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Answers to Written Questions from Senator Dick Durbin
Senate Judiciary Committee
"The Impact of Lawsuit Abuse on American Small Businesses and Job Creators"

Myriam Gilles

1. In March, the Lawsuit Abuse Reduction Act (LARA) was passed in the House over bipartisan opposition. This bill would reinstate the mandatory sanctions provision of Rule 11 that was adopted in 1983 and removed by the Judicial Conference in 1993.

   According to a letter sent this February by the Judicial Conference, "LARA creates a cure worse than the problem it is meant to solve….A decade of experience with the 1983 mandatory sanctions provision demonstrated that it failed to provide meaningful relief from the litigation behavior it was meant to address, and instead generated wasteful satellite litigation that had little to do with the merits of cases."

   The Judicial Conference made changes in 1993 to correct the flaws in this mandatory sanctions rule, after a period of Congressional review and with the approval of the Supreme Court. According to the Judicial Conference, "the amended rule has produced a marked decline in Rule 11 satellite litigation without any noticeable increase in frivolous filings."

   Would it be wise for Congress to overrule the judgment of the Judicial Conference and revert back to the 1983 version of Rule 11 that, according to the Judiciary Conference letter, caused "an explosion of satellite litigation"?

   It would be irresponsible for Congress to overrule the judgment of the Judicial Conference and revert back to the 1983 version of Rule 11, for a number of reasons. First, the 1983 version of Rule 11 featured Rule 11 mandatory sanctions, no safe harbor or cure provisions, and a clear emphasis on obtaining fee awards. As a result, and the American Bar Association explained in its February 1, 2017 letter to the House Judiciary Committee, "[d]uring the decade that the 1983 version of the Rule [] was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the

legal system and wasted valuable court resources and time."[1] Empirical studies of litigation activity in the pre-1993 period confirm significant increases in satellite litigation and judicial delays resulting from Rule 11 motions, coupled with the qualitative sense from judges and lawyers that the Rule had become a tool for harassment and delay.[2] More distressingly, quantitative analyses of that period also reveal that Rule 11 sanctions were more imposed against plaintiffs in certain kinds of cases – primarily civil rights, employment discrimination, and other important cases seeking to change or extend the law.[3]

Second, and as a direct consequence of the increase in satellite litigation and the disparate impact on public law cases, the Advisory Committee for the Federal Rules undertook a serious and lengthy study of Rule 11 in the early 1990's. And it was only after much thought and debate that the Committee proposed the 1993 amendments to the Rule, which were subsequently adopted by the Judicial Conference, the Supreme Court and Congress. In the intervening years, the Committee has chosen not to revisit these issues because there is simply no credible indication of a problem that requires its attention. In short: the rulemaking process worked as intended.[4] Congress established this comprehensive process for adopting and amending the Federal Rules in 1934, based on respect for separation of powers and the desire to tap the vast expertise and experience of judges, lawyers and academics in the field.[5] That process

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[1] ABA letter to Reps. Goodlatte and Conyers Opposing the Lawsuit Reduction Act of 2017, Feb. 1, 2017, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017feb1_lara_l.pdf.authcheckdam. These views were reiterated in a 2013 letter from the Advisory Committee to the House Judiciary Committee, which warned that the proposed legislation "would create a cure far worse than the problem that it was meant to solve by reinstating the 1983 version that proved contentious and diverted so much time of the bench and the bar. *Id.*

[2] *See* Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 173-74 (1994) (reporting statistics on growth in Rule 11 practice).

[3] *See* Arthur Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1007-9 (2003) ("[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered 'disfavored' by some ....").

[4] By design, the process for adopting or amending the Federal Rules of Procedure is lengthy and involved: proposals for rules or amendments are made to the Advisory Committee by judges, clerks of court, lawyers, professors, individuals, and organizations who are engaged with the litigation system in meaningful and important ways. The Advisory Committee may vote to recommend a rule or amendment for consideration. The next step involves publication and distribution of the proposed rule to more than 10,000 individuals. After considering public comments and making appropriate changes, the Committee submits a proposed rule or amendment to the Judicial Conference for approval and then to the U.S. Supreme Court. If supportive, the Supreme Court transmits the proposed rule or amendment to Congress, which retains the ultimate power to reject, modify, or defer any proposed change.

[5] Rules Enabling Act, 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."). *See also* The Judicial Improvements and Access to Justice Act, PUB. L. NO. 100-702, 102 STAT. 4642 (1988).

should not be circumvented at the behest of large corporations searching for another tool to chill litigation activity.[6]

Third, there is simply no evidence that the proposed bill is warranted. While the bill's supporters assert an increase in frivolous lawsuits, there is no data to support this assertion. Quite the contrary: tort cases and medical malpractice claims – often cited as prime examples of frivolous litigation – currently make up just 3.98% and 0.17% of all state court civil caseloads, respectively.[7] Further, the Federal Judicial Center's study of federal district judges reported that 85% believe that frivolous litigation is "no more than a small problem," and 87% prefer the current framework governing Rule 11 to the pre-1993 approach.[8] The responses of federal district judges should come as no surprise, given the numerous procedural tools they have available for disposing of weak cases, including Rule 12, Rule 16 and Rule 56. Rather than helping judges manage their caseloads, the proposed legislation undermines their discretion to determine whether sanctions are appropriate in the individual case. And it does so without any evidence to support that a change to the Rule is warranted.

2. Several years ago, Mr. Beisner represented One West Bank in litigation before Judge Matthew Kennelly in the Northern District of Illinois. This was a case in which a couple, Charles and Cynthia Thul, sued One West for breaching a promise to modify their mortgage. Mr. Beisner and his co-counsel filed a motion to dismiss, and in their opening brief they failed to bring to the court's attention an adverse 7th Circuit precedent that squarely rejected their argument.

