U.S. CHAMBER
Institute for Legal Reform

the ILR Research
REVIEW

Volume 1, Issue 2

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


# FROM THE TOP:

## *The President's Perspective*

On October 21st, ILR hosted its 15th Annual Legal Reform Summit titled "The Enforcement 'Collidescope': The New Litigation Paradigm," which focused primarily on the rise of an all-powerful, all-encompassing enforcement regime.

Today, enforcement officials are on a crusade. They're abusing the enforcement process to promote an ideological agenda, to attract headlines, and to raise revenue for the government in the form of mind-staggering fines and penalties.

Increasingly, companies are being targeted for the same alleged offense repeatedly—from one or more federal agencies, one or more state attorneys general, and one or more private civil actions from entrepreneurial plaintiffs' lawyers. We call this perpetual prosecution. The end result is companies facing years of costly, politically-motivated litigation—with no end in sight.

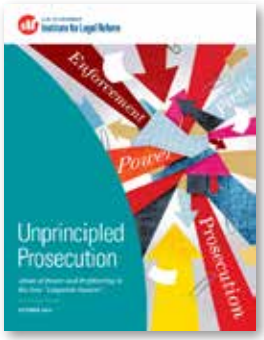
ILR remains committed to advocating for meaningful and effective solutions to curb lawsuit abuse, and we hope you find the research described within useful for your legal and business practices.

*- Lisa A. Rickard*

# ILR EVENT

## The Enforcement "Collidescope": The New Litigation Paradigm

ILR's 15th Annual Legal Reform Summit, **The Enforcement "Collidescope": The New Litigation Paradigm,** featured discussions on key legal reform issues, including the increase in duplicative and overlapping civil enforcement, the outsourcing of public powers to private parties, and follow-on litigation. New Jersey Governor Chris Christie delivered a keynote address, while U.S. Chamber President and CEO Tom Donohue also provided key remarks. ILR President Lisa Rickard delivered remarks about the importance of legal reform and the themes of the Summit.




ENFORCEMENT

# Unprincipled Prosecution

Abuse of Power and Profiteering in the New "Litlitigation Swarm"

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

Fair government enforcement plays a critical role in promoting compliance with legal rules and regulations. Punishing real violations demonstrates that "crime does not pay" and helps to deter future transgressions.

However, government enforcement loses legitimacy when:

- Enforcement decisions are influenced by government officials' self-interest rather than the public interest;
- Investigations and lawsuits are the product of lobbying by self-interested plaintiffs' lawyers, and those same lawyers are hired to prosecute the claims on a contingency fee basis;
- The enforcement process fails to ensure that sanctions are imposed only on guilty companies and does not give the innocent a chance to defend themselves; or
- Enforcement actions are based upon novel interpretations of vague laws that no reasonable business could have anticipated.

**Government enforcement instead becomes an unprincipled exercise of unconstrained power: unprincipled because government power that is supposed to serve the public interest is hijacked by private interests; unconstrained because a single official is a prosecutor, judge, and jury with the power to decide whether to initiate an investigation, whether to file litigation, and what the settlement terms will be.** That one official may—and often does—decide to impose huge financial levies and expand regulatory obligations as the price for settlement.

Solving the problems of swarm litigation and abusive enforcement will not be easy. This report, however, explains how to spur progress. Government officials and plaintiffs' lawyers have considerable vested interests in the status quo and will resist all efforts at reform. But change is needed to restore the fairness and checks and balances that are fundamental to our legal system

# ILR IN THE MEDIA

## Media Coverage from the 15th Annual Legal Reform Summit

ILR's Legal Reform Summit was mentioned in nearly 400 news stories, with most focusing on Governor Christie's keynote address. The stories included pieces by *Bloomberg Businessweek*, *Bloomberg TV*, *Corporate Counsel*, *NBC News*, and *U.S. News & World Report*. The Summit was covered by more than 30 broadcast, print and online outlets.


ENFORCEMENT

# The FIRREA Revival

Dredging Up Solutions to the Financial Crisis

Authors: *Michael Y. Scudder and Andrew M. Good, Skadden, Arps, Slate, Meagher & Flom LLP*

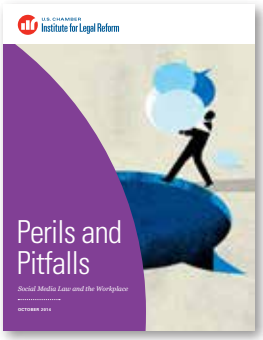
Like a well-stocked medicine cabinet, the United States Code contains statutes Congress originally prescribed to address yesterday's issues. As new challenges arise, it can be tempting to search the cabinet for older remedies. But care must be taken to ensure that they are not used to address ailments too different from Congress' original purpose.

