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Businesses Sit Out Fight Over Splitting the 9th Circuit

By Lawrence Hurley

WASHINGTON - Environmental activists recently voiced alarm that if Congress splits the 9th U.S. Court of Appeals into two courts, the new 12th Circuit will be more conservative and business-friendly.

If so, the normally outspoken corporate lobby is keeping unusually quiet about it.

A close review of testimony and letters to congressional committees and an informal survey of trade groups reveals that the business community is largely staying on the sidelines while lawmakers spar over the fate of the nation's largest and busiest circuit.

Some business interests actually favor keeping the nine-state 9th Circuit intact, while most have staked out no public position at all.

What little input has come from the business community is far afield from the claim made by liberal activists that the creation of a 12th Circuit, encompassing a swath of western states, will give property rights advocates an upper hand in high-stakes land-use cases involving fishing, mining, timber and other "extraction" issues.

Instead, the most prominent business voice in the current debate is the Seattle-based former general counsel of the Microsoft Corp. and president-elect of the American Bar Association, William Neukom.

He is urging Congress to leave the 9th Circuit as it is.

California and Hawaii would remain in the 9th Circuit if Congress approves a proposed split, while seven other western states would go into the newly formed 12th Circuit.

A split is bad, Neukom wrote last month to senators in a letter co-signed by veteran San Francisco business litigator Michael Traynor, because it "is unlikely to serve the interests of the many businesses and corporations that are so important to the economy of the West Coast."

The two lawyers emphasized a continuing need for the law in western states to be settled and uniform. The possibility of two courts reaching divergent conclusions on common issues means lawyers will have to spend more time keeping abreast of the law, they added.

"A single federal appellate court for the West Coast minimizes the risk that the law of intellectual property, maritime trade, labor relations, banking, or other business matters will be different in San Diego and Seattle," they wrote.

Traynor, a partner with Cooley Godward for 37 years, said in an interview that he sees the proposal purely as a partisan endeavor by Republicans in response to certain high-profile 9th Circuit decisions that angered conservatives.

"I think the primary motivations are partisan," he said. "I don't know what business lobbying there is, if any, on this issue."

Neukom did not respond to requests for comment.

In Washington, D.C., influential trade associations say they are simply not focusing on the split.

The U.S. Chamber of Commerce and the National Association of Manufacturers, heavy hitters on other legal issues, such as tort reform, are both sitting out the fight.

"We are highly critical of the 9th Circuit, but we are not on record or suggesting that the court be split," said a spokesman for the manufacturers' association.

Ditto for trade groups that represent extraction industries that are powerful voices in some of the states that would shift to the 12th Circuit. Among them are the National Mining Association and the National Fisheries Institute.

Spokesmen for both groups said they have no position on the issue and declined to comment further.

"I don't think many folks see it as an issue," said a former Republican staffer on the Senate Judiciary Committee.

As one of Washington, D.C.'s most powerful lobbies, the business community is plenty capable of making itself heard on court-related issues.

A case in point is tort reform. Major industries and groups like the National Association of Manufacturers have bankrolled expensive public relations campaigns in support of legislation to restrict product liability and medical malpractice litigation.

These efforts include setting up Web sites, hiring public relations consultants and lobbyists, and holding high-profile media events on Capitol Hill featuring prominent members of Congress.

By contrast, the 9th Circuit split proposal has remained under the radar, receiving little attention in the mainstream media.

"It makes sense to put their PR and lobbying bucks on issues that directly affect their operations," said Arthur Hellman, a law professor at the University of Pittsburgh who closely tracks 9th Circuit politics. "I would not have thought they would want to use their firepower on splitting the 9th Circuit."

He added that the notion of a new 12th Circuit siding with the business community more than the existing 9th Circuit is "distant and speculative."

The only lobbying firm known to be actively engaged in the split debate was hired by former California State Bar president Harvey I. Saferstein of Mintz Levin who is fighting against the current legislation on behalf of a group of West Coast business lawyers who call themselves "Friends of the 9th Circuit."

The group includes Eric George, a well-connected Beverly Hills Republican lawyer who advises the Bush administration on federal judicial appointments in California.

The lobbying firm hired by Saferstein is Washington, D.C.-based Parry, Romani, DeConcini & Symms.

Among lawmakers, all the main supporters of the split legislation are senators and representatives from the states that would be in the new 12th Circuit. Sen. John Ensign, R-Nev., sponsored the Senate bill, while Rep. Mike Simpson, R-Idaho, introduced the House version. Other vocal supporters include Sen. Jon Kyl, R-Ariz.; Sen. Gordon Smith, R-Or.; Sen. Lisa Murkowski, R-Alaska; and Conrad Burns, R-Mont.

The pro-split chorus outside Congress has been led by academics, court-watchers and some judges on the court, chief among them Judge Diarmuid O'Scannlain, a Reagan appointee who sits in Portland, Ore.

O'Scannlain said in an e-mail that he is unaware of any outside interest groups lobbying of Congress in support of the split.

In public statements, supporters of a split have argued that the 9th Circuit, by far the largest of the nation's 11 regional appellate districts, has grown too big to maintain administrative efficiency.

Critics have accused the split supporters of harboring an ideological agenda - and they point to frequent complaints from conservatives that the 9th Circuit is too liberal.

Ensign, for example, made reference to the now-infamous 2002 9th Circuit ruling striking down the words "under God" from the Pledge of Allegiance in the same press release that announced his court-splitting bill last year.

"Many of the court's rulings reflect a set of values that are at odds with the majority of the people of Nevada," he said in the statement. "I look forward to seeing Nevada's residents served by a new court in a new location with a viewpoint closer to their own."

California's senators, Barbara Boxer and Dianne Feinstein, both Democrats, are on the record opposing a split. And so are some of the state's prominent Republicans, including Gov. Arnold Schwarzenegger and former Gov. Pete Wilson.

With a Senate Judiciary Committee hearing on the proposed split scheduled for next month, some opponents see the absence of corporate lobbying as an indication that the legislation is really just an appeal to conservative grass-roots activists.

Glenn Sugameli is senior legislative counsel for Earthjustice, the environmental advocacy group that last month warned the media that the 12th Circuit would be a gold mine for business interests.

But in an interview this week, Sugameli acknowledged that his usual adversaries from corporate America are nowhere to be seen on the lobbying front.