



April 13, 2015

TO: Federal Bar Association

FROM: West Allen, Chair, Government Relations Committee
Bruce Moyer, Counsel for Government Relations

SUBJ: Update on Government Relations and Public Policy Developments

FBA Capitol Hill Day on April 30

Approximately fifty Federal Bar Association leaders will meet with House and Senate lawmakers on April 30 during FBA Capitol Hill Day. The increasingly popular FBA event will involve advocacy by FBA national, circuit and chapter leaders to promote:

- Support for adequate funding for the Federal Judiciary
- Support for prompt attention by the President and the Senate to filling judicial vacancies
- Support for curbing abusive patent litigation practices
- Opposition to H.R. 758 and S. 401, The Lawsuit Abuse Reduction Act of 2015
- Support for the establishment of an Article I Immigration Court

A brief FBA video providing a primer on each of these five issues has been recorded by Government Relations Counsel Bruce Moyer and is available here: <http://bit.ly/1IUml1a>

Further registration information about Capitol Hill Day is available here: <http://www.fedbar.org/Advocacy/2015-Capitol-Hill-Day.aspx>

FBA Support for Federal Judiciary Funding

As lawmakers return to Washington in mid-April from their two-week recess, House and Senate negotiators will convene to reconcile the differences between the House and Senate budgets adopted in March. They will aim at achieving a final framework for the FY 2016 appropriations allocations to government departments and programs, including for the Federal Judiciary.

The Federal Bar Association earlier communicated to Congress its strong support for the Federal Judiciary's FY 2016 budget request in correspondence from President Matthew Moreland to the chairs of the Senate and House Appropriations subcommittees overseeing funding for the federal courts. Those letters are attached.

In underscoring the need for adequate court funding, President Moreland noted that "The Judiciary's FY 2016 request will maintain current services across the Judiciary, continue the recovery and restoration of activities disrupted because of sequestration, and enable investment in important new or upgraded program initiatives to support judicial operations."

The Senate and House Appropriation Subcommittee on Financial Services and General Government held hearings on the judiciary's FY 2016 budget request on March 24 and 25. The leaders of the two committees reflected support for the Federal Judiciary's request of \$7.0 billion in discretionary funding, a 3.9 percent increase above last year.

Judge Julia Gibbons, chair of the Judicial Conference Committee on the Budget, and Jim Duff, Director of the AO, testified at both hearings in support of the Federal Judiciary's request. They emphasized the Judiciary's cost containment efforts, aimed at reducing the size of the Judiciary's physical footprint by 3% by 2018. They also pointed to expanded use of shared administrative services by court units and the additional cost savings that will arise through amendment of law (18 USC §3602) to permit the sharing of probation officers among federal judicial districts.

The Federal Judiciary supports \$181.5 million in funding for a new courthouse in Nashville, TN and \$20 million for renovations and security improvements in existing courthouses, as contained in the funding request for the General Services Administration, which coordinates the construction for new government buildings and capital improvements.

Judge Gibbons testified, in answer to a question about the potential impact of flat funding, that the judiciary would have to downsize staff by 260 FTEs, defer paying panel attorneys for one month, eliminate \$6.3 million from IT-related court security enhancements, and cut funding for court security personnel and equipment by \$22 million.

FBA Comments on House Litigation on Abusive Patent Litigation

In a March 26, 2015 letter to the House Judiciary Committee, the Federal Bar Association urged a “balanced approach” by Congress toward patent law reform that curbs abusive patent litigation while promoting a patent system that provides incentives for American leadership in innovation and technology. The letter reflects the Federal Bar’s opposition to legislation that “mandates rules and practices outside of the traditional Rules Enabling Act procedures and potentially infringes on judicial independence and discretion in adjudicating patent disputes.” The remarks came in a letter setting forth the FBA’s views on the Innovation Act, H.R. 9, legislation intended to deter abusive patent litigation. The FBA letter is attached.

During Capitol Hill Day on April 30, FBA leaders in meetings with Hill lawmakers will continue to urge Congress to temper abusive patent litigation, while raising concerns about approaches that intrude on judicial independence and generate fee-shifting wars.