Perhaps no better recent example exists than the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). FIRREA serves as the Department of Justice's (DOJ) remedy of choice to investigate and prosecute cases arising out of the recent financial crisis. The statute's main ingredients reveal why: a broad scope without the limitations of other statutory schemes, a reduced burden of proof, tough civil penalty provisions, broad investigative authority, incentivizing whistleblower provisions, and a 10-year statute of limitations.

**A close look at FIRREA and the sparse, though significant, case law interpreting it reveals a statutory scheme that DOJ relies upon as part of any final push to bring headline-grabbing cases arising out of yesterday's financial crisis.** Having glimpsed the unexpected power of this old weapon, DOJ can also be expected to employ FIRREA in other settings.

This paper describes the parameters of FIRREA's civil penalties provision, reviews recent enforcement actions and key holdings of those cases, and identifies different trends as DOJ expands its use of FIRREA.

FIRREA spent two decades at the back of the medicine cabinet. It is now on the countertop with its lid off, and it is being used regularly and aggressively by DOJ. Important questions, however, remain about the statute's scope and meaning.




# Perils and Pitfalls

**SOCIAL MEDIA**

## Social Media Law and the Workplace

Authors: *Sara A. Begley, Joel S. Barras, Divonne Smoyer, and Amanda D. Haverstick, Reed Smith LLP*

Social media has radically transformed the way companies do business—so much so that what was once referred to as "using social media for business purposes" is now, simply, "social business." Among the business processes encompassed by this newly-coined concept are those involving company brand promotion, marketing of products and services, and communicating with customers, consumers, suppliers, and shareholders, among others.

Recent studies indicate that:

- 75% of business customers rely on social media to make purchasing decisions;
- 81% of individual consumers are influenced by friends' posts on social media when choosing a product to buy;
- 47% of U.S. consumers report that Facebook is their number one buying influence; and
- 70% or more of marketing professionals have used Facebook to gain new customers.

Unfortunately, the current legal landscape in the U.S. does nothing to help mitigate the high legal risks social media brings to employers. **The meteoric rise in workplace social media use has far outpaced the ability of federal legislators to produce laws to govern it.** The result is a precarious absence of consistent legal standards to guide U.S. businesses.

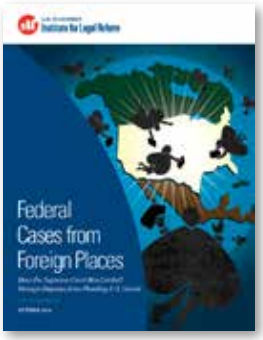
This paper explains how the increase in workplace social media use presents U.S. employers with considerable risks, both legal and commercial. The inconsistency among state laws governing employers' ability to access employees' social media accounts, the NLRB's ad-hoc, pro-employee rulemaking and decisions, and the importance of social media content to employers in litigation combine to make workplace social media use a threat for U.S. businesses that warrants the attention of federal lawmakers.

# ILR EVENT

## Panels at the 15th Annual Legal Reform Summit

The Summit featured substantive panels that addressed a myriad of legal reform issues, including:

- attorney fraud and lack of accountability
- current Restatement projects underway at the American Law Institute
- serial enforcement and perpetual prosecution
- the future of securities class actions
- digital technology and privacy
- the political landscape and 2014 elections.




# Federal Cases from Foreign Places

**TRANSNATIONAL**

## How the Supreme Court Has Limited Foreign Disputes from Flooding U.S. Courts

Authors: *George T. Conway III, Wachtell, Lipton, Rosen & Katz*
*John Bellinger, III and R. Reeves Anderson, Arnold & Porter LLP*
*James L. Stengel, Orrick, Herrington & Sutcliffe LLP*

Over the past several decades, American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts. Overseas plaintiffs seek out U.S. courts to take advantage of distinctively permissive features of the American judicial system, including liberal discovery rules, punitive damages, class action contingency fee arrangements, jury trials, and the absence of "loser pays" fee-shifting. To that end, foreign plaintiffs have married expansive theories of personal jurisdiction with aggressive interpretations of substantive laws such as the Alien Tort Statute, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act (RICO)—to have American courts adjudicate disputes that arose overseas.

The tide, however, might finally be receding. **Recent decisions by the United States Supreme Court in cases such as *Morrison, Kiobel, Goodyear, McIntyre,* and *Bauman* have cut back attempts to involve U.S. courts in controversies with minimal, if any, connection to the United States.** These decisions restrict the extraterritorial reach of U.S. laws and impose more rigorous standards for demonstrating personal jurisdiction over defendants. The plaintiffs' bar has reacted to these setbacks with creative attempts to circumvent these rulings in additional lawsuits against U.S. and foreign companies.

