The ILR Research Review

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

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From the Top:
The President's Perspective

Claiming to be a "disruptor" has become such a normal, even cliché way of talking about innovation that the act of disrupting the status quo is often lauded as a good unto itself. But it's worth remembering that sometimes the status quo exists for very good reasons, and disrupting it may cause harm all out of proportion to any benefit. The research profiled in this *Review* documents four instances where the plaintiffs' bar and associated interests are disrupting established systems in ways that harm consumers and businesses, while benefiting no one but themselves.

The targets of these disruptive efforts are critical mechanisms of the civil justice system, each designed to provide a path for redressing alleged harms while preserving the rights (and even the continued existence) of defendant entities.

For example, arbitration is intended to deliver fair, fast, and efficient resolution of disputes between customers, employees, and companies; the public nuisance cause of action was designed as a remedy to a narrow set of injuries involving interferences with public rights; the bankruptcy system is supposed to provide a path to equitable relief for current and future creditors; and the American Bar Association's (ABA) Model Rule of Professional Conduct 5.4 is supposed to keep inviolable the bond of trust between lawyers and their clients.

As the papers in this *Review* demonstrate, plaintiffs' lawyers, litigation funders, and (in some cases) ambitious politicians are attempting to disrupt each of these features of the civil justice system. The vast distance between the pretended benefits of these changes and the real-world harms of making them is a stark reminder of why we at ILR do what we do. Legal reform isn't just about fixing broken systems—it's also about preserving and improving systems that work, especially when they come under attack from "disruptors" peddling false solutions to complicated problems. The research you'll find in this *Review* offers a strong defense.

Happy reading,

—Harold H. Kim
President, U.S. Chamber of Commerce
Institute for Legal Reform

Chief Legal Officer and Executive Vice President, U.S. Chamber of Commerce

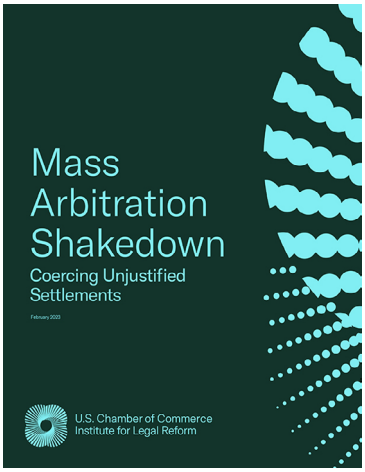
U.S. Chamber of Commerce
Institute for Legal Reform

Key Question in Ninth Circuit Appeal

Last November, the U.S. Chamber of Commerce Litigation Center partnered with attorneys from Mayer Brown (including several of the authors of this paper) to file an amicus brief urging the U.S. Court of Appeals for the Ninth Circuit to uphold bellwether arbitration provisions as a reasonable response to potential abuses in mass arbitrations.

The bellwether process, which involves arbitrating select batches of cases in a mass arbitration as a means of facilitating settlement, is an important tool that this research recommends for resolving large numbers of claims while preserving merits-based outcomes.

Mass Arbitration Shakedown: Coercing Unjustified Settlements



February 2023

Authors: Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett, and Carmen Longoria-Green, Mayer Brown LLP

Resolving disputes through arbitration, rather than litigation, benefits consumers, employees, and businesses—but not plaintiffs' lawyers. Now, the plaintiffs' bar is trying to undermine arbitration and repurpose their class action playbook through "mass arbitrations."

With this gambit, plaintiffs' firms trigger massive up-front fees for companies by filing hundreds or thousands of individual arbitrations against them. Plaintiffs' lawyers leverage those fees—or the threat of them—to extract settlements.

ILR's research documents this phenomenon, how courts and arbitration providers have (ineffectively) responded so far, and how arbitration providers, state bar associations, and companies can adapt to curb the abuses common to mass arbitrations.

Trading Legal Ethics for Finance Returns

In a late-January story describing the "Wild West" of legal advertising, litigation finance, and technology that has emerged to target the Camp Lejeune tainted water litigation, a Bloomberg Law analysis featured a discussion of Arizona's decision to weaken its version of ABA Rule 5.4. According to Bloomberg, the decision to allow marketing firms and litigation funders to share in actual verdicts or settlements from civil cases is generating significant interest in the state from those groups, who see the change as a chance to boost returns.

