House populists protect Wall Street speculators

by Leo F. Scanlon

An increasingly maniacal Republican majority in the U.S. House of Representatives enacted a package of legal reforms in early March which overturn the American tradition of free access to the courts, and insulate securities speculators from the consequences of their investment decisions. The Clinton administration has charged that the bills (HR 988, HR 1075, and HR 1058) contain elements which are "alien to the American legal system" and which "represent a disturbing and unprecedented federal encroachment on 200 years of well-established state authority and responsibility."

The rhetoric supporting the legal package of the "Contract on America," which portrays a legal system crumbling under the weight of increasingly irrational civil litigation, originates with cartel-financed think-tanks such as the American Legislative Exchange Council (ALEC), but sheds no light on the actual problems facing the U.S. legal system.

English rule versus U.S. legal tradition

The centerpiece of the legal reform scheme is the "Attorney Accountability Act" (HR 988), which imposes the so-called "English rule"—where the loser of a civil lawsuit pays the legal fees of the opposing party. The measure allegedly would reduce the incidence of "frivolous" lawsuits in the civil courts. Tort law (cases involving civil disputes with monetary damages) has historically been in the bailiwick of state courts in America. The Republican reforms would federalize those cases involving a multiplicity of jurisdictions (under the provisions of the interstate commerce clause, thus covering most product liability and related disputes), and would put such cases under a new set of rules. These rules require the plaintiff to settle for whatever amount the defendant offers, or risk paying full legal and court costs if he loses.

This proposal gives the lie to all the "states' rights" rhetoric of the Conservative Revolutionaries, and imposes a heavy burden on anyone who would challenge an opponent who has the means to mount a high-powered legal defense. It is the insurance industry which is lobbying most heavily for the reform, in the hopes that the provision will enable it to beat back the demands of claimants in personal injury and product liability cases.

This reform will overturn the historic U.S. approach, which allows any claimant, no matter how poor, a "day in court," no matter how powerful or wealthy the defendant. For better or worse, this mechanism is the means by which product liability and personal injury claims are settled. All parties admit that this system is in need of repair, but the fee-shifting provisions of the "Contract" proposal would put a gun to the head of any litigant who cannot afford to lose a suit. The *Wall Street Journal* has pointed out that the beneficiaries of this scheme would be the large investment houses and financial cartels, which would be able to run roughshod over competitors by engaging in predatory business practices, and responding to complaints with "an offer that can't be refused."

A companion bill, HR 1075, would put caps on product liability claims (which are usually paid out by insurers, not manufacturers) and this bill is similarly flawed. Liability lawsuits are in fact the nightmare of all businesses, large and small. Doctors live in fear of bogus malpractice claims, technical innovators are threatened with ruin by any technophobe who can hire a lawyer, and useful medicines are withheld from the market through fear of arbitrary jury decisions in injury claims.

None of these problems is addressed by capping punitive damage awards. Punitive damages—awarded to "teach a lesson" to an offending individual or corporation found negligent in an injury suit—are inherently arbitrary, and are a relatively new feature of U.S. civil law. But behind most of the horror stories about "runaway juries" making outrageous damage awards, there are two basic problems. First, it is often true that the health insurance system, and corporate managers, will abandon someone who is permanently handicapped or injured by an industrial accident or through faulty products, and juries attempt to compensate for that. Second, juries are often whipped into irrational action by the prevailing "hate propaganda" and "victim mentality" which permeates media news coverage in general. The point is that neither of these elements belongs in a courtroom in the first place.

The danger with product liability suits is the growing tendency of the courts to rely on the fraudulent and manipulated pseudo-scientific theories of environmentalists and sociologists to justify radical and arbitrary rulings which negatively affect regional economies, whole school systems, or entire industries. The "Contract" bills would respond to this by enacting a recent Supreme Court ruling which said that only "peer-reviewed" science is admissable as evidence. Of course, the worst environmentalist theories are thoroughly "peer reviewed."

The most absurd of the reform bills is one which would provide immunity to brokers and accountants charged with fraud in securities lawsuits. It was the Thornburgh Justice Department which demanded far-reaching conspiracy laws in order to target accountants and lawyers as the guilty parties in S&L failures, in order to protect the Federal Reserve and the bankrupt, deregulated banking system. The Republicans now find themselves answering Thomas More's rhetorical question, "When the last law is down and the devil turns on you, where will you go?"