

Major New Research Argues for Litigation as Opposed to Regulation

In a thorough and detailed analysis, Wendy Wagner, the Joe A. Worsham Centennial Professor, University of Texas School of Law, discusses regulation as opposed to litigation for protecting public health from risky products and activities. Many leading scholars have touted the value of regulation for advancing product safety. Professor Wagner found that the analysis criticizing litigation suffers from the critical flaw of ignoring the debilitating limitations on information that reduces the competence and accountability of agency regulators. In Regulators simply do not do the job because they do not obtain the information necessary to make good decisions.

Contemporary analysts take for granted the “fact” that regulatory agencies enjoy greater access to information regarding product and health risks than their judicial counterparts. That is not true. “When manufacturers conceal information about product risks, they insulate themselves from accountability for the harms they might be causing to society.” This private withholding of information is a costly barrier, sometimes an insurmountable one, to regulating product and related industrial risks.

Relative to their agency counterparts, litigants in tort cases are generally both more eager and more able to access information held by manufacturers and industrial polluters. “Streamlined document production and discovery tools available in the court provide litigants with a much broader sweep of privately held information.” In the litigation context, manufacturers cannot self-screen as when they deal with the revolving door of government agencies where one day a person may be a regulator, and the next day they may be a lobbyist for the regulated.

Professor Wagner also noted that the court system “is also much more aggressive in penalizing unjustified or frivolous claims and information is privileged or trade secret protected.” Finally, in contrast to regulatory counterparts, “litigants tend to be unencumbered by political considerations in attempting to access critical asymmetrical information.” In other words, people who sue are not deterred by political considerations.

Big business has responded to litigation by making it more complicated, being more defensive, hiding more information, and erecting the barrier of preemption. Preemption is a concept embraced by the courts whereby a personal injury or tort claim cannot be filed if the government has occupied a particular arena by regulating it. This is a form of immunity that has no common law basis.

The Professor is critical of cases that are concealed, such as by confidentiality clauses. Confidentiality clauses and secrecy in general undermine the advantages of the litigation system. However, most corporations insist upon both confidentiality and sealing of the record when a case is resolved.

The Professor does note that the courts “are able to penetrate the rising information costs that can fog in the regulatory system by transforming low-stakes

issues regarding general public safety into high-stakes damages claims....” Court involvement may reduce inflated information costs and lead to broader participation across all institutions.

Professor Wagner looks at some specific cases, noting that we have a much better understanding of the risks of asbestos, tobacco, ultra-absorbent tampons, and the Dalcon shield, thanks to litigation brought against these companies. “It was only as a result of litigation that the extent of their internal knowledge about product risks was uncovered and publicly exposed, revelations that often led to greater regulatory oversight and public condemnation.” Pharmaceutical litigation also highlights the frailties of the regulatory system and the “critical role that tort litigation plays both in uncovering hidden company documents and in raising public consciousness about the misdeeds of drug companies.” Drug litigation has focused regular attention on products that should be taken off the market.

In essence, case studies indicate “that without tort litigation, a number of dangerous products and wastes may have remained on the market or in the environment even longer, leading to still more human fatalities and injuries, as well as irreversible ecological damage.” Even unsuccessful litigation, such as breast implant litigation, has been successful in divulging important information about the risks of implants held by implant manufacturers.

The evidence seems to increasingly be turning towards the advantages of litigation given how hard the courts have worked in making case handling more efficient and professional, with ample protections against frivolous litigation.

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