U.S. CHAMBER
Institute for Legal Reform

the ILR Research
REVIEW

Volume 6, Issue 2

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

FROM THE TOP:

The President's Perspective

As the summer comes to a close, ILR is looking ahead to the challenges and opportunities the civil justice community will encounter in the fall. As always, the litigation landscape is vast, varied, and often perilous to navigate. This issue of the *ILR Research Review* is an effort to signpost that landscape.

Municipality litigation in Louisiana has serious implications for communities and the state economy. *Litigation vs. Restoration* documents the phenomenon of plaintiffs' lawyers and local officials targeting the Louisiana energy industry with coastal erosion allegations, then calls for policymakers and industry leaders to pursue collaborative solutions to erosion rather than engaging in wasteful litigation.

Data privacy continues to be a major concern for companies, and a source of debate for legislators and regulators. ILR supports the U.S. Chamber's advocacy for a preemptive federal data privacy law that excludes a private right of action (PRA). *Ill-Suited* examines privacy class actions under existing law and shows that a single, federally-enforced privacy regime would provide much better protection than PRAs.

Perhaps even more hotly contested than data privacy is arbitration. In response to the avalanche of anti-arbitration bills introduced in Congress and several states this year, ILR partnered with ndp | analytics to publish *Fairer, Faster, Better.* The study shows that plaintiffs in employment arbitration win more frequently and more quickly than in litigation, and their winnings are often substantially greater.

Finally, this *ILR Research Review* features an examination of problems inherent to multidistrict litigation (MDL) proceedings, which composed over half of the federal civil caseload last year. *MDL Imbalance looks* at the unfair advantage granted to plaintiffs in pretrial MDL proceedings, and urges Congress and the Advisory Committee on Rules of Civil Procedure to ensure defendants have equal access to the appeals process.

These developments represent a cross-section of the litigation challenges facing the American business community. We hope this research helps you meet those challenges head on.

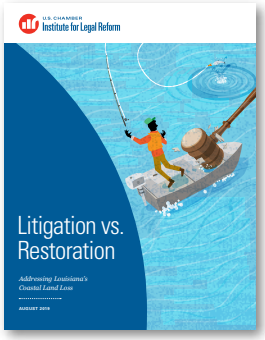
- Lisa A. Rickard

ILR IN THE MEDIA

On August 8, ILR COO Harold Kim gave keynote remarks at Crisis Point: Lawsuit Abuse in Louisiana, an event hosted by a coalition of state business groups aimed at highlighting the need for tort reform in the state. In the course of his remarks, Kim highlighted the increasing burden that lawsuits are placing on Louisiana's oil and gas industry, the state's largest employer. He introduced ILR's research documenting that problem and calling on state leaders to pursue more constructive action to address issues like coastal erosion. U.S. Chamber of Commerce Board of Directors Chair Maura Donahue introduced Kim at the event, which also featured remarks from Melissa Landry, Executive Director of Louisiana Lawsuit Abuse Watch.

U.S. CHAMBER EVENT

On July 11, the U.S. Chamber hosted its first-ever summit on data privacy issues, #DataDoneRight, featuring insight and discussion from policymakers and stakeholders from across the spheres of business and politics. A key element of the day's discussion was the creation and enforcement of rational data privacy laws. ILR COO Harold Kim interviewed Georgia Attorney General Chris Carr on the importance of balancing innovation and consumer protection considerations in all such laws, and *Ill-Suited* author Mark Brennan shared his perspective on why private rights of action are the wrong tool for the job when it comes to data privacy.



Litigation vs. Restoration

MUNICIPALITY LITIGATION

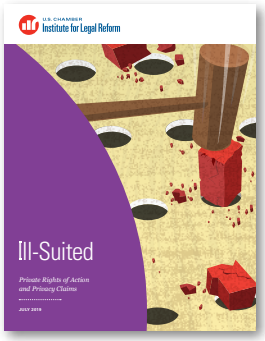
Addressing Louisiana's Coastal Land Loss

Authors: *Leigh Ann Schell, Sara Valentine, and Alexandra Roselli* | *Adams and Reese LLP*

The oil and gas industry employs nearly two million Louisianans, and pays hundreds of millions of dollars into the state treasury each year. It is at the core of Louisiana's economy, and has been for many years. But over the last few decades, plaintiffs' lawyers have recruited increasing numbers of private landowners and state and local officials to file lawsuits against oil and gas companies for allegedly contributing to coastal erosion.

This litigation has reached a point that threatens the future of the energy industry in Louisiana.

ILR's research looks at the history of the energy industry in Louisiana and of the litigation that continues to target it. The paper concludes by calling for state and local leaders to work with the energy industry to remediate coastal damage, rather than filing lawsuits that only serve to enrich plaintiffs' lawyers.



Ill-Suited

DATA PRIVACY

Private Rights of Action and Privacy Claims

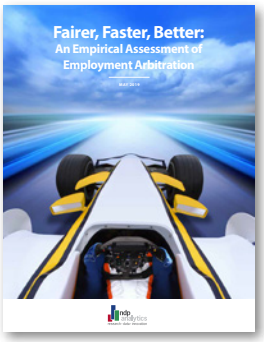
Authors: *Mark Brennan, Adam Cooke, and Alicia Paller* | *Hogan Lovells US LLP*

Private rights of action (PRAs) are highly problematic tools for addressing privacy issues. As has already been demonstrated by ILR and others, plaintiffs' lawyers often benefit more than their clients from America's lawsuit system. This white paper demonstrates that the same dynamic is at work when it comes to privacy litigation. By examining privacy class action trends under common law, state statutes, and federal statutes, the paper demonstrates that **private rights of action are inefficient and ineffective for addressing privacy concerns.** In fact, private rights of action in the privacy context often:

- undermine appropriate agency enforcement and allow plaintiffs' lawyers to set policy nationwide, rather than allowing expert regulators to shape and balance policy and protections;
- result in inconsistent and dramatically varied, district-by-district court rulings;
- lead to grossly expensive litigation and staggeringly high settlements that disproportionally benefit lawyers more than individuals whose privacy interests may have been infringed; and
- hinder innovation and consumer choice by threatening companies with frivolous, excessive, and expensive litigation, particularly if those companies are at the forefront of transformative new technology.

