The ILR Research Review

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

Volume 9
Issue
02
Summer 2022

From the Top: The President's Perspective

With Labor Day in the rearview mirror and mid-term elections coming up fast, ILR is looking ahead to a busy quarter for law and policy. In this edition of the *ILR Research Review*, we are pleased to offer analyses and solutions for some of the most significant problems in civil litigation today.

Class actions are one of the most heavily distorted features of American law. The modern class action system was created in the mid-20th century, with many believing it would serve as a powerful weapon against discrimination. Instead, class actions have become a lucrative line of business for plaintiffs' lawyers, and a seemingly endless source of abusive litigation. This *Review* features a deep dive into the functioning, flaws, and suggested fixes for consumer class actions, as well as an analysis of a key U.S. Supreme Court ruling that has changed the class action landscape in important ways.

We also offer an exploration of the re-emergence of "frequent filers" in securities class actions, and we point out solutions to shore up the reforms Congress enacted in 1995 to protect the securities class action system from exploitation.

Finally, turning to enforcement issues, ILR research examines the problematic mandatory per-claim penalty provision of the federal False Claims Act and reveals the data behind the FCA's destructive over-targeting of the American health care industry.

Looking ahead to the final months of 2022 and beyond, ILR is ready to attack the problems laid out in this *Review* with energy and determination. Legal reform is a constant commitment and an enduring opportunity to make the legal environment fairer and more predictable. We hope the research presented here will be another step on the road to that goal.

Stay safe, stay healthy, and happy reading,

—Harold H. Kim

U.S. Chamber of Commerce
Institute for Legal Reform

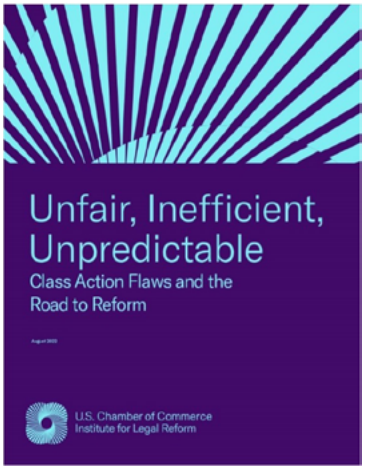
Class Action Campaign

The release of *Unfair, Inefficient* forms the foundation of a new ILR public education campaign around class actions. Grounded in original research, this campaign will feature social media content, an explainer video, podcasts, and a series of blogs, all marketed to the general public and to high-priority audiences. The goal of this campaign will be to clearly and comprehensively restate the case for fixing class actions and reposition the issue for reform.

Outsized Relator Influence

Per statistics released by the Department of Justice and analyzed in the *National Law Review* in February, private *qui tam* relators brought nearly 600 FCA lawsuits in 2021. That represents an average of over 11 cases brought per week, or nearly three quarters of all FCA actions brought that year. These statistics make it plain that *qui tam* relators have an outsized impact on the direction of government enforcement when it comes to this statute even though, unlike the government, they are primarily motivated by financial recoveries rather than protecting the public interest.

Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform



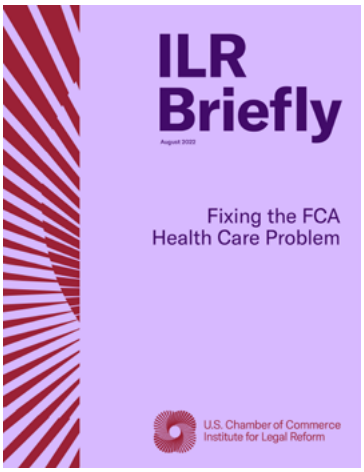
August 2022

Authors: John H. Beisner, Jordan M. Schwartz, and Paden Gallagher, Skadden, Arps, Slate, Meagher & Flom LLP

Class actions fail to serve their intended purpose, they benefit attorneys more than consumers, they leave the door wide open to abuse, and they are fundamentally inefficient at delivering compensation to wronged consumers. But they can be improved.

ILR's research offers a deep dive into the many problems that the modern class action mechanism has developed since its creation in the mid-20th century and concludes with a series of common sense solutions that Congress should adopt to fix it.

ILR Briefly: Fixing the FCA Health Care Problem



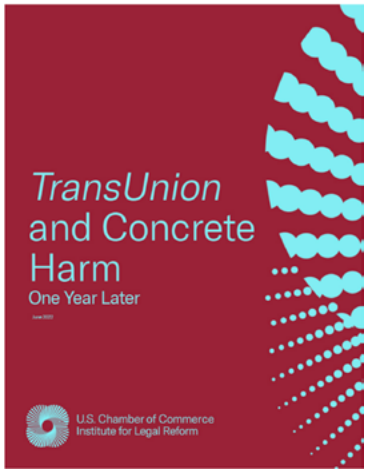
August 2022

Authors: Robert Salcido and Emily Gerry, Akin Gump Strauss Hauer & Feld LLP

The federal False Claims Act (FCA) plays an important role as the U.S. government's primary weapon to combat fraud against it. Unfortunately, the mandatory per-claim civil penalty provision of the FCA has a highly disproportionate impact on the health care system, which experiences high volumes of low-dollar federal claims.

