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U.S. CHAMBER
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

What a difference a year makes. When ILR published the Summer 2020 edition of this *Review,* we were staring down an unprecedented national crisis, and among all the challenges facing the business community was an extraordinary groundswell of concern about liability linked to COVID-19. But sitting here in spring of 2021, the picture looks a little different.

COVID-19 infections in the U.S. are declining, the economy is gathering steam, and 40 states have enacted some degree of protections from COVID-19 liability. But that doesn't mean we can be complacent—now is the time to pull up and examine the threats and opportunities of a post-pandemic world.

On the immediate horizon, state courts across the country are reopening to a civil litigation backlog of millions of cases and filings, often with COVID-19 restrictions still in place when it comes to convening juries and other standard court procedures. ILR's research looks at how courts are dealing with the fallout and offers recommendations for meeting this challenge.

Then there's Louisiana, where lawmakers are contemplating legislation to implement a settlement that would undermine efforts to repair Louisiana's damaged coastline, and potentially tee up a string of similar bad settlements in related litigation. ILR's paper examines that flawed settlement in detail, and points to much more effective solutions for the state's coastal erosion crisis.

Zooming out to the federal level, a troubling strain of populism among Democrats and Republicans has pushed antitrust issues to national prominence. Large companies now find themselves in the crosshairs, whether for the mere sin of "bigness" or for social and political issues that are fundamentally unrelated to competition. Our research warns against yielding to that momentum and expanding private antitrust liability.

And potentially affecting courts at all levels, the Federal Advisory Committee on Evidence Rules has approved a proposal to amend Federal Rule of Evidence 702. The Committee's decision followed the publication of the last paper in this *Review,* which highlights the failure of many state courts to fulfill their role as gatekeepers for expert evidence. ILR's paper outlines a brief history of the Rule, and the need to strengthen it and cut down on the glut of unreliable expert evidence being used in the courtroom.

The skies ahead seem clearer than they did a year ago, and spring is in the air. But there's a lot of work to be done—so let's get out there and do it.

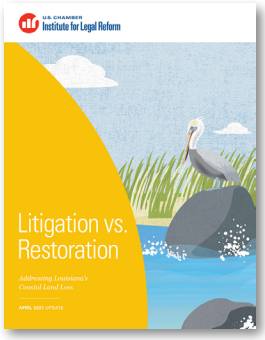
—Harold H. Kim

ILR AND PUBLIC OPINION

Soon after the publication of *Litigation vs. Restoration*, ILR released a Google Survey showing that over 70 percent of Louisianans don't think funds from coastal erosion litigation should be diverted away from coastal restoration efforts. Unfortunately, as the paper describes, that's exactly what will happen if state legislators approve implementing legislation for a settlement supported by the plaintiffs' bar.

ILR JOINT EVENT

In partnership with the U.S. Chamber's Antitrust Council, on May 13 ILR co-hosted "Antitrust: Focus on Liability," the third in a series of Chamber-hosted webinars discussing the recent push to overhaul America's antitrust laws. ILR President Harold Kim introduced the panel, which was moderated by Robert Bork, Jr., whose father Judge Robert Bork's "consumer welfare" conception of antitrust has shaped antitrust practice and policy for decades. Panelists included several expert practitioners, including Timothy Muris, one of the co-authors of ILR's paper and a former chairman of the Federal Trade Commission. Discussion focused on recent antitrust reform proposals that would expand private antitrust liability and why such proposals are ill-advised.



Litigation vs. Restoration

MUNICIPALITY LITIGATION

Addressing Louisiana's Coastal Land Loss

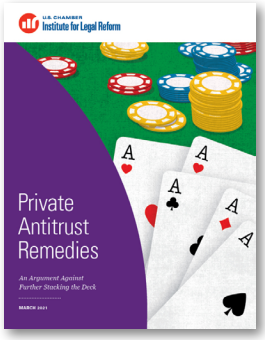
Authors: *Leigh Ann Schell, Sara Valentine, and Alexandra Lamb, Adams and Reese LLP*

ILR's latest research paper examines new developments in the long-running saga of lawyer-generated coastal erosion lawsuits against Louisiana energy companies.

