

## Legislation

### Trump Seen as Supportive of Business-Backed Litigation Bills

BY BRUCE KAUFMAN

A package of far-reaching bills to overhaul the civil litigation process, long cherished by business and derided by consumer groups, is likely to win approval from President Trump if it reaches his desk.

With a Republican in the White House, supporters of a batch of business-friendly bills now moving through the House have reason for optimism, especially after the president said in a Feb. 28 address to Congress that he supported related legislation addressing medical malpractice issues.

The prospects for enactment of the business-backed litigation measures, colloquially known as “tort reform,” are “certainly better than they’ve been since 2008,” Sherman “Tiger” Joyce, president of the American Tort Reform Association, told Bloomberg BNA.

Trump’s Feb. 28 public comments—that he supports medical malpractice changes that would reduce business costs—may tip the balance further toward industry as business groups often cite similar arguments in championing for broader civil liability changes.

We’re certainly “hopeful” that the “administration’s apparent support for medical liability reform implies support for a broader civil justice reform agenda,” Joyce said.

If it does “we’ll eagerly make the case to the White House and fence-sitters in Congress that, just as meritless litigation makes health care less affordable and accessible, it also undermines economic growth and job creation—two of President Trump’s top priorities,” Joyce said.

But both Joyce and the leading opponents of the broader bills cautioned against reading too deeply into Trump’s comments.

Joanne Doroshov, the founder of the consumer rights group Center for Justice & Democracy in New York, said medical malpractice is an issue that has “nothing to do with the other bills that exonerate misconduct by large industries, about which he said nothing.”

“It has different backers and has always traveled a very separate path in Congress,” she said.

Trump is also no ordinary Republican.

And with the exception of his latest comments on medical malpractice, and more distant remarks about asbestos, it’s noteworthy that there is no record of Trump coming down one way or another, as president

or during the fierce presidential campaign, on a half dozen long-disputed business issues now moving their way through Congress.

At stake are six bills championed by big business that include changes large and small to class actions and other important devices that shape the modern civil litigation process.

Five of the bills have already made it to the House floor.

Floor debate on at least four of the bills, including the recently merged class action and asbestos bills, are possible as soon as the week of March 6. A seventh bill, on medical malpractice, could be voted on the following week.

All seven bills are expected to pass the House in one form or another, but face uncertain prospects in the Senate where 60 votes will be needed to overcome a likely filibuster.

The half dozen bills, detailed below, 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.

Together these bills, and the effort to limit medical malpractice claims, represent the most significant congressional challenge to compensation law in more than a decade, and would likely aid business defendants in thousands of cases every year.

This article, the last in a three-part series examining the prospects for enactment, explores what Trump might do if these bills land on his desk. [See part one and part two].

**As Always, Eyes on Trump.** Is there really a firm basis for believing Trump is a supporter of significant litigation changes?

Alexander Stein, a professor at Brooklyn Law School in New York, and Aaron-Andrew P. Bruhl, a professor at William & Mary Law School in Williamsburg, Va., follow the raging debate.

Stein said that broad overhaul legislation, like what’s in the six bills addressing class, jurisdiction and other areas of litigation, “puts President Trump and his administration in a conflicting situation.”

“Corporate America, which they support, is interested in limiting consumer and other class actions and substitute arbitration for a jury trial,” Stein told Bloomberg BNA.

“But access to courts and trial by jury are also the cornerstones of what grassroots Americans perceive as

justice, and so curtailing these rights will be unpopular and even perceived as un-American,” Stein told Bloomberg BNA.

“Any pro-defendant litigation reform also curtails the power of the states and state courts, which clashes with the conservative understanding of federalism and popular will. For that reason, too, the current administration will be reluctant to support such initiatives,” he said.

Bruhl told Bloomberg BNA that the six bills “do not seem to be among the top priorities for the Trump administration.”

But they are “very high priorities for the Republican majority in Congress,” and if they are “able to get bills curtailing class actions or otherwise restricting civil liability to the President’s desk—a big ‘if’—I would expect him to sign them,” he said.

**Proponents ‘Confident’ About Trump.** Victor Schwartz, a partner at Shook, Hardy & Bacon in Washington and the dean of the movement to enact comprehensive litigation reform at the federal level, is on the front lines.

Schwartz told Bloomberg BNA he is “confident” Trump will sign legislation if supporters successfully link it to priorities he cares about, like job growth and the reduction of legal costs.

Lisa A. Rickard, president of the U.S. Chamber of Commerce’s Institute for Legal Reform in Washington, agreed.

In addition to his business background, Trump’s likely support for the bills is “evidenced by the people he has surrounded himself with,” she told Bloomberg BNA.

“Many senior-level members of the administration and its nominees,” including Vice President Mike Pence, Energy secretary nominee Rick Perry, EPA chief Scott Pruitt, and Attorney General Jeff Sessions have been “champions for legal reform during their careers,” she said.

“If ‘personnel is policy,’ then this administration seems to strongly value legal reform,” she said.

Others are more circumspect.

“It’s not as though tort reform was a big campaign theme for the new president,” Joyce, ATRA’s president, said.

