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
**Litigation vs. Restoration**

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**

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. 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

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

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.

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