In 2021, federal spending on health care accounted for 24 percent of federal outlays, but FCA lawsuits involving federal health care claims accounted for nearly 90 percent of total FCA recoveries. Beyond overzealous enforcement, the largest driver of this imbalance is FCA litigation from private *qui tam* litigants, who see the FCA as an opportunity to make a profit. ILR's paper unveils the data behind this trend and outlines simple reforms to ensure the FCA is equitably applied.

TransUnion and Concrete Harm: One Year Later



June 2022

Authors: Andrew J. Pincus, Archis A. Parasharami, Daniel E. Jones, and Carmen Longoria-Green, Mayer Brown LLP

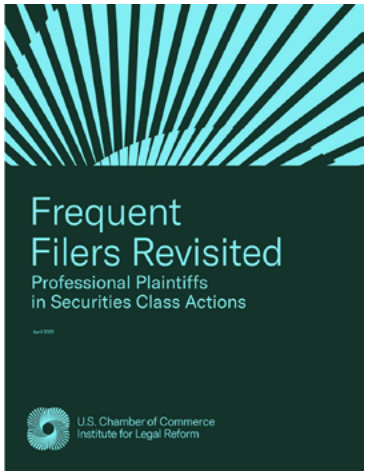
The U.S. Supreme Court's 2021 ruling in *TransUnion LLC v. Ramirez* resolved fundamental constitutional questions about what a plaintiff must do to establish standing to bring a federal lawsuit. The Court held that plaintiffs must allege a "concrete" injury, and it clarified the standard for determining whether an alleged injury is sufficiently concrete.

This white paper features a deep dive into the *TransUnion* decision and relevant precedent, the Supreme Court's reasoning in the case, its roots in the Anglo-American legal tradition and the American Founding, and the implications of *TransUnion* for civil litigation generally.

"No Concrete Harm, No Standing"

TransUnion continues to generate ripple effects across the civil justice system as courts interpret the Court's reasoning—especially in the realm of class actions. So-called "no-injury" class actions, in which the named plaintiff has experienced a concrete harm but the vast majority of the class has not, have become increasingly common in recent years. *TransUnion* creates a major obstacle for the certification of such classes. Though the plaintiffs' bar will certainly attempt to find ways around it, many courts have already applied the Justices' pithy admonishment—"no concrete harm, no standing."

Frequent Filers Revisited: Professional Plaintiffs in Securities Class Actions



April 2022

Authors: Stephen J. Choi, New York University School of Law; Jessica Erickson, University of Richmond School of Law; and Adam C. Pritchard, University of Michigan School of Law

In 1995, Congress moved to curb exploitative securities fraud litigation with the Private Securities Litigation Reform Act (PSLRA). Unfortunately, frequent securities litigation filers—whether individual or institutional—have found ways to evade the safeguards put in place by the PSLRA.

This paper explores the frequent filers problem, and reveals how individual frequent filers are exploiting a PSLRA loophole to file dozens of merger and acquisition challenges each year, with little to no benefit to class members. Institutional investors are also getting in on the frequent filing game, often agreeing to inflated attorneys' fee percentages and prompting questions as to the actual benefits their litigation is securing for shareholders. ILR's research concludes with a series of reforms to remedy the abuses associated with repeat securities fraud plaintiffs.

Ending an "Extortionate Business Model"

Soon after the publication of *Frequent Filers*, noted securities litigation commentator Kevin LaCroix of the *D&O Diary* published an article exploring the paper's main arguments and recommendations. LaCroix concluded his April 24 article by saying that "[c]learly something needs to be done to fix the problems the authors have identified .... In particular, I think extending the specific parts of the PSLRA to individual actions ... and also limiting the number of actions a plaintiff may file in a specified time period ... would go a long way toward eliminating the plaintiffs' lawyers' 'extortionate business model.'"

Summit 2022

Law • Policy • Politics

November 2

U.S. Chamber of Commerce
Institute for Legal Reform

Join ILR for our Summit 2022: Law • Policy • Politics. ILR's Summit is the nation's preeminent legal reform event which gathers business and industry leaders, government officials, and other experts to discuss the most important issues facing our lawsuit system and their impact on the business community in the U.S. and around the world.

Click here to register and learn what can be done to address these issues.

Wednesday, November 2 from **9:00 a.m. – 12:15 p.m. ET**