Doroshow, of the Center for Justice & Democracy in New York, a legislation opponent, agreed.

“This was not an election issue, not a talking point, never mentioned in the debates. And there’s no evidence whatsoever that voters cared about it in the least” during the elections, she told Bloomberg BNA.

**Trump Comments May Boost Supporters.** But Trump did appear to back related legislation aimed at addressing medical malpractice during his Feb. 28 address to Congress, citing business-friendly concerns about insurance.

Referring to the Protecting Access to Care Act (H.R. 1215), which caps medical malpractice awards, Trump said he supports measures that would “implement legal reforms that protect patients and doctors from unnecessary costs that drive up the price of insurance.”

H.R. 1215 also caps non-economic damages at \$250,000 and limits the liability of medical device defendants in certain cases.

As supporters of the six bills cite similar concerns about reining in insurance and other business costs, the endorsement of the medical malpractice measure would seem to give supporters of the broader litigation bills a strong hint of Trump’s support.

Even so, most supporters and opponents of the other six business-backed litigation bills say the comments shouldn’t be viewed as directly affecting their broader legislation.

Joyce, of ATRA, was cautiously optimistic it would.

But Doroshow, the bill opponent, said of Trump’s support of malpractice limits that “his endorsement of legal changes in this area, tepid as it was, puts him in direct conflict with many conservatives who strongly object to Congress interfering with traditional state tort law.”

Pamela Gilbert, a veteran consumer advocate and a partner at Cuneo Gilbert & LaDuca in Washington, termed Trump’s comments a “lukewarm” endorsement of “legal reform” and told Bloomberg BNA that we still have “no indication that President Trump will be in favor of the other liability bills.”

He “linked his support to lowering insurance costs, and while there is no evidence that liability restrictions will lower insurance costs, his desire to bring costs down in the health care system doesn’t mean that he is in favor of relieving corporate and other wrongdoers from their responsibilities to pay for the harms they cause,” she said.

**Asbestos Comments May Foreshadow Views.** Aside from his Feb. 28 comments on medical malpractice, Trump has offered no discernible comments about civil litigation overhaul efforts during his time as a prominent developer, a presidential candidate or as president.

Multiple attempts to contact the White House for comment on the administration’s views on the current package of six bills have come up dry.

This vacuum has caused each side to parse his few utterances, some going back 20 years.

In the case of asbestos, Trump offered a bewildering tweet in October 2012, saying: “If we didn’t remove incredibly powerful fire retardant asbestos & replace it with junk that doesn’t work, the World Trade Center would never have burned down.”

In his 1997 book, “Art of the Comeback,” Trump wrote that asbestos was safe, anti-asbestos laws were “stupid” and the anti-asbestos movement was tainted by organized crime.

Do these comments, all verified by Bloomberg BNA, offer a window into Trump’s thinking about the pending asbestos bill or the broader litigation overhaul efforts generally?

Mark Behrens, a partner at Shook, Hardy & Bacon in Washington and a long-time proponent of litigation changes, told Bloomberg BNA that he would be cau-

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tious about “reading too much one way or another into tweets or similar statements made by anyone long ago.

McKinney, ATRA’s director of communications said there “isn’t any particular reason to believe that 20-year-old and 5-year-old comments from a business mogul who would someday become president have much to do with today’s politics.”

Doroshov, a bill opponent, was more blunt, saying there’s “no point wasting time trying to refute crazy.”

But now that Trump is in government, he does have access to “actual information,” she said.

Trump should learn from his own Centers for Disease Control and Prevention about the number of people who are diagnosed with mesothelioma each year, which is only caused by asbestos exposure, she said.

“And a disproportionate number of these individuals are veterans,” she said.

Gilbert, also a bill opponent, said she hasn’t heard of any of Trump’s comments cited in the debate over asbestos claims and liability.

**Populist Messages Shape Up.** Even though Trump’s views of the six bills aren’t known, or at least can’t be discerned, that doesn’t mean supporters aren’t busy crafting a populist message that might resonate with the president.

Joyce, of ATRA, indicated that supporters of the broader bills will be linking them to job growth, similar to the arguments in favor of medical malpractice overhaul.

He also said another avenue may be through prescription drug pricing, about which Trump has expressed concerns.

“It seems to me, we can’t have a truly thorough discussion about drug pricing without mentioning the stratospheric litigation costs invariably reflected in that pricing,” Joyce said.

For the Trump administration, one the biggest challenges may simply be scheduling priorities, Joyce said.

Tax, immigration and health-care related changes, along with border security and military readiness “all seem to be in line ahead of civil justice reforms,” he said.

“And with the virulent partisanship gripping the Senate at the moment, one would have to have a far more powerful crystal ball than I to make any useful predictions,” Joyce said.

Nevertheless, it “seems reasonable that a businessman like President Trump would be willing to listen to fact-based arguments about the drag that our nation’s powerful lawsuit industry exerts on economic growth and job creation,” Joyce said.

If that happens, expect to hear champagne corks pop in corporate boardrooms across the U.S. this year.

**Bills Targeting Litigation Process.** The following bills, all likely to pass in the House, seek to dramatically 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 “‘Frivolous 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.

- *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.”

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