

Section Name

Legislation

Push to Enact Civil Justice Bills Follows Industry Playbook

BY BRUCE KAUFMAN

The formula can easily be sketched for a major business victory in Congress on legislation aimed at tilting the civil litigation system more in the favor of companies.

First, strike quickly in the House with multiple bills, before opponents can muster their defenses.

Second, divide the Democrats in the Senate by focusing on red state Democrats with tough reelection fights in 2018.

Third, brand the legislation as “pro jobs,” and toast to victory after President Donald Trump signs a series of bills into law.

But the developing battle over a half-dozen pending federal litigation measures, colloquially known as “tort reform,” comes with many uncertainties.

The bills include provisions to rewrite class-action practice, aid defendants striving to keep cases out of plaintiff-friendly state courts, and punish attorneys who file dubious claims.

They also seek to put new limits on settlements entered into by the Department of Justice and the Environmental Protection Agency, and require more disclosures by asbestos victims who seek compensation from bankruptcy trusts.



‘Fast Track’ Legislation? In the House, leading supporters, including the U.S. Chamber of Commerce and the National Association of Manufacturers, hope to move the legislation swiftly, to leave more time for the process to unfold in the more deliberative Senate.

The “fast-track” approach is important, said Victor E. Schwartz, a partner at Shook, Hardy & Bacon in Washington and the dean of the movement to enact comprehensive pro-business litigation change at the federal level. “It gets things done early before they get too politicized,” he told Bloomberg BNA.

Five of the measures—including several championed by Speaker Paul Ryan (R-Wis.) in the “Litigation Re-

form” section of his legislative blueprint, A Better Way”—have already been pushed through the House Judiciary Committee and are all but certain to pass with comfortable margins on the House floor. A sixth bill, targeting the settlement process for citizen suits, is expected to be approved by that committee as well and sail through the House.

All House Republicans have promised to support the litigation overhaul measures in “A Better Way,” Schwartz said.

In this article, the second in a three-part series examining the prospects for enactment of the litigation-related legislation, Bloomberg BNA explores the developing legislative battle. In part one, we laid the groundwork for the long-fought, contentious issue. Part three appraises what Trump might do if these bills land on his desk.

Lisa A. Rickard, president of the U.S. Chamber of Commerce’s Institute for Legal Reform, told Bloomberg BNA that the early action by the House Judiciary Committee “signals that Congress recognizes the need for urgent action on legal reform” and that the issue will receive “priority consideration this year.”

One bill not endorsed in Ryan’s “A Better Way” is the asbestos measure, which divides Republicans on federalism grounds. It also is opposed by many—but not all—veterans’ organizations, a traditional supporter of Republican causes.

Even so, a nearly identical asbestos provision passed the House in 2016, though by a relatively modest 211-188 vote.

The House Judiciary Committee action on the latest round of bills came so quickly in early February, about a week after their introductions, that panel chairman Robert Goodlatte (R-Va), a key industry ally, will likely schedule additional hearings to help build a record to spur on reluctant senators.

During the Feb. 15 markup on the asbestos bill, when amendments were considered, Goodlatte challenged Democrats who said the proposals were moving too fast.

Members should “consult the video testimony” from hearings during prior years, Goodlatte said.

Not So Fast, Opponents Say. But not all supporters envision a speedy process in the House, and opponents hope to gum up the works.

Rickard said while the current bills are a priority, they are not the same in terms of complexity, and some may advance through the congressional process at differing rates of speed.

Some bills, Rickard said, like the 2017 version of the Fairness in Class Action Litigation Act, “are more comprehensive in nature” and so slower movement can be expected.

The provisions in that measure reach nearly every corner of class action and complex litigation practice. They include tightening class certification require-

ments, capping or delaying distribution of fees to class counsel, requiring the disclosure of litigation financing, and tying the reporting of settlement data to plaintiffs' lawyers' fees.

Other legislation, she said, "are more focused," such as those aimed at requiring additional disclosures for asbestos victims filing bankruptcy claims and making it harder for plaintiffs to keep some suits in state court.

Some veteran litigation reform supporters, like Sherman "Tiger" Joyce, president of the American Tort Reform Association in Washington, are taking a cautious approach.

Considering the "lengthy list of competing legislative priorities, one would not be going out on a limb by betting against a speedy process," Joyce told Bloomberg BNA.

A key opponent of the legislation, Joanne Doroshow, the founder of the consumer rights group Center for Justice & Democracy in New York, agreed in part.

"Perhaps the House will vote soon, but nothing will be speedy after that," she said, foreseeing slower action in the Senate, where opponents have more sway.

Pamela Gilbert, a partner at Cuneo Gilbert & LaDuca in Washington and a veteran consumer advocate, said the "process will go well into 2018," a mid-term election year when all House seats and a third of Senate seats are at stake.

