

The ILR Research Review

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

Volume 9
Issue

01

Spring 2022

From the Top: The President's Perspective

Spring is in the air, March Madness is in full swing, and America is emerging from yet another COVID slump into a brighter new season. At least, I hope that's the case. But in life, as in litigation, hope is not a strategy. So ILR is keeping an eye on the horizon.

The issues covered in this edition of the *Research Review* are at an inflection point. Depending on how they evolve in the coming weeks and months, the litigation landscape could look very different.

As in years past, the century-old arbitration mechanism is under attack. With the passage of the FAIR Act in the House, the Senate stands as the last obstacle to sweeping legislation that would effectively ban arbitration in most private contracts. Research from ndp | analytics—supported by ILR—demonstrates conclusively that consumers and employees win more money, more often, more quickly in arbitration than in the courthouse.

Elsewhere in Washington, the Department of Justice (DOJ) has undertaken a series of policy changes collectively known as the “Monaco Memo,” after Deputy Attorney General Lisa Monaco. The Memo appears to reverse gains in transparency,

consistency, and predictability made in previous years—but many of its proposed changes have yet to appear in the U.S. Justice Manual. Our white paper explores the full range of implications.

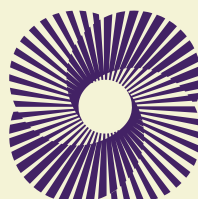
Turning our eyes skyward, an effort is underway to determine the future of drones in our legal order. ILR's research documents the array of actors attempting to shape the rules and regulations governing how drones operate, and makes the case that sweeping, new laws for drones are neither necessary nor desirable.

The final paper covered in this issue of the *Review* examines the impact of the U.S. Supreme Court's April 2021 ruling in *Facebook v. Duguid*, a case with major implications for litigation under the Telephone Consumer Protection Act (TCPA). As the paper shows, the consequences of *Duguid* continue to ripple around the country.

As always, ILR will activate the full breadth of our program to engage on these issues as they develop and will remain in constant contact with our members as we do so.

Stay safe, stay healthy, and happy reading,

—Harold H. Kim



U.S. Chamber of Commerce
Institute for Legal Reform

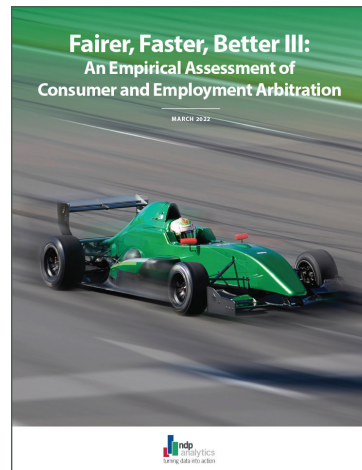
Arbitration Under Attack

On March 17, just over a week after *Fairer, Faster, Better* was published, the U.S. House of Representatives narrowly passed the so-called Forced Arbitration Injustice Repeal (FAIR) Act, which would effectively ban arbitrations in private contracts if passed by the Senate and signed into law. Ahead of the vote, the U.S. Chamber of Commerce Institute for Legal Reform rallied over 120 business association signatories on a coalition letter to the House, highlighting the benefits of arbitration for consumers, businesses, and employees, and urging members to oppose the FAIR Act.

Doubling Down

Soon after the release of the *ILR Briefly*, U.S. Attorney General Merrick Garland spoke about the Monaco Memo and associated changes to the American Bar Association's Institute on White Collar Crime. In his March 3 remarks, AG Garland echoed the Monaco Memo's focus on individual prosecutions. He also reiterated that in order for companies to seek cooperation credit, they will need to provide the Department of Justice with information about all individuals involved in alleged misconduct, regardless of whether the company deems their involvement to be "substantial." As referenced in the paper, a major consequence of this change will be to make it harder for companies to cooperate with government investigations.

Fairer, Faster, Better III An Empirical Assessment of Consumer and Employment Arbitration

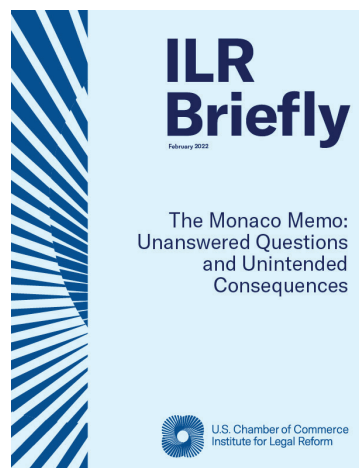


March 2022

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

As the debate over arbitration rages on, strategic research firm ndp | analytics has conducted an updated study of how arbitration performs compared to litigation. From 2014 to 2021, consumers prevailed 12.4% more often and employees prevailed 26.9% more often in arbitration compared to litigation. With regard to compensation, on average consumers were awarded \$8,591 more and employees were awarded \$36,456 more in arbitration compared to litigation. Arbitration was also faster—consumers spent an average of 118 fewer days in arbitration versus litigation, while employees spent an average of 56 fewer days in arbitration.