   Judge Kennelly said that their failure to do so ran afoul of their obligation of candor under the ABA Model Rules of Professional Conduct and corresponding Illinois rules, and "it likely amounted to conduct sanctionable under Federal Rule of Civil Procedure 11(b)(2) and 28 U.S.C. section 1927." Judge Kennelly ordered Mr. Beisner and his co-counsel to show cause why they should not be sanctioned, including by payment of plaintiffs' reasonable attorney's fees, revocation of *pro hac vice* status, a written or oral reprimand, or other sanctions. Judge Kennelly's memorandum opinion and order can be found here: https://abovethelaw.com/wp-content/uploads/2013/01/Thul-v-OneWest-Bank-Skadden-benchslap-1.pdf.

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[6] Myriam Gilles, Written Testimony before the Senate Judiciary Committee, Nov. 8, 2017, available at https://www.judiciary.senate.gov/imo/media/doc/11-08-17%20Gilles%20Testimony.pdf ("A number of bills that recently passed by the House and are now before the Senate contain provisions which were considered and rejected by the Advisory Committee. Failing that rigorous and demanding process, proponents of litigation 'reform' now seek direct legislation to protect them from liability for wrongdoing.").

[7] 2016 Civil Caseloads, National Center for State Courts (NCSC), available at http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Civil.

[8] David Rauma & Thomas E. Willging, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (FEDERAL JUDICIAL CENTER, 2005), available at http://www.uscourts.gov/sites/default/files/rule1105_1.pdf.

Mr. Beisner and his co-counsel responded by apologizing to the judge and settling the case with the Thul family.

a. **Does Mr. Beisner's conduct in the case *Thul v. One West* show that attorneys defending big corporate interests can engage in litigation abuses?**

No one seriously disputes that attorneys on all sides – whether representing plaintiffs or defendants, individuals or corporations, in simple or complex cases – sometimes overstep ethical bounds in their zeal to prevail. And certainly – as we see in the *Thul v. One West* example – even ethical and well-regarded lawyers will sometimes take actions that are perceived as substantial breaches, at least at first blush. What the *Thul* case shows is how dangerous it would be to remove the safe-harbor and cure provisions of Rule 11, as LARA would do. Rule 11 sanctions are a potent tool, and not one that should be outfitted with a hair-trigger. Widespread Rule 11 practice before the 1993 amendments convinced the Advisory Committee that the ends of honest and ethical litigation are not served by turning the pre-trial process into a mine-field, where a careless misstep triggers punitive sanctions that may affect litigation results.

b. **Should we be careful about tilting the litigation playing field so that it ends up benefitting those big corporate interests to the detriment of families like the Thuls?**

Recent legal developments have made it far more difficult for citizens to bring meritorious cases to public courts for adjudication by a jury of their peers. The regrettable rise of forced arbitration,[9] heightened pleading standards,[10] increased reliance on summary dismissals,[11] restrictive views on standing to sue,[12] tougher class certification requirements,[13] and the narrowing of personal jurisdiction over foreign

[9] *See, e.g.,* AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011) (striking down state law rule under which arbitration clauses were regarded as unconscionable unless they allowed for class proceedings, and dismissing the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"); American Express Co. v. Italian Colors, 133 S.Ct. 2304 (2013) (enforcing class actions bans in arbitration clauses, even where proving the violation of a federal statute in an individual arbitration would be so costly that no rational claimant would undertake it).

[10] *See, e.g.,* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009) (announcing a new "plausibility" standard for determining the adequacy of pleadings at the motion to dismiss stage). *See also* Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court,* 100 CORNELL L. REV. 193 (2014) (heightened pleading requirements in *Twombly* and *Iqbal* "had palpably negative effects on plaintiffs").

[11] *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007) ("Over the 25-year period [from 1975 to 2000], the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent.").

[12] *See, e.g.,* Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016) (determining whether statutory injury is sufficient to meet Article III "particularized" and "concrete" harm requirement for standing to sue).

[13] *See, e.g.,* J. McIntyre v. Nicastro, 564 U.S. 873 (2011) (rejecting personal jurisdiction over a foreign company doing business in the United States and in the state where plaintiff was injured); Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915 (2011) (finding foreign corporations subject to

companies whose products injure Americans,[14] among other legal developments, place often-insurmountable obstacles in the path to the courthouse. Given this restrictive ethos, Congress should be loathe to impose further limitations on access to justice – particularly where these changes are being urged by the Chamber of Commerce and other powerful corporate lobbyists. These groups have one singular goal and it is not to "reform" the civil justice system or to stop so-called meritless lawsuits against businesses – it is to stop *all* lawsuits against businesses, period. And the cost of granting corporations virtual immunity from liability will ultimately be borne by the American citizens, veterans and small business owners who no longer have access courts to resolve disputes, seek redress for grievances, or enforce state and federal laws.

3. On October 24, Vice President Pence broke a tie in the Senate to pass a Congressional Review Act resolution repealing a mandatory arbitration rule issued by the Consumer Financial Protection Bureau (CFPB). The CFPB's rule aimed to stop financial services companies from using forced arbitration clauses to block consumers from joining class actions. The rule would protect consumers who have been victimized by big corporations like Equifax and Wells Fargo.

