



Sweeping Corporate Immunity for the Fuel Industry: The Next Front in the 'Corporate Accountability' Wars

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Executive Summary

For more than two centuries, the civil justice system has restrained the dangerous behavior of corporations by compensating the victims of their negligence. While the modern regulatory state, crafted by the legislative and executive branches over decades, plays a vital role in protecting individuals and our environment, Americans have a long tradition of seeking recourse in the courts to fill regulatory gaps by providing a general incentive to avoid corporate misbehavior. Despite this long tradition, the past thirty years have witnessed a concerted assault on the civil justice system by corporate America and its allies in the media and industry-sponsored think tanks.

The effort to close down or limit the civil justice system has proceeded in three waves. First, at the state level, there has been a concerted effort to obtain laws that have, among other things, capped damages for claims against health care providers, eliminated the ability of plaintiffs to hold multiple defendants jointly and severally liable for damages they have jointly caused, capped or eliminated punitive damages for especially egregious misbehavior, and reduced or eliminated claims for economic harm. Second, there has been an extensive effort to persuade the courts that state tort liability is preempted by federal legislation. Third, various industries have sought statutory exemptions from legal liability for past behavior, including oil and gas companies, vaccine and drug manufacturers, and HMOs and other healthcare providers.

Historically, Congress has granted liability immunity to particular industries only as part of a comprehensive federal program to provide remedial and protective mechanisms specific to a given hazard (which typically comes to light as a result of litigation). The National Vaccine Injury Compensation Program, established in 1986, is an example of when Congress established a substitute for state tort law. In 2005, however, Congress established immunity for the gun industry without offering any alternative method of compensation for the victims of tortious behavior by gun manufacturers and distributors.

Recently, additional industries have likewise sought to be completely immunized from liability for their tortious behavior. In 2012, for example, the “Domestic Fuels Act” (DFA) (companion bills in the House and Senate) sought to grant immunity to purveyors of ethanol and other fuel additives. Bills like the DFA are the next wave of the attack on corporate accountability. The massive MTBE litigation of the late 1990s and early 2000s and the efforts by the petroleum marketing industry to secure similar liability waiver legislation from Congress in 2005 was no doubt the impetus behind the current efforts by corn growers and the corn refining and petroleum marketing industries to persuade Congress to enact ethanol liability waiver legislation. This legislation grants absolute immunity from tort without corresponding federal recourse through administrative settlement schemes for those injured by corporate malfeasance. The DFA would dismiss, with prejudice, existing litigation related to fuel additives, including MTBE.

Sweeping immunity legislation, including overly broad grants of immunity for fuel and fuel additives in DFA-type legislation, is against the public interest for the following reasons:

- **Immunity Legislation Eliminates Corrective Justice:** Federal regulatory programs are designed to prevent injury, but they almost never include a mechanism to provide compensation to those who are injured when the preventative standards fail. The “corrective justice function” of tort law fills this gap, and has done so since the advent of English common law. When Congress passes immunity legislation, it eliminates this corrective justice function.
- **Immunity Legislation Reduces Economic Efficiency:** The civil justice system also establishes a more efficient market system. In an efficient market system, persons or entities that harm others are responsible for paying for the results of that harm. When Congress passes immunity legislation, it eliminates this economic improvement.
- **Immunity Legislation Eliminates the Deterrence of Harmful Behavior:** The civil justice system also functions to deter behavior that harms people and the environment. When Congress enacts immunity legislation, it eliminates this deterrence function.
- **Immunity Legislation Shifts Compensation to the Public:** Immunity legislation also shifts the burden of redressing injuries from the responsible party to the victims, to taxpayers, and to society as a whole.
- **Immunity Legislation Weakens Federal Regulation:** The civil justice system not only serves as a backstop for federal regulation, it supports federal regulation and makes it more effective. Immunity legislation eliminates the possibility that the civil justice system will make the regulatory system more effective.
- **Immunity Legislation Does Not Respect Federalism:** States have traditionally enjoyed primary authority to protect the health, safety, and welfare of their citizens. Immunity legislation abandons this fundamental principle of American government in a simplistic effort to relieve corporate defendants of liability for producing dangerous products and engaging in hazardous activities.

Congress should refuse to grant absolute immunity to any industry because of the damage it does to correct injustices and the capacity of government, state and federal, to protect the public and the environment. The important role that the civil justice system provides in providing corrective justice, establishing economic efficiency, and underpinning the regulatory system should not be abandoned in a simplistic effort to relieve corporate defendants of liability for producing dangerous products and engaging in hazardous activities.

Introduction

For centuries, the civil justice system has restrained the dangerous behavior of corporations by compensating the victims of their negligence. While the modern regulatory state, crafted by the legislative and executive branches over decades, plays a vital role in protecting individuals and our environment, Americans have a long tradition of seeking recourse in the courts to fill regulatory gaps by providing a general incentive to avoid corporate misbehavior.

In the last three decades, industry interests have sought to limit the role of the civil justice system in exposing their wrongdoing and in compensating those who were injured as a result. Claiming that the tort system has produced a medical malpractice crisis and encouraged frivolous lawsuits, business interests have advanced “tort reform” measures in Congress and state legislatures aimed at limiting access to the courthouse and capping how much victims can obtain in damages if they can successfully negotiate the barriers to litigation. Tort reform initiatives pretend to correct overzealousness in the judicial system, but they actually preserve corporate profits at the expense of citizens, consumers, and the least politically influential among us.