ILR Briefly: The Monaco Memo Unanswered Questions and Unintended Consequences



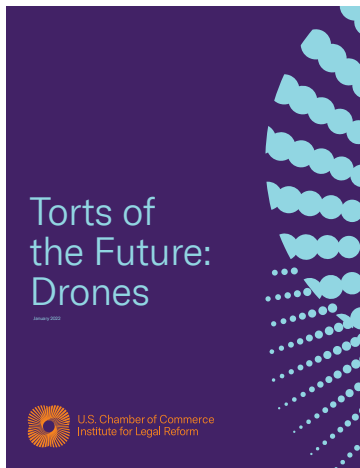
February 2022

Authors: Albert Stieglitz and Eric
Kuwana, Alston & Bird, LLP

In late 2021, Deputy Attorney General Lisa Monaco announced a slate of corporate enforcement policy changes known as the "Monaco Memo." Unfortunately, as ILR's research shows, these changes appear rushed and insufficiently developed; they are not supported by relevant data; and they may have harmful consequences. Notably, these changes are likely to make compliance and cooperation with the government harder for companies.

As the paper points out, the Monaco Memo backtracks on prior improvements to transparency, consistency, and predictability in corporate enforcement policy. ILR's research concludes by calling on the public, companies, and corporate counsel to be vigilant in preserving those prior improvements.

Torts of the Future: Drones



January 2022

Authors: Joshua Turner, Sara Baxenberg, Scott Bouboulis, and Kyle Gutierrez, Wiley Rein, LLP

This research takes an in-depth look at the current federal and state regulatory regime for commercial drone use and examines how courts, legislators, and secondary actors contribute to shaping tort law as it applies to drones. The paper asserts that despite the relative novelty of drones, the creation of new legal doctrines to address them is unnecessary.

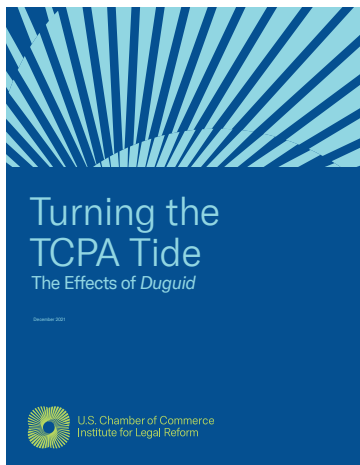
On the way to that conclusion, ILR's research explores the interplay of local, state, and federal law around drones, then examines the future of drone torts through the lens of privacy torts, trespass, and negligence. Although there remain some areas of uncertainty where further clarity is needed, courts would be well-served to apply settled principles of tort law to drones as they increasingly hear these types of cases.

Cause for Action Podcast

Following the release of *Torts of the Future*, ILR Senior Vice President Oriana Senatore interviewed Joshua Turner, one of the paper's authors, about his findings and the future of drone law in U.S. courts. As Joshua points out, the arrival of drones has created significant turbulence in an area of law that has not seen major disruption in decades—namely, law governing the use of airspace. That disruption has created an opportunity for diverse and numerous actors to attempt to shape this emerging field.

Joshua also discussed concerns raised in the paper on a February, 2022 webinar hosted by the Law and Economics Center of George Mason University's Antonin Scalia Law School.

Turning the TCPA Tide: The Effects of *Duguid*



December 2021

Authors: Mark W. Brennan, Arpan Sura, Adam Cooke, Abby Walter, and Sophie Baum, Hogan Lovells US, LLP

Special thanks to: John Castle and Ashley Mills

The U.S. Supreme Court made a splash with its April 2021 decision in *Facebook Inc. v. Duguid*, resolving a key ambiguity within the Telephone Consumer Protection Act (TCPA). The Court's ruling, by which it adopted a narrow definition of "automatic telephone dialing system" (ATDS) for purposes of the TCPA, seemed to close the floodgates on a rising tide of TCPA lawsuits that relied on a broader ATDS definition.

ILR's research paper decodes the nuanced impact of the Court's ruling by examining the TCPA litigation arena in the six months before and six months after *Duguid*, and sheds light on how the plaintiffs' bar has shifted tactics to adapt.

Revenge of the TCPA

Immediately after the Court's decision in *Duguid*, Sen. Edward Markey (D-Mass.), one of the original authors of the TCPA, and Rep. Anna Eshoo (D-CA) slammed the ruling and signaled their intent to introduce new legislation to expand the definition of an ATDS under the statute. While such a bill has not materialized at the time of this writing, states such as Florida and Georgia have passed or are considering so-called "mini-TCPA" bills and amendments that would similarly broaden liability for customer communications. ILR and in-state legal reform groups around the country have mobilized to block or improve these bills as they move through the legislative process.

In Case You Missed It: ILR's 2021 Research Program

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

