



the ILR Research REVIEW

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

FROM THE TOP: *The President's Perspective*

Times of transition are opportunities to reflect on all we've accomplished, and all we have left to do. This year more than most, we have a lot to think about.

American businesses have struggled heroically to stay afloat amidst the devastation of COVID-19. Despite the odds, many have succeeded, and at the time of this writing, hospitals are taking delivery of the first vaccines. But many other businesses have gone under, and still more are teetering on a cliff's edge—which is why financial assistance and federal liability protections are still sorely needed.

Even before COVID-19, tort liability costs for American companies—and especially small businesses—were running rampant. This *ILR Research Review* features a new tort cost study that shows small businesses bore more than half of America's \$343 billion commercial tort costs in 2018, despite making less than a fifth of the revenue.

Their burden threatens to grow even heavier in 2021, as trial lawyer allies in Congress prepare to renew their assault on arbitration. This edition of the *Review* highlights empirical research showing that consumers who initiate disputes with companies win more money, more often, and more quickly in arbitration than they do in litigation. Combined with a 2019 study that showed the same result for employees in arbitration, this research will be a critical defensive asset for the coming year.

Further complicating the picture is a new business model from third party litigation funders, the hedge funds that invest in lawsuits for a cut of the proceeds. Some funders are now buying part of the U.S. government's interest in *qui tam* False Claims Act lawsuits—without disclosing their involvement. This edition of the *Review* has the details.

Finally, looking across the pond, the European Union is considering a sweeping set of rules that threaten to stifle the groundbreaking artificial intelligence industry before it can find its footing, narrowing an important path to growth at a moment of dire economic need.

So looking back at this year and forward to the next, we as a business community should celebrate what we've survived and accomplished—and we should gear up for a busy 2021.

Stay safe, stay healthy, and happy holidays,

—Harold H. Kim

ILR IN REFLECTION

The results from ndp | analytics' 2020 empirical assessment of consumer arbitration reinforce similar findings from their 2019 research on employment arbitration.

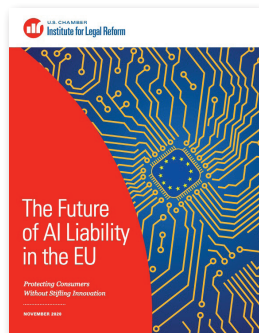
Their 2019 study found that employee-plaintiffs in arbitration won:

- three times more often than in litigation (32 percent of cases vs. 11 percent);
- 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 days).

The results of these two studies combined show that resolving disputes through arbitration is clearly more efficient for both consumers and businesses.

ILR IN THE NEWS

The release of ILR's consumer arbitration study was covered by *Reuters* and featured in Alison Frankel's "On The Case" column.



The Future of AI Liability in the EU

EMERGING LIABILITY ISSUES

Protecting Consumers
Without Stifling Innovation

Authors: *Ken Daly and Monika Zdzieborska* | *Sidley Austin LLP*

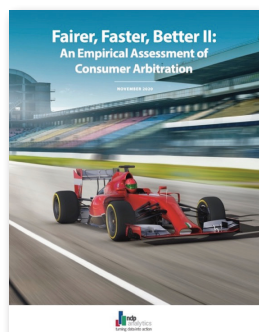
The European Commission has signaled its intent to create a liability regime "fit for the digital age," and that includes amending existing liability frameworks and/or creating new liability frameworks for artificial intelligence (AI).

The impact of any such legislation is potentially vast. Any legislative measures will likely affect broad swathes of consumers and industry, including any businesses active in the AI space that sell their products or services to the EU's hundreds of millions of consumers.

In this context, it is extremely important for the Commission to strike the right balance between protecting consumers and fostering technological innovation.

ILR's research paper breaks down the various elements of the Commission's emerging position on AI and offers a set of guiding principles for the development of a future-oriented AI liability regime. These principles include:

- taking stock of existing EU measures and industry best practices;
- favoring "soft" measures, not overzealous regulation;
- consulting with stakeholders and adopting a participative regulatory approach;
- coordinating with other institutions and governments;
- promoting evidence- and risk-based regulations; and
- adopting reasonable constraints on liability.



Fairer, Faster, Better II

ARBITRATION

An Empirical Assessment of Consumer Arbitration

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

Frequently the target of attacks from the plaintiffs'

bar, arbitration is a near-century-old method for efficiently resolving legal disputes without resorting to lengthy and expensive trials.

Research from ndp | analytics demonstrates that in consumer-company disputes initiated by the consumer, consumers fare much better in arbitration than they do in litigation.