Federal Judicial Vacancies

Since the start of the 114th Congress, the number of judicial vacancies has grown from 44 to 55 in appeals, district and international trade courts. Those considered emergency vacancies for benches facing high caseloads has nearly doubled from 12 to 23.

The Senate this week is set to confirm the first judicial nominee since Republicans gained the majority three months ago. That is a slower pace than 2007, when Democrats confirmed 15 of Republican President George W. Bush’s court nominees in the three months after they regained control of the Senate in 2007.

The US Courts website, as of this date, reflects:

	Current Vacancies	Nominees Pending
Courts of Appeal	8	2
District Courts	43	13
US Ct of International Trade	<u>4</u>	<u>1</u>
Total	55	16

Of the 55 current vacancies, 23 are designated as “judicial emergencies” by the Federal Judiciary, an increase of 2 over a month ago. There are 26 vacancies that are expected to arise over the course of the next year.

Texas is responsible for more than one-third of those emergencies (six Texas federal district court and two Texas Fifth Circuit seats), one fifth of 55 current vacancies (9 district & 2 Fifth Circuit seats), and two announced future judicial vacancies.

Judge Alfred H. Bennett, whom the Senate is expected to confirm this week for a seat on the Southern District Court of Texas, would fill one of the “emergency” spots that has been empty for more than two years.

The Lawsuit Abuse Reduction Act of 2015

The Lawsuit Abuse Reduction Act of 2015 (H.R. 758) was the subject of a House Judiciary subcommittee hearing on March 17. A companion bill (S. 401) also has been introduced in the Senate. A prior version of the legislation in the last Congress passed the House of Representatives, but stalled in the Senate. It is opposed by the Federal Bar Association, along with the Judicial Conference of the United States and the Obama Administration. The FBA will urge opposition to the legislation during meetings with lawmakers during Capitol Hill Day on April 30.

The legislation would restore mandatory sanctions for frivolous lawsuits filed in federal court and require those who file frivolous lawsuits to pay for the legal costs of defendants when it is proven that the lawsuit was without any basis in law or fact. The mandatory sanctions permitted under the legislation would include repayment to defendants of the full costs of their reasonable expenses incurred as a direct result of the Rule 11 violation, including attorneys’ fees. The bill strikes the current “safe harbor” provisions in Rule 11 that allow lawyers to withdraw allegedly frivolous claims by withdrawing them within 21 days.

The Federal Bar Association opposes the legislation because it would eliminate judicial discretion in the imposition of sanctions for frivolous litigation and likely cause expensive satellite litigation to unfold. By creating an automatic financial incentive, and by removing the safe-harbor period, the changes to Rule 11 could dramatically increase the number of sanctions motions, including those filed against Federal government attorneys, and correspondingly increase the risk of financial exposure for any conduct that might be considered a Rule 11 violation. In short, the legislation would raise the amount and cost of civil litigation and provide more opportunity for unnecessary delay and harassment.

Attorney General Nomination

Senate floor action on the nomination of Loretta Lynch to become Attorney General post continues to remain on hold as Republican opposition has increased over concerns that she would be a rubber stamp for President Barack Obama's executive actions, which many Republicans have labeled an unconstitutional power grab. Lynch, the U.S. attorney for the Eastern District of New York, received high marks for character and competency in her nomination hearings. But as her nomination was held up in March over a stalemate on an abortion amendment on a human trafficking bill. She would be the first black female attorney general, succeeding the first black male attorney general, Eric Holder.

FBA Meeting with AO Director Duff

A cordial and productive meeting of FBA national leaders with James Duff, the new director of the Administrative Office of the U.S. Courts, occurred in Washington on March 26. FBA President Matt Moreland, Vice-President Mark Vincent, Treasurer Hon. Michael Newman, Executive Director Karen Silberman and Government Relations Counsel Bruce Moyer represented FBA. Director Duff thanked FBA for its continued support of the Federal Judiciary and for the collaborative role FBA plays at the national and chapter levels. He was especially appreciative of the FBA's work on Capitol Hill and its advocacy for adequate resources for the federal courts. He also expressed interest in exploring ways that the FBA may further assist in promoting civic education programs that increase public understanding and respect for the federal courts.