   One of the groups that opposed the repeal of this CFPB rule was the American Legion, which is the nation's largest veterans service organization. The American Legion membership had approved a resolution stating that it is "extremely unfair to bar servicemembers, veterans and other consumers from joining together to enforce statutory and Constitutional protections in court." On October 26, American Legion National Commander Denise Rohan said "Our membership has stated unequivocally that we are opposed to situations where our military and veterans' financial protections are chipped away to increase the profits of big banks. Repealing the CFPB arbitration rule takes away consumers' most effective tool to protect themselves against predatory lenders."

   Shouldn't this Committee be concerned about efforts to strip away the legal rights of veterans and consumers?

   This Committee should be working to improve access to justice, not to further divest citizens of their legal rights. One clear path towards improving access to justice was provided by the CFPB in its short-lived rule prohibiting forced arbitration containing class action bans in consumer financial contracts.[15] Class action bans force

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general jurisdiction only where they are "at home"); Daimler AG v. Bauman, 134 S.Ct. 746 (2014) (same); Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco City, 137 S.Ct. 1773 (2017) (same).

[14] *See, e.g.,* Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338 (2011) (elevating predominance requirement under Rule 23(a)); Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (finding that economic models of antitrust injury must be common to the class).

[15] *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

all consumers, service members, and veterans to resolve disputes through individual arbitration rather than aggregate litigation. But given the certainty that consumers and veterans will almost never arbitrate small-dollar claims individually,[16] or be able to find an attorney who can afford to take on the case in forced arbitration and on an individual basis,[17] such provisions effectively eliminate these groups' access to justice.[18]

These days, corporations regularly impose these bans in standard-form contracts, click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.[19] Not surprisingly, studies have shown that veterans and consumers often have no idea that they regularly enter into contracts that deprive them of their right to go to court before a jury of their peers.[20] And, as more companies insert these forced arbitration clauses into their contracts, there is little choice available in the market for even those of us who would wish to decline the services of a company that employs these forms of remedy-stripping arbitration clauses. For example, consumers today would either accept a forced arbitration clause or not have a cell phone, because every provider's service plan contains a remedy-stripping clause. That means that more than 240 million cell

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[16] *Id.* at § 1.4.3, at 11–12 (concluding that from 2010 to 2012, consumers filed an average of 411 arbitrations in the consumer finance space, but that only 25 consumer arbitrations per year involved claims of less than $1,000).

[17] *See, e.g.*, Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006) ("[C]lass-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys."); Lauren Weber, *More Companies Block Staff from Filing Suits*, WALL ST. J., March 31, 2015, available at https://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287 (observing that where class actions are unavailable "workers frequently abandon claims because individual damages are too small to interest attorneys").

[18] This is because conventional wisdom teaches that consumer fraud and workplace abuse typically injure large groups of victims in relatively small, nearly-identical ways. Because few of those victims, if any, would take on the cost and complexity of the legal system alone to recoup such small sums, it is only by aggregating their claims and pooling resources can ordinary litigants realistically access the legal system.

[19] *See e.g.,* Myriam Gilles, *Killing Them With Kindness: Examining Consumer-Friendly Arbitration Clauses after* AT&T v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012) (reporting on dozens of companies that imposed class action bans on consumers in the wake of *Concepcion* via change in terms provisions that required only the click of a box on a screen); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice,* N.Y. TIMES, Nov. 1, 2015, available https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices."). *See also* Myriam Gilles, *Opting Out of Liability*: *The Forthcoming, Near-Total Demise of the Modern Class Action,* 104 MICH. L. REV. 373 (2005) (observing that even if consumers were aware of these terms, it's not clear they would attach a negative value to these arbitration clauses at the time of contracting when the prospect of class litigation appears very remote, and certainly not worth the hassle of declining a product or service to ensure retain).

[20] *See* CFPB Arbitration Study, at 3-4, 19-24 (reporting that half of all respondents said they didn't know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

phone subscribers have service agreements that contain forced arbitration clauses. As the CFPB Arbitration study revealed, the same is true of credit cards and checking accounts.[21] For many essential goods and services, forced arbitration clauses have become pro forma: there is no bargaining, no negotiation, no searching the market for an alternative.

The vote on the night of October 24, 2017 was especially heart-wrenching because the clear goal of the CFPB's rule was to protect millions of veterans and consumers from unscrupulous practices and economic exploitation by restoring their right to join together in class and collective actions. Class actions are critical to these groups for at least two reasons. First, class actions allow these groups to enforce the laws enacted to protect them from abuse in the workplace and the marketplace. In the absence of class actions to efficiently and reliably aggregate numerous small claims, consumers and veterans cannot possibly remedy widespread violations of labor, consumer, employee benefits, debt collection and antitrust laws.[22] Veterans, especially, are left vulnerable to illegal and abusive practices such as predatory lending, wrongful foreclosures, illegal repossessions, and other wrongdoing. Enacting legislation to protect members of the military is rendered meaningless if these rights cannot be adequately enforced.[23] Corporations should not be allowed to subvert the will of Congress and to undermine the rule of law by using fine print in take-it-or-leave-it contracts, but yet this is exactly what is currently happening to servicemembers.

Take for example the distressing stories of Joshua Hause, Charles Beard, Wilbert McCoy and Archie Hudson. Army veteran Joshua Hause from Tennessee was forced by an unscrupulous lender into converting an existing $975 payday loan to an open-ended "flex" loan that carried 279% interest. Soon, Hause's payments ballooned to $2,000 per month -- trapping him in a downward cycle of debt – but a class action challenging these exploitative lending practices was thrown out of court due to a forced arbitration clause.[24] Sergeant Charles Beard's car was repossessed by his lender while he was serving his country in Iraq, violating the Servicemember Civil Relief Act (SCRA) which protects active duty soldiers by requiring lenders to obtain court orders before seizing their possessions. But when Beard tried to bring a class action against the lender on behalf of other members of the military who had suffered the same harm, the case was thrown out due to a forced arbitration clause in the car lease

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[21] *Id.* § 3, at 19 (reporting that over 88% of mobile wireless contracts and 99% of storefront payday loans are subject to forced arbitration).