The paper also contends that when it comes to addressing consumer privacy concerns, **statutes that do not include private rights of action and instead delegate enforcement power to agencies are often superior to private litigation.** Among other things, statutes exclusively enforced by agencies generally:

- benefit from appropriate guidance by experts in the field who can be expected to understand the complexities of encouraging compliance and innovation while preventing and remediating harms;
- provide constructive, consistent decisions that shape privacy protections for all American consumers and provide structure for companies aiming to align their practices with existing and developing law; and
- are subject to oversight by administrative law judges, Congress, and/or the President.



Fairer, Faster, Better

ARBITRATION

An Empirical Assessment of Employment Arbitration

Authors: *Nam D. Pham and Mary Donovan | ndp | analytics*

Contrary to the assertions made by the opponents of arbitration, **employees in disputes with their employer are more likely to win cases, get more compensation, and get it more quickly in arbitration** than in litigation.

This study, performed by ndp | analytics, examined nearly 100,000 cases between 2014 and 2018, including over 90,000 federal lawsuits and 10,000 arbitrations.

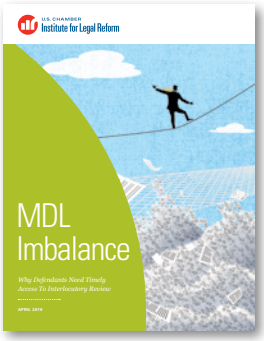
The analysis found that employee-plaintiffs in arbitration won:

- three times more often than in litigation (32% of cases vs. 11%);
- almost twice as much money as in litigation ($520,000 on average vs. $270,000); and
- in far less time than in litigation (569 days on average vs. 665).

In addition to these clear empirical advantages, ILR also conducted a national public opinion survey that showed strong, bipartisan support for preserving access to employment arbitration. Together, these studies demonstrate that resolving employment disputes through arbitration is both more effective and more popular than filing lawsuits.

ADVOCACY

ILR's research was published on the same day as a House of Representatives subcommittee hearing on arbitration. ILR consultant and Mayer Brown partner Andy Pincus introduced the research as part of his testimony at that hearing, and he pointed to its findings as clear proof that arbitration remains a valid and effective method for plaintiffs to seek justice.



MDL Imbalance

MULTIDISTRICT LITIGATION

Why Defendants Need Timely Access to Interlocutory Review

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

Multidistrict litigation proceedings (MDLs) were created as an efficient way to handle pretrial proceedings in hundreds or thousands of similar cases against the same defendant. **However, the lack of an interlocutory appeal mechanism makes MDLs fundamentally unfair for defendants.** If a defendant makes a dispositive motion—on preemption or expert evidence, for example—and is denied, they cannot immediately appeal. But if the defendant wins the motion, plaintiffs can appeal right away.

Dispositive motions during MDL proceedings can influence the fate of thousands of cases, meaning that appellate review of the denial of these motions is an extremely important stage of the process. The current unequal treatment of defendants and plaintiffs at that stage is a clear imbalance that needs to be corrected. This imbalance is especially impactful because as of 2018, over half of the federal civil caseload is concentrated in MDLs.

ILR's research calls on both Congress and the Advisory Committee on Civil Rules to address the issue through legislation and/or a change to the Federal Rules of Civil Procedure:

- **Congress:** By taking up and passing the Fairness in Class Action Litigation Act (FICALA), which was passed by the House in 2017, Congress could require federal appeals courts to accept an interlocutory appeal of an order made in a mass tort MDL if "an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings."
- **Advisory Committee:** By creating an amendment to the Federal Rules of Civil Procedure, the Committee could authorize prompt appellate review of key interlocutory rulings in mass tort MDLs, including motions to dismiss for lack of personal jurisdiction, motions for summary judgment, and *Daubert* motions.

TIMELY UPDATE

ILR'S MDL research comes as the Advisory Committee on Rules of Civil Procedure's MDL Subcommittee examines the possibility of a rules change enshrining defendants' right to interlocutory appeal in pre-trial proceedings in MDLs. Such a change would provide a much-needed update to the MDL mechanism, which has become the most-used channel for federal civil litigation in recent years and which continues to give plaintiffs an unfair structural advantage.

ILR COO Harold Kim and Georgia AG Chris Carr discuss data privacy protection and enforcement at the U.S. Chamber of Commerce's July 11 privacy summit, #DataDoneRight. (Photo Credit: Ian Wagreich, Chief Photographer, U.S. Chamber of Commerce)

Ill-Suited *author and Hogan Lovells partner Mark Brennan (second from left) participates in a stakeholder panel on a federal preemptive data privacy law at #Datadoneright, moderated by the U.S. Chamber Technology Engagement Center's Jordan Crenshaw. (Photo Credit: Ian Wagreich, Chief Photographer, U.S. Chamber of Commerce)*

SAVE THE DATE **SUMMIT 2020:** *The Future in Focus* | April 1, 2020