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Dems' Senate Win Sinks Insurers' Virus Liability Shield Hopes

By **Jeff Sistrunk**

Law360 (January 13, 2021, 12:33 PM EST) -- The insurance industry's hopes for sweeping national legislation that would shield businesses from most coronavirus-related lawsuits were likely dashed last week as Senate control swung to the Democrats, who have resisted such a measure, warning that it would erode legal protections for workers and consumers.

By flipping both of Georgia's Senate seats, Democrats and their two independent allies wrested control of the chamber from Republicans for the first time since 2014. According to experts, the shift in power is likely the death knell for Senate GOP members' broad proposed COVID-19 liability shield for corporations, schools, health care providers and other organizations.

Majority Leader Mitch McConnell, R-Ky., once described a corporate liability shield as a nonnegotiable "red line" for the next coronavirus relief package. But Democratic leaders have indicated the proposal is a nonstarter for their caucus, **voicing concerns** that it is an overbroad and cynical effort at tort reform, and it proved to be a major sticking point in lawmakers' coronavirus relief talks both before and after Election Day.

Leading insurance industry trade groups have thrown their support behind the nationwide liability shield, known as the Safe to Work Act, calling it necessary to prevent their policyholders from being inundated with frivolous coronavirus-related litigation as they operate during the pandemic. The groups' fear is that, if policyholders are forced to defend a huge volume of suits, liability insurance carriers could be flooded with claims and their resources could be stretched to the breaking point.

"Liability relief is the biggest concern for our member firms right now, given the Democratic leadership's traditional fealty to the trial bar," said Joel Wood, senior vice president for government affairs at the Council of Insurance Agents and Brokers, or CIAB.

With Democrats now holding a slim advantage in the Senate, however, they are unlikely to entertain the GOP's liability shield pitch in negotiations over the next coronavirus relief package, according to experts. Unions, consumer protection organizations and trial attorneys have all fervently urged Democrats to spurn the proposed shield.

"With the Democrats taking control, there will be almost a 100% chance that you will not see a liability shield in the next coronavirus relief package," said Jimi Grande, senior vice president for government affairs at the National Association of Mutual Insurance Companies, or NAMIC. "Preserving the right to sue is important for some groups, and this has become a highly divisive issue."

A spokesman for McConnell declined to comment on how the election results may impact the liability shield proposal. Representatives for Minority Leader Chuck Schumer, D-N.Y., and House Speaker Nancy Pelosi, D-Calif., did not respond to messages seeking comment.

Harvey Rosenfield, founder of the nonprofit consumer advocacy group Consumer Watchdog, welcomed the likely demise of the nationwide liability shield proposal, saying the insurance industry's concerns are overblown.

"Anytime there is a catastrophe, the insurance industry and its corporate brethren take advantage to insulate themselves from liability for misconduct," he said. "It is their standard operating procedure: Wall Street and corporate politicians get together and try to connect something Americans need with something these industries want, which is a bailout from liability."

Linda Lipsen, CEO of the American Association for Justice, an organization of trial lawyers, said in a statement that a sweeping corporate liability shield is unnecessary. Her organization pointed to a litigation tracker maintained by Hunton Andrews Kurth LLP, which indicates that less 400 of the over 7,100 coronavirus-related suits have been the sort of personal injury, medical malpractice or wrongful death suits that the proposed shield would preclude.

"Lawmakers should be focused on stopping the spread of the pandemic, not giving immunity to corporations that endanger the lives of workers and consumers," Lipsen said.

The Safe to Work Act, proposed by Senate Republicans in July, would enact a five-year period of limited immunity for certain businesses and nonprofit organizations in coronavirus-related personal injury and medical malpractice suits, and such cases would fall under the jurisdiction of federal courts. The bill also contains a two-pronged requirement that plaintiffs must establish that a business or organization was grossly negligent or engaged in willful misconduct, and that it failed to make "reasonable efforts" to comply with applicable public health guidelines.

In addition, all such cases would be subject to a "clear-and-convincing" evidentiary standard, and plaintiffs would have to provide a statement of facts "giving rise to a strong inference that the defendant acted with the required state of mind."

In late July, NAMIC and CIAB joined more than 490 other business trade associations across the insurance, banking, retail, medical, manufacturing and hospitality sectors in sending a letter to Congress urging the passage of the nationwide liability shield.

"COVID-19-related lawsuits and their consequent exorbitant legal costs could deter entities from reopening and could ultimately cripple businesses, educational institutions, and non-profit organizations both large and small," the letter said. "Furthermore, absent the proposed liability protections, many frontline healthcare workers and facilities, as well as manufacturers of critical personal protective equipment, would be punished for their efforts in the form of costly lawsuits."

But now, with the federal bill's prospects dimmed, the insurance industry's hopes will shift to the states, which have seen a flurry of activity surrounding COVID-19 liability shields.

"With the federal government's notorious gridlock, we are much more likely to see movement on this issue at the state level," said Morgan Lewis & Bockius LLP partner Scott Fischer.

To date, 16 states have passed some form of liability protection for businesses and nonprofits — either via legislation or executive order — and more than a dozen other state legislatures have proposed such measures.

None of the state shields is as sweeping or long-lasting as the Safe to Work Act, but they contain some of the federal bill's elements. While the state measures vary in terms and scope, they all impose a temporary bar on suits claiming that a business or nonprofit negligently exposed an individual to the virus. However, also like the federal proposal, the state measures all permit suits alleging the defendant engaged in willful misconduct, and several also allow actions claiming gross negligence.

Fred Karlinsky, co-chair of Greenberg Traurig LLP's insurance regulatory and transactions practice group, told Law360 that, "irrespective of what Congress is going to do, we are likely to see more state legislatures proposing some form of liability shield in 2021."

"For many of them, there is a concern that, without some protections, the economies in their states could suffer as they reopen," he said.

--Editing by Adam LoBelia.