[22] *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

[23] *See, e.g.,* Military Lending Act, 10 U.S.C. § 987 (2016); Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (1940).

[24] NewsChannel 5, *Critics Call 279% Loan A 'Debt Trap' For Poor*, Feb. 16, 2016, available https://youtu.be/DcrRY7d_yL0.

agreement.[25] Archie Hudson and Wilbert McCoy, both veterans, applied for what they believed were ordinary home improvement loans – but those loan applications ended up ensnaring them in the massive Wells Fargo consumer scam, as both these vets discovered that unwanted credit cards had been secured in their names.[26] And again, their efforts to challenge these fraudulent practices in court were rejected because of Wells Fargo's forced arbitration clause. In each of these instances, determined veterans tried to enforce the laws enacted by Congress to protect them from abuse in the marketplace – and in each instance, corporate actors engaged in the abusive practices were able to use their enormous power to circumvent any and all exposure to liability for clear violations of law.

The second benefit of class actions is that the *threat* of class liability is, in and of itself, generally sufficient to deter bad actors from engaging in fraudulent and abusive practices.[27] During my testimony on November 8, 2017, Senator Grassley read from a scholarly paper in which wrote that "concerns with the under-compensation of absent class members in small-claims class actions are totally misplaced." If Senator Grassley had continued reading, I went on to argue in the paper that "the deterrence of corporate wrongdoing is what we can and should expect from class actions."[28] Indeed, the deterrence function of class litigation – i.e., the threat of liability – forms a protective shield around vulnerable communities, warning would-be scam artists and financial predators to stay away lest they face bankrupting liability.[29] No rational observer seriously doubts this effect, nor is it controversial that losing this protective shield exposes consumers, veterans and other groups to even greater risk of financial exploitation.

As with many recent legislative efforts, the repeal of the CFPB rule exhibited the willingness of the majority of Congressional Republicans to put corporate interests over the interests of middle-class Americans and veterans. The rabid partisanship, intense politicking, and the pressure put on members of Congress by corporate interests to repeal this rule was deeply disturbing, and bodes poorly for future efforts to preserve basic rights. The only realistic solution is for Congress to enact the Arbitration Fairness Act, which would restore the ability of Americans to air their grievances in open, public courts governed by the rule of law. Only Congress has the

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[25] Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES, March 16, 2015, available https://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html.

[26] Jimmie E. Gates, *New lawsuit filed against Wells Fargo by Jackson couple*, CALRION LEDGER, May 15, 2017, available at http://www.clarionledger.com/story/news/2017/05/15/wells-fargo-lawsuit/322493001/

[27] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536 (2016) (discussing the significance of class action remedies "to communities that are constantly confronted with nefarious business practices").

[28] Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Cost Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106 (2006).

[29] *See* How Consumer Financial Class Actions Help and Protect Americans, available at https://centerjd.org/content/study-how-consumer-financial-class-actions-help-and-protect-americans.

constitutional authority to enact this curative legislation and to prevent important claims from "slip[ping through the legal system."[30]

4. **Can you discuss the ways in which forced arbitration clauses help silence the voices of victims of sexual harassment? Is the use of forced arbitration clauses to keep sexual harassment matters secret an abuse of the legal system that this Committee should examine and address?**

Forced arbitration perpetuates the exploitation of women in the workplace by denying them the right to speak out against their attackers, call out corporate policies that shield wrongdoers, and vindicate their rights under federal and state laws. Studies show that 1 in 3 women suffer sexual harassment on the job, yet 70% of victims are afraid to come forward because they (1) have no idea how rampant the problem is; and (2) worry about confronting a powerful adversary and facing possible backlash/victim-blaming alone.[31] Forced arbitration significantly exacerbates and enables these problems by shuttling all victims into a private system where each is unaware of the other and where the arbitration provider(who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse.[32]

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[30] AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1753 (2011). Preemption principles limit the power of the lower federal courts, state courts or state legislatures to override *Concepcion* -- though it worth noting that a number have tried and failed to do so. State courts, in particular, have granted motions to compel arbitration under protest – essentially pleading with the Supreme Court to reconsider its jurisprudence or with Congress to enact the AFA. *See, e.g.*, Schnuerle v. Insight Commc'ns, Inc., 376 S.W.3d 561, 569, 573 (Ky. 2012) ("[U]pon application of *Concepcion*, we are now constrained to conclude that under contracts like the one now before us, which contain a class action waiver and also require disputes to be arbitrated under the FAA, the federal policy favoring arbitration preempts any state law or policy invalidating the class action waiver as unconscionable based solely upon the grounds that the dispute involves many de minimis claims which are, individually, unlikely to be litigated. . . . We, of course, yield as we must to the United States Supreme Court's interpretation of federal law."); Willis v. Debt Care, USA, Inc., No. 3:11-cv- 430-ST, 2011 WL 7121456, at *7–8 (D. Or. Oct. 24, 2011) ("[T]he vast majority of numerous, small value claims . . . for statutory violations will go unprosecuted unless they may be brought as a class due to the high costs associated with pursuing individual claims. . . This court is sympathetic to the [plaintiffs'] argument. Regrettably, *AT&T* forecloses many consumer class actions which may provide the only recovery for wronged individuals."); Porreca v. Rose Grp., 2013 WL 6498392, at *1, *15 (E.D. Pa.Dec. 11, 2013) (complaining that the decision to uphold the class action ban was "unappetizing" and "lamentable"); Dean v. Draughons Junior Coll., Inc., 917 F.Supp.2d 751, 765 (M.D. Tenn. 2013) ("While required by the FAA, this result strikes the court as manifestly unjust and, perhaps, deserving of legislative attention. . . . [I]n cases such as the one presented here, requiring impoverished individuals to arbitrate could effectively prevent them from exercising their rights as state citizens.").

