Sen. Mitch McConnell is demanding that any future coronavirus relief law provide a litigation shield for businesses, and other conservative/business interests have made similar proposals.

So far, the supporters of these proposals have engaged in some dramatic handwaving but haven't begun to make a reasoned argument in support of a litigation shield.

In this post, I'm going to limit myself to negligence suits against businesses. Basically, these lawsuits claim the plaintiff got the virus due to the failure of a business to take reasonable safety precautions.

Even without a business shield, these are not going to be easy cases to win. Plaintiffs will have to show that they were exposed to the virus due to the defendant's business operation, that better precautions would have prevented the exposure, and that they weren't exposed elsewhere.

Tort lawyers may be reluctant to take on such claims except in the unusual cases where there was no other significant exposure to the virus. In addition, the plaintiff will have to show that the business failed to take reasonable precautions, which won't be easy in many cases. Even if they prove all that, the damage award will be lowered if the plaintiffs failed to take reasonable precautions to protect themselves. A lawsuit will have to jump all these hurdles. The question is whether businesses need additional protection beyond that already provided by the ordinary rules of negligence law.

Proposed Limits on Litigation

I've collected some of the specific proposals. They differ in details but there are some common threads.

Chamber of Commerce

The Chamber of Commerce is the #1 representative of business interests in Washington, D.C. Here's a description of the Chamber's views on April 13, 2020. They were calling for the following:

1. "[I]n the negligence space, providing a safe harbor for companies following CDC or state/local health department guidance could be helpful so long as the companies' actions do not amount to gross negligence, recklessness, or willful

misconduct."
2. "Procedural reforms such as channeling certain claims into federal court rather than allowing them to remain in various state courts could be helpful."

National Federal of Independent Businesses (NFIB)

NFIB's core proposal is that "Businesses should be protected from liability to customers and other third-parties unless those customers or parties prove the business knowingly failed to develop and implement a reasonable plan for reducing the risk of exposure to COVID-19 and that failure caused the injury." The paragraph setting forth this proposal makes it clear that this liability protection would apply even if a business was not fully in compliance with federal or state health rules. NFIB also proposes some subsidiary reforms:

1. Worker's compensation would be the exclusive remedy for employees (apparently regardless of whether they're injured by the employer or by third-parties.)
2. Liability would only cover people whose illnesses required hospitalizations.
3. Lawyers who bring frivolous actions should be liable for the attorneys' fees and other costs of the lawsuit to the business.

Heritage Foundation

The Heritage Foundation has a multi-part proposal:

1. [D]ismissal of claims based on negligent implementation of pandemic mitigation or response measures.
2. Businesses could obtain this protection in two ways: (a) by having their safety plans approved by a federal agency, or (b) by demonstrating to a judge as soon as they are sued that they are complying with "regulations, best practices, or guidance issued by federal or state health officials."
3. A plaintiff could overcome the shield by showing that the agency committed fraud in obtaining federal approval or willful misconduct in implementing its safety plan.
4. Lawsuits against businesses could only be brought in federal courts.

Evaluating the Proposals

Underlying assumptions

Before turning to the specifics of the proposals, I should note that there are two key

assumptions underlying them. None of the proposals attempts to defend those assumptions.

The first assumption is that frivolous tort claims are going to be a serious problem. I haven't seen any evidence to support this, either based on past experience or on lawsuits brought to date. Despite all the talk about unscrupulous plaintiffs' lawyers, we don't know how much of a problem they are.

The second assumption is that federal intervention is required. Tort law is a matter of state concern. If personal injury lawsuits are going to be an unfair burden on businesses and prevent the economy from reviving, why can't we trust state legislatures to respond? A related assumption seems to be that state courts can't be trusted to handle these cases. Again, there's no evidence to support this assumption. Whatever happened to states' rights?

Other gaps.

Beyond the failure to defend these assumptions, there are other serious gaps in the argument for these proposals:

Overlooked benefits of liability. The proposals conspicuously ignore any possible justifications for imposing liability. In general, negligence liability has two justifications. First, it provides an incentive to exercise reasonable care. It's not implausible to assume that businesses will be more likely to take reasonable care if they face the threat of liability for carelessness. Second, negligence liability is based on the moral sense that someone who is at fault should compensate the victims of their carelessness. The reform proposals would undermine both goals to the extent that they protect businesses that actually failed to exercise reasonable care.

Failure to consider alternatives. If in fact unfounded lawsuits are an undue burden on businesses, there are alternative solutions. One would be some kind of federal support for business liability insurance, such as a tax credit for liability premiums. Another alternative would be to cap damages. A different option would be to add special procedural requirements for these lawsuits in order to allow frivolous claims to be weeded out quickly and inexpensively.

Workability issues. Shunting these lawsuits to federal court seems unworkable, given the limited number of federal judges and their already overloaded dockets. The proposal to have the federal government certify safety plans assumes that federal agencies have spare resources to devote to this task. Moreover, because many federal and state safety requirements are vague, it may be difficult for businesses to establish that they were in compliance. (Moreover, at this writing, the White House seems unwilling to allow CDC to issue reopening guidelines.) The

requirement that plaintiffs show gross negligence may or may not be a deterrent to “unscrupulous trial lawyers.”

In short, at this point the supporters of these proposals have failed to show that negligence law is in need of a federal cure, that the cure will not be worse than the feared “epidemic” of unfounded litigation, or that the cure will work.