The latest battle in the corporate accountability wars is an effort to persuade Congress to grant blanket immunity to entire industries that might face litigation for defective products or corporate negligence that endangers human health, imperils the environment, and damages private property. The concept of sweeping corporate immunity from state tort law – a twisted cousin of federal preemption legislation that also dismisses the rights of victims of corporate negligence – was born in response to the hugely successful tobacco litigation of the 1980s and 1990s, and later attempts at comprehensive litigation against gun manufacturers and the fast food industry. President George W. Bush signed into law immunity for gun manufacturers, but an effort by the fast food industry to gain similar immunity has so far never been passed by the Senate.

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The Attacks on Corporate Accountability

Over the past three decades, perennial defendants in tort litigation, such as the tobacco and pharmaceutical industries, have joined with industry-sponsored conservative think tanks in attacking state common law protections at both the state and the federal level. These efforts to reduce industry liability for negligence have come on three fronts.

State Legislation

First, at the state level, there has been a concerted effort to obtain laws that have, among other things, capped damages for claims against health care providers, eliminated the ability of plaintiffs to hold multiple defendants jointly and severally liable for damages they have jointly caused, capped or eliminated punitive damages for especially egregious misbehavior, and reduced or eliminated claims for economic harm.¹ Previous reports in CPR's Truth About Torts series have shown how most of these assaults on the civil justice system have very little basis in fact or in sound public policy.²

Preemption

Second, there has been an extensive effort to persuade the courts that state tort liability is preempted by federal legislation.³ Under the Supremacy Clause of the Constitution, Congress may choose to preempt state law from operating, and where Congress's intent is not clear, it is up to the judiciary to determine if Congress intended preemption. In the George W. Bush administration, several federal agencies joined this preemption effort. The U.S. Food and Drug Administration (FDA) spearheaded these efforts, filing amicus briefs supporting industry-defendants' claims that federal drug-safety authority preempted state tort actions.⁴ More broadly, FDA inserted language in the preamble to a drug-labeling rule declaring that it preempts all state tort actions for inadequate warnings about the risks posed by a prescription drug. Similarly, the Consumer Product Safety Commission (CPSC),⁵ the Federal Railroad Administration,⁶ the Pipeline and Hazardous Materials Safety Administration, the Transportation Safety Administration, the Department of Homeland Security and, the National Highway Traffic Safety Administration (NHTSA) each made agency history by inserting tort-preemption language in rulemakings during the Bush administration.⁷

Although the courts rejected this argument in some regulatory contexts,⁸ they accepted it in other cases, leaving the plaintiffs with no remedy.⁹ When it is successful, the preemption attack on corporate accountability poses a significant threat to public health and safety by eliminating the incentives that state tort law gives manufacturers to keep up with advancements in safety technology, and it eliminates Americans' fundamental right to go to court to seek redress when harmed by the negligence of others.¹⁰ Adequate protection

of public health depends on the continued existence of state common law as a complement to federal regulation. Common law has a unique ability to provide corrective justice and is a useful way to fill regulatory gaps caused by outdated or imperfect regulation.¹¹

Shortly after his first inauguration, President Obama issued an executive order recognizing that the “Federal Government’s role in promoting the general welfare and guarding individual liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public.” The President noted that “[t]hroughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”¹² Accordingly, he established a general policy “that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”¹³

Immunity

Third, various industries in the past few years have sought statutory exemptions from legal liability for past behavior, including oil and gas companies, vaccine and drug manufacturers, and HMOs and other healthcare providers. When the trend began, it typically involved the creation of some other – and presumably more efficient – means of recompense for victims of industry bad behavior, as we discuss below.

In 2005, however, Congress passed and the President signed a bill granting immunity to the gun industry from certain lawsuits, even though no such lawsuits had ever resulted in jury or judge awards against the industry.¹⁴ Not surprisingly, that law was the result of intense lobbying by the gun industry and its champions.¹⁵ The food industry then went to Congress, arguing that it should be exempted from all lawsuits relating to health conditions associated with weight gain or obesity. Most recently, there is the effort to gain immunity for the use, development, and transportation of fuel additives described at the beginning of this White Paper. These most recent efforts, like gun industry immunity, provide no alternative method of compensation for tort victims.

Liability Immunity Legislation

Historically, Congress has granted liability immunity to particular industries only as part of a comprehensive federal program to provide remedial and protective mechanisms specific to a given hazard (which typically comes to light as a result of litigation). Congress has created a workers compensation program for railroad and harbor workers, and compensation programs for the victims of Black Lung disease, vaccine related illnesses, and the terrorist attacks of September 11, 2001. In all of this legislation, Congress has provided an alternative compensation system for its limitations on a plaintiff's right to sue.¹⁶ Unlike these efforts, the gun industry immunity and other similar efforts, such as broad fuel immunity initiatives, "take without giving back."¹⁷

Alternative Compensation Funds

The National Vaccine Injury Compensation Program (NVICP),¹⁸ established in 1986, is an example of how Congress has established a substitute for state tort law. The legislation provides a no-fault compensation regime for vaccine-related injuries and deaths. In so doing, the legislature removed claims for injuries caused by vaccinations from state courts and provided a special claim procedure using special masters and the United States Court of Federal Claims.