It's not unusual for legislative efforts to get waylaid by other congressional priorities as well.

Doroshow even downplayed the significance of the rapidly unfolding House process.

"So far, the only bills introduced and moving through Congress are bills that Republicans have introduced in multiple Congresses over many years and which have repeatedly failed," she said.

"These bills have nothing to do with Trump. The entity exerting the most influence is the U.S. Chamber of Commerce and a small number of the chamber's gigantic industry members who have liability exposure for harming the public. They run the show," she said.

Where Bills Go to Die. In the Senate, where pro-business efforts to change the litigation process have often died in previous congressional sessions, the bills must overcome far steeper hurdles than in the House.

For one, the legislation must be bipartisan to succeed.

In recent years, similar legislation hasn't even received a Senate hearing. Lurking in the background was always a frustrating reality for supporters: Even if 60 votes could be found to pass the bill, a veto threat by President Barack Obama made Senate action seem futile, especially with so many competing priorities.

Assuming the 60-vote threshold in the Senate is maintained, the strategy for 2017 and beyond will be to reach that number by "splitting the Democrats," Schwartz said.

Joyce, of ATRA, agreed. "Many Senate Democrats face re-election in red states in 2018 and it's not unreasonable to think that any number of them might be persuadable on any given tort reform bill that, for example, would help make healthcare more accessible and affordable or otherwise contain consumer prices."

The key targets for supporters: 10 Democratic senators in states won by Trump who face reelection in 2018:

- Tammy Baldwin (Wis.)

- Sherrod Brown (Ohio)
- Bob Casey (Pa.)
- Joe Donnelly (Ind.)
- Heidi Heitkamp (N.D.)
- Dean Heller (Nev.)
- Joe Manchin (W.Va.)
- Claire McCaskill (Mo.)
- Bill Nelson (Fla.)
- Jon Tesser (Mont.)

In addition to peeling off eight of the 10 red state Democrats, including Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia, supporters must also hold on to a pair of middle-of-the-road Republicans in blue states, Dean Heller of Nevada and Susan Collins of Maine.

A Focus on Preemption, Partisanship For opponents, the task seems easier because the goal is only to impede the bills long enough to run out the clock, consumer advocate Pamela Gilbert said.

"The challenge is daunting in the House, where Republican leadership can pass anything they want without any Democratic support," she said. But in the Senate, our challenge is only to maintain enough opposition to block the bills, she added.

To that end, Gilbert said opponents will test a similar approach to Republicans—identify the states that Trump won and use "grassroots pressure" against supporters of the legislation.

"The American public supports the civil justice system and the Seventh Amendment right to a jury trial by big margins," she said. "The proponents of the legislation take big risks if the public finds out what they are doing," she said.

If the public learns what's in the legislation, it will oppose it, said Julie Braman Kane, president of the American Association for Justice, the plaintiffs' bar.

Kane derided two of the leading litigation-related bills favored by business. She said the "so-called Fairness in Class Action Litigation Act (H.R. 985)" would "prevent groups of people from securing legal representation if their injuries require a class action or mass tort action."

Meanwhile, the "improperly named" Innocent Party Protection Act (HR. 725), Kane said, would "inexplicably overturn the 100-year-old 'fraudulent joinder doctrine' to allow corporate defendants to force cases into the forum most favorable to them."

Lisa Gilbert, director of Public Citizen's Congress watch, said opponents also plan to roll out the time-tested strategy of federal preemption to win over wavering Democrats and make in-roads with Republicans concerned about attacks on federalism.

Many of these bills federalize important areas of law, and in the process preempt (or displace) the authority of state legislatures to establish legal regimens that meet localized needs.

But Rickard, with the chamber, said "legal reform has traditionally been a bipartisan and bicameral issue, with members from both sides of the aisle and both



sides of Capitol Hill supporting efforts that have become law.”

She also countered Kane’s description of the two bills.

The class action bill (H.R. 895) will ensure that class members “get paid first, and that lawyers only earn a percentage of what class members actually receive.”

“It will also protect businesses from abusive lawsuits, and the economic damage that they cause,” she said. And the fraudulent joinder bill (H.R. 725), prevents plaintiffs’ lawyers from “keeping a case in a friendly state court simply by naming a local defendant that is not the lawsuit’s true target.”

Opponents also plan to argue that these bills are not bipartisan, an approach broadly favored by the public.

Doroshow, who helped orchestrate a February joint letter from dozens of consumer groups opposing the bills before Goodlatte’s committee, said the real reason these measures haven’t passed both houses in past years is simple: “These bills are not popular.”

The only bipartisan aspect to these bills is “the opposition to them,” she said.