Attachments



Federal Bar Association

March 23, 2015

The Honorable Ander Crenshaw
Chairman
Appropriations Subcommittee on
Financial Services and General Government
U.S. House of Representatives
Washington, DC 20515

The Honorable Jose Serrano
Ranking Member
Appropriations Subcommittee on
Financial Services and General Government
U.S. House of Representatives
Washington, DC 20515

Re: FY 2016 Funding Request of the Federal Judiciary

Dear Chairman Crenshaw and Ranking Member Serrano:

We write to express strong support for the Federal Judiciary's FY 2016 budget request. The request equals \$7.0 billion in discretionary appropriations, and increase of 3.9 percent over the FY 2015 enacted level. The request also includes \$571.1 million in mandatory appropriations. We urge the Congress to make these funds available to assure the federal courts are able to fulfill their constitutional and statutory responsibilities.

Our Association's membership of over 16,000 attorneys represents a major constituency of the Federal court system. Our members witness the daily need for adequate funding for the Federal courts. Their clients, whether defendants or plaintiffs, enter the courts in civil and criminal disputes with the same expectations for the fair and prompt administration of justice.

We are deeply appreciative of your Subcommittee's past support for the Federal Judiciary and your vigilance to assure that the necessary resources are made available to permit them to fulfill their responsibilities as a co-equal branch of government. The funding that Congress made available to the Federal courts in FY 2015 was vital in helping courts across the nation to stabilize their financial position and operations after the devastating impact of sequestration. The Judiciary's FY 2016 request will maintain current services across the Judiciary, continue the recovery and restoration of activities disrupted because of sequestration, and enable investment in important new or upgraded program initiatives to support judicial operations.

We note that the Judiciary's budget request fully funds the Judiciary's defender services program, which provides court-appointed counsel to indigent defendants, and increases the non-capital panel attorney hourly rate from \$128 to \$134. The funding request also ensures that funds will be available for criminal and civil jury trials. For the first time since 1990, the Judiciary's request provides for an increase in the daily juror attendance fee by \$10, from \$40 to \$50.

We ask your Subcommittee to take into account the commendable actions taken by the Judiciary to contain costs and implement more efficient ways to administer justice. Space reduction remains the Judiciary's primary cost-containment initiative. Since 2013, the Judiciary has

proactively removed more than 242,000 square feet of space from its rent bill, representing an annual savings of \$6 million.

In addition, we support the Judiciary's request for design and construction services funding for the Nashville, Tennessee Federal Courthouse, as included in the Administration's budget request for the General Services Administration. Funding of this project would represent only the second approval of new federal courthouse funding since 2010.

Members of the Federal Bar are committed to doing everything we can to continue to support the Judiciary's efforts to assure the administration of justice good stewardship of taxpayer resources. Thank you for your consideration of our comments.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Matthew B. Moreland', with a stylized flourish at the end.

Matthew B. Moreland
President

cc: Members of the House Appropriations Subcommittee on Financial Services and General
Government
The Honorable Julia S. Gibbons, Chair, Judicial Conference Committee on the Budget
The Honorable James Duff, Director, Administrative Office of the U.S. Courts



Federal Bar Association

March 23, 2015

The Honorable John Boozman
Chairman
Appropriations Subcommittee on
Financial Services and General Government
United States Senate
Washington, DC 20510

The Honorable Chris Coons
Ranking Member
Appropriations Subcommittee on
Financial Services and General Government
United States Senate
Washington, DC 20510

Re: FY 2016 Funding Request of the Federal Judiciary

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Matthew B. Moreland
President

cc: Members of the Senate Appropriations Subcommittee on Financial Services and General Government
The Honorable Julia S. Gibbons, Chair, Judicial Conference Committee on the Budget
The Honorable James Duff, Director, Administrative Office of the U.S. Courts



Federal Bar Association

March 26, 2015

The Honorable Robert Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Innovation Act, H.R. 9

Dear Chairman Goodlatte and Ranking Member Conyers:

I write on behalf of the Federal Bar Association to address the “Innovation Act” (H.R.9), which has been the subject of hearings before your committee and the topic of much public comment.