When Congress replaces the civil justice system with an administrative system, the system does not necessarily work in an efficient and fair manner. Analyses by the General Accountability Office (GAO),¹⁹ the Federal Judiciary Center,²⁰ a congressional committee²¹ and others²² have raised concerns about the NVICP concerning delays in resolving cases that stretched far beyond the statutory 240-day limit for resolving cases, an overly adversarial process in a program intended by Congress to be less adversarial, and that attorneys fees were too low, took too long to process, and were subject to unnecessarily adversarial review by Department of Justice (DOJ) attorneys. Recent developments seem to have exacerbated the problems. Virtually no cases filed under the NVICP are completed with the 240-day deadline established in the act, largely because of recent administrative and judicial interpretations that have created hurdles to proving causation.²³ Moreover, some types of plaintiffs have been both excluded from receiving compensation and from suing under state tort law.²⁴

Congress had a stronger justification for the creation of the Victims Compensation Fund (VCF), related to the terrorist attacks on September 11, 2001. If all of the victims had sued the airlines and related businesses, the available company assets and insurance indemnification would have been rapidly exhausted, and many plaintiffs would have been left with no financial compensation. Because all airplanes were grounded for two and half days, the industry lost approximately \$330 billion per day.²⁵ Combined with reduced demand for airplane travel after the attacks, the industry faced a huge economic hurdle, and

it lost approximately \$24 billion over the next year.²⁶ Thus, the federal government had an interest in both protecting a large and important domestic industry and providing relief for the many victims of the attacks.

The VCF statute created an administrative compensation system that gave plaintiffs a choice between suing airlines as part of a consolidated case in federal court, subject to the limits of the airlines insurance lines and waiving their right to sue in exchange for a no-fault, tax-free payment. Importantly, the legislation did not protect the airline industry at the expense of the victims of the attacks by eliminating their access to justice. Instead, Congress attempted to solve both problems by achieving a measure of solvency in the industry and providing significant financial help to the victims. It also established the government as a protector of its citizens, thereby neutralizing one of the primary goals of terrorism -- putting a wedge between citizens and their government.²⁷

The VCF is hardly a perfect substitute for the civil justice system. There appear to be problems concerning a lack of transparency, the arbitrariness of some of the fund administrator's compensation calculations, and the limitations on eligibility.²⁸ Nevertheless, Congress did not simply rescue an industry by ignoring the victims of the tragedy. Liability immunity statutes like the Firearms Liability Waiver and sweeping fuel immunity efforts neither establish administrative compensation programs nor give victims the option of going to court. They protect an industry by divesting victims of their right to a trial by jury.

The Firearms Liability Waiver Legislation

In the early 2000s, some private attorneys, who had assisted in the tobacco litigation, decided to bring similar class action lawsuits against the manufacturers of assault handguns for damages to individuals and several municipalities for damages caused by those guns when they wound up in the hands of criminals.²⁹ Statistics compiled by the federal Bureau of Alcohol, Tobacco and Firearms (ATF), the severely underfunded agency with responsibility for regulating interstate sales of weapons, revealed that guns were channeled to criminals through a very small number of "rogue" gun dealerships. Testimony in the litigation revealed that gun manufacturers could easily ascertain the identities of these dealerships. Only 1.2 percent of licensed retail gun dealers were responsible for the sale of more than 57 percent of the guns traced to crimes between 1996 and 1999.³⁰

The plaintiffs' attorneys had to prove that the manufacturer violated the relevant standard of care, that the violation caused the plaintiff's harm, and that the intervening act of dealers, previous owners, and the criminal were not "superseding intervening causes." Consequently, gun manufacturers were successful in almost every case. Nevertheless, the gun dealers, with the aid of the politically powerful National Rifle Association, persuaded Congress to enact the Protection of Lawful Commerce in Arms Act (PLCA Act) of 2005 into law.³¹ That

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statute retroactively banned most lawsuits brought by individual gun victims and all lawsuits brought by municipalities against gun manufacturers, importers, distributors, dealers and trade associations for marketing and distributing their products. It did not put into place any compensation regime for innocent victims, nor did it provide additional resources to the beleaguered ATF.

The country has paid, and continues to pay a high price for gun violence. After the massacre at the Sandy Hook elementary school, Congress is once again considering legislation imposing some restrictions on gun ownership. Responding to special interest pleading from the gun industry, Congress cut off what may have been a promising response to gun violence when it passed the firearms liability waiver.

Other Liability Waiver Legislation

Even before the previous, legislation, Congress passed the Volunteer Protection Act,³² which gives federal immunity to volunteers, but not non-profit organizations, such as the American Red Cross. As with the firearms legislation, Congress established no alternative compensation system to replace the civil justice system. In its wake, Congress has considered dozens of proposed bills to give similar immunity in other circumstances and supersede state laws, including the bills to protect volunteer pilots, the Volunteer Firefighter Assistance Act, the Nonprofit Athletic Organization Protection Act, and the Doctor Disaster Immunity to name a few. Congress continues to consider such legislation each session, but to date only the Cardiac Arrest Survival Act of 2000 has been passed.

