



Issue Brief

The U.S. Chamber of Congress: Lessons from *Chicken Little*

We are living in unprecedented times. A global pandemic has taken over our daily lives, forcing people to rethink how to move about safely. We are also witnessing the best of our society pull together to care for the sick and elderly, who are at greatest risk of contracting the coronavirus. As this unprecedented national emergency is playing out, the U.S. Chamber of Commerce has been quietly lobbying federal and state lawmakers to immunize businesses of all kinds from liability for harm they may cause through their own negligence.

If passed, the Chamber's immunity proposal would exempt businesses from laws in all 50 states that provide people an avenue for seeking compensation for harm caused by another's failure to take reasonable care. This sweeping proposal would lead to more illnesses for workers and consumers and more preventable deaths, while slowing our economic recovery.

Congress and the U.S. Supreme Court have in the past noted that state-law claims are an important tool for encouraging people to act reasonably and are often the sole means of holding companies accountable when they fail to do so. The Chamber, though, sees litigation brought by injured individuals only as a nuisance that cuts into corporate profits. (To be clear, however, the Chamber generally has no issue with company-to-company litigation.)

"As America reopens, prepare for a flood of coronavirus workplace lawsuits," proclaims the Chamber.¹ But the Chamber is merely recycling a well-worn playbook of hyperbole.

Like *Chicken Little* crying "the sky is falling," the Chamber over the years has repeatedly attempted to scare lawmakers, media, and the public with a false claim of impending doom. To support its anti-litigation rhetoric, the Chamber's "flood" of litigation metaphor has become something of a parody.

¹ *As America Reopens, Prepare For A Flood Of Coronavirus Workplace Lawsuits*, U.S. Chamber Institute for Legal Reform (May 20, 2020), <https://www.instituteforlegalreform.com/resource/as-america-reopens-prepare-for-a-flood-of-coronavirus-workplace-lawsuits>.

Now, yet again, the Chamber is warning of a new flood, as it tries to take advantage of the coronavirus pandemic to undermine state-law protections that provide accountability and potential compensation to people injured by others' negligence.

The Chamber's anti-litigation rhetoric is a tool in its broader effort to lobby for reductions in corporate accountability—through advocacy for weaker regulation, lighter penalties, and diminished court access to resolve individuals' claims. This issue brief provides an overview of some of the ways the Chamber, over a 30-year period, has fomented unjustified fear of litigation that seeks to hold companies accountable to workers and consumers. It also shows how in each of those situations, the Chamber's cry that "the sky is falling" never came to pass.

The Chamber of Commerce

The U.S. Chamber of Commerce is one of the country's most powerful lobbying groups. Its members include a wide range of businesses, on whose behalf it seeks to reduce government oversight and limit corporate accountability.

In 1998, the Chamber established the Institute for Legal Reform, or ILR, to push specifically for pro-business changes to the civil justice system. Since then, the "Institute" has focused on advocating before Congress, state legislatures, and the courts to add barriers to the system that make it harder for consumers and workers to access the courts.

A Y2K litigation flood ... that never happened

In 1999, many people were concerned that computers were not programmed properly to move from 1999 to 2000 and would crash across the globe as the clock struck midnight on January 1, 2000. The Chamber's response to the so-called Y2K-bug provides a good example of the Chamber's playbook: using fear of the economic consequences of a widely felt problem (now, COVID-19; then, the Y2K bug) to seek immunity for businesses from accountability. In fact, Congress's Y2K law has been mentioned as precedent for granting immunity to business for harms related to the coronavirus.² The facts about Y2K, however, make the opposite point: The Y2K Act turned out to be unnecessary and, although it put in place some limitations on liability, it did *not* confer immunity.

