Public Citizen Says Oil Companies Aren’t Federal Officers

As the public has learned more about the causes and effects of global warming, it has become clear that major oil companies have long known that the greenhouse-gas emissions produced when their products are used cause potentially catastrophic damage to our planet’s climate. Nonetheless, those companies chose to conceal their knowledge for many years while feeding our fossil-fuel addiction. When the companies’ knowledge came to light, lawsuits followed.

Public Citizen has now entered the battle to prevent those cases from being derailed by a procedural maneuver: the oil companies’ effort to move the cases from state to federal court. This is both a delaying tactic and an effort to pick a forum they think, based on case law, may be more sympathetic than state courts to the companies’ arguments that the suits should be dismissed.

Beginning in 2017, at least 10 state and local governments sued major oil companies in state courts claiming that their activities have created a “public nuisance.” The lawsuits seek damages and compensation for the costs governments face in trying to protect their residents from the consequences of climate change. So far, suits have been brought by, among others, seven cities and counties in California; the city of Baltimore, Md.; the state of Rhode Island; and Boulder County, Colo.

In each case, the oil companies’ first move was to try to remove the case to federal court, where they hope their defenses will get a more friendly reception. The oil companies invoked the federal statute that allows removal when a federal officer or agency, or someone acting under the direction of a federal officer is sued in a state court for some official action. The removal statute dates back to the early 1800s, when federal customs

Justice and the Coronavirus

The coronavirus is sweeping across the country as we go to press and has become a genuine national public health emergency.

The pandemic is laying bare profound flaws in our health care system, underinvestment in our public health infrastructure and huge gaps in worker protections. It is likely to wreak severe economic havoc, with the worst pain felt by the most vulnerable among us, and it threatens to interfere with our ability to conduct the 2020 elections.

We can’t know how the coronavirus epidemic is going to evolve, but we can exert some significant effect on the damage it does. Public Citizen is advocating furiously to prompt government action to reduce the toll it takes.

Free testing, treatment, and vaccines: We are pushing hard
Public Citizen Sues Amtrak Over Forced Arbitration

In 2019, Amtrak added to all its tickets a provision requiring anyone who purchases a ticket or rides on Amtrak to “agree” to binding private arbitration of any disputes they might have at any time with Amtrak. The arbitration provision is far-reaching. It states that it is “intended to be as broad as legally possible” and specifies a litany of claims subject to arbitration: negligence, gross negligence, disfigurement, wrongful death, claims for medical and hospital expenses, discrimination, and failure to accommodate an actual or perceived disability. It also bars individuals from litigating against Amtrak in a class action.

In a lawsuit filed on Jan. 7 in the U.S. District Court for the District of Columbia, Public Citizen challenged Amtrak’s forced arbitration clause. The lawsuit was filed on behalf of Public Citizen President Robert Weissman and attorney Patrick Llewellyn, both of whom plan to use Amtrak for travel, but want to buy tickets that are not subject to an arbitration clause.

Amtrak is a governmental corporation, created by statute. The lawsuit alleges that Amtrak’s forced arbitration clause exceeds Amtrak’s statutory authority and violates the U.S. Constitution in three ways.

First, as a component of the federal government, Amtrak may not, consistent with the Constitution, condition its service on passengers’ consent to a waiver of their First Amendment right to petition the government for redress of grievances.

Second, because Amtrak is a governmental entity, it cannot constitutionally require passengers, as a condition for providing passenger rail services, to waive their rights to have legal disputes adjudicated by a federal judge entitled to the salary and tenure protections of Article III.

Third, Amtrak’s mandatory arbitration provision threatens the institutional integrity of the judicial branch by creating a wholly separate, private litigation process that lacks meaningful judicial oversight. As a creature of Congress, Amtrak must adhere to the constitutional separation of powers, including the role of the judicial branch as the final arbiter of disputes.

If Amtrak can compel millions of passengers into a private arbitration system, then nothing prevents Congress from mandating private arbitration for a host of claims against the government, which would undermine the role of Article III courts in

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our constitutional system.

In December, Public Citizen spearheaded a petition and letter, signed by 31 other groups and more than 4,700 Public Citizen members, calling on Amtrak and Congress to remove forced arbitration clauses from Amtrak’s ticketing. Amtrak did not respond.