MTBE: The Impetus Behind the Ethanol Bill

The massive MTBE litigation of the late 1990s and early 2000s and the efforts by the petroleum marketing industry to secure liability waiver legislation from Congress in 2005 was no doubt the impetus behind the current efforts by corn growers and the corn refining and petroleum marketing industries to persuade Congress to enact ethanol liability waiver legislation. MTBE was a fuel additive that petroleum refiners had been using to prevent engine knocking after EPA banned lead in gasoline in the late 1980s. Its popularity expanded as refiners used it as an oxygenate to meet the winter oxygenate requirements imposed by EPA to comply with the ambient air quality standard for carbon monoxide. The use of MTBE grew dramatically as EPA and the states mandated reformulated gasoline in urban areas that did not meet the ambient air quality standards for ozone.³³

Although MTBE is not especially toxic as compared to other components of gasoline, it smells and tastes so bad, even in the tiniest concentrations, that it can ruin drinking water supplies.³⁴ Another troubling characteristic is its ability to move very rapidly in groundwater from spills and leaking underground storage tanks (LUSTs) to aquifers that are often used by municipalities and individuals as a source of drinking water. EPA estimated in 1999 that there were 825,000 LUSTs nationwide, approximately 550,000 of which were located at retail gasoline stations. Although EPA had required all tanks to be upgraded by 1998, releases continued from some upgraded systems due to inadequate design, installation, maintenance, and/or operation.

By the end of the 1990s, lawsuits had been filed by dozens of individual plaintiffs and several municipalities against the petroleum refineries claiming that they knew full well that MTBE was malodorous, that it migrated more rapidly in groundwater than other constituents, and that hundreds of thousands of underground gasoline storage tanks were leaking MTBE into the surrounding groundwater. The lawsuits noted that refiners nevertheless continued to add MTBE to gasoline rather than using other oxygenates or refining it differently.

As it became clear that they were facing hundreds of millions of dollars in liability, the petroleum companies beat a path to Congress to demand legislation shielding them from liability for marketing a defective product. Their lobbyists persuaded supporters in the U.S. House of Representatives to attach the liability waiver to the lengthy energy legislation that Congress was considering in response to the recommendations of Vice President Dick Cheney's energy task force, but the provision was very unpopular among senators from states that had been adversely affected by MTBE in groundwater. Interestingly, the legislation also contained liability waivers for ethanol producers. Both provisions were debated in conference committee in two successive Congresses, but they were removed on both occasions.

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Although petroleum refiners soon removed MTBE from gasoline, most gasoline sold in the United States still contains substantial amounts of another additive: ethanol. There is little indication at the moment that ethanol is causing any health or environmental problems of such a magnitude that they could give rise to litigation. But the ethanol and fuel industries are still insisting on the same liability waiver.

The Domestic Fuels Act of 2012

In 2012, Senator John Hoeven (R-N.D.) and Representative John Shimkus (R-Ill.), two of the corn industry's biggest congressional supporters,³⁵ introduced "The Domestic Fuels Act of 2012"³⁶ and its companion "The Domestic Fuels Protection Act of 2012".³⁷

The legislation, which we will refer to as the DFA, supports an industry-led push for mandating that more ethanol be used in gasoline while "protecting" the fuel supply chain from the threat of litigation related to that mandate. The liability waiver, however, is not limited to the use of ethanol as a fuel additive. The bills prohibit citizens and states from suing anyone in the fuel chain, including oil and ethanol producers, for environmental harm, human health effects, or consumer product damage resulting from the use, development, or transportation of fuel additives, whether they are ethanol or some other additive.

The bill's supporters promoted it as a way to encourage the market to accept new fuel blends and protect small businesses that chose to supply them, but the legislation would protect the entire fuel supply chain – from the large oil and chemical companies that create fuel additives all the way to the corner filling station – from litigation over any fuel additive. Worse still, the bills would dismiss, with prejudice, existing litigation related to fuel additives, including MTBE.

The DFA owes its existence to relatively recent political interest in ethanol. In 2007, in response to growing pressure to increase renewable fuel production and reduce demand for foreign oil, Congress reauthorized the Renewable Fuel Standard (RFS).³⁸ The RFS requires the use of biofuels that reduce greenhouse gas emissions by at least 20 percent compared to ordinary gasoline by 2022. The RFS has stimulated the demand for ethanol, and in response fuel refiners and distributors and ethanol producers, have sought liability immunity.

The DFA provides that "[n]o person shall be liable under any Federal, State, or local law (including common law) because an underground storage tank, underground storage tank system, or associated dispensing equipment is not compatible with a fuel or fuel additive" as long as that "tank, system, or equipment has been determined to be compatible with the fuel or fuel additive" under guidelines to be developed by the EPA.³⁹ In addition, the bills prohibit litigation, and dismiss with prejudice any ongoing litigation, against "any entity engaged in the design, manufacture, sale, or distribution of any" fuel or fuel additives that are regulated under the Clean Air Act or part of a fuel mix regulated under the CAA.⁴⁰

The DFA is written to protect the entire fuel chain when owners of older cars or small boats "misfuel" – that is, put E15 (gasoline with 15 percent ethanol) in their gas tanks. Since ethanol can damage older and smaller engines, EPA has warned that E15 should not be used in cars older than the 2001 model year or in motorcycles, watercraft, off-road vehicles, or gasoline powered-equipment because it can damage engines and corrode tailpipes, leading to increases in toxic emissions. EPA labeling requirements for fuel pumps, however, do not

appear to be sufficient to prevent misfueling. The legislation overlooks this problem and shifts the costs of misfueling to the consumer. This is no trivial matter, given the millions of dollars worth of older motorcycles, watercraft, and off-road vehicles that are at risk.

