

111TH CONGRESS  
2D SESSION

# H. R. 6239

To provide targeted liability protections for claims based on damages resulting from, or aggravated by, the inclusion of ethanol in certain fuel, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 29, 2010

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To provide targeted liability protections for claims based on damages resulting from, or aggravated by, the inclusion of ethanol in certain fuel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Prevention of Frivo-  
5 lous Ethanol Lawsuits Act of 2010”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds as follows:

8 (1) Ethanol is currently widely distributed in  
9 commerce for general use in all conventional gaso-

1 line-powered onroad and nonroad vehicles and  
2 nonroad engines in widespread use.

3 (2) A decision to increase the current blending  
4 limit of ethanol into gasoline for motor vehicle and  
5 equipment engines requires an agency finding that  
6 the increased emission products will not cause or  
7 contribute to a failure of any emission control device  
8 or system (over the useful life of the motor vehicle,  
9 motor vehicle engine, nonroad engine or nonroad ve-  
10 hicle in which such device or system is used).

11 (3) Significant questions and concerns exist as  
12 to the effects of increasing the current blending limit  
13 of ethanol into gasoline for motor vehicle and equip-  
14 ment engines on the performance of such engines.

15 (4) Effects such as increased engine failures,  
16 decreased engine performance, increased consumer  
17 complaints, increased litigation, or other unforeseen  
18 effects could have a significant impact on interstate  
19 commerce.

20 (5) The Federal Trade Commission has pro-  
21 posed labeling requirements for all fuels distributed  
22 in commerce that exceed the current blending limit  
23 of ethanol into gasoline to disclose to consumers that  
24 using such fuels may harm some conventional vehi-  
25 cles.

1           (6) A multifaceted Federal testing regimen is  
 2           currently underway on newer motor vehicles to de-  
 3           termine the effects on motor vehicle engines of in-  
 4           creasing the current blending limit of ethanol into  
 5           gasoline.

6           (7) There is insufficient data on the effects of  
 7           increasing the current blending limit of ethanol into  
 8           gasoline on older vehicles and nonroad engines.

9           (8) Nonetheless, the executive branch has—

10                   (A) statutory authority to increase the cur-  
 11                   rent blending limit of ethanol into gasoline; and

12                   (B) is currently undertaking a process to  
 13                   reach a decision on this issue.

14           (9) It is appropriate for Congress to mitigate  
 15           undue effects on parties engaged in interstate com-  
 16           merce resulting from a Federal decision to allow an  
 17           increase of the current blending limit of ethanol into  
 18           gasoline.

19 **SEC. 3. TARGETED LIABILITY PROTECTIONS FOR CLAIMS**  
 20 **BASED ON DAMAGES RESULTING FROM, OR**  
 21 **AGGRAVATED BY, THE INCLUSION OF ETH-**  
 22 **ANOL IN CERTAIN FUEL.**

23           (a) LIABILITY PROTECTIONS.—

24                   (1) IN GENERAL.—Subject to the other provi-  
 25                   sions of this section, a covered entity shall be im-

1        mune from suit and liability under Federal and  
2        State law with respect to all claims for loss resulting  
3        from, or being aggravated by, the use of any renew-  
4        able fuel, as defined by section 211(o)(1) of the  
5        Clean Air Act, and containing ethanol in concentra-  
6        tions of greater than 10 percent, pursuant to a waiv-  
7        er under section 211(f)(4) of the Clean Air Act, to  
8        operate an internal combustion engine.

9            (2) SCOPE OF CLAIMS FOR LOSS.—For pur-  
10       poses of this section, the term “loss” means any  
11       type of loss, including—

12            (A) death;

13            (B) physical, mental, or emotional injury,  
14       illness, disability, or condition;

15            (C) fear of physical, mental, or emotional  
16       injury, illness, disability, or condition, including  
17       any need for medical monitoring; and

18            (D) loss of or damage to property, includ-  
19       ing business interruption loss.