[31] *See* Select Task Force on the Study of Harassment in the Workplace, EEOC 2016, available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. *See also* Washington Post/ABC News Poll, available at https://www.washingtonpost.com/lifestyle/style/a-majority-of-americans-now-say-that-sexual-harassment-is-a-serious-problem/2017/10/16/707e6b74-b290-11e7-9e58-e6288544af98_story.html?utm_term=.1eaec1fd7941 (reporting that one-third of women have experienced sexual advances from a male colleague or a man with influence over their job; and one-third of those women said the advances constituted sexual abuse).

[32] See, e.g., Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 472 (2015) (reporting that arbitration clauses

This culture of silence allows harassment to continue unabated, enabling wrongdoers to believe they are impervious to legal rules and workplace norms.

The examples of cases in which forced arbitration has aided and abetted a cover-up of widespread workplace harassment are many – and likely just the tip of the iceberg. Gretchen Carlson's claim of sexual harassment against Roger Ailes was nearly forced into secret arbitration based on a clause in her employment contract with Fox News Corp.; it was only "because she resisted that clause through a creative legal theory that her allegations were made public – unleashing a tsunami of claims of sexual harassment by Ailes and others at Fox News."[33] Over the past two decades, hundreds of employees of Sterling Jewelers were "routinely groped, demeaned and urged to sexually cater to their bosses to stay employed"[34] – but their claims were shunted into private arbitration to protect company executives, who were never reprimanded for misconduct.[35] A similar epidemic of harassment and assault occurred at the now-defunct American Apparel, Inc., and again, if the company "hadn't been able to use arbitration and confidentiality clauses to keep investors and the public in the dark," the wrongdoing would have been uncovered much earlier.[36] By promising secrecy, forced arbitration shields all types of wrongdoing, making it more difficult for victims to hold the wrongdoers accountable and allowing illegality to continue unchecked.[37]

The Judiciary Committee should take every opportunity to examine the ways in which the secret nature of forced arbitration covers up and thus enables rampant workplace abuse to occur. Because forced arbitration is a private system in which there are no public filings, proceedings, appeals, or searchable records, it is imperative that this Committee use its power to analyze ways to limit the use of forced arbitration

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increasingly feature provisions prohibiting "an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties").

[33] Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, Consumer Law & Policy Blog, Oct. 23, 2017, available at http://pubcit.typepad.com/clpblog/2017/10/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing.html.

[34] Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASHINGTON POST, Feb. 27, 2017, available at https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html?hpid=hp_hp-top-table-main_sterling-7pm%3Ahomepage%2Fstory&utm_term=.c9213252610a.

[35] Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation,* WASHINGTON POST, March 1, 2017, available at https://www.washingtonpost.com/business/economy/sterling-discrimination-case-highlights-differences-between-arbitration-litigation/2017/03/01/cdcc08c6-fe9b-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.1f1ccba3921d.

[36] Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, N.Y. TIMES, July 15, 2014, available at https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/.

[37] *See, e.g.,* Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 200–06 (2000) (asserting that a lack of transparency in dispute resolution causes harm to the public by, among other things, allowing corporate actors to circumvent legal requirements and denying claimants their proverbial day in court).

in order to bring issues of systemic sexual harassment in the workplace into the public light.

5. Last year this Committee held a hearing on the so-called FACT Act, and I read into the record a powerful letter that the Committee received from 17 veterans services organizations opposed to the bill. The letter said:

> Our veterans are disproportionately impacted by asbestos disease, including the painful and almost-always fatal mesothelioma. In fact, while veterans make up about 8 percent of the U.S. population, they account for 30 percent of those who are diagnosed with and die from the disease….
>
> Forcing our veterans to publicize their work histories, medical conditions, social security numbers, and information about their children and families is an offensive invasion of privacy to the men and women who have honorably served, and it does nothing to assure their adequate compensation or to prevent further asbestos exposure and deaths. All of this to give big asbestos corporations an advantage in litigation and shift the cost of discovery to asbestos compensation trusts….
>
> [The FACT Act] is a bill that its supporters claim will help asbestos victims, but the reality is that this bill only helps companies and manufacturers who knowingly exposed this deadly fiber to our honorable men and women who have made sacrifices for our country. These veterans do not forget.

What is your reaction to this letter?

My first reaction to this letter is profound sadness that our elected representatives would even consider further harming victims of asbestos-related diseases by demanding that they publicly disclose such personal and intimate information. These victims deserve our concern and protection – and in the case of veterans exposed during service, our deepest gratitude. Instead, this bill adds insult to the physical injuries these victims face each day.

My second reaction is head-shaking disbelief at the hypocrisy of asbestos companies – which have perpetrated one of the vastest cover-ups in the history of American law – in demanding "transparency" from their victims. As discussed below in response to Question 6, I believe Congress should require asbestos companies – not victims of exposure – to disclose past settlements and other information about their products that has never been made public and that would enable us to finally understand the nature and causes of the largest toxic exposure crisis in our nation's history.