Moreover, the legislation would prohibit future litigation, and dismiss with prejudice any ongoing litigation, against “any entity engaged in the design, manufacture, sale, or distribution of any” fuel or fuel additives that are regulated under the Clean Air Act (CAA) or part of a fuel mix regulated under the CAA.⁴¹ If this provision becomes law, no citizen, local, or state entity can sue the negligent party or parties if a new fuel additive has been released into drinking water supplies as long as the manufacturer of the additive complied with the notification provisions in the CAA. These provisions require the manufacturer to inform the EPA Administrator that it will introduce a new fuel additive that industry testing has shown to be safe. Since the legislation is retroactive, these immunity bills could result in the dismissal of ongoing litigation related to MTBE – a carcinogenic fuel additive that has been found in many drinking water supplies and has been the subject of several multimillion-dollar lawsuits by individuals and municipalities.

The DFA places all the liability and risk of fuel additives on the American consumer, leaving them with damaged engines, poisoned groundwater, worse tailpipe emissions, and no one to help. At a hearing before the Environment and Economy Subcommittee of the House Energy and Commerce Committee, Chairman John Shimkus (R-IL) suggested that he and other legislators did not intend for these bills to affect litigation beyond consumer product liability claims over approved fuel additives and blends.⁴² While the chairman may be right – that the DFA does not affect liability under the Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation, and Liability Act – the breadth of the bill suggests that oil companies could begin using any one of thousands of fuel additives, many of them toxic or carcinogenic, without any accountability in state or federal court.

The Consequences of Sweeping Corporate Immunity

Bills like the Domestic Fuels Act are the next wave of the attack on corporate accountability. Like preemption, this legislation grants absolute immunity from common law liability without corresponding federal recourse through administrative settlement schemes for those injured by corporate malfeasance. The legislation undermines the role of the civil justice system in providing corrective justice, addressing market flaws, deterring unreasonable behavior that injures people and the environment, and providing useful feedback to Congress and regulatory agencies. Such legislation is inconsistent with America's long tradition of avoiding federal interference with state civil justice systems.

Immunity Legislation Eliminates Corrective Justice

Federal regulatory programs are designed to prevent injury, but they almost never include a mechanism to provide compensation to those who are injured when the preventative standards fail. The "corrective justice function" of tort law fills this gap, and has done so since the advent of English common law. When Congress passes immunity legislation, such as overly broad fuel immunity legislation, it eliminates this corrective justice function.

Corrective justice incorporates the fundamental principle that individuals should be able to rely on the legal system to provide them with compensation when they are injured through the fault of others. When someone is injured despite a manufacturer's compliance with existing federal regulatory standards, the corrective justice function of state tort law recognizes that the manufacturer should still be liable for those injuries if it has not acted reasonably in light of existing information or available technologies not yet reflected in federal regulation. In this manner, the civil justice system ensures that those injured are properly compensated in light of the evolving state of technology and new information available to the defendant. The corrective justice function requires that a company should compensate those who are injured as a result of its failure to act responsibly, even if the company is not subject to fines or other sanctions for violating any particular regulatory requirement.

Congress at times has substituted an administrative compensation system for the civil justice system. While this decision presents both advantages and disadvantages, it does not eliminate the corrective justice function of the civil justice system because an alternative means of compensation is available. By comparison, immunity legislation wipes out the corrective justice function.

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The effort in legislation like the Domestic Fuels Act to retroactively ban tort litigation is especially offensive. It denies individuals, who were operating under the assumption that they were protected by the civil justice system, the opportunity to use that system to obtain corrective justice. Up to this point, Congress has almost always rejected immunity legislation. The Protection of Lawful Fire Arms Act is an unfortunate exception. The PLCAA prevents surviving families of mass shootings from bringing product liability actions against assault weapon manufacturers, despite the offensive marketing they often employ and known risks their products pose to innocent victims in our towns and cities. Likewise, the DFA would prevent innocent municipalities and homeowners from seeking compensation from the manufacturers of fuel additives like MTBE when their wells and groundwater foreseeably become contaminated with those additives as a result of leaking underground storage tanks and spills.

Immunity Legislation Reduces Economic Efficiency

The civil justice system also establishes a more efficient market system. When Congress passes immunity legislation, it eliminates this economic improvement.

