barely existed. Now, according to a recent survey, U.S. funders alone have over \$9.5 billion under management.

ILR’s research looks at why this industry has experienced such explosive growth, how it is **fueling abusive litigation**, how the few TPLF agreements that have been made public reveal profound

ethical issues with the practice, and how legislators and rule makers can approach TPLF reform.

Among the solutions documented in the paper are proposals that:

- TPLF agreements must be disclosed to all parties in litigation.
- Fee-sharing agreements between lawyers and non-lawyers should be banned.
- TPLF should not be permitted in the class action context.

THIRD PARTY LITIGATION FUNDING