In February, Amtrak filed a motion to dismiss the lawsuit. The motion attacks the standing of Weissman and Llewelyn, characterizes Amtrak as a private entity not subject to constitutional constraints, and contends that the constitutional claims lack merit because passengers consent to the arbitration clause by purchasing or using an Amtrak ticket.

In late March, we filed an opposition to the motion to dismiss and cross-motion for summary judgment, explaining the flaws in Amtrak’s arguments and asking the court to enter judgment in our favor.

In 2016, Amtrak agreed to pay up to $265 million under a court-supervised settlement of claims arising from a 2015 crash that killed eight people and injured more than 200. Had the forced arbitration clauses been in place at the time, Amtrak could have forced all of the victims into arbitration, where the proceedings would have been hidden from the public.

The number of forced arbitration agreements in effect in the U.S. is at least 2.5 times the population, and the overwhelming majority of these agreements waive a person’s right to join others in a class-action lawsuit. Yet public sentiment is overwhelmingly against the use of forced arbitration clauses: 84% of voters want to stop corporations from forcing consumers and workers into arbitration.

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Graphic courtesy of Marty Bernard / Flickr.
Putting People Above Corporate Profits

The U.S. Consumer Product Safety Commission (CPSC), the nation’s chief product safety regulator, is barred by law from releasing a wide swath of information about product safety hazards. Public Citizen is working hard to explain the problem to members of Congress and push for changes to the law.

The problem stems from section 6(b) of the Consumer Product Safety Act. That provision creates a time-consuming process for release of critical safety information to consumers. The provision gives companies an effective veto over public disclosure of information about product defects.

Under section 6(b), before the CPSC can publicly release information that would allow consumers to identify a product or manufacturer, the agency must notify the company that it intends to release the information and give the company an opportunity to respond to the accuracy and fairness of that information.

If the company objects to the CPSC mentioning the product by name — as companies routinely do — the agency has to initiate litigation to overcome the company’s objection. The CPSC’s default workaround for this provision is simply to issue vague statements that fail to provide full safety information.

The CPSC’s actions with respect to the Fisher-Price Rock ‘n Play Sleeper and similar products illustrate the problem. In May 2018, in light of reports to the agency about infants being killed in the sleepers, the CPSC issued a consumer alert — essentially a press release — warning about the hazards of allowing babies to sleep unrestrained in “inclined sleep products.” Although the agency stated that it was aware of infant deaths associated with inclined sleep products, the consumer alert did not name specific products.

By the time that Fisher-Price recalled 4.7 million Rock ‘n Play Sleepers in April 2019, more babies had been hurt. Two weeks after that recall, almost 700,000 inclined sleepers manufactured by Kids II were recalled because of infant deaths.

Later, an investigation by Consumer Reports found that the CPSC knew that specific Fisher-Price sleepers were linked to fatalities for several years before the recall. Yet it failed to tell the public.

As this example shows, the secrecy caused by section 6(b) is problematic for two reasons. First, it hinders the CPSC’s ability to quickly inform the public about a product safety hazard that may be sitting in American homes.

Second, the U.S. Supreme Court has held that, before the CPSC can release records under the Freedom of Information Act (FOIA) in response to a request seeking records concerning a specific product, the CPSC must comply with section 6(b)’s requirements to give the company that makes the product a heads up and opportunity to object.

As a result, so few product-specific documents are released that it is difficult for journalists, watchdog groups like Public Citizen, or the public to find out information about a company’s safety track record, and to determine whether the agency is effectively carrying out its mission of safeguarding the public from product safety hazards.

Statutes relating to consumer products regulated by other federal regulatory agencies

See Product Safety, Page 5
— such as drugs, foods, and automobiles — do not have provisions similar to section 6(b).

U.S. Rep. Bobby Rush (D-Ill.) recently introduced the Safety Hazard and Recall Efficiency (SHARE) Information Act (H.R.5565) to amend section 6(b) to allow the CPSC greater authority to release product safety information to keep families safe. Public Citizen is working with Rush and other members of Congress to increase understanding of the safety hazard presented by section 6(b) and to pass the SHARE Information Act. Public Citizen is all in on the fight to put people above corporate profit.