My third reaction is to arrive at the clear-headed conclusion that the FACT Act is merely an attempt by asbestos companies to avoid paying for the harm their products caused – and to do so by forcing victims of asbestos-related diseases to disclose their private health, medical and legal information so as to delay payments or deter claimants

from seeking redress. This is the only possible justification for a bill that seeks to solve a problem that doesn't exist. As with the other so-called "reform" bills enacted by the House, the FACT Act is based solely on self-serving anecdotes from industry lobbyists, and there is no evidence or data showing that victims are "double dipping" or filing specious claims. Indeed, asbestos trusts were subjected to comprehensive study by the Government Accountability Office, which found no evidence of fraud.[38] Further, the judges who oversee the bankruptcy trusts are more than capable of ensuring that claims are paid in a fair and reasonable manner.

6. **If the proponents of the FACT Act want to mandate public transparency of trust settlements with victims, why do they not also seek to require asbestos defendants to disclose their settlements with victims, including the dollar amounts, the locations where victims were exposed to asbestos, and the defendants' products that were at the locations? Is it hypocritical for asbestos companies to demand a public registry of victims and trust claim payments when they insist on keeping their own tort settlement information confidential?**

Requiring asbestos companies to disclose and make public information about their harmful products, as well as the financial settlements they have paid to thousands of victims, would serve important public ends. Further, there is precedent for demanding disclosures by defendants as a matter of public health policy. Specifically, in enacting the Health Care Quality Improvement Act of 1986, Congress created the National Practitioner Data Bank ("NPDB").[39] Under the statute, doctors and other healthcare providers must report to the NPDB whenever a malpractice claim results in state disciplinary actions, adverse hospital privileging decisions, or payment of damages. One of the goals of mandating these disclosures and establishing the registry was to ensure that practitioners could not move from state to state without discovery of past malpractice.[40]

Notably, there has never been, to my knowledge, a similar disclosure requirement imposed upon *victims* of medical malpractice – and for good reason: the purpose of a disclosure requirement should to be monitor repeat bad actors, to ensure that they are held accountable for recurring acts of wrongdoing and don't slip through the regulatory cracks, and to protect future patients from harm. Victims of malpractice (or asbestos exposure) are not bad actors responsible for causing harm, nor are these private citizens regulated entities -- but doctors (and asbestos companies) are repeat bad actors and are regulated in various ways. Accordingly, if Congress wished to set up a registry to track asbestos-related settlements, it should begin by demanding that

[38] "Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts," Oct. 19, 2011, available http://www.gao.gov/products/GAO-11-819.
[39] PUB. L. NO. 99-660, § 402, 100 STAT. 3784, 3784 (1986).
[40] NPDB RESOURCE MANUAL, available at https://www.npdb.hrsa.gov/resources/NPDBGuidebook.pdf/.

asbestos companies fully and publicly disclose the details of all settlements – including the harm alleged, the amounts paid, the locations where victims were exposed to asbestos, and the defendants' products that caused the exposure. Similar to the NPDB, this information would prove invaluable for studying the nature, extent and impact of asbestos exposure in this country.

7. Prior to this hearing the Committee received a letter from a group of small business associations including the American Sustainable Business Council, the Main Street Alliance, and the South Carolina Small Business Chamber of Commerce. The letter said "We oppose attempts to limit our rights under the civil justice system." It went on to say, "small businesses need unfettered access to the courts for equal protection to guarantee deserved compensation and justice form offending parties." **Can you comment on how small and medium businesses use the court system, including class actions, to challenge misconduct by bigger businesses and to hold them accountable?**

Small businesses are vital enforcers of state and federal laws in areas of great economic consequence, specifically antitrust and unfair competition.[41] And just as consumers often cannot enforce their legal rights without joining together in collective litigation, so too do small businesses rely on the availability of class actions to level the playing field when seeking accountability from major corporations. In recent years, small and medium-sized businesses have brought numerous class actions alleging price-fixing, monopolization, and other exclusionary conduct.[42] These cases have advanced legal doctrine, delivered substantial damage awards, and brought about enduring changes to business practices.[43] Few, if any, of these cases could have been brought without a procedural device that enables small businesses to enforce their legal rights collectively. For this reason, when small businesses are subject to forced arbitration clauses, they lose their ability to effectively enforce laws and redress harms.

Consider the antitrust class action brought by small businesses against American Express challenging various anticompetitive practices.[44] This case had important

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[41] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 625-6 (2012) ("Over the past fifty years . . . we have come to assume, quite correctly, that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations . . . and many other areas.").

[42] *See, e.g.,* In re Air Cargo Shipping Services Antitrust Litigation, Case No. 06-md-1775 (E.D.N.Y); In re Bulk [Extruded] Graphite Products Antitrust Litigation, Case No. 02-CV-06030 (D.N.J.); In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, MDL No. 1486 (N.D. Cal.); In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D. Pa.); In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 1827 (N.D. Cal.); In re Insurance Brokerage Antitrust Litigation [Zurich Settlement], Case No. 04-5184 (D.N.J.); In re Linerboard Antitrust Litigation, MDL No. 1261 (E.D. Pa.); Sullivan v. DB Investments, Inc., Case No. 04-cv-2819 (SRC) (D.N.J.); In re Puerto Rican Cabotage Antitrust Litigation, Case No. 08-md-1960 (D.P.R.).

[43] *See id.* These class actions have resulted in per-plaintiff damages ranging from $5,000 to more than $2 million to small- and medium-sized businesses.

