

# The ILR Research Review

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

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Issue

# 01

## From the Top: The President's Perspective

"Burdened by principle." It's a phrase I use from time to time to describe the Institute for Legal Reform and our work, because what we do is fundamentally about fairness, justice, and a level playing field—key ingredients for free enterprise and a healthy democracy. But holding to those principles isn't easy.

There is a real burden that comes from playing by the rules and working to improve a flawed system. Our opponents don't have to shoulder that weight. They move quickly and aggressively, because their first and last priority is extracting maximum returns from our litigation system. That ruthless flexibility makes them formidable—and it means we have to work twice as hard as they do and be twice as smart. Luckily, we have a team and a toolset that are up to the challenge.

The *ILR Research Review* encapsulates one of the most important tools we have: our ability to generate critical insights on how the plaintiffs' bar is exploiting the system, and how to stop them.

You'll find research on the evolution of Telephone Consumer Protection Act litigation following a landmark U.S. Supreme Court ruling; the growing trend of naming dozens of companies in asbestos lawsuits despite a lack of evidence tying them to the cases; the disproportionate tort burden borne by American small businesses; and a Supreme Court decision that may have huge implications for personal jurisdiction.

These are just a few of the challenges on our radar, and to say that the legal reform community has its hands full would be an understatement. But as U.S. Chamber President Suzanne Clark has been known to say, we don't just sit around and admire problems. We recognize them, then we go out and solve them. The research in this edition of the *Review* helps equip us to do just that.

Go, fight, win.

— Stephen Waguespack  
Acting President,  
U.S. Chamber of Commerce  
Institute for Legal Reform



U.S. Chamber of Commerce  
Institute for Legal Reform

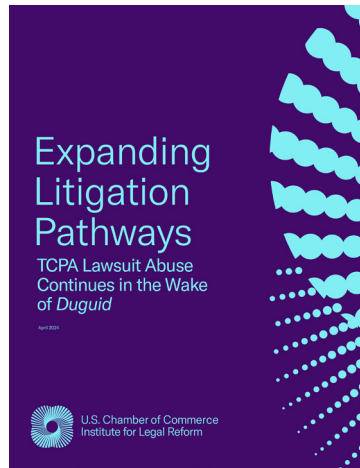
## ILR Opposes Expansion Attempt

Shortly before the release of *Expanding Litigation Pathways*, ILR submitted comments urging the Federal Communications Commission (FCC) to reject a petition that it declare the FCC's Caller ID Rule for telemarketers to be enforceable under the TCPA's private right of action. We argued that creating such a rule would exacerbate TCPA litigation abuse, that most courts have already found that the Caller ID Rule is not subject to private enforcement, and that Congress has not given the FCC the authority to make it so.

## Establishing Over-Naming Safeguards

Unfortunately, over-naming is not unique to Pennsylvania, and many states do not have safeguards against the practice. However, ILR has worked for years to support the passage of laws that create basic evidentiary requirements for asbestos lawsuit filings, making it much more difficult for plaintiffs' lawyers to name unrelated defendant companies to lawsuits. As of this writing, Alabama was poised to become the seventh state with an over-naming safeguard in place.

## Expanding Litigation Pathways: TCPA Lawsuit Abuse Continues in the Wake of *Duguid*



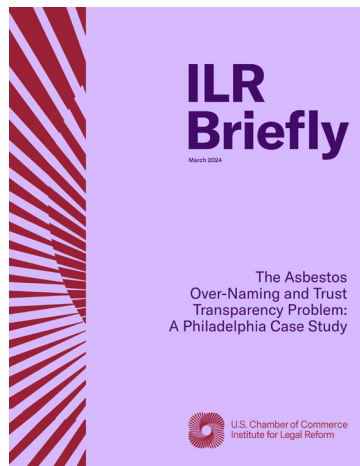
April 2024

Authors: Megan Brown, Kathleen Scott, Stephen Conley, and Lauren Lerman, Wiley Rein LLP

This paper examines the landscape of Telephone Consumer Protection Act (TCPA) litigation three years after the U.S. Supreme Court's *Facebook v. Duguid* decision. *Duguid* narrowed the path to the courthouse for a subset of abusive lawsuits under the TCPA, prompting the plaintiffs' bar to seek alternative ways to leverage the TCPA and to support passage of equivalent statutes in the states.

ILR's research documents trends in TCPA filings since *Duguid*, surveys the different ways the plaintiffs' bar has attempted to circumvent the Court's decision, and urges policymakers to avoid kneejerk expansions of liability when considering how to respond to constituent pressure over unwanted calls and texts.