Thank you to our Supporters — Civil Justice Leaders (Annual Support of $6,000-$11,999)

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Public Citizen’s Lobbyist for Civil Justice and Consumer Rights, Remington Gregg (pictured third from left), speaks at a panel event at the International Consumer Product Health and Safety Organization’s annual meeting on Feb. 19, 2020 about the need to repeal 6(b) of the Consumer Product Safety Act. Photo courtesy of Neal Cohen.
After years of strong leadership and legislative advocacy by Public Citizen, the U.S. House of Representatives in late September of last year passed a bill that would ban enforcement of forced arbitration clauses in employment, consumer, antitrust, or civil rights disputes.

The bipartisan bill, the Forced Arbitration Injustice Repeal (FAIR) Act, passed by a vote of 225-186.

The U.S. Senate companion bill sits on U.S. Senate Majority Leader Mitch McConnell’s (R-Ky.) desk, along with dozens of other pieces of important legislation that he has refused to consider.

Meanwhile, Public Citizen continues to lead the charge through other means to oppose the now-routine use of forced arbitration clauses.

For example, in February, Public Citizen, along with coalition partners, worked hard behind the scenes to urge Intuit shareholders to vote down a proposal that would have allowed the financial software firm to prevent shareholders from going to court.

Public Citizen, along with coalition partners, worked behind the scenes to urge shareholders to vote against the proposal, which was overwhelmingly rejected with only 2.4% of shareholders voting to allow the company to force shareholders into arbitration. Some of Intuit’s largest shareholders, including Blackrock, Vanguard, and State Street, voted to support shareholders’ rights to go to court if wronged.

Public Citizen also is leading a coalition of organizations to pressure Wells Fargo to end the use of forced arbitration against workers and customers.

Spurred by our advocacy, Wells Fargo announced in February that it would allow workers who allege future sexual harassment claims to go to court instead of forcing them into arbitration.

While Wells Fargo’s new position is a step in the right direction, it does not go nearly far enough. For example, even under its new policy, Wells Fargo contin-
ues to require claims based on other forms of discrimination or harassment, such as discrimination against an African American employee, to be addressed behind the shroud of opaque arbitration proceedings.

The bank’s new policy also does not address other unfair workplace practices, such as improper wage calculations or firing an employee in retaliation for exposing corporate wrongdoing.

Wells Fargo continues to require such disputes be sent to private arbitration, where such practices do not receive the public scrutiny needed to address the root problem.

In March, in a series of U.S. House Financial Services Committee hearings with Wells Fargo senior leadership, Public Citizen worked with Capitol Hill allies to publicize the problems with forced arbitration.

Our campaigns against powerful companies like Intuit and Wells Fargo serve a dual purpose. Most immediately, each campaign seeks an outcome related to the specific company.

More broadly, campaigns against the arbitration policies of one company can dissuade their competitors from taking similar actions. They also provide an avenue to educate the public on forced arbitration.

In addition, Public Citizen is supporting bills that would bar forced arbitration in specific arenas. For example, in early March, U.S. Sen. Richard Blumenthal (D-Conn.) and U.S. Rep. Conor Lamb (R-Pa.) introduced a bill that would prevent Amtrak from forcing its passengers into arbitration.

The bills came on the heels of a Public Citizen-led effort, involving 31 organizations, to pressure Amtrak to give up its forced arbitration clause as well as Public Citizen’s filing of a lawsuit against Amtrak. (See story on page 2.)

Blumenthal and Lamb’s bill, titled Ending Passenger Rail Forced Arbitration Act (H.R. 6101), would prohibit Amtrak from blocking the courthouse doors to passengers with a claim against Amtrak.

Although the bill may end up in the McConnell legislative graveyard, our advocacy for the bill has pushed Amtrak to go on the defensive, forcing it to explain to the press, customers, and Congress why it has taken this course of action.

We are intensifying that pressure through media work, advocacy on Capitol Hill, and public education efforts until we succeed in reversing Amtrak’s position, as we have done with other corporate pressure campaigns.

Public Citizen is leading a coalition of organizations to pressure Wells Fargo to end the use of forced arbitration against workers and customers.
Defending the Telephone Consumer Protection Act

The Telephone Consumer Protection Act (TCPA) prohibits making calls to cell phones using automated telephone dialing systems or recorded messages without the recipients’ consent. In three recent cases, federal courts of appeals upheld this provision in the face of First Amendment challenges.