A recent, $100 million settlement between one mid-size energy company (which no longer operates in the state) and a group of private attorneys representing local parishes threatens to up-end the entirety of state coastal policy. **Moreover, this one-off settlement threatens the successful coastal protection and restoration regimes already in place in the state.**

ILR's research gives a brief overview of Louisiana's coastal erosion problem and trial lawyer efforts to monetize it through litigation, then examines various pieces of legislation that have been proposed to implement the settlement.

Our paper shows that far from helping remedy coastal erosion, this legislation and the settlement itself would create major complications for the state's coastal remediation efforts, and they would set a terrible precedent for energy businesses operating in Louisiana and for the state's economy itself. It also shows that by contrast, **a working partnership between the state and Louisiana energy companies accomplishes far more to restore the coast than lawsuits can.**



Private Antitrust Remedies

ANTITRUST

An Argument Against Further Stacking the Deck

Authors: *Jonathan E. Nuechterlein and Timothy J. Muris, Sidley Austin LLP*

Antitrust issues have risen to prominence in today's public policy debates, largely on the back of growing populist sentiments on both sides of the aisle.

A staff report (the Report) issued by the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law in late 2020 advocates for **legislation that would revamp antitrust doctrine and practice in a way that would widen the scope of antitrust liability.**

As well as calling for expansive public antitrust enforcement, the Report advocates for changes that would effectively open the floodgates for private antitrust litigants. This is the focus of ILR's white paper.

Our research summarizes the current regime for private antitrust remedies in the United States and explains how it **systematically stacks the deck in favor of plaintiffs**, even compared to non-antitrust litigation. It then outlines how, in the context of antitrust lawsuits launched by private litigants, the Report's recommendations would eliminate fundamental safeguards against litigation abuse.

This paper concludes by urging decision makers not to further stack the deck against private enterprise at a moment of unique economic instability by adopting the Report's recommendations.

ILR Briefly: COVID-19 and Court Procedures

COVID-19 SERIES ISSUE 5

Author: *Anne C. Malik, Orrick, Herrington, and Sutcliffe, LLP*

COVID-19 has fundamentally disrupted the American legal system. The country's state courts, where the majority of cases are heard, have largely been unable to continue with business as usual.

This edition of *ILR Briefly* examines the myriad issues facing state courts as they begin to reopen or increase their activity, including the unprecedented challenges brought by the backlog of millions of delayed cases and case filings.

Courts will be faced with pressing issues at all stages of litigation, from the commencement of a lawsuit, through the discovery process, to case resolution.

ILR's paper examines potential pitfalls and offers commonsense solutions as courts contend with questions regarding statutes of limitations and prejudgment interest; the preservation of digital documents in a world of remote work and uncertain litigation deadlines; and the oft-misguided temptation to consolidate cases.

ILR's paper examines these hurdles and more, offering recommendations to state courts to overcome historic challenges and ensure that the fair and efficient administration of justice is fulfilled.

Fact or Fiction

EXPERT EVIDENCE

Ensuring the Integrity of Expert Testimony

Author: *Cary Silverman, Shook, Hardy & Bacon L.L.P.*

Expert testimony is often crucial in complex civil cases. A ruling on whether an expert's proposed testimony is admissible may mean the difference between the dismissal of thousands of product liability cases and a multibillion-dollar settlement. A series of U.S. Supreme Court decisions, starting with the Court's 1993 ruling in *Daubert* v. *Merrell Dow Pharmaceuticals*, require judges to serve as "gatekeepers" for expert testimony, scrutinizing not only the qualifications of an expert but whether his or her testimony is reliable and fits the facts of the case. Federal Rule of Evidence 702 was then amended in 2000 to reflect the *Daubert* line of cases and to clarify and strengthen the applicable standard.

State courts have slowly but steadily transitioned to the *Daubert* standard, amended their rules of evidence to match Rule 702, or both. But some courts do not fully and consistently apply these rules. **The lack of appropriate judicial scrutiny can (and often does) result in the admission of "shaky" expert testimony**, bringing immense pressure on defendant companies to settle, even if they feel they have a strong case.

Fact or Fiction outlines the state of expert evidence standards around the country, explores key issues and concerns supporting a more universal adoption of *Daubert* and further amendment of Rule 702 , and offers recommendations for promoting these changes.

