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Institute for Legal Reform

the ILR Research REVIEW

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

FROM THE TOP:
The President's Perspective

"A return to normal." That's a phrase I used to hear a lot back in 2020 and earlier this year, before we had a clear sense of the long road COVID-19 had in store for us. It's a phrase I hear much less often now, as we discover new rhythms of work and life. But at least when it comes to litigation, a "return to normal" is exactly what we're looking at—and businesses and consumers are paying the price.

This edition of the *ILR Research Review* runs the gamut from high-tech to low-tech, covering developments in food lawsuits and biometric privacy litigation; the state of play on municipality lawsuits, securities class actions, and the broken multidistrict litigation system; and the direction of public opinion in the European Union, where consumers overwhelmingly support the creation of safeguards to rein in the out-of-control third party litigation funding industry.

The breadth and depth of these challenges is daunting, but familiar. For better or worse, the litigation landscape is largely developing along a trajectory that we would have predicted before the pandemic. Longstanding flaws in the framework of the American civil justice system are being exploited to the hilt by the plaintiffs' bar, and without consistent repair that framework will continue to weaken—and that's also true for the European Union, where plaintiffs' lawyers and litigation funders are breaking new ground.

Fortunately, the papers included in this edition of the *Review* will equip lawmakers and courts at all levels to address these challenges with solutions that are sound, practical, and necessary.

As the world continues to find its footing on the rocky road to recovery, the civil justice community has an opportunity and an obligation to advocate for long-awaited changes that will make that path easier to navigate.

And as always, I can promise you that ILR will be at the forefront.

Stay safe, stay healthy, and happy reading,

—Harold H. Kim

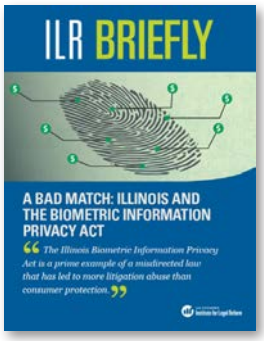
STATE PRIVACY LAW SURGE

The last two years have seen more than 30 privacy bills introduced in states around the country. While disruptions created by COVID-19 and its consequences stalled movement on many of these initiatives in 2020 and 2021, we expect to see resurgent momentum behind the push for state privacy legislation moving into next year—especially in the absence of preemptive federal law. As lawmakers consider either comprehensive privacy laws or more narrow laws addressing biometrics specifically, we will continue to highlight BIPA as a model to avoid.

REFORMING MDLS

On October 22, author Benjamin Halperin participated in a panel event hosted by George Mason University's Antonin Scalia Law School, titled "The Growth of MDLs: What's Driving the Trends and at What Cost for Civil Justice?" Panelists discussed the issues outlined in *Twisted Blackjack* and explored solutions that Congress and the courts can adopt.

Earlier in October, a subcommittee of the Federal Advisory Committee on Civil Rules (a body that establishes rules for federal courts) discussed creating a requirement for MDL courts to consider an approach to early vetting that could address some of the serious flaws in the MDL mechanism. While the Committee was not specific about how this requirement would work, their discussion of this issue is an encouraging sign that much-needed reform to MDLs may be on the way.



ILR Briefly: A Bad Match

DATA PRIVACY

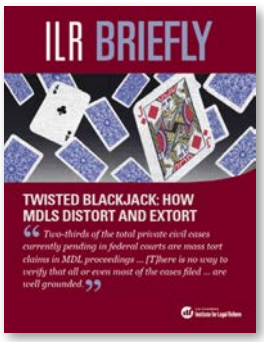
Illinois and the Biometric Information Privacy Act

Authors: *Megan L. Brown, Duane C. Pozza, Kathleen E. Scott, and Tawanna D. Lee, Wiley Rein LLP*

The Illinois Biometric Information Privacy Act (BIPA) is a prime example of a misdirected law that has led to more litigation abuse than consumer protection. This edition of *ILR Briefly* takes a close look at BIPA—the only state biometric privacy law that authorizes a private right of action—and documents how **the law has become a litigation magnet.**

Lawsuits under BIPA have experienced explosive growth since the Illinois Supreme Court found that plaintiffs only need to claim a defendant violated one of BIPA's many technical requirements to sue under the statute, and that plaintiffs do *not* need to claim they were actually harmed. **That January 2019 ruling in *Rosenbach v. Six Flags* kicked off a race to the courthouse—nearly 300 BIPA lawsuits were filed through the end of 2019, almost four times the previous high watermark.** All told, over 900 cases have been filed alleging BIPA violations through September 2021.