Consumers are more likely to win in arbitration than in court. Consumers initiated and prevailed in 44 percent of all consumer arbitrations that were terminated with awards during January 2014 – June 2020. During the same period, consumers initiated and prevailed in 30 percent of

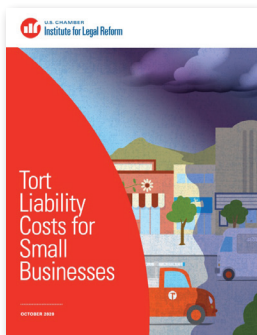
all consumer litigation cases that were terminated with judgments.

Consumers receive higher awards in arbitration than in litigation. The mean award in arbitrations that consumers initiated and won was \$68,198, compared to \$57,285 in litigation. The median award in consumer-initiated arbitrations was \$20,019, compared to just \$6,565 in litigation.

Consumer arbitration is faster than litigation. It took an average of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared to 429 days in litigation. The median time in arbitration was 251 days, compared to 311 days in litigation.



U.S. Chamber Institute for Legal Reform



Tort Liability Costs for Small Businesses

U.S. TORT SYSTEM

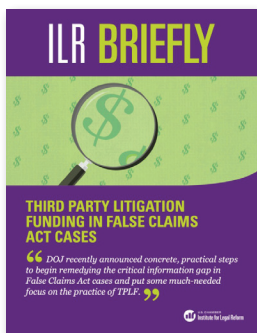
Authors: *David McKnight and Paul Hinton | The Brattle Group*

Small businesses are facing an existential threat when it comes

to COVID-19, and excess liability costs are another risk factor they can't afford. Unfortunately, it's a risk they're forced to take.

A new study from ILR and The Brattle Group shows that small businesses (those making less than \$10 million in annual revenue) bear a disproportionate share of the costs of the tort system. **While small businesses accounted for just 19 percent of the business revenues earned in 2018, they bore 53 percent of the costs of the commercial tort system, or \$182 billion.**

The smallest and most vulnerable businesses (those making less than \$1 million annually) fare even worse. They bore 39 percent of the commercial tort liability cost in 2018—almost \$135 billion. And on a per-dollar-of-revenue basis, these numbers look even worse, with **the smallest businesses shouldering a burden almost ten times as large as those making over \$50 million.** This study clearly illustrates that the businesses that can least afford it are the ones that pay the most.



ILR Briefly: Third Party Litigation Funding in False Claims Act Cases

THIRD PARTY LITIGATION FUNDING

Authors: *Matthew Dunn and Krysten Rosen Moller | Covington & Burling, LLP*

The federal False Claims Act (FCA) is the principal statutory mechanism for combating fraud against the U.S. government—but it seems the third party litigation funding (TPLF) industry is also trying to make it a new source of revenue.

Funders are specifically targeting the *qui tam* provision of the FCA, which allows private citizens (relators) to bring lawsuits on behalf of the government alleging violations of the Act in return for a certain percentage of any resulting recoveries, with the rest going to the government. In each action, the government decides whether or not to take over the case (with the relator getting paid either way), or to move for dismissal if the case lacks merit.

The Department of Justice (DOJ) has moved to address the involvement of TPLF in *qui tam* suits. During a June 2020 presentation to ILR, a senior DOJ official announced that the Department would begin to ask a series of questions at each relator interview to determine, among other things, if TPLF is involved and to what extent the funding agreement allows the funder to exercise control over the relator's litigation or settlement decisions.

As it gathers answers to these questions, DOJ's experience may inform its exercise of discretion to move for dismissal in *qui tam* FCA suits, and it may decide that a more in-depth inquiry into TPLF in *qui tam* suits is warranted.

ILR IN REFLECTION

The results from ILR's *Tort Liability Costs for Small Businesses* research build on the findings from our 2018 study - *Costs and Compensation of the U.S. Tort System*. In *Costs and Compensation*, the authors found that in 2016, the total costs and compensation in the U.S. tort system amounted to \$429 billion. That figure was equivalent to 2.3 percent of U.S. GDP, or \$3,329 per household in America.

But for that cost, Americans are getting a system that is extremely inefficient at delivering justice. Only 57 percent of the money spent in the tort system goes to plaintiff compensation, and that's before contingency fees are subtracted.

Together, these two studies show that the U.S. tort system is out of control.

ILR SUMMIT

ILR's Summit 2020: Future in Focus featured a panel discussion on *Tort Liability Costs for Small Businesses*. The panel featured David McKnight, a senior associate with the Brattle Group, and Chuck Jones, president of Jones Coffee Roasters, who provided insight into the real-life impact of tort costs on small businesses.

ILR'S 2020 RESEARCH PROGRAM

Access the full range of ILR research publications at
www.instituteforlegalreform.com/research