Three petitions for certiorari to the U.S. Supreme Court promptly followed, and Public Citizen is playing a role in all three cases.

In the cases, the First Amendment challenge is based on a 2015 amendment to this prohibition, which makes an exception for calls to collect debts owed to or guaranteed by the federal government.

The challengers argued that the exception was a content-based preference for some forms of speech over others and that, as a result, the prohibition violates the First Amendment.

In all three cases, the courts of appeals agreed that the TCPA’s exception creates a content-based preference. Rather than striking down the prohibition, however, the courts struck down only the exception. The courts held that, with the exception stricken, the TCPA prohibition is a valid, content-neutral restriction on the time, place, or manner of speech.

Two of the appeals arose from cases brought by individuals suing under the TCPA because they received robocalls to their cell phones. As a defense, the defendant — Facebook in one and Charter Communications in the other — argued that the prohibition violates the First Amendment.

The defendants then each petitioned for certiorari after the Ninth Circuit upheld the challenged TCPA prohibition.

Public Citizen attorneys joined as co-counsel in the Supreme Court and drafted the oppositions to the petitions in both cases.

In the third case, an association of political consultants and other political organizations sued the attorney general and Federal Communications Commission, seeking a declaratory judgment that the automated-call restriction is unconstitutional and an injunction against its enforcement. The government petitioned for certiorari after the Fourth Circuit struck down the TCPA exception but upheld the remainder of the prohibition.

The Supreme Court granted the government’s petition and is holding the other two pending its decision. Public Citizen then filed an amicus brief in that case, Barr v. American Association of Political Consultants, Inc. Our brief explains that, when conduct regulations burden protected speech, the First Amendment permits the regulations if they are content neutral and serve significant governmental interests.

The TCPA prohibition on automated calls to cell phones without consent satisfies this standard because it serves an
interest of the highest order: protecting individuals against unwanted and irksome intrusions into personal privacy.

The amendment to the TCPA’s prohibition, which excepts automated calls to collect debts owed to or guaranteed by the United States, did not transform the restrictions from a neutral regulation of conduct into a content-based one.

As our brief argues, the exception is not defined by the content of speech, but by use of automated telephone equipment in a particular form of regulable commercial activity: debt collection. Moreover, even applying strict scrutiny, the TCPA’s restrictions on robocalling would pass muster because they remain narrowly tailored to the compelling privacy protection interest they serve.

In its brief, Public Citizen argues that if the exception is constitutionally problematic, the proper remedy is the one on which all three of the lower court decisions agreed: severing the problematic exception and keeping the rest of the statute intact.

Finally, the brief argues, even if the court of appeals were correct to find a constitutional violation and incorrect to sever the amendment responsible for it, the consequence would not be facial invalidation of the TCPA in all its applications.

The bulk of the statute applies to calls involving commercial speech that may be subjected to content-based regulation without triggering strict scrutiny. Even if the statute may not be applied validly to respondents’ political speech, the Supreme Court’s precedents foreclose a broader invalidation of the law.

The Supreme Court scheduled oral argument in Barr for April 22 and will issue a decision by the end of June.
officers were very unpopular in states that opposed the War of 1812 and were often sued or even prosecuted in state courts for carrying out their duties.

To protect them, Congress gave them the right to move those cases to federal courts that were less likely to be influenced by hostility to federal officers.

What do claims against oil companies have to do with a law intended to protect federal officers and employees and those who assist them in carrying out their duties?

According to the oil companies, when they marketed fossil fuels and concealed their knowledge of the danger of global warming, they were engaging in official actions under the direction of federal officers.

Why? The companies’ rationale is that they have offshore oil leases with the United States, gasoline supply contracts with service stations on military bases and other federal contracts. In producing and selling oil under those contracts, they argue, they are acting under the direction of federal officers.

The oil companies are not the first private enterprise charged with concealing the hazards of its products to try to invoke the federal officer removal statute when sued in state court. Philip Morris tried it over a dozen years ago, claiming that it acted under the direction of a federal officer when it concealed the hazards of “light” cigarettes.