## ILR Briefly: The Asbestos Over-Naming and Trust Transparency Problem A Philadelphia Case Study



March 2024

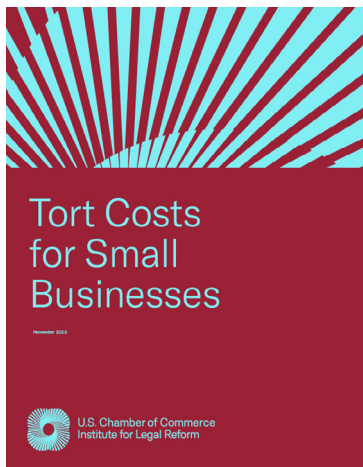
Authors: C. Anne Malik, Orrick Herrington & Sutcliff LLP; Peter Kelso and Marc Scarcella, Roux Associates Economic and Complex Analytics Practice

As traditional asbestos manufacturers have exited the tort system after bankruptcy, plaintiffs' lawyers have cast a wider net for companies to sue.

ILR's study zooms in on this trend in the Philadelphia Court of Common Pleas, examining a set of asbestos lawsuits filed between 2017-2021. The study finds that on average, only half of companies named in these cases are identified in discovery as sources of plaintiffs' alleged asbestos exposures. The rest are likely dismissed from the litigation—but only after shouldering the expense of responding to the complaint and participating in discovery.

The paper concludes that without legislative and/or judicial solutions, plaintiffs' lawyers will "perpetuate the cycle of asbestos bankruptcy filings as [they] continue the endless search for a solvent bystander to sue."

## Tort Costs for Small Businesses



December 2023

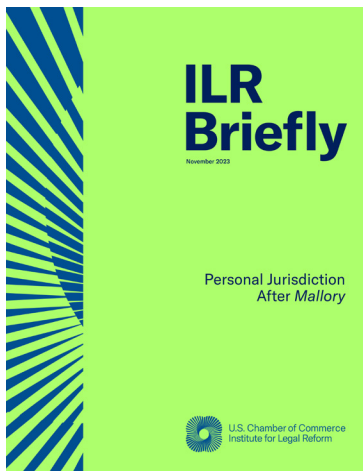
Authors: David McKnight and Paul Hinton, the Brattle Group

Small businesses are uniquely exposed to the costs of the litigation system. According to research commissioned by ILR, businesses making \$10 million or less annually account for just 20 percent of commercial revenues, but they bear 48 percent of commercial tort costs—an estimated \$160 billion in 2021.

That disparity is sharper when comparing the smallest and largest businesses. For every thousand dollars of revenue, businesses making \$1 million or less can expect about \$35 in tort costs. By contrast, businesses making \$50 million or more incur less than five dollars in tort costs for every thousand dollars earned.

Policymakers recognize the importance of empowering small businesses, and they have a stake in protecting them from excessive tort costs.

## ILR Briefly: Personal Jurisdiction After *Mallory*



November 2023

Authors: Andrew J. Pincus, Archis A. Parasharami, and Daniel E. Jones, Mayer Brown LLP

The U.S. Supreme Court's decision in *Mallory v. Norfolk Southern Railway Co.* created an opening for plaintiffs' lawyers to challenge the modern understanding of personal jurisdiction, undermining a fundamental aspect of American law.

The Court decided 5-4 to reject Norfolk Southern's argument that a unique Pennsylvania statute, which treats registration to do business by an out-of-state corporation as consent to general personal jurisdiction in the state's courts, violates the Due Process Clause. Plaintiffs' lawyers are seeking to expand "consent by registration" around the country.

ILR's research finds that consent-by-registration statutes like the one raised in *Mallory* are legally questionable and fundamentally bad policy, and urges policymakers to reject invitations by the plaintiffs' bar to expand *Mallory*.

## Smallest Businesses Pay Highest Cost

Earlier this year, the U.S. Chamber partnered with MetLife to release the Q1, 2024 edition of our Small Business Index survey, which highlights current sentiments and concerns of American small business owners. In the latest survey, over half of participants said that "the biggest challenge" facing them right now is inflation—an unpredictable multiplier of costs over which they have little control. Another multiplier is litigation risk, and as ILR's research shows, it is often the smallest businesses that bear the highest burden when that risk turns into reality.


## New York Rejects Pennsylvania Model

In December 2023, shortly after the release of our *Mallory Briefly*, Gov. Kathy Hochul vetoed a bill that would have created a Pennsylvania-like statute in New York. Aside from being a positive development for New York, Gov. Hochul's veto may have had a chilling effect on similar nascent efforts in other states. In the immediate aftermath of *Mallory*, many predicted that the plaintiffs' bar would move quickly to support consent-by-registration in 2024 legislative sessions—but as of this writing, no such legislation had made significant progress in any state since December.

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