As the world prepared for the turn of the 21st century, the Chamber was busy provoking anxiety that the so-called Y2K bug would lead to a flood of litigation against businesses. The Chamber argued that, without legislation to curb litigation against companies related to potential harm

² David Morgan, *Corporate America Seeks Legal Protection for When Coronavirus Lockdowns Lift*, REUTERS (Apr. 21, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-liability/corporate-america-seeks-legal-protection-for-when-coronavirus-lockdowns-lift-idUSKCN223179>.

caused by the Y2K glitch, “[t]he Y2K bug will ... [u]sher in an era of unbridled litigation, as individuals, small business entrepreneurs, and even the largest corporations in the world will spend years in court suing each other in an aimless effort to find blame for the Y2K computer glitch.” It ominously warned of a “potential explosion in litigation that would discourage Y2K compliance efforts, hurt American consumers and weaken our economic growth.”³

Nonetheless, it was clear even then that “The [Chamber] ha[d] always wanted to legally limit the amount plaintiffs can be awarded, and it saw Y2K litigation reform as a first step.”⁴ And as 2000 neared, the premise for the Chamber’s anti-litigation rhetoric—the impending flood—did not exist:

A trickle of new lawsuits in recent months is expanding the legal landscape of the Year 2000 computer problem. But so far, the cases offer little support for the dire predictions that courts will be choked by litigation over Y2K, as the problem is known.⁵

The Chamber’s fearmongering, however, helped to consume a great deal of lawmakers’ time, wholly unnecessarily. “In fact, while Congress and many state legislatures [were] suddenly awash in proposed laws meant to prevent such a tidal wave, many lawyers actively involved with Year 2000 issues [began to] question just how big the litigation threat really [was].”⁶

In the end, the Chamber convinced Congress to pass a bill limiting—but not blocking—claims related to Y2K. The Y2K Act established procedures for cases arising out of Y2K failures, such as a requirement of pre-litigation notice to give the defendant-business a chance to address the problem without litigation. It also imposed limits on class actions and punitive damages. Notably, the Act excluded personal injury and wrongful death actions, as well as most claims arising under the federal securities laws.

Experts predicted that a tidal wave of lawsuits would *not* materialize; they were right. But the Chamber’s path was set: Loudly exclaim fear of a litigation flood that will harm the economy as a way to push legislation to cut off the right of individuals to hold businesses accountable for harm.

³ Archive of the Tampa Bay Times, *Congress Passes Bill Limiting Y2K Litigation*, TAMPA BAY TIMES (Sept. 29, 1999), <https://www.tampabay.com/archive/1999/07/02/congress-passes-bill-limiting-y2k-litigation/>.

⁴ Dylan Mulvin, *Distributing Liability: The Legal and Political Battles of Y2K*, IEEE Annals of the History of Computing 1, 10 (2020), London School of Economics and Political Science, http://eprints.lse.ac.uk/103330/1/Annals_Final_Mulvin.pdf.

⁵ Barnaby J. Feder, *A Trickle of Year 2000 Lawsuits*, NEW YORK TIMES (Apr. 12, 1999), <https://www.nytimes.com/1999/04/12/business/technology-a-trickle-of-year-2000-lawsuits.html>.

⁶ *Id.*

Other floods ... that never happened

The Chamber asks Congress to address an imaginary flood whenever it sees potential for businesses to escape liability.

In 2013, the Chamber focused on lawsuits seeking medical monitoring for people exposed by a defendant to a hazardous substance.⁷ Seeking to stoke fear, the Chamber argued that medical monitoring remedies should not be permitted, claiming that, “if allowed, [they] will undoubtedly **flood courts** with speculative, frivolous, and fraudulent claims.”⁸ Although several states allow claims seeking medical monitoring, no flood has materialized.⁹

Also, in 2013, the Chamber warned a New York court about allowing punitive damages in asbestos cases. Disingenuously purporting to express concern for future plaintiffs, the Chamber wrote, “With a finite pool of resources available for plaintiffs, **opening the floodgates** of punitive damages would exhaust funds that are needed to provide future asbestos plaintiffs with compensation.”¹⁰ The courts disagreed;¹¹ the floodgates did not open.

In an amicus brief filed in 2015, the Chamber urged Maryland’s highest court to hold that a company did not have a duty to warn about the hazards of asbestos in products it sold. The Chamber argued that “acceptance of plaintiffs’ theory of liability would further exacerbate the decades-long asbestos litigation and invite a **flood of new cases.**”¹² The court disagreed; no flood materialized.

In 2019, the Chamber’s anti-litigation focus spurred it to argue in favor of robocalls. Decrying a “**deluge of suits**”¹³ brought under the Telephone Consumer Protection Act about unwanted robocalls, the Chamber argued that if a single provision about calls on behalf of government debt collectors were held invalid, the Supreme Court should invalidate the entire prohibition against

⁷ Victor E. Schwartz et al., *The New LawsUIT Ecosystem: Trends, Targets and Players*, U.S. Chamber Institute for Legal Reform (Oct. 23, 2013), https://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-LawsUIT-Ecosystem-Report-Oct2013_2.pdf.