20       Each of subparagraphs (A) through (D) applies  
21       without regard to the date of the occurrence, presen-  
22       tation, or discovery of the loss described in the sub-  
23       paragraph.

24            (3) SCOPE.—The immunity under paragraph  
25       (1) applies to any claim for loss that has a causal

1 relationship with the use of any renewable fuel, as  
2 defined by section 211(o)(1) of the Clean Air Act,  
3 and containing ethanol in concentrations of greater  
4 than 10 percent, pursuant to a waiver under section  
5 211(f)(4) of the Clean Air Act, to operate an inter-  
6 nal combustion engine including a causal relation-  
7 ship with the design, development, testing or inves-  
8 tigation, manufacture, labeling, distribution, formu-  
9 lation, packaging, marketing, promotion, sale, pur-  
10 chase, dispensing, administration, licensing, or use  
11 of such renewable fuel.

12 (b) EXCEPTION TO IMMUNITY OF COVERED PER-  
13 SONS.—

14 (1) IN GENERAL.—Subject to subsection (i), the  
15 sole exception to the immunity from suit and liabil-  
16 ity of covered persons set forth in subsection (a)  
17 shall be for an exclusive Federal cause of action  
18 against a covered person for death or serious phys-  
19 ical injury proximately caused by willful misconduct,  
20 as defined pursuant to subsection (c), by such cov-  
21 ered person. For purposes of section 2679(b)(2)(B)  
22 of title 28, United States Code, such a cause of ac-  
23 tion is not an action brought for violation of a stat-  
24 ute of the United States under which an action  
25 against an individual is otherwise authorized.

1           (2) PERSONS WHO CAN SUE.—An action under  
2       this subsection may be brought for wrongful death  
3       or serious physical injury by any person who suffers  
4       such injury or by any representative of such a per-  
5       son.

6       (c) PROCEDURES FOR SUIT.—

7           (1) EXCLUSIVE FEDERAL JURISDICTION.—Any  
8       action under subsection (b) shall be filed and main-  
9       tained only in the United States District Court for  
10      the District of Columbia.

11          (2) GOVERNING LAW.—The substantive law for  
12      decision in an action under subsection (b) shall be  
13      derived from the law, including choice of law prin-  
14      ciples, of the State in which the alleged willful mis-  
15      conduct occurred, unless such law is inconsistent  
16      with or preempted by Federal law, including provi-  
17      sions of this section.

18          (3) PLEADING WITH PARTICULARITY.—In an  
19      action under subsection (b), the complaint shall  
20      plead with particularity each element of the plain-  
21      tiff's claim, including—

22            (A) each act or omission, by each covered  
23            person sued, that is alleged to constitute willful  
24            misconduct;

1 (B) facts supporting the allegation that  
2 such alleged willful misconduct proximately  
3 caused the injury claimed; and

4 (C) facts supporting the allegation that the  
5 person on whose behalf the complaint was filed  
6 suffered death or serious physical injury.

7 (4) VERIFICATION REQUIREMENT.—

8 (A) IN GENERAL.—The complaint shall in-  
9 clude a verification, made by affidavit of the  
10 plaintiff under oath, stating that the pleading is  
11 true to the knowledge of the deponent, except  
12 as to matters specifically identified as being al-  
13 leged on information and belief, and that as to  
14 those matters the plaintiff believes it to be true.

15 (B) IDENTIFICATION OF MATTERS AL-  
16 LEGED UPON INFORMATION AND BELIEF.—Any  
17 matter that is not specifically identified as  
18 being alleged upon the information and belief of  
19 the plaintiff, shall be regarded for all purposes,  
20 including a criminal prosecution, as having been  
21 made upon the knowledge of the plaintiff.

22 (5) PROOF OF WILLFUL MISCONDUCT.—In an  
23 action under subsection (b), the plaintiff shall have  
24 the burden of proving by clear and convincing evi-

1       dence willful misconduct by each covered person  
2       sued.