This edition of *ILR Briefly* argues that BIPA's private right of action, its low hurdles to bring suit, and its technical complexity make this law a burden for businesses, an obstacle to innovation, and a lucrative target for plaintiffs' lawyers—as well as a clear lesson in how *not* to create biometric privacy protections.



ILR Briefly: Twisted Blackjack

MULTIDISTRICT LITIGATION

How MDLs Distort and Extort

Author: *Benjamin Halperin, Skadden, Arps, Slate, Meagher & Flom LLP*

Plaintiffs' lawyers have turned the personal injury mass tort system into a rigged casino game—one they can reliably win at minimal cost and risk.

This edition of *ILR Briefly* explores how the game works: first, plaintiffs' lawyers identify a perceived widespread injury and recruit thousands of plaintiffs for thousands of lawsuits; then, these claims are consolidated into multidistrict litigations (MDLs) overseen by a single federal judge; next, plaintiffs' lawyers argue (almost always successfully) that it's too burdensome for them to provide basic information about the thousands of cases in an MDL—meaning there's no way to tell if any one case has merit; finally, they use the threat of gigantic liabilities represented by those numerous cases to pressure companies into settling. The alternative for defendants is often to risk bankruptcy in extended litigation, as the overburdened court slowly churns through the docket.

As of July 2021, there were 368,078 pending cases consolidated in the roughly 50 active MDLs involving primarily personal injury claims. That's two-thirds of all private civil cases pending in federal courts—which is completely unsustainable.

This *Briefly* concludes with proposed safeguards to correct this dynamic, by bringing greater transparency to multidistrict litigation proceedings and reducing the number of meritless claims clogging the federal docket.

THIRD PARTY LITIGATION FUNDING

Consumer Attitudes to Third Party Litigation Funding and its Potential Regulation in the EU

Author: *WorldThinks*

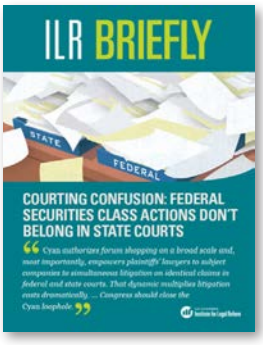
European consumers do not want lawsuit finance companies to invest in civil litigation without oversight, and they strongly support a range of proposed safeguards to keep third party litigation funding (TPLF) in check. Those are the major takeaways from a survey of over 5,000 European Union (EU) consumers across France, Germany, Netherlands, Poland, and Spain, conducted by international polling firm WorldThinks.

Currently, TPLF companies operate under a near-total lack of regulation and transparency in the EU and around the world, and the survey showed that this state of affairs is unacceptable for EU consumers.

Eighty-three percent of respondents support the introduction of safeguards to ensure cases funded by TPLF operate in consumers' best interests.

Respondents also strongly supported a range of specific proposals, including the creation of a fiduciary duty for funders towards claimants (79%); a requirement for funders to see funded cases through until the end (78%); and subjecting funding agreements to independent review (78%).

By contrast, less than a third of respondents supported leaving TPLF companies to self-regulate by developing codes of conduct.



SECURITIES LITIGATION

ILR Briefly: Courting Confusion

Federal Securities Class Actions Don't Belong in State Courts

Authors: *Andrew J. Pincus and Avi Kupfer, Mayer Brown LLP*

The U.S. securities litigation system is being actively exploited by plaintiffs' lawyers, who routinely force investors to pay hundreds of millions of dollars in unjustified litigation and settlement costs.

The U.S. Supreme Court's 2018 *Cyan* decision exacerbated the problem by permitting plaintiffs to litigate a significant category of federal securities class action cases—those asserting claims under the Securities Act of 1933 (1933 Act)—in state courts as well as in federal court.

In the aftermath of *Cyan*, there has been a dramatic increase in the number of 1933 Act class actions filed in state courts, and in the number of parallel filings. Plaintiffs' lawyers are increasingly filing simultaneous, nearly identical 1933 Act class actions in state and federal court, multiplying litigation costs for defendant companies and creating additional settlement pressure.

Congress must act to end this clearly unfair and untenable dynamic, by requiring that all 1933 Act claims be brought in federal court and by authorizing the removal of 1933 Act class actions to federal court.