⁸ *Id.* at 5.

⁹ *See, e.g.*, *Petito v. A.H. Robins Co., Inc.*, 750 So.2d 103 (Fla. Dist. Ct. App. 1999) (recognizing a cause of action for medical monitoring), *In re West Virginia Rezulin Litigation*, 214 W.Va. 52 (2003) (allowing the recovery of medical monitoring costs), and *Sadler v. PacifiCare of Nev.*, 130 Nev. 990 (2014) (allowing a cause of action for negligence with medical monitoring as a remedy).

¹⁰ Brief for U.S. Chamber et al. as Amicus Curiae, *In re: New York City Asbestos Litigation* (N.Y. Sup. Ct. Oct. 31, 2013).

¹¹ *See In re NYC Asbestos Litigation*, 2014 N.Y. Slip Op. 33525 (N.Y. Sup. Ct. 2014); *see also Matter of New York City Asbestos Litig.*, 74 N.Y.S.3d 180 (N.Y. App. Div. 2018).

¹² Brief for U.S. Chamber et al. as Amicus Curiae at 3-4, *May v. Air & Liquid Systems, Inc.*, 446 Md. 1, 129, (No. 544).

¹³ Brief for U.S. Chamber as Amicus Curiae at 7, *Barr v. American Association of Political Consultants, Inc.*, (No. 19-631), https://www.supremecourt.gov/DocketPDF/19/19-631/139639/20200401143229159_19-631%20bsac%20Chamber%20of%20Commerce.pdf.

robocalling: “[T]hat is a course of action that will bring an end to the meritless TCPA litigation **swamping the federal courts.**”¹⁴ The Supreme Court, fortunately, disagreed, preserving the Act’s prohibition against robocalls.

Also, in 2019, in response to a bill aimed at eliminating contracts that require consumers to arbitrate claims against businesses (while allowing consumers and businesses to arbitrate if they choose to do so), the Chamber wrote: “Corporations and their general counsel can brace for a **flood of class action lawsuits** if Congress passes legislation introduced Thursday aimed at eliminating forced arbitration.”¹⁵ This statement, more candidly than most, reveals that the Chamber’s support for arbitration is not because the process is efficient, as it claims, but because it allows corporations to avoid class actions.

And in 2020, the Chamber recycled its rhetoric, describing a case against Amazon as part of “a nationwide **wave of litigation** attempting to extend strict products liability beyond its currently defined scope.”¹⁶

The sky is not falling

As we grapple with the biggest public health crisis of our lifetimes, the Chamber is opportunistically using the pandemic as an excuse to advance a long-time goal: a federal law that exempts businesses from liability for a wide range of potential claims. Even as the Chamber sends out daily flood warnings, data illustrate that its rhetoric is bunk.

According to a “COVID-19 Complaint Tracker,” consumers have filed few cases, and those that have been filed hardly support granting immunity. The majority of lawsuits brought by consumers seek refunds related to cancellations or postponements; despite the huge number of cancelled events over the past several months, the Tracker shows only 109 cases in this category, as of July 15. Other consumer cases arise from price gouging (20 cases), recurring membership fees (28 cases), or deceptive advertising (6 cases). Only 11 cases involve claims of personal injury, and only 35 involve claims of wrongful death. Only 6 are medical malpractice claims.¹⁷ These data show one thing clearly: There is no flood; there is a trickle.

Notably, about 25 percent of the cases filed to date pertain to insurance coverage issues (819 nationwide) and are almost certainly business-to-business lawsuits. The Chamber does not

¹⁴ *Id.* at 19.

¹⁵ Sue Reisinger, *US Chamber Legal Leader Warns of Flood of Lawsuits if Congress Ends Forced Arbitration*, LAW.COM (Feb. 28, 2019), <https://www.law.com/corpocounsel/2019/02/28/us-chamber-legal-leader-warns-of-flood-of-lawsuits-if-congress-ends-forced-arbitration/>.