Economics identifies two types of costs associated with the sale and use of a consumer product. “Internal” costs are costs paid for by the company responsible for the manufacture, distribution, or sale of the product.⁴³ A manufacturer, for example, will pay for the labor and raw materials that are necessary to make its product. These costs are “internal” to the transaction of making and selling the product because the seller must pay for these expenses in order to be in business. By comparison, “external” costs are costs associated with the making and use of a product that are paid for by persons other than those responsible for the making and selling of a product or service,⁴⁴ such as the medical expenses paid by a consumer as the result of an injury by a dangerous product. In an efficient market, the seller of a dangerous product would pay for the external costs resulting from the manufacturer, distribution, and use of the product, and include these expenses in the product price.⁴⁵ If the product is sold for a price less than its internal and external costs, there will be greater demand for the product than if it were sold at a higher price reflecting both of these costs, which is an economically inefficient outcome.⁴⁶ In addition, overproduction also reduces aggregate social wealth by creating costs that would not exist if the product were properly priced.⁴⁷

The tort system provides a valuable service for society when it causes the internalization of external costs. When, for example, Shapiro, Ruttenberg, and Leigh studied the cost of injuries and fatalities attributable to three dangerous products – Ford SUV’s with Firestone tires, the pharmaceutical drug Baycol, and All Terrain Vehicles (ATVs) with three wheels – they found that, according to a cost of injury estimate, the three products alone created nearly \$4.7 billion in external costs.⁴⁸ Their estimates did not include the cost of pain and suffering or other extended costs. The extended costs can be quite large.

In their study, the three authors found that external costs measured by a cost of injury method ranged from \$4,045 to \$1,697,279 per case, extended costs ranged from \$159,349 to \$2,554,783 per case.⁴⁹

Economics treats those who seek sweeping immunity legislation as “rent seekers.”⁵⁰ It is legislation that favors special interests and makes markets less efficient than they would be without the legislation. In rent seeking, special interests seek to use legislation to protect their own profitability, which is in their self-interest, but is not in the general public interest.

The PLCAA interferes with the efficient functioning of markets by preventing the civil justice system from forcing gun manufacturers to pay for harms that they have caused by their tortious behavior. The DFA would have the same impact concerning those in the chain of supply of fuel additives. In both cases, immunity legislation constitutes a rejection of capitalism and well functioning markets.

Moreover, in a well functioning market, consumers would have complete information about a product, including how dangerous it is to them or others. Manufacturers and sellers, however, have a strong incentive to keep from the public information in their possession about such risks and to attack as inaccurate public information about the risks.⁵¹ The civil justice system helps to shed light on information by disclosing information concerning the inferiority of products and services. Immunity inhibits access to this information and allows inferior products to stay on the market.

Immunity Legislation Eliminates the Deterrence of Harmful Behavior

The civil justice system also functions to deter irresponsible behavior that harms people and the environment. The knowledge that they may be forced to compensate the potential victims can deter companies from acting unreasonably in the first place. The deterrence function of the civil justice system exists both because of the potential that a company will have to pay compensation to persons that it has harmed and because of the negative publicity that can adversely impact the company’s standing with its customers, investors and the public at large. When Congress enacts immunity legislation, it eliminates this deterrence function.

Legislation that Congress has passed to regulate potential risks to people and the environment has the important advantage that it can prevent harms before they can occur. The civil justice system, by comparison, operates retroactively, after there are injuries or harm has been caused. But federal regulatory standards often do not adequately prevent the harms that they were supposed to prevent. There are a number of reasons for this result.

First, regulatory agencies are subject to being captured. “Agency capture” describes the many ways that powerful interest groups can wield undue influence over decision-makers who should be setting safety standards according to statutory mandates and a professional duty to protect consumers, rather than ideological preferences. This can occur when administrations appoint administrators who are opposed to their own agencies’ protective missions. Under the George W. Bush administration, for example, high-level agency decision-makers were often former (and future) business lobbyists, industry lawyers, and employees of trade associations.⁵²

The rulemaking process also generally favors regulated industry. Product manufacturers have better access to information about safety data and design and engineering capabilities than do consumer advocates or regulatory officials. Such information is the fundamental basis for regulatory standards, and its concentration in the hands of those who would be regulated creates an unequal balance of power in the formal procedures and informal negotiations that inform the rulemaking process. The tort system, on the other hand, is built on procedures that are designed to put all parties on equal footing, with equal access to relevant safety information. Moreover, the tort system involves harmed individuals and lawyers who can dig deeply into facts about a risk. Indeed, they often elicit information never known to regulatory officials.

Second, federal agencies have also been subject to budget cuts that have impacted their capacity to promulgate regulations and to enforce them. Additional budget cuts are likely as Congress struggles to reduce the federal deficit. When agencies lack money and staff, or when those resources are shifted to non-regulatory programs, the development of well-designed safety and environmental standards languishes, which can leave in place inadequate, older regulatory standards. And with inadequate resources, regulatory oversight and enforcement can also languish. If Congress eliminates state tort law, manufacturers operate without sufficient incentive to update their products in ways that reduce risks to consumers.

Third, even when agencies are able to regulate, the rulemaking process is notoriously slow. Studies indicate that the average time it takes to complete a rule after it is proposed is about 1.5 to 2 years, but no one thinks that any type of significant rule can be completed in such a short time frame. As Professor Richard Pierce has observed, “[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.”⁵³ The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.⁵⁴ A Congressional report found that it took the Federal Trade Commission (FTC) five years and three months to complete a rule using hybrid rulemaking.⁵⁵ These reports do not take into account additional analytical requirements that have been imposed since their publication date.