Selling Out: The Dangers of Allowing Nonattorney Investment in Law Firms

January 2023

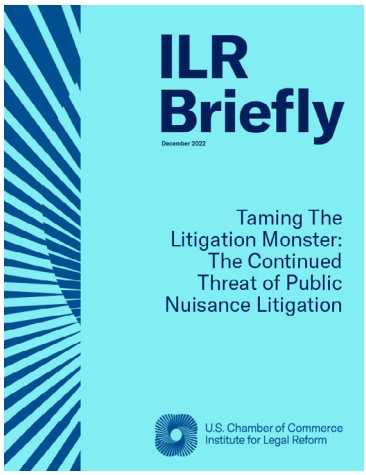
Author: William W. Large, President, Florida Justice Reform Institute

The ABA's Model Rules of Professional Conduct provide critical guidance for attorneys and protection for clients, the legal profession, and the public. Rule 5.4, which safeguards lawyer independence and protects clients by prohibiting nonlawyers from owning law firms or splitting fees with attorneys, is under attack.

With the vocal support of litigation funders—who see potential to increase their control of and profit from civil litigation—efforts have been undertaken in several states to erode or remove Rule 5.4 completely. ILR's paper describes the history of Rule 5.4 and explores the movement to weaken it, before concluding with a staunch defense of the rule and an explanation of the dangers posed by undermining the protections it provides.

ILR Briefly: Taming the Litigation Monster

The Continued Threat of Public Nuisance Litigation

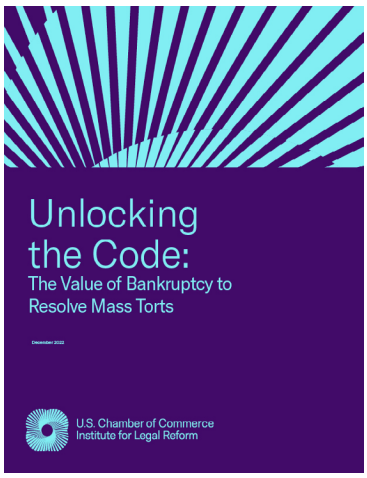


December 2022

Authors: Elbert Lin, Trevor S. Cox, Roger C. Gibboni, and J. Pierce Lamberson, Hunton Andrews Kurth LLP

The age-old law of public nuisance is being stretched far beyond its traditional boundaries, in an attempt to create "a monster that would devour in one gulp the entire law of tort." This paper picks up from ILR's 2019 research and documents how plaintiffs' lawyers are twisting this traditional cause of action into a potentially limitless tort. The paper outlines key aspects of state statutes defining public nuisance, documents how courts have responded to efforts to expand the cause of action, and offers solutions that policymakers can implement to restore its traditional boundaries.

Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts



December 2022

Author: C. Anne Malik, Orrick, Herrington & Sutcliffe LLP

As ILR's research shows, the bankruptcy system offers a more effective means of providing relief to current and future tort claimants than the mass tort litigation system. This paper begins with a discussion of the serious deficiencies in multidistrict litigations and class actions when it comes to aggregating assets and equitably distributing relief to current and future injured claimants. We then discuss bankruptcy's comparative strength in consolidating assets, using the experience of asbestos bankruptcy trusts as a proof point, and offer reforms to better the bankruptcy system's approach to claim evaluation and fund distribution.

The paper concludes that, while it can and should be improved, the bankruptcy system is an essential option for claimants and defendants when it comes to fairly and efficiently resolving mass tort claims.

Carmakers in the Crosshairs

At the time of this *Review*'s publication, a range of cities from Columbus, Ohio to Seattle, Washington have sued or signaled their intent to sue major auto manufacturers whose cars have been stolen in especially high numbers in a wave of auto thefts currently sweeping the nation. The lawsuits, which rely on a distorted interpretation of the public nuisance theory, essentially accuse the manufacturers of creating a public nuisance by making their cars too easy to steal.

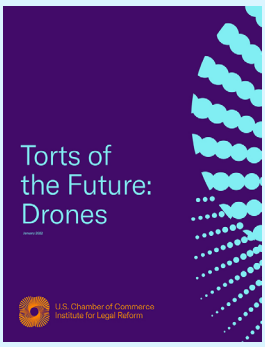
These lawsuits and others like them demonstrate how far politicians and plaintiffs' lawyers are willing to distort this cause of action in order to skirt the legislative process in pursuit of policy goals.