As you know, the mission of the FBA is to strengthen the federal legal system and administration of justice by serving the interests and needs of the federal practitioner, both public and private, the federal judiciary and the public they serve. With 16,000 members, we are the foremost bar association serving the federal practitioner. While we support legislation to curb abusive patent litigation practices, we oppose legislation that mandates rules and practices outside of the traditional Rules Enabling Act procedures and potentially infringes on judicial independence and discretion in adjudicating patent disputes. We endorse a balanced approach to patent law reform that curbs abusive patent litigation and maintains a patent system that provides incentives for American leadership in innovation and technology.

Our evaluation of H.R. 9 recognizes that the recently enacted “America Invents Act” fundamentally reformed patent law and addressed a number of policy concerns about patent litigation. As you know, it created robust new Patent Office proceedings designed to more efficiently weed out invalid patents, triggering record-breaking levels of patent challenges. Meanwhile patent infringement filings last year dropped by almost 20 percent. As part of this wave of change, a substantial body of recent court decisions, including a significant number of recent Supreme Court rulings, have sharply curtailed what can be patented.

The impact of these developments is only beginning to be felt. We are encouraged by their potential for bringing about significant change in the law that renders the need for major legislative action unnecessary at this time. We recognize that there are areas that might warrant further legislative attention, and we certainly welcome Congressional action that assures the prevention of abuse of our judicial system. However, the necessity for legislation that overlaps with actions within the authority of the judiciary appears ill advised. Three sections of the bill generate this concern.

First, Section 3 sets forth heightened pleading requirements with legislative detail. Form 18 to the Federal Rules of Civil Procedure has historically governed patent infringement pleadings and sets a low pleading bar. But through the Rules Enabling Act that form is in the

late stages of being eliminated, with its repeal expected later this year. Freed from the strictures of Form 18, the judiciary will be able to develop a body of common law as to the proper pleading standard under the evolving *Twombly/Iqbal* standard. The federal judiciary should be given that chance to do so. In addition, the element-by-element patent infringement contention details required by Section 3 may be at odds with the sequence of events proscribed by the district court patent rules adopted by courts around the country. These rules came about only after careful analysis and deliberation among the members of the local civil rules committees, comprised of judges and practitioners. Congress itself has recognized the benefit of the framework of local patent rules, including their adoption as one of the criteria for a district to participate in the Patent Cases Pilot Program (Pub. L. 111-349; 124 Stat. 3674-3676).

Second, Section 3 changes the statutory provision governing fee-shifting (35 U.S.C. §285) to presume a fee award, absent specific findings by the court to the contrary. Last year in *Highmark Inc. v. Allcare Health Mgmt.*, 572 U.S., ___ (2014) and *Octane Fitness v. ICON Health & Fitness*, 572 U.S., ___ (2014), the Supreme Court made it easier to grant fees under §285, by eliminating the steep *Brooks Furniture* fee-shifting standard that had been in place for many years. Under *Highmark/Octane*, trial court judges are empowered more broadly and more flexibly to award fees. Trial judges should have the authority to show that they can properly exercise their new discretion to shift-fees when abuses occur — before an outright presumption of fee-shifting is imposed statutorily. A fee-shifting presumption not only raises concerns about access to the courts, it encourages satellite disputes about fee-shifting because prevailing parties have a strong incentive to force the opposing party to rebut the presumption in situations where they would not otherwise seek a fee award.

Third, Section 6 includes an extensive number of patent-specific rules of procedure the Judicial Conference will be required to put in place regarding discovery and case management. The specificity of Section 6, in our view, sets aside a tradition of Congressional deference to the authority of the courts to establish subject-specific procedural rules, as recognized under the Rules Enabling Act. Currently the Judicial Conference is in the process of approving a package of proposed amendments to the Federal Rules of Civil Procedure applicable to all civil litigation. This package includes new limits on discovery regarding proportionality and the allocation of the cost of discovery. These new tools, achieved after substantial consideration, will allow courts to manage discovery in the normal case-specific manner, but with a greater flexibility to prevent excesses. These major changes have the potential to achieve the same aims sought by Section 6 and should be given time, at least several years, to work.

On behalf of our 16,000 members, thank you for your consideration of our views. We will be happy to answer any questions you and your staff may have regarding these issues.

Sincerely,



Matthew B. Moreland
President