GROWING MOMENTUM FOR CHANGE

The WorldThinks survey, which ran from June 24 through July 2, comes in the context of an EU legislative debate over whether and how the Union should regulate the burgeoning TPLF industry. And the EU isn't alone—the Australian parliament is currently considering a bill that would put caps on the fees funders are allowed to charge in class actions (among other changes), New Jersey federal courts recently implemented a TPLF disclosure rule, and the Federal Rules Advisory Committee is considering a mandatory disclosure requirement for TPLF in all funded federal cases. More than ever before, momentum is building for change on litigation funding.

LAWYERS WIN, SOCIETY LOSES

"From my perspective, there are no valid arguments against the reforms proposed. None." Those words were written by veteran securities litigation observer Kevin LaCroix, in an August 31 blog post reviewing *Courting Confusion*. In his post on the *D&O Diary*, LaCroix echoed ILR's call for Congress to fix the glaring flaws created by the U.S. Supreme Court's decision in *Cyan*. He also asserted that the continued existence of concurrent state court jurisdiction for 1933 Act liability actions "was absolutely 100% not the result Congress intended" when drafting the Securities Litigation Uniform Standards Act of 1998. The status quo, according to LaCroix, "benefits no one except a very small group of plaintiffs' lawyers but imposes enormous costs on companies, shareholders, courts, and insurers."

PODCAST: LAUGH LESS, WORRY S'MORE

Soon after the release of this *Food Court* update, ILR Senior Vice President Oriana Senatore sat down with Cary Silverman, one of the authors, for a conversation on ILR's *Cause for Action* podcast. The two discussed the top-level findings of the report, including the tidal shift of food litigation from California to New York, and the most ridiculous lawsuits Silverman has seen in his years of observing this docket (hint: doughnuts are involved).

PRESERVING AG AUTHORITY

This paper was released just ahead of the summer meeting of the Attorney General Alliance, a bipartisan association of state attorneys general. Panelists at the June event discussed ILR's paper and the problem of municipality litigation undermining the role of AGs as their states' top law officers. Also in June, ILR released an episode of *Cause for Action* titled "A Deep Dive on Municipality Litigation," in which ILR Senior Vice President Page Faulk interviewed the paper's authors—Trever S. Cox and Elbert Lin—about the evolution of municipality litigation and the many challenges it presents.

The Food Court

FOOD & BEVERAGE LITIGATION

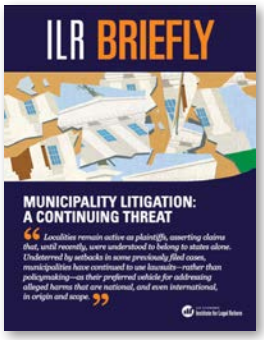
Developments in Litigation Targeting Food and Beverage Marketing

Authors: *Cary Silverman, James Muehlberger, and Adriana Paris, Shook, Hardy & Bacon LLP*

Lawsuits targeting food and beverage marketing have reached record levels, building on the alarming trend that ILR documented four years ago in the first iteration of *The Food Court*. This update documents recent developments in food and beverage marketing litigation and calls on courts and state legislatures to take action to curb this trend.

Among the developments discussed are the increasing number of consumer class actions targeting food and beverage marketing; the rising trend in lawsuits targeting product flavoring or ingredients; the upsurge in "greenwashing" litigation alleging that company claims about eco-friendly practices are overstated; and the shift from California to New York of the nation's most popular "food court" jurisdiction.

Because courts have often been hesitant at an early stage to dismiss even the most ridiculous food labeling and marketing claims, companies often make the calculation that it is easier and cheaper to settle than to dispute those claims. The result is **a litigation cottage industry that enriches plaintiffs' lawyers who file numerous cookie-cutter claims**, while wasting court resources and imposing needless costs on businesses and consumers. Only decisive action from courts and legislatures can change this dynamic.



ILR Briefly: Municipality Litigation

MUNICIPALITY LITIGATION

A Continuing Threat

Authors: *Trevor S. Cox and Elbert Lin, Hunton Andrews Kurth LLP*

In March 2019, ILR released its groundbreaking white paper, *Mitigating Municipality Litigation: Scope and Solutions*, which examined a then-emergent surge in litigation by cities, counties, and other political subdivisions seeking to saddle the business community with responsibility for a wide range of societal ills.

Two years later, that trend has experienced massive growth, with thousands of locality plaintiffs asserting claims that, until recently, were understood to belong to states alone.

This edition of *ILR Briefly* provides an overview of the different elements of this trend, including the factors that are driving municipality litigation, the problems it raises, and recent developments in high-profile cases. Finally, this paper summarizes the various, mainly legislative solutions that state leaders might pursue—and that some have enacted already—to curb municipality litigation.