

Dear Speaker Pelosi, Leader McCarthy, Leader McConnell, and Leader Schumer:

We are 136 law professors from universities across the country. We call upon you to ensure that our courthouse doors remain open to all Americans for injuries they suffer from negligence during the COVID-19 pandemic.

Advocates of immunity talk about everything else except justice for victims. Enacting a liability shield violates the core principle, enshrined in many state constitutions, that every wrong must have a remedy. An immunity shield would leave workers, consumers, and their families with no remedy, while corporations will be free to cut corners on safety to bolster their bottom line.

A federal immunity shield would also invade the core of state responsibility. Tort law, like property law, has always been the domain of state law. State courts and legislatures set the rules for who can recover from automobile accidents, plane crashes, defective products, and medical malpractice. These rules already take into account the existence of emergencies and the need to balance safety with the cost of precautions. This system has served all Americans, while leaving every jurisdiction free to set rules governing disputes between its own citizens. There is no evidence — none whatsoever — that states are incapable of doing the same for disputes about harm from coronavirus.

The U.S. Chamber of Commerce and other “tort reform” interests argue that there will be a flood of bogus litigation that will impede reopening. In fact, it is risky behavior and the virus’s unrelenting spread that is impeding reopening. We are now many months into the pandemic. More than 140,000 Americans have died, and many more have become seriously ill. Where are the thousands of lawsuits that we’ve been warned of? The best available count from Hunton and Kurth lists more than 3,000 coronavirus-related cases, but a closer look reveals that only a tiny fraction involve damages for personal injury. Moreover, the graph shows no sign of acceleration. There simply is no “wave” of litigation.

It is nothing new for the U.S. Chamber of Commerce and its allies to cry wolf about an imaginary “flood of litigation.” Lobbyists intent on weakening our civil courts have been pedaling myths about such bogus claims for decades, long before the arrival of the COVID-19 pandemic. This effort is simply an attempt to exploit the current emergency to advance their broader campaign to deprive Americans of access to justice.

The outlines of the proposed liability shield are now becoming clear, and they draw from the familiar bag of tricks that the U.S. Chamber of Commerce has long pushed to block citizen access to the courts. The possible components are (1) a dramatic contraction of responsibility for harm, (2) extraordinary procedural barriers, and (3) an extended timeline. Specifically, defendants would be liable only if they failed to make reasonable efforts to follow applicable public-health guidelines and committed an act of gross negligence or intentional misconduct. Given the vagueness and gaps in many state guidelines, a “reasonable attempt” might not amount to much. Moreover, even a company that fails to make a reasonable attempt would apparently get a free pass as long as it was not intentionally trying to cause infection and was not “willful and wanton” in disregarding health precautions. So long as a defendant made even a token effort to protect employees and customers, a lawsuit would be difficult to win.

As high as this barrier to recovery is, it would be made all the more unsurpassable by procedural barriers. Lawsuits would be restricted to federal courts that already have crowded dockets. Plaintiffs would need detailed knowledge of the facts before they could even file a lawsuit. In addition, the bill would require clear and convincing evidence, which is only a step below requiring proof beyond a reasonable doubt. If Congress wishes to legislate on procedures in coronavirus cases, it would do better to eliminate artificial barriers to justice like mandatory arbitration clauses.

Even if a plaintiff could prove by clear and convincing evidence that the defendant willfully decided to skip essential health precautions, damages would be capped.

Finally, the proposal provides a five-year shield even if the coronavirus emergency ends sooner. This shows that the intent is not to protect businesses that reopen during an emergency, but simply to set a precedent for protecting bad actors from paying the consequences. This whole series of barriers to, and limitations on, recovery would be tremendous overkill even if there were a flood of unfounded litigation — which there isn't.

Given the combination of these barriers, it would be far more honest for the proposal to simply say that no coronavirus victim can ever receive full compensation, no matter what. This is not a “safe harbor” for conscientious businesses. Instead, it protects an entire ocean of corporate misconduct from liability.

This is actually the worst possible circumstance to limit liability for behavior that magnifies public health risks. Providing liability for wrongdoing is especially important right now, since other incentives to exercise due care seem to have broken down. For instance, a recent report from the Center for Progressive Reform, *Protecting Workers in a Pandemic: What the Federal Government Should Be Doing*, demonstrates that workplace safety agencies, from the federal Occupational Safety and Health Administration (OSHA) on down, have defaulted during the crisis. Because regulatory agencies are not policing safety measures effectively, the threat of litigation is especially important right now to provide a safety incentive.

To be blunt, the underlying premise of the proposal is simply that protecting the bottom line of businesses takes precedence over the rights of people who suffer or die when a business does not bother taking reasonable precautions. The message to businesses is that they need not take public health seriously. We feel confident that this callous disregard for public welfare is not shared by the American people.

As with all other kinds of injury, coronavirus victims are entitled to a forum to seek recovery against negligent wrongdoers. We urge you now to provide Americans with this assurance by defeating measures that will serve to limit meaningful access to civil courts.

We appreciate your attention to this request.

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