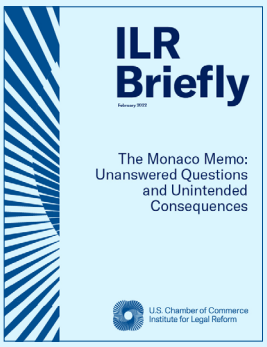
Bankruptcy on Defense

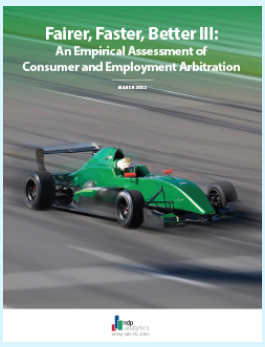
At the time of this *Review*'s publication, several high-profile bankruptcy cases are up in the air following a series of federal court rulings that cast doubt on the ability of companies to create specialized "liability unit" subsidiaries that then declare bankruptcy and meet obligations to claimants through funding from their parent companies. Depending on what happens in these cases, vast numbers of claims may be forced back into the litigation system, likely delaying and shrinking compensation for plaintiffs while ensuring that plaintiffs' lawyers get a substantial portion of any eventual awards or settlements.

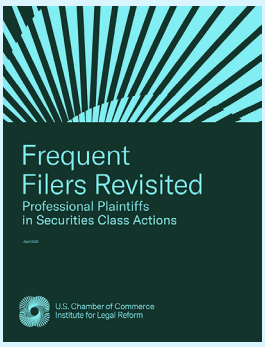
In Case You Missed It: ILR's 2022 Research Program

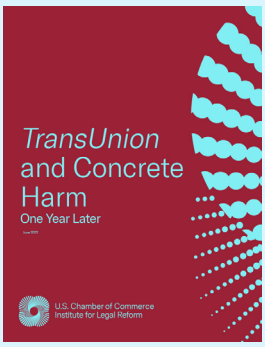
Access the full range of ILR research publications at instituteforlegalreform.com

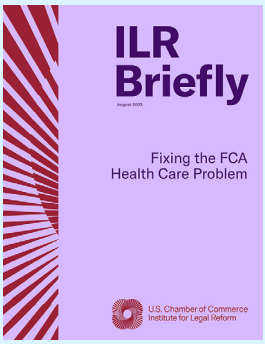


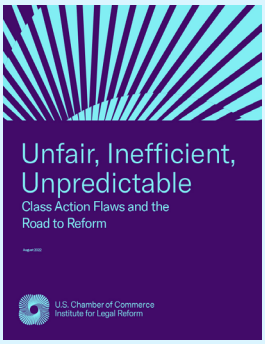


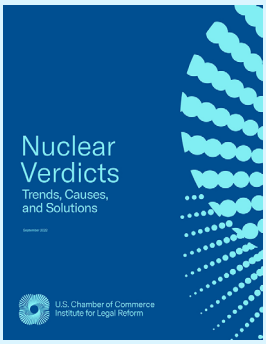


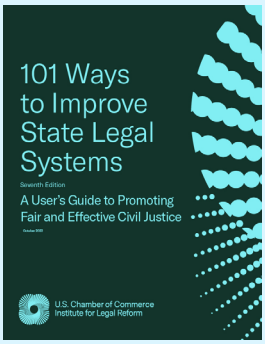


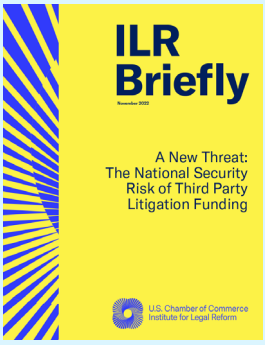


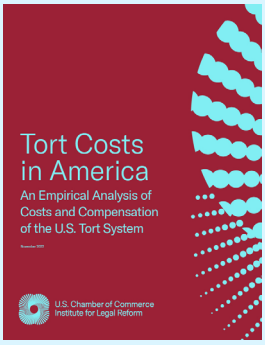


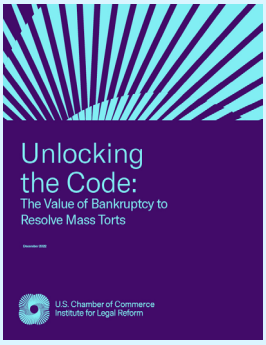


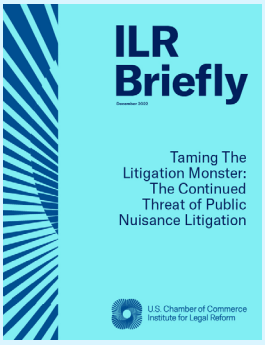












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