

**“The Impact of Lawsuit Abuse on American Small Businesses and Job Creators”**  
**Questions for the Record – Chairman Grassley**  
**November 15, 2017**

**Questions to Ms. Milito**

1. The purpose of my Lawsuit Abuse Reduction Act is to deter the filing of claims or demand letters that attorneys know are baseless. Can you elaborate on how this deterrence would be important for small businesses?

*It is incumbent upon the attorney representing a plaintiff to get the facts straight **before** sending a threatening letter or filing a lawsuit, not after the letter is sent or the lawsuit is filed. Sadly, due in large part to the ineffectiveness of Rule 11 in its current form, we have a legal system in which many plaintiffs’ attorneys waste resources and place a significant drain on the economy by making the small-business owner do the plaintiff’s attorney’s homework to prove no culpability in cases where a few hours of research, at most, would lead the attorney for the plaintiff to conclude that the lawsuit is unjustified.*

*In my experience, plaintiffs and their attorneys find “demand” letters particularly attractive when they can file a claim against a small-business owner for violating a state or federal statute. Generally, on behalf of a plaintiff, an attorney will send a one and a half to two-page letter alleging the small business violated a statute. The letter is replete with cites to statutes and case law. At some point, the attorney’s letter states that the business owner has an “opportunity” to make the whole case go away by paying a settlement fee up front.*

*Rule 11, in its current form, does nothing to deter these frivolous demand letters. The revisions made to Rule 11 in 1993 rendered it nothing more than a “toothless tiger.” As a result, unscrupulous attorneys, out to make a quick buck, know that the odds of being sanctioned under Rule 11 are remote. The 21-day “safe harbor” provision allows plaintiffs’ attorneys to avoid sanctions by simply withdrawing a lawsuit. Unscrupulous attorneys receive something more like a “get out of jail free” card when they bring frivolous lawsuits. The Lawsuit Abuse Reduction Act would discourage plaintiffs’ attorneys from taking cavalier and abusive positions in litigation and pre-suit demand letters.*

2. A recent article in The Hill describes the cost on the economy of so-called “drive-by” lawsuits under the Americans with Disabilities Act. As you know, the ADA does not provide for damages to a plaintiff, but it does provide that lawyers who file lawsuits may receive attorney’s fees. The article estimates that over a 10-year period, “the amount businesses will pay to attorneys... would be close to a half-billion dollars.”<sup>1</sup> Can you elaborate on the cost of these lawsuits on small businesses and how that money could be better spent refurbishing or updating property to ensure accessibility?

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<sup>1</sup> John McMickle, “Drive-by’ Lawsuits under Disabilities Statute Costing Economy,” The Hill (Nov. 13, 2017) available at <http://thehill.com/opinion/finance/360079-drive-by-lawsuits-under-disabilities-statute-costing-economy>.

*The Americans with Disabilities Act was enacted to provide access for the disabled to public accommodations, but too often it has been abused to shake down businesses — particularly small businesses. Unable to afford to expensive litigation, small businesses are more likely to pay off plaintiffs for the most minor of violations that do not actually impede access.*

*Indeed, small businesses are paying the highest price for the confusion surrounding the ADA. Taking advantage of the ambiguity in "readily achievable" standard and the other complexities of compliance, vexatious litigants file thousands of lawsuits against small-business owners. The statutory framework of the ADA has opened the door to what one court described as a "cottage industry" for the plaintiffs' bar, a money-making scheme more focused on extorting attorney's fees from businesses than gaining accessibility for the disabled. See Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9<sup>th</sup> Cir. 2001).*

*In Rodriguez v. Investco, 305 F. Supp.2d 1278, 1280-81 (M.D. Fla. 2004), the district court noted that the attorney's fee provision creates a "cottage industry" for the plaintiffs' bar, and dissuades efforts for voluntary compliance with the property owner. The court explained that it would make sense for plaintiffs to notify business owners of ADA accessibility violations, and work with these businesses for "conciliation" and "voluntary compliance" to fix these problems. Id. Plaintiffs would gain accessibility to these facilities as intended by the ADA, and obtain the same result as a lawsuit for injunctive relief. The Court noted that "one might ask whether attorney's fees should be awarded where no effort is made pre-suit to obtain voluntary compliance." Id. However, the ADA does not require plaintiffs to notify a business owner or attempt pre-suit settlement before filing suit. Rather, the ADA discourages this option because "pre-suit settlement does not vest plaintiff's counsel with an entitlement to attorney's fees." Id. Plaintiffs seeking pre-suit settlement with a business owner would also risk another plaintiff suing this facility, which often occurs. The Court noted that "the current ADA lawsuit binge is, therefore, essentially driven by economics -- that is, the economics of attorney's fees." Id.*

*NFIB believes the better way to preserve the intention of the ADA is to inform a small-business owner of a potential ADA violation and allow the business owner to update the facility before allowing the plaintiff to file a lawsuit.*

## Written Questions from Senator Dick Durbin

### Hearing on “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators”

For questions with subparts, please answer each subpart separately.