[44] American Express Co. v. Italian Colors Rest., 133 S. Ct. at 2308.

implications for millions of small merchants who felt abused by Amex's high fees, and whose theory of antitrust injury sought important changes in the electronic payments industry. By dint of Congressional intent and statutory enactment, these are precisely the types of claims that small businesses are meant to pursue.[45] Then, in *American Express v. Italian Colors,* the Supreme Court enforced the arbitration clause and class action ban buried in Amex's merchant service agreement, prohibiting these small businesses from pursuing their legal claims collectively. Given that the cost of an individual small business bringing an antitrust action against a huge company like American Express was prohibitive, this ruling all but ensured that Amex and other big companies that impose forced arbitration on small businesses are rendered immune from liability and free to engage in whatever anti-competitive conduct they want.[46] Indeed, Justice Scalia thumbed his nose at Congressional authorization of private rights of action intended to enable small businesses to enforce the nation's antitrust laws, writing that "[t]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[47] But without small businesses seeking to protect their legal rights, we lose a critical enforcement tool and render the laws on the books a mere nullity.

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[45] *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrylser-Plymouth, 473 U.S. 614, 634 (1985) (declaring the "fundamental importance [of antitrust law] to American democratic capitalism"); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826–27 (2d Cir. 1968) (observing that an antitrust violation "can affect hundreds of thousands -- perhaps millions – of people and inflict staggering economic damage," such that arbitration of such "issues of great public interest" was ill advised).

[46] Alan Carlson, the owner of a small restaurant in Oakland, California, was the lead plaintiff in the *American Express v. Italian Colors* litigation. *See* Testimony of Alan Carlson, U.S. Senate Committee on the Judiciary, Dec. 17, 2013, available at https://www.judiciary.senate.gov/imo/media/doc/12-17-13CarlsonTestimony.pdf ("Normally, every American has the right to join with others to fight to hold corporate giants accountable. But I don't, because of a forced arbitration clause buried in the fine print of terms and conditions imposed upon me years after I started taking American Express cards. If I cannot be part of a class action to enforce my rights against American Express, I have no way of enforcing those rights. I don't have the money to take on American Express by myself.").

[47] Am. Express Co., 133 S.Ct. at 2306. *See also id.* at 2311 ("[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.").

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Answers to Written Questions from Senator Amy Klobuchar
Senate Judiciary Committee
"The Impact of Lawsuit Abuse on American Small Businesses and Job Creators"

Myriam Gilles

1. The Furthering Asbestos Claim Transparency (FACT) Act would require victims of asbestos-related diseases to disclose reports containing private health information, including on their history of exposure to asbestos. As you noted in your testimony, these reports present privacy issues for victims and "could potentially be used to offer other victims less compensation in future claims."

   Can you describe how this proposal would put asbestos victims seeking compensation at a disadvantage, in addition to how it could deter legitimate victims from filing claims?

   The FACT Act would require asbestos claims trusts to create a "report that shall be made available on the court's public docket," including a tremendous amount of private, identifiable information about individual asbestos victims. Some of this information is already contained in the legal docket – for example, in order to recover damages, victims must allege facts regarding exposure to the asbestos-containing product, as well as the nature and extent of their injuries.[1] But the FACT Act deliberately goes beyond the factual assertions ordinarily found in legal papers, forcing these victims to divulge far more intimate details -- such as the last four digits of their social security numbers, their work history, and even personal information regarding their children and family members. This is an unprecedented invasion of privacy for

[1] State civil discovery laws grant asbestos defendants access to any relevant information about a victim's work history, medical records, and other personal information relevant to the legal claim. As Representative Jackson Lee (D-TX) observed during the House debates on this bill, if asbestos companies want information about their victims, they can easily "go to their counsel [or] go to the courthouse." Statement of Sheila Jackson Lee in Opposition to H.R. 982 at H187, available at https://www.gpo.gov/fdsys/pkg/CREC-2016-01-08/html/CREC-2016-01-08-pt1-PgH181-2.htm.

asbestos victims – one that surely puts them at greater risk for identity theft and other financial scams.[2]

Moreover, the FACT Act would demand this confidential information for no good public policy reason. Its supporters in the House make tepid and baseless allegations concerning fraud and "double-dipping" among victims – but the asbestos trusts were subjected to comprehensive study by the Government Accountability Office, which found no evidence of fraud.[3] And, in any event, no supporter of this bill has articulated how forcing asbestos victims to provide sensitive information would solve any alleged problem.[4]

Nonetheless, industry lobbyists continue to falsely portray this bill as benefiting victims – despite the fact that asbestos-exposure victims are unanimous in their opposition.[5] Indeed, Republicans in the House refused to even let victims testify at hearings on the bill – likely because they feared the ferocity of these victims' anger.[6] As one victims' rights group wrote to the House after their request to speak was denied: "not one person who has been directly affected by the ravages of asbestos disease has been permitted to testify about this legislation. The bill's supporters claim to care about victims, yet we have been treated with disrespect and neglect every step of the way."[7]

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[2] In a letter to the House, a asbestos-victims group wrote: "The FACT Act would force victims seeking any compensation from a private asbestos trust fund to reveal on a public web site private information including the last four digits of our Social Security numbers, and personal information about our families and kids. This is offensive. The information on this public registry could be used to deny employment, credit, and health, life, and disability insurance. We are also extremely concerned that victims would be more vulnerable to cybercriminals, such as identity thieves, con artists, and other types of predators." *Asbestos Patients and Their Families Say "Listen to Us" and Oppose Section 3 of H.R. 1927, the so-called "FACT Act,"* Jan. 5, 2016, available at https://www.gpo.gov/fdsys/pkg/CREC-2016-01-08/html/CREC-2016-01-08-pt1-PgH181-2.htm. *See also* Glen Kopp, *Identity Theft Threatens Asbestos Victims Under Congressional Proposal,* EWG Action Fund, available at http://www.asbestosnation.org/analysis-identity-theft-for-asbestos-victims-looms-under- congressional-proposal/ (observing that the FACT Act would make public precisely the type of information that is typically used by identity thieves).