¹⁶ Brief for U.S. Chamber as Amicus Curiae at 17, *McMillan v. Amazon.com, Inc.*, (No. 20-20108), <https://www.chamberlitigation.com/sites/default/files/cases/files/20202020/U.S.%20Chamber%20Amicus%20Brief%20--%20McMillan%20v.%20Amazon.com%2C%20Inc.%20%28Fifth%20Circuit%29%200.pdf>.

¹⁷ COVID-19 Complaint Tracker, Hunton Andrews Kurth, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited July 15, 2020).

complain about those.¹⁸ The next largest buckets of cases allege civil rights violations, and many of those cases seek no money damages, only injunctive relief.

Importantly, the public does not support immunizing businesses from accountability. Sixty-four percent of voters oppose letting corporations off the hook by giving them immunity from liability if it is proved that a company “engaged in unsafe practices.”¹⁹ That includes 72% of Democrats, 64% of Independents, and 56% of Republicans.²⁰

Organizations representing millions of people also oppose immunizing businesses,²¹ including organizations representing:

- Small businesses,²²
- Seniors,²³
- Residents of long-term care facilities²⁴
- Consumers,²⁵
- Labor²⁶
- Students²⁷
- Members of the academic community²⁸

¹⁸ *Id.*

¹⁹ Geoff Garin and Guy Molyneux, *Survey Finds Bipartisan Opposition to Guaranteeing Businesses Immunity from COVID Lawsuits*, HART RESEARCH ASSOCIATES (May 6, 2020), <https://www.justice.org/sites/default/files/Hart%20Research%20Poll%20on%20Business%20Liability%20Immunity.pdf>.

²⁰ *Id.*

²¹ See Coalition Letter to Senate Judiciary, Re: Committee on the Judiciary Hearing on "Examining Liability During the COVID-19 Pandemic" (May 12, 2020), https://www.citizen.org/wp-content/uploads/Covid-Coalition-Letter-to-Senate-Judiciary_final-5-12-2020.pdf.

²² Main Street Alliance, Letter to congressional leadership on corporate immunity (May 15, 2020), https://d3n8a8pro7vhm.cloudfront.net/mainstreetalliance/pages/990/attachments/original/1589917974/MSA_Letter_on_Corporate_Immunity_05.15.20.pdf?1589917974.

²³ AARP, Senate Judiciary Committee COVID Immunity Hearing Letter (May 11, 2020), <https://www.aarp.org/content/dam/aarp/politics/advocacy/2020/05/aarp-senate-judiciary-committee-covid-immunity-hearing-letter-ga.pdf>.

²⁴ Coalition Letter to Ways and Means Committee, theconsumervoice.org (June 24, 2020), https://theconsumervoice.org/uploads/files/issues/Ways_and_Means_Letter.pdf.

²⁵ Public Citizen, Letter to Congress Opposing Business Immunity from COVID-19 Liability (May 6, 2020), <https://www.citizen.org/article/letter-to-congress-opposing-business-immunity/>.

²⁶ SEIU, Letter to House Leadership re: Corporate Accountability (May 11, 2020), <https://drive.google.com/file/d/1ITp7N4kyeIxz2IFaRIANqQTgQ3Wqu1h/view>.

²⁷ People's Parity Project, Letter to Senate HELP Committee (June 3, 2020), https://www.peoplesparity.org/wp-content/uploads/2020/06/LOCKED_-_Letter-to-Senate-HELP-Committee-1.pdf; see also Americans for Financial Reform & Student Borrower Protection Center, Letter to Committee on Health, Education, Labor, and Pensions (June 3, 2020), <https://protectborrowers.org/wp-content/uploads/2020/06/AFR-SBPC-Letter-to-HELP-on-Higher-Education-Immunity.pdf>.

²⁸ Center for Progressive Reform, Re: Preserving Access to Courts for Victims of COVID-19 Pandemic (May 11, 2020), <https://cpr-assets.s3.amazonaws.com/documents/CPR-Letter-COVID19-Liability-Waiver-051120.pdf>.

- Civil rights issues²⁹

The Chamber should be working with its members to ensure that workplaces are safe for workers, consumers, and patients. Immunity from liability will not restore our country from this time of hardship.

Public health, not corporate profit, should be everyone's priority.

²⁹ The Leadership Conference on Civil & Human Rights, RE: Oppose Business Immunity for Coronavirus-Related Claims (June 30, 2020), <https://civilrights.org/resource/oppose-business-immunity-for-coronavirus-related-claims/>.