RPC JUDICIARY UPDATE

Trial Lawyer Giveaways, Concerns from Federal Judges, and Burdening Main Street: More Problems with the Dodd Bill

The bill contains giveaways to trial lawyers. The bill authorizes state attorneys general to enforce its consumer protection provisions.[1] In practice, states frequently subcontract their litigation to private law firms. These private law firms, many of which are among the majority party's most prolific campaign contributors, typically agree to conduct the litigation under contingency fee agreements that allow trial lawyers to pocket huge portions of any money won at trial or by settlement. In short, this is a huge financial opportunity for trial lawyers and a strong financial incentive for lawsuit abuse.

The bill has troubling implications for bankruptcy law and the practical operation of bankruptcy courts, and may be unconstitutional. The Dodd bill creates an "Orderly Liquidation Authority Panel" in the Bankruptcy Court for the District of Delaware.[2] There are many problems with this proposal, as the federal judiciary has made clear in letters to lawmakers.[3] The judges "urge" the Senate to consider "the practical impact on the courts, and the ability of the Judiciary to implement effectively and efficiently the provisions of the legislation."[4] Their concerns include:

- the panel would require more judges than are currently authorized under federal law, making it impossible to construct;
- the bill's 24-hour time limit on certain decisions by the panel "presents practical difficulties that may be insurmountable;"[5]
- the bill has the potential to disturb the orderly proceedings of firms that are already in the bankruptcy courts, potentially violating the due process rights of parties;
- the bill "does not specify how the transition from a bankruptcy proceeding to an administrative proceeding would be effected. Further, the bill does not specify the effect of the transfer on prior rulings of the court;"[6]
- the panel's authority under the Dodd bill "may exceed what is constitutionally permitted"[7] by Supreme Court precedent.[8] Because bankruptcy judges are not Article III judges, their authority is limited. However, the bill would ask the panel to review decisions made by the Treasury Secretary to initiate the special resolution procedures created by the bill. This type of review typically would fall squarely in Article III jurisdiction.

The bill burdens Main Street, not just Wall Street. Although purportedly designed to rein in Wall Street abuses, this bill does not clearly limit itself to big banks and similar companies. Instead, it creates a new consumer protection bureau that would have authority to regulate any business engaged in financial activity.[9] This flexible and overbroad definition could invite a new and powerful federal authority to impose burdens on small businesses that had nothing to do with the recent financial crisis. Worse, certain provisions of the bill, including the massive liability provisions discussed above, apply to "any person." This would, for instance, apparently make it unlawful for anyone -- not just financial actors -- to engage in "unfair, deceptive, or abusive" acts.[10]

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The likelihood that the scope of the bill would creep far beyond the financial sector is further increased by the authorization of state attorneys general to bring actions (see above).

The bill would federalize corporate law, long a province of the states. The bill imposes a number of federal standards for corporate governance.[11] This would be a major intrusion into the traditional American system of state governments designing frameworks of corporate law they believe best suit their citizens. This system has served America well. It promotes competition between the states and allows American businesses to incorporate in the state that has the legal and regulatory environment best suited to that business. State-based corporate law had nothing to do with the financial crisis, and this bill should not take steps toward federalizing basic corporate law.

The bill creates overlapping and potentially conflicting regulations. Currently most consumer protection is provided under state law. When the federal government chooses to impose its own regulations in an area traditionally covered by the states, it often "preempts" the prior existing state law. It does this so that regulated parties know the standards to which they must conform, rather than face a bewildering thicket of 50 state laws plus federal laws. The Dodd bill does not fully and clearly preempt state law. Indeed, the bill provides that it does *not* preempt state laws that provide greater protection than federal law.[12] This will burden businesses with significant compliance costs and likely lead to expensive litigation as well, as it will produce a confusing regulatory landscape.

The bill would weaken arbitration, harming consumers and investors. Arbitration is a form of alternative dispute resolution that has long been recognized as an effective tool for efficiently and fairly resolving disputes.[13] This bill contains provisions that would allow the Securities and Exchange Commission and the new consumer protection bureau to regulate or even prohibit arbitration in the financial field. [14] A recent letter to the Senate signed by the U.S. Chamber of Commerce, the National Association of Manufacturers, and several other representatives of American businesses expressed strong opposition to these provisions, which, they wrote, are "unnecessary and unwarranted" and "will harm consumers and investors while doing nothing to protect the strength and stability of the financial system." [15]

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[1] Restoring American Financial Stability Act of 2010 (as filed), Section 3217. Bill text available at: http://banking.senate.gov/public/_files/TheRestoringAmericanFinancialStabilityActof2010AYO10732_xml0.pdf.
[2] Section 201, et seq.
[3] Judicial Conference of the United States, Letter to Judiciary Committee Chairman Patrick Leahy, April 12, 2010; Judicial Conference of the United States, Letters sent to Majority Leader Harry Reid and Minority Leader Mitch McConnell, April 26, 2010.
[4] Letter of April 26, see supra at fn 3.
[5] Letter of April 12, see supra at fn 3.
[6] Id.
[7] Id.
[8] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
[9] Section 1001, et seq.
[10] Section 1036.
[11] Section 971, et seq.
[12] Section 1041, et seq.
[13] See, e.g., "Is Arbitration Really Cheaper," *Forbes.com*, July 14, 2009 (Concluding that it is cheaper and quicker to settle a securities claim fairly in arbitration than in court. "Indeed, securities cases are especially susceptible to the most costly and time-consuming aspects of litigation, and an investor is usually up against a big corporation that can afford … to drive up costs and delay everything.")
[14] Sections 921, 1028.
[15] Coalition to Preserve Arbitration, Letter to Members of the United States Senate, April 22, 2010.