The Supreme Court slapped down that effort, holding that a company cannot move a case to federal court just because it carries out its business in compliance with federal regulations. Amicus briefs filed by Public Citizen played an important role in bringing about that decision.

Public Citizen has jumped into the climate-change cases to explain to the courts that a company that has some federal contracts cannot remove cases to federal court on the theory that in running its business it is carrying out official actions under the direction of a federal officer.

Public Citizen has filed amicus briefs in the U.S. Courts of Appeals for the First, Fourth, Ninth, and Tenth Circuits in cases originally filed in the state courts of Rhode Island, Maryland, California, and Colorado and moved to federal court by the oil companies.

The amicus briefs explain that the oil companies’ worldwide production and marketing efforts have nothing in common with the kinds of actions of federal officers that the removal statute was created to protect.

Public Citizen’s efforts in these cases reflect the intersection of two different organizational commitments: our dedication to the desperate fight against global warming, and our wonky devotion to the principle that corporations should not be permitted to misuse the jurisdiction of federal courts.

Each of the four courts of appeals is likely to rule sometime this year.

THANK YOU TO OUR SUPPORTERS — CIVIL JUSTICE SUSTAINERS (Annual Support of $600-$1,199)

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to ensure that every American, regardless of ability to pay, can receive the treatment and care they need for coronavirus-related illness.

In a Medicare for All system, this would be true automatically. Achieving this objective under our current system will require federal action to ensure public and private insurance covers all costs, with no copays, deductibles, or fees, and that every person without insurance has access to the care they need at no cost.

Ensuring access is not just about guaranteeing the health of every person; it is crucial as a public health measure. Efforts to curtail and eventually defeat the epidemic will be stymied if people avoid testing or cannot get treatment because of cost concerns, or if a vaccine is available only to some.

Guaranteed sick leave: Every American should be entitled to sick leave from their job. But again, in the absence of the broad guarantees that should be in place, we need specific rules for sick leave for coronavirus-related illness or quarantines.

The federal government also must appropriate funds to provide payments to self-employed individuals, including those in the gig economy, for work time missed and to reimburse small businesses for the cost of paid sick leave. Sick leave also is about more than treating individuals fairly; if people go to work when sick because they cannot afford to miss a day’s pay, then efforts to control the pandemic will be stymied.

Vaccine affordability: We’ve issued a report on research and development into coronaviruses, almost all of which has been undertaken by the public sector. The obvious corollary is that a vaccine that was developed with public funds should be licensed on a nonexclusive basis and must be made affordable and accessible to all.

There’s also a broader lesson...
about the failure of the monopoly model to incentivize public health priority research and development.

Our report was the basis for a letter anchored by U.S. Rep. Jan Schakowsky (D-Ill.) to U.S. Secretary of Health and Human Services Alex Azar on vaccine affordability.

We are working on a host of other coronavirus health issues, including protecting the right of public health officials to speak truthfully about the coronavirus, drug shortages due to U.S. reliance on China for pharmaceutical raw materials, and protections for health workers.

As the government moves rapidly to bail out affected businesses, we are insisting that workers and regular people must be protected first.

We can’t have a repeat of 2008-2009, when the banks were bailed out and regular people were left to fend for themselves, with millions thrown out of their homes and millions more thrown out of work with no protections.

Last, we also are homing in on threats to the 2020 election. It is very possible that the coronavirus will make it impossible to hold elections that rely on people voting at the polls. Even in a better case scenario, it is likely that there will be a shortage of poll workers and that many voters will stay away from the polls due to health concerns.

The obvious solution to this problem is vote-by-mail. Only three states conduct elections by mail. Twenty-eight permit anyone who chooses to vote absentee by mail. We need all states fully prepared for exclusive voting by mail, if that becomes necessary. Making sure they are prepared for this possibility requires them to take action now.

The coronavirus is spreading fast and increasingly disrupting everyday life. We must move even faster in response, which is exactly what we are doing. ■

Save the Date!
Public Citizen Brunch with Robert Weissman
Washington, D.C.
Sunday, July 12, 2020
9:00 a.m. – 10:30 a.m.

Join Public Citizen President Robert Weissman and share in the discussion about Public Citizen’s Civil Justice Project.
For more information, please contact Amanda Fleming at (202) 588-7734 or afleming@citizen.org.