[3] "Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts," Oct. 19, 2011, available http://www.gao.gov/products/GAO-11-819.

[4] Indeed, observers assert that existing state procedural rules render "double-dipping" almost impossible. For example, states hold defendants responsible for paying only their proportionate share of the harm they caused to the victim. States also have rules on joint and several liability, the right to assignment, and comparative contribution/setoffs. As a result, no defendant settles for another defendant's liability, and no trust pays for another trust's proportion of a victim's harm. Accordingly, "double dipping" cannot occur.

[5] Statement of Rep. Jackson, *supra* note 1 ("[A]lthough the proponents of this legislation assert that it is intended to protect asbestos victims, it is interesting to note that not a single asbestos victim has come forth to express support for this legislation.").

[6] *Asbestos Patients and Their Families Say "Listen to Us" and Oppose Section 3 of H.R. 1927, the so-called "FACT Act,"* Jan. 5, 2016, available at https://www.gpo.gov/fdsys/pkg/CREC-2016-01-08/html/CREC-2016-01-08-pt1-PgH181-2.htm ("We are the real people who matter in this debate, and yet the supporters of the FACT Act would not allow any of us to testify. We may have been shut out of the hearings, but we will not be silenced. We are determined to stop any legislation that places the interests of the asbestos industry above the rights of innocent victims.").

[7] *Id.*

Given the lack of any evidence to support this invasive legislation, one must be forgiven for suspecting that the asbestos companies' strategy has little to do with benefiting victims. More likely, the asbestos companies may hope that demanding and making public these intimate, identifiable details will deter some victims from filing claims and seeking recovery for their injuries. Or perhaps asbestos companies expect that the onerous disclosures mandated by this bill will simply slow down or delay claims. Sadly, in the context of asbestos-exposure -- where victims diagnosed with mesothelioma are often given mere months to live -- delays in claiming can result in complete nonpayment of damages and an utter failure of justice.

2. Private enforcement plays an important role in enforcing the antitrust laws. While the Justice Department's Antitrust Division and the Federal Trade Commission focus on punishing and deterring violations of the Sherman Act, private class action lawsuits brought by individuals or small businesses under the Act are often the only way to pursue compensation for the victims of antitrust violations such as price fixing.

   Can you elaborate on the importance of private enforcement in addressing anti-competitive practices?

Private enforcement plays a critical role in enforcing federal antitrust laws, supplementing public enforcement actions by seeking monetary damages for victims of anticompetitive conduct. To ensure that private parties have an adequate economic incentive to undertake costly antitrust litigation, the antitrust statutes authorize the award of treble damages, plus attorneys' fees, to prevailing plaintiffs.[8] Congress established this robust system of private enforcement to give antitrust victims an incentive to act as "private attorneys general" to enforce the law, recognizing the critical importance of free and fair competition to our economy.[9]

Meanwhile, public enforcers such as the Justice Department's Antitrust Division vigorously prosecute antitrust crimes to punish and deter antitrust conspiracies.[10] But the Justice Department itself has observed that private enforcement is often the best way to provide restitution to businesses and consumers that are victimized by antitrust violations.[11] A 2013 study by law professors Robert H. Lande and Joshua P. Davis bears this out, finding the total recovery for consumers and businesses in sixty private

[8] 15 U.S.C. §15; *see aksi* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (observing that the "treble-damages provision wielded by the private litigant [is]. . . a chief tool in the antitrust enforcement scheme," because it creates "a crucial deterrent to potential violators").
[9] *See, e.g.,* Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.").
[10] 18 U.S.C. § 3571(c)(1)-(2), (d); 15 U.S.C. § 1.
[11] U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, n.15, available at http://www.justice.gov/atr/public/workload-statistics.html.

antitrust settlements since 1990 to be over $30 billion.[12] We can also observe the salience of private enforcement of antitrust laws in the numerous cases brought each year by victims of price-fixing and other anticompetitive conduct.[13] This flow of antitrust litigation means that "our courts are constantly presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking the rationale of older decisions and restating core principles with added clarity."[14]

In sum, private enforcement of antitrust laws is (1) a feature of statutory design, particularly the provision of treble damages; (2) effective at recovering and distributing monetary damages to victims of wrongdoing; and (3) a catalyst for the development of important legal doctrine, spurring antitrust law to evolve alongside changes in the global economy.

[12] Robert H. Lande & Joshua P. Davis, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 22-25 (2013). *See also* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws,* 2011 B.Y.U. L. REV. 315 (2011) (finding that in major cartel cases, the damages recovered on behalf of U.S. consumers far exceeds the fines imposed by the Justice Department).

[13] See, e.g., In re Air Cargo Shipping Services Antitrust Litigation, Case No. 06-md-1775 (E.D.N.Y); In re Bulk [Extruded] Graphite Products Antitrust Litigation, Case No. 02-CV-06030 (D.N.J.); In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, MDL No. 1486 (N.D. Cal.); In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D. Pa.); In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 1827 (N.D. Cal.); In re Insurance Brokerage Antitrust Litigation [Zurich Settlement], Case No. 04-5184 (D.N.J.); In re Linerboard Antitrust Litigation, MDL No. 1261 (E.D. Pa.); Sullivan v. DB Investments, Inc., Case No. 04-cv-2819 (SRC) (D.N.J.); In re Puerto Rican Cabotage Antitrust Litigation, Case No. 08-md-1960 (D.P.R.).

[14] Bill Baer, *Public and Private Antitrust Enforcement in the United States,* Remarks before the EU Competition Forum, 2014, available at https://www.justice.gov/atr/file/517756/download.