Lawsuits Needn't Block Recovery

Congress has the power to limit coronavirus liability while regulators develop rules to control contagion.

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Photo: Chad Crowe

As Congress considers another Covid-19 rescue bill, the usual partisan divide has opened over limiting pandemic-related tort liabilities. Republicans and business owners argue that litigation will hamstring recovery. Trial lawyers, unions and Democrats counter that liability limits would encourage businesses to endanger employees and consumers. The Senate Republican leadership proposes immunity for all businesses that comply with public-health guidelines except in cases of "gross negligence" and willful misconduct.

Republicans' approach is appealing in theory, but in practice it can't be implemented without detailed regulatory standards—which in the case of Covid-19 won't be written for some time. Rather than permanently change liability standards based on incomplete information about the virus, it would be wiser to enact an immediate but temporary immunity. That would permit the economy to begin reopening while allowing time for federal regulators to promulgate standards on which long-term immunity could be conditioned.

The existing tort liability system, which rests mostly on state statutory and common law, has few virtues and many flaws. It is inefficient and often arbitrarily imposes liability. Tort litigation, unlike regulatory standards and enforcement, is largely unconstrained by due process and other constitutional limits. The results can be crippling for small businesses, which can't afford protracted litigation, and even large companies have to settle meritless or frivolous lawsuits. The system is driven by jackpot-justice incentives.

This system is particularly ill-equipped for dealing with Covid-19, which affects the whole economy. Yet hundreds of lawsuits are already pending against universities, processing plants, manufacturing, mass-transportation companies and other businesses. Plaintiff lawyers are petitioning legislatures to rewrite or courts to reinterpret insurance policies, which specifically exclude pandemic-related liabilities, in an effort to obtain large recoveries. While such efforts are constitutionally suspect, these lawsuits won't die easily.

The notion that businesses will act recklessly if Congress affords liability relief ignores the good-faith compliance culture of American enterprises and the regulatory environment in which they operate. Businesses have strong incentives against even negligent behavior, which would cause bad publicity

and customer distrust. We've seen many announcements in recent weeks about what businesses are doing to keep customers and employees safe. Bad actors can and will be held to account by states and municipalities using police and regulatory powers to fine, close or even prosecute those that operate dangerously. An elaborate system of federal and state workmen's compensation provides additional protection.

Tort law is primarily a state matter, but it's well-established that Congress can intervene via its power to regulate interstate commerce. Federal law has provided tort liability protections to firearms makers and for nuclear power. Congress also enacted laws to limit liabilities arising out of Y2K—like Covid-19, a specific event that was thought to have potentially calamitous economic consequences.

The Supreme Court has sustained congressional authority to sweep aside state policies, statutes and procedures that impair interstate commerce, beginning with Gibbons v. Ogden (1824), which affirmed federal pre-eminence in regulating interstate navigation. In New York v. Beretta (2008), which upheld the limitations on liability for firearms makers, the Second U.S. Circuit Court of Appeals held that Congress's authority includes the power to ban state tort lawsuits that "are a direct threat" to specific industries.

While there are legitimate doubts—which we share—that the Commerce Clause's original meaning encompasses intrastate economic activities, the high court has embraced this view since 1942, when it held in Wickard v. Filburn that the federal government could ban growing wheat for personal consumption because it impaired a wheat-production scheme created by federal statute. The justices also asserted in Gonzales v. Raich (2005) that the Commerce Clause allows Congress to regulate intrastate activities that "substantially affect interstate commerce." Those precedents are enough to allow Congress to protect businesses with local footprints, such as beauty salons or restaurants, that buy products or supplies in interstate commerce.

Senate Republicans should also propose to make protection against tort liability a precondition for states and localities to receive nearly $1 trillion in the new Covid-19 rescue bill. In National Federation of Independent Business v. Sebelius (2012), the ObamaCare case, the Supreme Court limited Congress's ability to coerce states into adopting new policies by threatening to withdraw money for existing programs. Since this money is new, that won't pose an obstacle. Using its spending and Commerce Clause powers, Congress can promulgate a variety of regulatory schemes that would replace current federal and state statutory and common-law liabilities for Covid-19 and that would survive litigation challenges.

Making liability protection work will require regulation to evolve along with scientific understanding of Covid-19. Current federal, state and local guidelines, including those published by the Centers for Disease Control and Prevention, are informed exclusively by medical considerations and do not reflect traditional regulatory criteria such as cost and feasibility of implementation, and are too ambiguous and inconclusive to be a proper basis for imposing or limiting Covid-19-related liabilities. New, industry-specific guidelines will have to be developed by agencies such as the Occupational Safety and Health Administration.

OSHA and other federal agencies have the expertise to evaluate scientific, practical and cost-effective standards governing operations of a wide range of businesses. What they need is new statutory authority to issue safe-harbor guidelines for businesses that pre-empt tort liability under state law. Companies and trade associations would work with OSHA and propose industry- or business-specific guidelines to the agency, such as for meat packing plants or package sorting facilities. OSHA would promptly review each proposal, make necessary modifications, and then issue it as an immediately effective regulation with the legal force to override lawsuit liability. Businesses that comply with these regulations can rest assured that they've met their legal obligations.

Such considered Covid-19 liability reform—temporary immunity while businesses reopen, followed by promulgation of comprehensive federal regulatory guidelines—would be constitutional and consistent with federalist values. It would protect public health while enabling a prompt and full economic recovery.

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