Doroshow cited the House vote on H.R. 1927 in 2016, when one litigation-related bill addressed both class actions and asbestos.

“Not a single Democrat voted for that bill and over a dozen Republicans opposed it,” she said.

“The same is basically true for the other bills in the House last year. All of these bills are coming up again in the House. They are not bipartisan bills,” she said.

A Window Into Strategy Congressional success for these bills will depend on sound strategy and execution. Both sides offered a window into their thinking.

Early on, supporters decided to avoid an all-encompassing bill that would incorporate numerous targeted revisions, and instead urged congressional supporters to introduce a series of individual measures.

Was that wise?

The piece-meal approach is best, Schwartz said. Moving the bills as a package “creates a bigger target for opponents,” he said.

Joyce, ATRA’s chief, agreed.

Congress attempted to pass “comprehensive” reform in the 1990s, but that effort was unsuccessful, Joyce said.

“Success at the federal level has been with specific, targeted reforms such as securities litigation reform or the statute of repose for small aircraft,” he said, referring to the 1995 Private Securities Litigation Reform Act and the 1994 General Aviation Revitalization Act, which restricted manufacturer liability for certain aircraft after 18 years.

“Single-issue bills can be better explained to the public,” and can be “more easily defended against inevitable lawsuit industry attacks,” Joyce said.

Pamela Gilbert, the veteran consumer advocate and legislation opponent, said that if anything passes this time around, “it will be piece-meal. Comprehensive packages usually don’t pass,” she said.

Another important strategy: putting a human face on the issues, ideally while painting the other side as out-of-touch and beholden to special interests.

Doroshow said her coalition includes “consumer, civil rights, environmental, worker safety, and a range of other credible public interest organizations who are united in their opposition to these measures.”

These groups represent the public’s “strong belief that large companies would cut corners and risk the public’s safety and security if corporate liability were weakened. They will be most influential in the outcome,” she says.

Kane, of the American Association for Justice, told Bloomberg BNA the measures are supported only by “corporate front groups like the U.S. Chamber of Commerce Institute for Legal Reform and the American Tort Reform Association.”

But Joyce, of ATRA, countered there is “no shortage of victims who’ve suffered at the hands of self-serving plaintiffs’ lawyers, those who sue anyone with the audacity to succeed in earning a profit through talent and hard work.”

“Among many others, these victims of lawsuit abuse include small business owners, jobseekers, rural Americans in need of specialized healthcare services, and everyday consumers,” Joyce said.

He cited a recent example: Subway’s “Five-Dollar Footlong” sub.

“A year ago, after being forced to defend several preposterous class actions alleging that the sandwiches occasionally measured only 11.5 inches, Subway raised the price to \$6,” Joyce said.

Joyce said that in both the house and Senate, the “principal challenge to passage of reasonable limits on civil liability will be the lawsuit industry’s political influence with Democrats.”

But Doroshow said the “only groups united on this issue are a handful of gigantic industries who are sued because they cause the public a great deal of harm, and their paid special interest business lobbyists. It is not most companies, and clearly not most small businesses.”

The Six Bills. The following bills, all likely to pass in the House, seek to significantly change the federal litigation process:

- *The Fairness in Class Action Litigation Act* (H.R. 985) affects nearly all facets of class action practice. For more, see “Bill Targeting Class Actions, MDLs Sent to House.”

- *The Innocent Party Protection Act* (H.R. 725) targets what is known as fraudulent joinder—the improper addition of defendants to suits in a bid to keep cases in more plaintiff-friendly state courts. For more, see “Frustrated Litigation Targeted in Bill Headed to House Floor.”

- *The Sunshine for Regulatory Decrees and Settlements Act* (H.R. 469). The so-called “sue-and-settle” bill alters the settlement process for citizen suits. For

more, see “EPA Settlement of Citizen Suits May End Under Trump.”

■ *The Stop Settlement Slush Funds Act* (H.R. 732) seeks to bar the Department of Justice from entering into settlements that steer funds to favored third-party groups. For more, see “DOJ Settlements Funding Non-Profits Targeted in House Bill.”

■ *The Lawsuit Abuse Reduction Act* (H.R. 720) requires judges to impose mandatory sanctions on attorneys who file “meritless” civil cases in federal courts. For more, see “‘Frivolous Litigation Targeted in Bill Headed to House Floor.’”

■ *The Furthering Asbestos Claims Transparency Act* (H.R. 906) mandates increased reporting of payments to plaintiffs by trusts that pay out asbestos exposure claims against bankrupt companies. For more, see “Asbestos Trust Disclosure Bill Heads to House Floor.”

Next: Bloomberg BNA explores what President Trump might do if these bills land on his desk.

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