3           (6) THREE-JUDGE COURT.—Any action under  
4       subsection (b) shall be assigned initially to a panel  
5       of three judges. Such panel shall have jurisdiction  
6       over such action for purposes of considering motions  
7       to dismiss, motions for summary judgment, and  
8       matters related thereto. If such panel has denied  
9       such motions, or if the time for filing such motions  
10      has expired, such panel shall refer the action to the  
11      chief judge for assignment for further proceedings,  
12      including any trial. Section 1253 of title 28, United  
13      States Code, and paragraph (3) of subsection (b) of  
14      section 2284 of title 28, United States Code, shall  
15      not apply to actions under subsection (b).

16          (7) CIVIL DISCOVERY.—In an action under sub-  
17      section (b), no discovery shall be allowed—

18           (A) before each covered person sued has  
19           had a reasonable opportunity to file a motion to  
20           dismiss;

21           (B) in the event such a motion is filed, be-  
22           fore the court has ruled on such motion; and

23           (C) in the event a covered person files an  
24           interlocutory appeal from the denial of such a



1 motion, before the Court of Appeals has ruled  
2 on such appeal.

3 (d) STANDARD.—Notwithstanding any other provi-  
4 sion of law, the court in an action under subsection (b)  
5 shall permit discovery only with respect to matters directly  
6 related to material issues contested in such action, and  
7 the court shall compel a response to a discovery request  
8 (including a request for admission, an interrogatory, a re-  
9 quest for production of documents, or any other form of  
10 discovery request) under rule 37, Federal Rules of Civil  
11 Procedure, only if the court finds that the requesting party  
12 needs the information sought to prove or defend as to a  
13 material issue contested in such action and that the likely  
14 benefits of a response to such request equal or exceed the  
15 burden or cost for the responding party of providing such  
16 response.

17 (e) REDUCTION IN AWARD OF DAMAGES FOR COL-  
18 LATERAL SOURCE BENEFITS.—

19 (1) IN GENERAL.—In an action under sub-  
20 section (b), the amount of an award of damages that  
21 would otherwise be made to a plaintiff shall be re-  
22 duced by the amount of collateral source benefits to  
23 such plaintiff.

24 (2) NONECONOMIC DAMAGES.—In an action  
25 under subsection (b), any noneconomic damages may

1 be awarded only in an amount directly proportional  
2 to the percentage of responsibility of a defendant for  
3 the harm to the plaintiff. For purposes of this para-  
4 graph, the term “noneconomic damages” means  
5 damages for losses for physical and emotional pain,  
6 suffering, inconvenience, physical impairment, men-  
7 tal anguish, disfigurement, loss of enjoyment of life,  
8 loss of society and companionship, loss of consor-  
9 tium, hedonic damages, injury to reputation, and  
10 any other nonpecuniary losses.

11 (f) RULE 11 SANCTIONS.—Whenever a district court  
12 of the United States determines that there has been a vio-  
13 lation of rule 11 of the Federal Rules of Civil Procedure  
14 in an action under subsection (b), the court shall impose  
15 upon the attorney, law firm, or parties that have violated  
16 rule 11 or are responsible for the violation, an appropriate  
17 sanction, which may include an order to pay the other  
18 party or parties for the reasonable expenses incurred as  
19 a direct result of the filing of the pleading, motion, or  
20 other paper that is the subject of the violation, including  
21 a reasonable attorney’s fee. Such sanction shall be suffi-  
22 cient to deter repetition of such conduct or comparable  
23 conduct by others similarly situated, and to compensate  
24 the party or parties injured by such conduct.

1 (g) INTERLOCUTORY APPEAL.—The United States  
2 Court of Appeals for the District of Columbia Circuit shall  
3 have jurisdiction of an interlocutory appeal by a covered  
4 person taken within 30 days of an order denying a motion  
5 to dismiss or a motion for summary judgment based on  
6 an assertion of the immunity from suit conferred by sub-  
7 section (a) or based on an assertion of the exclusion under  
8 subsection (h)(1).

