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## Tort Costs Make US Cos. Less Competitive: Panel

By **Dan Rivoli**

Law360, New York (May 24, 2011) -- The U.S.' high litigation costs, driven by fraud and abuse, hampers the development of American businesses and prevents some foreign companies from investing here, panelists told members of a U.S. House of Representatives subcommittee Tuesday.

At a hearing on litigation's effect on America's global competitiveness, members of the House Judiciary subcommittee on the Constitution were told that the U.S.' litigation costs were drastically higher than in other developed countries and disproportionately fell on small businesses.

"The key problem is we've made lawsuits an attractive investment," said John Beisner, a Skadden Arps Slate Meagher & Flom LLP partner and co-head of the mass torts and insurance litigation group. "The parties themselves are becoming less and less relevant in litigation. The litigation process is being taken over by sophisticated investors."

Beisner, who testified on behalf of the U.S. Chamber of Commerce's Institute of Legal Reform, described a legal system prone to abuse, citing third-party litigation financing, private lawsuits that "piggy-back" on government investigations and lawyers who use medical screenings that he said discover injuries in patients who were unaware of any illness.

The hearing comes as the Judiciary Committee considers the Lawsuit Abuse Reduction Act, which would impose mandatory sanctions on Rule 11 violations to deter frivolous lawsuits, and the Help Efficient, Accessible, Low-cost, Timely Healthcare Act, which would limit noneconomic damages in health care cases.

Rep. Trent Franks, R-Ariz., the subcommittee chair, in opening remarks called the effect of the U.S. litigation environment "a tax almost on anyone who would create jobs in America."

"This lawsuit tax is the most regressive," Franks said. "The lawsuit tax can stop job-creating businesses in their tracks."

The cost of the U.S. tort system is estimated to cost about \$250 billion in 2009, or about 2 percent of gross domestic product, according to testimony from Paul Hinton, vice president of NERA Economic Consulting.

Hinton said these costs in the U.S. are higher, as a percent of GDP, than any other industrialized country and more than double the estimates for the U.K., France and Japan.

"Litigation imposes direct costs that are higher in the United States than they are in other countries. And they mostly fall on small business," Hinton said.

However, as one panelist pointed out, the U.S.' litigation system actually benefits competitiveness by pushing industries to change in ways that decrease the number of lawsuits and errors, such as health care.

The only dissenter on the three-person panel, Charles Silver, the McDonald chair in civil procedure at the University of Texas School of Law, said the lawsuits could be used to improve services and make reforms that will lead to a lower number of complaints and lower liability insurance.

For example, Silver said, anesthesiologists practicing before the mid-1980s were slammed with high medical malpractice insurance rates because of lawsuits due to medical errors made during risky procedures.

Instead of fighting for tort reform, Silver said, anesthesiology groups used the lawsuits to learn "the root causes of medical errors, redesigned their equipment and took steps to reduce mistakes."

"The results were spectacular," Silver said. "As anesthesia became safer, the harmfulness of injuries declined, and lawsuits pretty much dried up."

When Franks, the subcommittee chair, asked about the cost effectiveness of the U.K.'s law system, which also creates enforceable rights, Silver said legal systems capture only a fraction of the cost, which can be shifted elsewhere.

For a U.K. plaintiff suing for damages over an injury or illness, the health care costs would be picked up by the National Health Service, Silver said.

"If you were to eliminate the tort tax, you would foster false growth," Silver said. "It would be saddling other people with billions and trillions of costs they otherwise would not be accountable for."

Beisner, the Skadden Arps attorney, however, said companies often note the difference between the U.S. and European legal systems that ensure rights at lower costs.

"When you talk with persons responsible with the administration of business, they certainly make a huge distinction in the environment they find in European countries [and what they find] in the Untied States."

--Editing by Lisa Uhlman.

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