

BOZEMAN DAILY CHRONICLE

Democrats, tort lawyers pan McConnell's liability immunity idea

By Jim Saksa CQ-Roll Call (TNS)
Apr 29, 2020

WASHINGTON — Senate Majority Leader Mitch McConnell's call to make tort reform a condition for giving state and local governments aid for budgets depleted by COVID-19 have left Democrats and plaintiffs' attorneys with a bitter taste in their mouths.

"Before we start sending additional money down to states and localities, I want to make sure that we protect the people we've already sent assistance to, who are going to be set up for an avalanche of lawsuits if we don't act," McConnell said Monday on Fox News Radio. "The lawyers, trial lawyers, are sharpening their pencils to come after health care providers and businesses, arguing that somehow the decision they made with regard to reopening adversely affected the health of someone else."

McConnell didn't detail what kind of change he would like to see in tort law, but the nature of the COVID-19 pandemic may affect the nature of any legislative and legal debate.

Much about the disease, including its prevalence, remains unknown, and state and local governments may be as decisive in when businesses reopen as they were in closing them. Businesses also face uncertain legal liabilities for how they've responded and operated during the pandemic, with many worried that what seems reasonable now, especially in light of inconsistent and conflict federal guidance, may seem unreasonable later to juries. Manufacturers have been pressed into making products they normally don't, but Congress has already shielded mask manufacturers from liability in the third coronavirus response package.

McConnell's call echoed the National Association of Manufacturers, a group that asked Congress in early April to limit lawsuits based on claims that companies knew about exposure to COVID-19 and were indifferent to the risk or disregarded it.

As Congress prepares to return to debate another economic aid bill after passing four relief bills in rapid succession, McConnell's comment and the Democratic response indicated that it could be a slog to enact a fifth bill aimed at spurring an economic recovery and fixing the mistakes made during the legislative rush on the first four.

Democrats want at least \$500 billion for state governments in the next bill and \$200 billion in additional state Medicaid funding, House Speaker Nancy Pelosi said on a press call Tuesday. Pelosi said Democrats were waiting for updated funding requests from state governors, and added that they would support additional funds earmarked specifically for local governments.

The National Association of Counties, the National League of Cities and the U.S. Conference of Mayors have requested \$250 billion from Congress.

The Senate is set to return to Washington on May 4. House Majority Leader Steny H. Hoyer, D-Md., announced Tuesday that the House would remain in recess until the next coronavirus relief bill was ready for a vote.

But Democrats pounced on McConnell's tort law demands as tone deaf.

"How does that make sense?" Senate Minority Leader Charles E. Schumer asked Tuesday on a call with reporters. "Instead of making sure businesses have PPE (personal protective equipment) for their employees, McConnell wants to make it harder for workers to show up at their jobs and to hold their employers accountable for providing safe working conditions.... Instead of fighting for more testing to help everyone working on the front lines, Sen. McConnell is fighting to protect corporate executives."

Plaintiff attorneys accused McConnell of trying to trade Americans' safety for a long-sought GOP policy.

"Liability protections and tort reform are just like tax cuts and stopping immigration: It has been the Republican prescription for everything for more than a generation now," said Max Kennerly, a co-founder of Kennerly Loutey LLC, a plaintiff's firm in Philadelphia. "This proposal from McConnell is no different from what he was proposing a year ago, 10 years ago or 20 years ago."

The lawyers also say shielding companies from coronavirus-related lawsuits would put more Americans at risk of a disease that spreads from human contact.

"Liability protections come at a cost, and the cost is to employers, customers and public at large, because if a business has no incentive to guard against these kinds of harms, safety becomes the more expensive and less competitive option," said Kennerly.

Linda Lipsen, the CEO of the American Association of Justice, said the economy won't restart if people feel they are at risk and can't hold those responsible.

"There are more than 50,000 dead Americans and counting and our economy is at a standstill, yet Leader McConnell and the U.S. Chamber of Commerce want to give immunity to corporations that harm consumers and workers by not taking precautions against COVID-19," she said.