This report analyzes recent civil procedure decisions that affect the ability of plaintiffs to bring, and keep, transnational litigation in American courts, focusing on the impact of procedural principles such as personal jurisdiction and pleading standards on global forum shopping. Recent decisions have given American companies new tools to oppose the importation of foreign disputes into U.S. courts. Nevertheless, litigation over the extraterritorial reach of U.S. statutes and the proper application of personal jurisdiction show no signs of going away any time soon

# ILR EVENT

## ILR Hosts Transnational Litigation Forum at Pepperdine University School of Law

On October 29th, ILR co-sponsored a forum at the Pepperdine University School of Law which featured practitioners and scholars who discussed recent transnational developments in American law. This year's colloquium explored academic research and writing on key developments in transnational litigation and forum shopping; international arbitration; foreign judgment recognition and enforcement; investment law; the Alien Tort Statute (ATS) post-*Kiobel*; and *forum non conveniens*. The event also featured a luncheon keynote address by Judge Royce Lamberth of the U.S. District Court in the District of Columbia.

# ILR EVENT

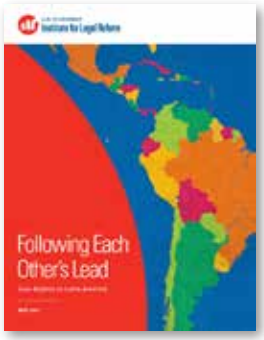
## Latin America: The Legal Environment Through a Business Lens

On May 1st, ILR hosted a first-of-its-kind event, **Latin America: The Legal Environment Through a Business Lens**, in conjunction with the U.S. Chamber's Americas Department, the Brazil-U.S. Business Council, the Association of American Chambers of Commerce in Latin America and the U.S.-Mexico Leadership Initiative. International legal experts and business leaders spoke about the need for a strong rule of law in the region and its direct impact on companies' global investment and operational decisions, and how companies are coping with the current business and legal environments in Latin America.

# ILR IN THE MEDIA

## Media Coverage from Latin America: The Legal Environment Through a Business Lens

Earned media from the Latin America event included key articles by *International D&O Diary*, *PanAm Post*, *Latin Business Chronicle*, and *Commercial Risk Europe*, as well as an *op-ed* by ILR President Lisa Rickard in the Brazilian-American Chamber of Commerce Member News.




INTERNATIONAL

# Following Each Other's Lead

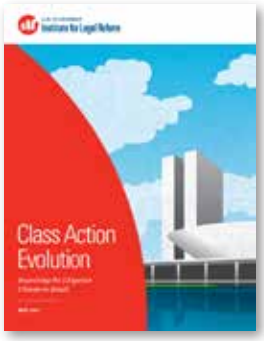
Law Reform in Latin America

Author: *William J. Crampton, Shook, Hardy & Bacon L.L.P.*

When it comes to the evolution of law, Latin American countries follow each other's lead. As the law evolves in one country, similar changes are likely to surface elsewhere in the region. But not all developments in the region are positive. In several countries, new and proposed laws have the potential to undermine a key precondition for economic growth—a fair civil justice system. These changes could imperil economic growth for Latin America—an outcome that benefits no one.

This paper explores the significant legal trends in Latin America that are rapidly expanding in the region and impacting individual defendants and the business community alike. These trends include the rise of class actions, the newly-created collective *Amparo* (protection of constitutional rights), claimant-friendly changes to civil procedure codes, and other troubling trends in the substantive law, such as absolute liability and punitive damages. **These regional trends make it easier to file lawsuits with questionable merit, create financial incentives to bring mass litigation, and unbalance the civil justice system to tip the scales between plaintiffs and defendants.**

In conclusion, multinational businesses operating in Latin America should become increasingly engaged and active as these developments arise, when the discussions and debates are still being formed, in order to help shape the outcome and ensure a level playing field for all members of society.




INTERNATIONAL

# Class Action Evolution

Improving the Litigation Climate in Brazil

Author: *Fernando Dantas M. Neustein, Mattos Muriel Kestener*

As it currently exists, the Brazilian class action system is imbalanced and creates mechanisms that either stimulate the filing of class actions or undermine safeguards to guarantee unbiased and predictable proceedings. A recent class action reform proposal, Bill 282, is currently under consideration by the Brazilian Senate and would significantly change the class action procedure. This report provides a critical view of Bill 282, which ultimately creates an unbalanced legal framework. **The criticism is focused not only on the provisions that weakens defendant's procedural rights (like the possibility of shifting the burden of proof in the judgment and the possibility for the court to grant *ex officio* injunctions), but also on provisions that stimulate a monetization phenomenon of class actions in Brazil (like the possibility to offer a financial compensation to civil associations if the class action is found to have grounds).** The report recommends a full rejection of the Bill.

If the Brazilian Senate decides to approve Bill 282, however, the report recommends certain amendments for improvement, including: (i) the inclusion of a predominance criterion, so that the court ensures that collective issues prevail over individual ones; and (ii) a full review of legal aid provisions so plaintiffs are also subject to the loser-pay rule, just as defendants are.

Ultimately, the paper suggests that effective tools must be created to restrict litigation in general and Brazil must adopt innovative solutions to ensure class actions are only used when necessary