9 (h) EXCLUSION FOR REGULATED ACTIVITY OF MAN-  
10 UFACTURER OR DISTRIBUTOR.—

11 (1) IN GENERAL.—If an act or omission by a  
12 manufacturer or distributor with respect to a cov-  
13 ered countermeasure, which act or omission is al-  
14 leged under subsection (b)(1) to constitute willful  
15 misconduct, is subject to regulation by the Clean Air  
16 Act, such act or omission shall not constitute “will-  
17 ful misconduct” for purposes of subsection (b) if—

18 (A) neither the Administrator of the Envi-  
19 ronmental Protection Agency nor the Attorney  
20 General has initiated an enforcement action  
21 with respect to such act or omission; or

22 (B) such an enforcement action has been  
23 initiated and the action has been terminated or  
24 finally resolved without a covered remedy.

1 Any action or proceeding under subsection (b) shall  
2 be stayed during the pendency of such an enforce-  
3 ment action.

4 (i) ACTIONS BY AND AGAINST THE UNITED  
5 STATES.—Nothing in this section shall be construed to ab-  
6rogate or limit any right, remedy, or authority that the  
7 United States or any agency thereof may possess under  
8 any other provision of law or to waive sovereign immunity  
9 or to abrogate or limit any defense or protection available  
10 to the United States or its agencies, instrumentalities, of-  
11 ficers, or employees under any other law, including any  
12 provision of chapter 171 of title 28, United States Code  
13 (relating to tort claims procedure).

14 (j) DEFINITIONS.—In this section, the following defi-  
15 nitions apply:

16 (1) COVERED ENTITY.—The term “covered en-  
17 tity” means an entity engaged in the manufacture,  
18 sale or distribution of fuel or products which use re-  
19 newable fuel, as defined by section 211(o)(1) of the  
20 Clean Air Act.

21 (2) ENFORCEMENT ACTION.—The term “en-  
22 forcement action” means a criminal prosecution, an  
23 action seeking an injunction, a seizure action, a civil  
24 monetary proceeding based on willful misconduct, a  
25 mandatory recall of a product because voluntary re-

1 call was refused, a proceeding to compel repair or  
2 replacement of a product, a debarment proceeding,  
3 an investigator disqualification proceeding where an  
4 investigator is an employee or agent of the manufac-  
5 turer.

6 (3) COVERED REMEDY.—The term “covered  
7 remedy” means an outcome—

8 (A) that is a criminal conviction, an in-  
9 junction, or a condemnation, a civil monetary  
10 payment, a debarment; and

11 (B) that results from a final determination  
12 by a court or from a final agency action.

13 (4) FINAL.—The terms “final” and “finally”—

14 (A) with respect to a court determination,  
15 or to a final resolution of an enforcement action  
16 that is a court determination, mean a judgment  
17 from which an appeal of right cannot be taken  
18 or a voluntary or stipulated dismissal; and

19 (B) with respect to an agency action, or to  
20 a final resolution of an enforcement action that  
21 is an agency action, mean an order that is not  
22 subject to further review within the agency and  
23 that has not been reversed, vacated, enjoined,  
24 or otherwise nullified by a final court deter-  
25 mination or a voluntary or stipulated dismissal.

1           (5) WILLFUL MISCONDUCT.—The term “willful  
2       misconduct”—

3           (A) shall not, for purposes of subsection  
4       (b), denote an act or omission that is taken  
5       pursuant to regulations or guidance promul-  
6       gated in response to a full or partial waiver of  
7       the requirements of the Clean Air Act with re-  
8       spect to ethanol-gasoline blends of more than  
9       10 percent by volume ethanol; but

10          (B) shall, for purposes of subsection (b),  
11       denote an act or omission that is taken—

12               (i) intentionally to achieve a wrongful  
13               purpose;

14               (ii) knowingly without legal or factual  
15               justification; and

16               (iii) in disregard of a known or obvi-  
17               ous risk that is so great as to make it  
18               highly probable that the harm will out-  
19               weigh the benefit.

○