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America Wakes Up to the Importance of Liability and the Stupidity of “Caps”

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Teachable moments can come almost [anytime](#), from [anywhere](#). The recent history of corporate and professional breakdowns and mess-ups should provide a number of them. Bob Herbert [raised the issue](#) in a stinging *New York Times* column recently when he asked, "Will we learn anything from this disaster ...?" BP was his focus but also on his mind was "how the giant financial firms almost destroyed the American economy" and the "devastating mine explosion in West Virginia — at a mine run by a company with its own hideous safety record ..."

We'll add to that list the [Toyota debacle](#), drug companies [marketing contaminated](#) childrens' medications, [builders who pushed](#) defective Chinese drywall into thousands of homes, Delaware doctors who [covered-up](#) a pedophile pediatrician who raped children, not to mention [more and more](#) dangerous [hospitals everywhere](#). What a couple of months.

Herbert observed that there exists an "unholy alliance" between "the entire spectrum of giant corporations that have used vast wealth to turn democratically elected officials into handmaidens, thus undermining not just the day-to-day interests of the people but the very essence of democracy itself." Hello U.S. [Chamber of Commerce](#), the nations' largest lobby group that dumps untold amounts into election campaigns and creates its own "newspapers" and movie commercials to [manipulate public opinion](#). For the Chamber, deregulation and corporate liability limits (so-called "tort reform") are treacherous top priorities. Hello also the thousands of like-minded corporate trade associations and their spokespeople, like mainstream media darling Philip K. Howard, the [corporate law partner](#) who has [made a career](#) out of attacking corporate regulations and the civil jury system.

For those of us concerned that our civil courts be free of political influence so they can perform their critical functions - compensating those injured by corporate or professional recklessness, protecting us all by supplying financial incentives to keep corporations from

running completely amuck, and providing a forum where evidence of misconduct can be forced out into the open- the recent spate of corporate disasters could not have afforded a better teachable moment.

For example, in the financial arena, while there are still far too many legal obstacles in the way of defrauded investors and homeowners, civil lawsuits including those by state Attorneys General, though legally restricted, have been an incredibly important supplement to financial reform and accountability. In West Virginia, luckily the efforts of Massey CEO Don Blankenship to buy judges and politicians, along with those of "tort reform" trade associations that continuously do his bidding, haven't completely worked. Families there should still be able to get some justice, sending a message to mine owners that they will be held accountable.

Then there's BP. Last week, the company testified before Congress about its so-called "promise" to pay all "legitimate" liability claims, arguing that because of its magnanimity, the \$75 million cap on liability that Congress gifted them in 1990 was essentially irrelevant. This is a "cap" that no one believes is right except for oil company protectors from oil states who continue to block the Senate's efforts to raise or eliminate it.

This exchange between Rep. Jerry Nadler (D-N.Y.) and Darryl Willis, BP's vice president for resources, typifies what we can expect:

Nadler pressed Willis repeatedly to define "legitimate." He asked, for example, whether BP would compensate people who, hypothetically, might be injured by the chemical dispersant BP is using to reduce the impact of the oil spill.

"Is that a valid claim?" Nadler asked.

"They can file a claim, yes," Willis said.

"I didn't ask if they can file a claim," Nadler shot back. "Is that a claim that you will pay?"

"Every claim will be evaluated," Willis said.

"Can you answer yes or no, please?" Nadler asked.

Willis would not, as the exchange continued. "We're going to do the right thing. We're going to respond to this in an effective manner, and we realize we're going to be judged based on our response," he said.

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Finally we get down to it.

Enter Tom Donahue, head of the U.S. Chamber of Commerce, who [opposes lifting](#) the liability cap to help Gulf residents, calling such an effort "not right." He also noted that the Chamber "may choose to be more engaged in the other thing that I was just talking about, and that is how do we dig more gas and oil." More tone-deafness. And just to make sure no one gets any ideas, he says he won't stand for any attempt to "undo" the Chamber's 2005 law that now makes it more difficult to bring class actions against corporate miscreants (think the agrochemicals lawsuit in [Michael Clayton](#)).

Fortunately, in light of this mess, many in Congress are rising up against the Chamber's point of view in ways we have never seen before. In addition to trying to eliminate the \$75 million oil company liability cap, several Senators are now pushing to reverse the U.S. Supreme Court's ruling in the Exxon Valdez case that drastically limited "punitive damages" (where a jury finds that a company has been particularly reckless) in "maritime" cases. There are additional efforts to amend an obscure law called the Death on the Highseas Act, an exceptionally unfair law that severely reduces what the families of the 11 men who died in the Deepwater Horizon explosion will be able to recover, a function simply of the rig's physical location.

It wasn't so long ago that Congress was immersed in health care reform and one of the issues that both [tea partiers](#) and their Congressional allies kept raising to kill the bill was "tort reform." They wanted to cap the liability of negligent doctors and hospitals, spouting a lot of rhetoric that seemed [clearly wrong](#).

When Congress rejected these measures, some were quick to blame "politics" as if federally "capping" compensation for injured patients were otherwise the right thing to do. It was never the right thing to do. Whether we are talking about reckless oil companies or greedy mine owners or irresponsible car companies or incompetent health care providers, limits on liability do nothing but stop the most deserving from getting properly compensated and lessen the accountability of the grossly negligent. Liability and compensation decisions should be left in the capable hands of judges and juries, and not made by politicians in Washington D.C. This is especially true when the U.S. Chamber of Commerce is breathing down their neck.

Sometimes, the greatest teachable moments come about at the worst times, and only with terrible costs. We can only hope that finally, one important lesson has been learned: that weakening legal accountability by capping compensation to legitimately injured people is a really dumb idea.