In Congressional testimony, Professor Shapiro explained why a realistic time schedule for complicated regulations was four to eight years.⁵⁶ Moreover, these estimates assume the comment period only takes three months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at the Office of Information and Regulatory Affairs (OIRA). Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities also have the potential to delay a rule by another 6-12 months.

Tort litigation provides an important mechanism for corporate accountability when there are regulatory gaps or the regulatory system operates too slowly. When that happens, the civil justice system serves as a complementary apparatus to ensure that ordinary citizens and consumers are protected. For example, in reaction to the Bush administration's weakening of Clean Air Act regulations, the North Carolina Attorney General sought "last resort" injunctive relief against power plants in neighboring states to force them to clean up their emissions.⁵⁷ Regulatory decisions can often be clouded by political influence in the executive branch.

Immunity legislation, such as the Domestic Fuels Act, eliminates this backstop feature of the civil justice system. The proposed legislation eliminates lawsuits related to leaking tanks, contaminated groundwater, or misfueling as long as a fuel additive or underground storage tank has met EPA's regulatory approval. It therefore assumes the EPA regulatory protections are sufficient to protect the public, but this might not be the case, as the MTBE situation teaches us. If EPA were to fail to do its job properly, due to lack of resources at the agency, executive branch interference, or simple misfortune, then victims of leaking underground storage tanks, for example, would have absolutely no recourse.

Immunity Legislation Shifts Compensation to the Public

Immunity legislation also shifts the burden of redressing injuries from the responsible party to the victims, to taxpayers, and to society as a whole. Consider a report, for example, issued by the National Conference of State Legislatures on a rule proposed by NHTSA, which would require that automobile manufacturers install roofs that are less likely to collapse if a car rolls over. The report estimated that the agency's asserted preemption of tort suits would cost the states \$60.2 million a year because some persons who would become disabled as a result of rollover accidents would be forced to resort to Medicaid (partially funded by states) because of the lack of tort compensation.⁵⁸

"Immunity legislation also shifts the burden of redressing injuries from the responsible party to the victims, to taxpayers, and to society as a whole."

The public can also end up absorbing millions of dollars in costs attributable to dangerous products and practices even when the tort system provides compensation. When Shapiro, Ruttenberg and Leigh studied the total costs associated with three dangerous products, they found that taxpayers might have been responsible for a significant percentage of costs not picked up by the tort system. Concerning all three products, they constructed likely scenarios that would result from three accidents. Based on this estimate, they found that the public sector could end up paying for a significant portion of costs that would not be included in tort compensation:

Product	Total Extended Costs Per Accident	Family Costs Per Accident	Public Costs Per Accident
Ford SUV ⁵⁹	\$740,000 - \$2,555,000	\$740,000-\$981,000	\$495,000 - \$2,555,000
Baycol ⁶⁰	\$159,000 - \$2,207,000	\$96,870 - \$2,207,000	\$62,479 - \$116,073
ATVs ⁶¹	\$289,000 - 2,366,000	\$289,000 - 1,437,000	\$32,000 - \$928,000

Table 1: Estimated Taxpayer Costs Associated With Three Dangerous Products

When the tort system deters behavior that creates accidents such as those studied, both individuals and the public are better off. The individual is spared the pain, suffering, economic loss and medical expenditures that usually accompany a preventable accident, and society avoids the Medicare, Medicaid and other public assistance expenditures that are usually incurred when the individual cannot afford necessary medical attention. Immunity legislation divests the civil justice system of this powerful deterrent effect. In the case of MTBE, for example, public utilities that provided safe drinking water to millions of people suffered hundreds of millions in economic losses when MTBE contaminated the aquifers from which they drew their water supplies. Had the petroleum companies that were responsible for the contamination been shielded by immunity legislation, municipal taxpayers and ratepayers would have been stuck with those significant losses.

Immunity Legislation Weakens Federal Regulation

The civil justice system not only serves as a backstop for federal regulation, it supports federal regulation and makes it more effective. Professor Thomas McGarity describes the informational interactions between regulatory agencies and the courts as “feedback loops ... in which each institution draws on information, experience and different incentives of the other.”⁶² Immunity legislation eliminates this possibility that the civil justice system will make the regulatory system more effective.

As a result of tort actions, Congress is informed of problems in the regulatory system. Consider, for example, how the civil justice system prompted legislation and regulation in response to the Ford Explorer/Firestone tire problem. In 2000, Congress passed the

Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, which required NHTSA to develop a new system for gathering and analyzing reports of tire, equipment, and motor vehicle defects.⁶³ Regulatory agencies obtain technical data, analyses of the state of the science from the relevant literature, and other information that can inform subsequent regulatory decisions. At the same time, the courts look to the agencies for analysis of the risks and benefits of regulated products, as well as regulatory standards that can factor into decisions about whether regulated parties have met their duty of care. Feedback loops “have unquestionably improved the quality of decision-making in both institutions.”⁶⁴

Immunity legislation destroys the feedback loop, unwisely limiting the useful information that is obtained from the tort system. Tort claims filed in state courts are a primary source of information for agencies about potential holes or gaps in the regulatory protection system. Simply by virtue of a claim having been filed, the tort system provides signals that defects may exist or existing safety standards may be inadequate. “The availability of damages in state tort lawsuits can give injured citizens the incentive to come forward and share potentially valuable information.”⁶⁵