The spirit of tort law Unlike many nations that rely on strict health and safety codes, frequent government inspections and stiff fines, the U.S. relies heavily on private litigation to police corporate behavior. The risk of losing a large lawsuit keeps companies clean and safe, tort lawyers say. Detractors in the corporate sector say civil lawsuits strike capriciously and even meritless claims can cost huge sums to defend.

Overhauling tort law, making it harder for plaintiffs to sue and win injury cases, has long been a corporate goal shared by the GOP.

“He doesn’t want to let a crisis go to waste,” said **Shanin Specter, a founding partner at Kline & Specter** and a law professor at the University of California, Hastings. “What is being proposed is both unnecessary and dangerous.

“Sen. McConnell has been hostile to the civil justice system for as long as he’s been in the Senate,” said Specter, whose father, Arlen, served in the Senate with McConnell. “So he’s got a collateral agenda to try to undermine the civil justice system, and if he can do it, in the atmosphere of the COVID-19 crisis, he will.”

McConnell’s press release Monday referred to front-line health care professionals, small-business owners and major employers, saying “a massive tangle of federal and state laws could easily mean their heroic efforts” to adapt to the pandemic conditions could result in years of lawsuits.

That points at four broad kinds of lawsuits: medical malpractice, workers compensation, product liability and personal injury.

The National Association of Manufacturers’ guidelines in early April for reopening the economy sought to limit lawsuits to “those based on claims that companies had actual knowledge that the person would be exposed to COVID-19 and acted with reckless indifference or conscious disregard as to whether the person would contract it, and require that such allegations be pled with particularity.”

Specter said that would raise the legal standard of negligence and encourage companies to play fast and loose with safety standards.

“Tort law says liability only attaches where the conduct was unreasonable under the circumstances and the circumstances under COVID already give businesses and others plenty of leeway to make judgment about how to respond to the crisis,” he said.

Kennerly warned that relaxing the standards would reward bad behavior, pointing to a federal injunction issued Monday against Smithfield Foods after the nonprofit law firm Public Justice sued on behalf of workers at a Missouri meatpacking plant. The lawsuit alleges Smithfield failed to provide protective equipment or follow social distancing guidelines. The temporary injunction directs the company to comply with recommendations from the Occupational Safety and Health Administration and the Centers for Disease Control and Prevention.

“Do we really want it so that a meat company that doesn’t take reasonable measures to stop the spread of coronavirus will actually be rewarded?” Kennerly said. “That it’ll be a good thing, that they can save money by not trying to keep people safe?”

Executive protection On Tuesday, President Donald Trump suggested he would extend legal protections to food producers, saying he would sign an executive order later that day to address “liability problems” in the food supply chain, according to a White House pool report. In recent weeks, there have been coronavirus outbreaks at large meatpacking facilities in South Dakota, Iowa, Minnesota and Arizona, leading to closures and concerns of broader food supply disruptions.

McConnell’s mention of “health care professionals” suggests he wants to limit medical malpractice claims stemming from COVID-19. Kennerly said responsible health providers had nothing to fear under existing tort law

“No doctor anywhere in the country is required to guarantee a cure, they don’t guarantee a treatment, they are not held responsible if something bad happens to a person,” he said. “What they are held responsible for is if they are negligent and they go beneath the standard of care.”

Specter said employers’ liability to employees would be limited to the workers compensation system, which compensates employees for lost wages and medical costs, and not the non-economic “pain and suffering” or punitive damages that can lead to massive jury awards.

Unlike most tort claims, workers compensation imposes a strict liability standard on employers. Employees only need to prove that they were injured at work, not that it was their bosses’ fault. But for both workers compensation and other tort claims, plaintiffs need to prove they were infected at the business location and not by a family member or a different store, Specter said.

“That claim on causation is going to be somewhere between difficult and impossible, and lawyers aren’t going to take those cases as a general proposition,” he said.

Customers who sue a business for making them sick would be making a personal injury claim, which can’t be filed as class action, the type of case that tort critics usually bemoan. Infected customer would have to make their own claims against individual businesses, which limits the financial incentive for plaintiff lawyers to bring these cases, said Specter.
