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Institute for Legal Reform

the ILR Research
REVIEW
Volume 6, Issue 1

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

FROM THE TOP:

The President's Perspective

As I have said many times, it does no good to whine about problems if you can't come up with a solution. That's why ILR has a 20-year tradition of offering practical proposals to correct the many flaws in America's lawsuit system.

This edition of the *ILR Research Review* follows in that tradition by offering a set of smart solutions to two urgent litigation challenges: private securities class actions and municipality litigation.

Our capital markets are the best in the world. They are the bedrock of our capitalist system, and they provide a path to wealth for every American. However, the competitiveness of these markets could be threatened if the growing trend of private securities class actions is left unchecked. We cannot take the integrity of our system and its benefits for granted—which is why the research covered in this edition of the *Review* contains a detailed analysis of the factors behind this wave of securities lawsuits, and offers a full suite of solutions to deal with the problem.

We also look at another, newer problem in the litigation landscape. Municipality litigation involves plaintiffs' lawyers partnering with activists and ambitious local officials to file lawsuits against companies across a wide range of societal issues.

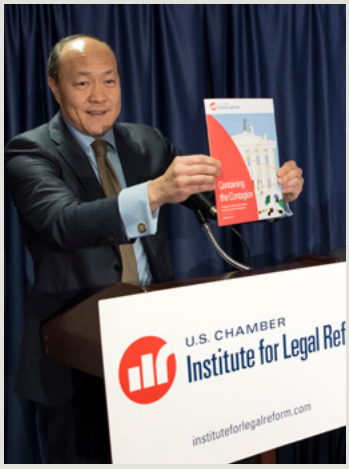
What distinguishes this litigation from past waves of municipal contingency fee lawsuits is its sheer scale. There are over 1,500 municipal lawsuits consolidated in the federal opioid docket alone, without counting the hundreds if not thousands of similar suits at the state level. By multiplying the number of plaintiffs to this extent, municipalities and their lawyers will make it nearly impossible to reach a global settlement, on opioids or any other issue. ILR's research examines the shaky underpinnings of these lawsuits, documents the harm they cause, and proposes a legislative and regulatory road map for state attorneys general and lawmakers to curb this damaging trend.

By identifying two highly significant litigation challenges, describing them in detail, and proposing solutions, we've created a path to action. Now it's time to get to work.

- Lisa A. Rickard

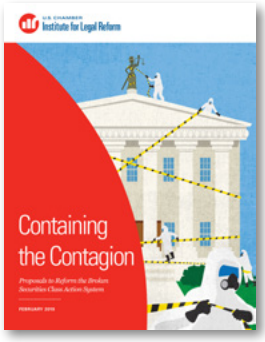
EXPERT PANEL

ILR launched *Containing the Contagion* and *Risk and Reward* with an expert panel discussion at the National Press Club on February 26, 2019. ILR Chief Operating Officer Harold Kim introduced the event, which was moderated by *The D&O Diary's* Kevin LaCroix. Panelists Andy Pincus of Mayer Brown and Adam Pritchard of the University of Michigan Law School each presented their papers, which detail the factors behind the recent spike in private securities fraud class actions and offer solutions to curb that trend. Multiple media outlets covered the event, including *Politico Pro*, *Corporate Counsel*, and *Law360*.



Harold Kim (ILR)

Left to right: Andy Pincus (Mayer Brown), Adam Pritchard (University of Michigan Law School), and Kevin LaCroix (The D&O Diary)



Containing the Contagion

SECURITIES LITIGATION

Proposals to Reform the Broken Securities Class Action System

Author: *Andy J. Pincus, Partner | Mayer Brown LLP*

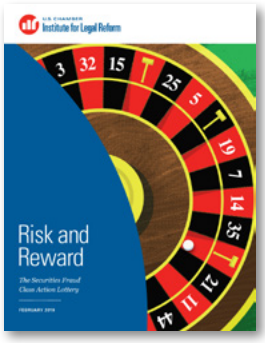
Following on the heels of the Institute for Legal Reform's 2018 research on the rising threat of securities class actions, this paper provides the most up-to-date picture of the broken state of America's securities class action system and makes an urgent call for reform. **The research points to a number of regulatory and legislative solutions that the Securities and Exchange Commission (SEC) and Congress can adopt to address the problem.**

The paper advocates for the SEC to:

- undertake a project to evaluate the state of private securities class action litigation, with a focus on abusive practices;
- issue a policy paper acknowledging the scope of the securities class action problem; and
- institute a program of amicus brief filings informing federal courts of the serious nature of this problem, and urging them to intervene early to prevent cases from being used to extort unjustified attorneys' fees.