At each successive step in the litigation process, tort suits provide additional opportunities for the development of information that could be useful to federal agencies.⁶⁶ Pre-trial discovery can turn up technical data about the risks posed by a product or practice. The discovery process can also uncover useful information about decisions made by manufacturers concerning safety and environmental decisions, thereby adding a level of public accountability. Regulatory agencies may also be informed by expert testimony given in discovery or at trial when the testimony is bolstered by the experts’ analysis of the state of the science. In addition, expert analysis of the specific facts that give rise to tort claims sheds light on how injuries actually occur in the real world.⁶⁷ Finally, jury decisions, whether in favor of injured plaintiffs or manufacturer defendants, provide insight about evolving social norms, information that can be useful to agencies when they analyze the potential impacts of proposed regulations.

Immunity legislation would destroy this vital source of information about corporate misconduct in areas subject to the immunity shield. Attorneys for the plaintiffs in the MTBE litigation, for example, uncovered dozens of “smoking gun” documents showing that the petroleum companies knew full well that MTBE was contaminating groundwater, that it caused that water to be unfit for drinking, and that they had not disclosed information to EPA. If Congress passes the DFA, there will be no civil justice actions to ferret out evidence of corporate misconduct relating to ethanol and future fuel additives.

“Tort claims filed in state courts are a primary source of information for agencies about potential holes or gaps in the regulatory protection system.”

Immunity Legislation Does Not Respect Federalism

Adequate protection of public health depends on the continued existence of state common law as a complement to federal regulation. Common law has a unique ability to provide corrective justice and is a useful way to fill regulatory gaps caused by outdated or imperfect regulation. States have traditionally enjoyed primary authority to protect the health, safety, and welfare of their citizens. Federal immunity legislation such as sweeping fuel immunity efforts weaken this fundamental principle of American government in a simplistic effort to relieve corporate defendants of liability for producing dangerous products.

As is widely recognized, federalism in the United States has strong advantages. As the American Enterprise Institute's Michael S. Greve notes, "Popular appeal aside, one can make a powerful theoretical case for the experimental, decentralized politics that the laboratory metaphor suggests. Political institutions should be capable of adapting to changing economic circumstances and social values. Much can be said for the piecemeal diffusion of new policies: when we do not know what we are doing, it is best not to do it everywhere, all at once."⁶⁸ Justice Brandeis' metaphor, "laboratories for experiment" captures this idea.⁶⁹ Under this concept, states can develop responses to emerging public problems, forming a system of laboratories in which the experience in each state informs the other states and the national government. Federalism therefore promotes gradualism, feedback and institutional learning. Moreover, federalism permits states to adapt to local needs, circumstances, and preferences.

The DFA would stop this experimentation and development in its tracks, while taking away from the states their ability to hold wrongdoers accountable, should they so choose. For example, many states have enacted regulatory programs regulating underground storage tanks that would be preempted by the DFA. It is not at all clear that the bill, if enacted, would not also limit the efforts by state attorneys general to pursue violators of these critical regulatory programs.⁷⁰

Conclusion

In recent years, the elected branches of our government have failed to address many real social problems for which solutions are desperately needed. Indeed, the fact that common law courts have been playing an increasing role in “determining the regulatory responsibilities of U.S. industry” is due to the fact that elected officials have been slow to address pressing problems. This is likely a consequence of the dependence of elected officials on campaign donations from regulated private sector entities.⁷¹ When Congress and regulatory agencies are slow to act, the civil justice system is present as an important backstop, a role that immunity legislation eliminates. Seeking special immunity from state tort law – the background set of principles that define the duty of corporations to avoid wrongful injury to others – is a relatively new phenomenon that merits close scrutiny in light of the virtues of a robust civil justice system.

With corporate immunity legislation, such as the DFA, Congress is not replacing a state tort claim with an improved or alternative federal compensation scheme or federal regulatory program; it is simply erasing that claim altogether. This move not only shields companies from legal responsibility for their defective products and negligent conduct, it also abandons the federalist view, long championed by conservatives, that state common law has an important role to play in our federal system of government. At the same time, it transfers costs from the person or entity that has harmed people to the victims and the taxpayers.

Legislation to grant sweeping fuel immunity, if enacted, will establish a perverse incentive for companies to bring unproven and under-studied fuel additives to market with little concern for their potential to damage automobile engines or contaminate groundwater. Worse, it will set the stage for additional corporate interests to seek industry-by-industry and product-by-product nullification of the common law of torts as applied to them and their products.

Fuel immunity legislation undercuts States’ authority to protect the health, safety, and welfare of their citizens and leaves harmed citizens with no recourse to justice. The common law and these fundamental principles of American government should not be abandoned in favor of relieving corporate defendants of liability for producing dangerous products.

Fuel immunity legislation undercuts States’ authority to protect the health, safety, and welfare of their citizens and leaves harmed citizens with no recourse to justice.

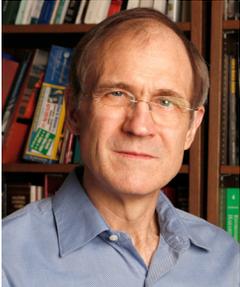
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