COVID DELAYS IN REVIEW

On April 15, the U.S. Chamber Litigation Center hosted a expert panel discussion on COVID-19 litigation. The discussion focused on macro trends, lessons learned over the previous year, and what businesses can generally expect going forward. Speakers at the event highlighted ILR's *Briefly* paper in the context of court delays and their consequences.

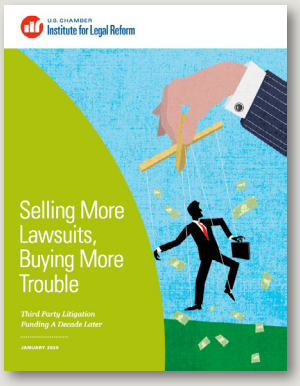
REFORM MOVES FORWARD

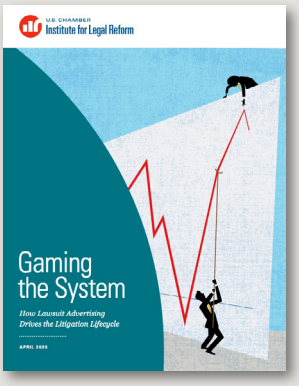
Soon after the release of *Fact or Fiction*, the Advisory Committee on Evidence Rules approved a Rule 702 amendment proposal aimed at clarifying the role of judges as gatekeepers. The proposal reflects language that ILR and our partner in Rule 702 advocacy, Lawyers for Civil Justice (LCJ), requested in comments filed with the Committee at the end of 2020. We also discussed these comments at an expert panel event, co-hosted by ILR and LCJ on February 17.

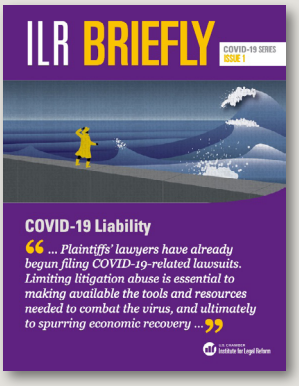
The anticipated proposed amendment would add language requiring the proponent of expert testimony to satisfy the elements of Rule 702 by a preponderance of evidence. It would also explicitly require an expert's opinion to reflect a reliable application of the expert's principles and methods to the facts of the case. Once public comment opens on the proposal this summer, ILR and LCJ will activate our joint Rule 702 Coalition to keep up momentum for this essential change.

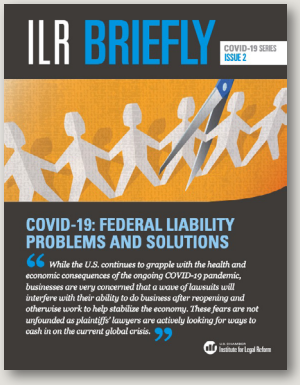
IN CASE YOU MISSED IT:
ILR'S 2020 RESEARCH PROGRAM

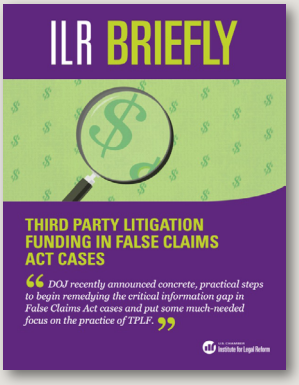
Access the full range of ILR research publications at www.instituteforlegalreform.com/research

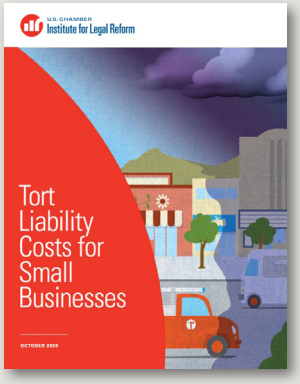


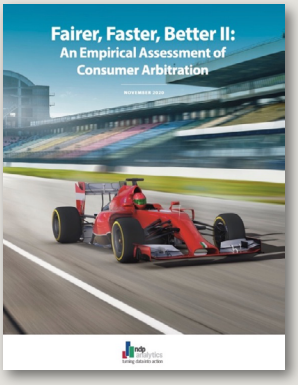












SAVE THE DATE

ILR SUMMIT XXI

VIRTUAL EVENT | OCTOBER 19

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