The research also calls on Congress to:

- enact an "Investors' Bill of Rights" that would prohibit plaintiffs' lawyers from exercising control over these lawsuits by requiring disclosure of relationships between the lawyers and the plaintiffs, barring individuals from serving as plaintiff in more than five cases in 36 months, and requiring federal courts to more closely scrutinize fee requests;
- amend the Private Securities Litigation Reform Act of 1995 to adjust for plaintiffs' lawyer workarounds that have emerged in the last 25 years; and
- adopt a cap on damages for non-IPO cases, with small investors given priority to collect damages.



Risk and Reward

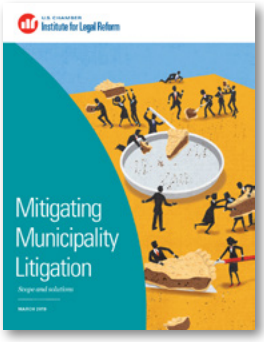
SECURITIES LITIGATION

The Securities Fraud Class Action Lottery

Authors: *Stephen J. Choi | New York University School of Law*
Jessica Erickson | University of Richmond School of Law
Adam C. Pritchard | University of Michigan Law School

Though intended to be a check against bad behavior from public corporations, **securities fraud class action lawsuits are becoming a simple game of chance for the plaintiffs' bar.** Some plaintiffs' lawyers are partnering with individual shareholders to target large companies with numerous class actions on frequently weak merits, weighing the comparatively low costs of filing suit against the potential for "mega-settlements."

By identifying cases with "mega-settlement" potential, and winning the right to serve as lead counsel in those cases, plaintiffs' firms are turning what is meant to be a valuable corrective mechanism in the American legal system into yet another lawsuit income stream.



Mitigating Municipality Litigation

MUNICIPALITY LITIGATION

Scope and Solutions

Authors: *Rob McKenna, Former Washington State Attorney General*
Elbert Lin, Former West Virginia Solicitor General and Partner | Hunton Andrews Kurth LLP
Drew Ketterer, Former Maine Attorney General and Partner | Ketterer and Ketterer

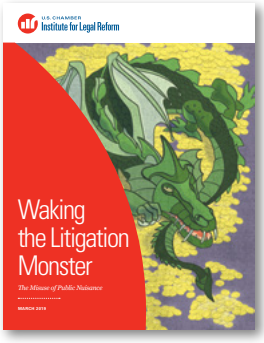
Municipality litigation is becoming an extremely popular business model for the plaintiffs' bar. Entrepreneurial contingency fee attorneys are teaming up with cash-strapped municipalities, activists, and politically ambitious local officials to file lawsuits covering a broad swathe of important public policy issues.

ILR's research explores this trend and its consequences, including how **municipal lawsuits create obstacles for global settlement, undermine the authority of legislators and state AGs, and ultimately reduce funds available to compensate injured individuals.**

The paper also provides a comprehensive list of legislative and judicial solutions that states can pursue to reduce municipality litigation and the problems it poses.

These solutions include:

- changing laws relating to municipalities' power to sue;
- limiting the range of potential municipal suit defendants;
- reducing the availability of valid causes of action under state law; and
- limiting available forums in which municipal plaintiffs can bring suit.



Waking the Litigation Monster

MUNICIPALITY LITIGATION

The Misuse of Public Nuisance

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

Originally intended to address conduct interfering with a public right (usually relating to land use), public nuisance was made largely obsolete by the expansion of the regulatory state in the mid-20th century. But then a coalition of legal scholars, plaintiffs' lawyers, and activists began pushing to expand it into an effectively boundless cause of action that they could use to influence major public policy issues, as evidenced by the American Law Institute's significant expansion of public nuisance in its 1979 Second Restatement of Torts.

The effort to further stretch the doctrine continues today, particularly with regard to climate and opioid litigation.

ILR's research documents the origins, expansion, and current state of public nuisance litigation. The paper finds that municipalities and plaintiffs' lawyers have tried to leverage public nuisance as a way to influence wide-ranging societal issues that should be left to the political branches. Aside from being a poor tool to address those issues, the paper also finds this use of public nuisance to be dangerous. To echo the Eighth Circuit's decision in *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum*, allowing public nuisance to serve as a cause of action "regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery…" would create **"…a monster that would devour in one gulp the entire law of tort."**

GROWING LITIGATION TREND

ILR is the first civil justice organization to release comprehensive research on the growing trend of municipality litigation. While there is nothing new about local litigation per se, the recent spike in municipal lawsuits over major public policy issues like opioids, climate change, and data privacy is challenging the authority of legislators and state AGs, while creating major barriers to global settlements and delaying relief for injured parties. Furthermore, attempts by plaintiffs' lawyers to morph public nuisance tort theory into an all-purpose cause of action in support of these suits threaten to undermine bedrock principles of tort law. ILR's stance on this issue and our launch of these two papers were covered in *Bloomberg Law* and dozens of local and regional media outlets.

IN CASE YOU MISSED IT

Access ILR's 2018 research program and our full range of publications at www.instituteforlegalreform.com/research