#### Questions for Elizabeth Milito

1. In 2016 the NFIB published its survey of small businesses entitled “Small Business Problems and Priorities.” (<https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>) The survey asked small business owners to rank 75 business problems in order of severity for them.

“Costs and Frequency of Lawsuits and Threatened Lawsuits” was ranked number 68 in this survey. It was one of the “problems of least concern” identified in the survey, well behind issues like “telephone costs and service” (number 33), “credit card payment processing costs” (number 38), and “traffic, highways, roads, bridges” (number 52).

In other words, looking at the title of this hearing, the impact of “lawsuit abuse” on NFIB’s own members appears to be relatively small. **Do you think this Committee should focus attention on issues that are higher on the NFIB’s list, for example, finding ways to help address telephone costs and credit card payment processing costs?**

*While health insurance, taxes, and regulations remain top issues for NFIB and its members, for a small business owner who has been sued, defending against a lawsuit becomes a top priority. Lawsuits are unique in that they aren’t regularly occurring events or chronic issues like a monthly phone bill or increasing health insurance costs. They are generally singular events that can be extremely disruptive at that specific time. Moreover, it’s impossible to capture the degree of problem if a business closes because of costly lawsuit.*

*NFIB also believes the increasingly litigious environment is driven in part by the ever-increasing volume of regulation and the statutory attendant private rights of action. For instance, as I discussed in my testimony, unscrupulous plaintiffs’ attorneys have exploited the Americans with Disabilities Act to gain quick settlements from small business owners.*

## Questions for the Record

Senator Ben Sasse

November 15, 2017

Questions for Ms. Milito and Mr. Beisner:

1. Though difficult to quantify due to the lack of information on the indirect and direct costs as well as the diversity of firms in different sectors of the economy, can you describe the types and magnitude of costs that excessive litigation places on American small businesses?

*For the average NFIB member, with 10 employees or less, the problem is the \$5,000 and \$10,000 settlements not the million-dollar verdicts. When you consider that many of these small businesses only net \$40,000 - \$60,000 a year, \$5,000 paid to settle a case immediately eliminates about 10 percent of a business' annual profit. For the impact on the U.S. economy, the 2011 report, "U.S. Tort Cost Trends 2011 Update," at 3, by Towers Watson, found that the U.S. tort system cost \$264.6 billion in 2010, which translated to \$857 per person versus \$820 per person in 2009. See also "2016 Litigation Trends Annual Survey," Norton Rose Fulbright (2016) (finding that between 2015 and 2016 an additional 6% of companies surveyed were sued).*

2. To what extent are businesses' litigation costs passed on to consumers? Does the extent tend to vary by firm size?

*Small businesses cannot pass on to consumers the costs of liability insurance or pay large lawsuit awards without suffering losses. See Damien M. Schiff and Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 *Tex. Rev. L. & Pol.* 97, 98-99, 109-113 (2012) (discussing the financial difficulties facing small business owners when legal problems arise, and the financial disincentives against protecting their legal rights).*

3. To what extent does the enforcement of arbitration agreements not only reduce costs for the firm, but also prevents increases in costs for the end consumer?

*Thank you for the question, but NFIB is unable to answer it. NFIB members typically do not use consumer arbitration clauses.*

4. Class action waivers in arbitration clauses were the target of a recent CFPB rule that banned class action waivers in arbitration clauses, though the rule was recent repeal via the Congressional Review Act.

- a. What is the average consumer payout for class action lawsuits?

*Unfortunately, it can be very difficult to ascertain what happens to class action settlement money after judges certify settlements. But according to research conducted by Mayer Brown, which reviewed consumer class actions filed in federal courts in 2009, in five of six cases where settlement distribution data was available, the percentage of class members who got money ranged from 12% down to 0.000006%. Not one case went to trial since once a judge certifies a class action, the stakes are usually so high that a company is forced to settle. Mayer Brown's study is available at*

*<https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.*

- b. What is the average consumer payout for arbitration?

*Thank you for the question, but NFIB is unable to answer it. NFIB members typically do not use consumer arbitration clauses.*

- c. How long does it typically take for arbitrations to be completed?

*Thank you for the question, but NFIB is unable to answer it. NFIB members typically do not use consumer arbitration clauses.*

- d. How long does it take for class action lawsuits to be completed?

*In talking with members involved in litigation, most cases take years to resolve. Moreover, according to the Mayer Brown study cited in response to question 4.a., approximately 14 percent of class actions were still pending four years after filing with no indication as to when resolution or dismissal would occur.*

- e. Is there a risk that encouraging class action lawsuits actually encourages “frivolous” lawsuits that companies settle instead of challenge, given the costs associated with going to court in a class action lawsuit?

*NFIB believes that financial incentives encourage frivolous litigation, including frivolous class action lawsuits. Calculating attorneys know that they can often exact settlements from small businesses simply by holding the threat of a lawsuit over the business. This is true of larger businesses to a certain extent as well, but small businesses operate on razor thin margins and maintain fewer assets than larger businesses. Small businesses simply cannot absorb the costs of a legal battle as easily as larger businesses—or for that matter the cost of paying damages if they should lose in the end.*

*The plaintiffs' bar knows that most small business owners realize that the costs of fighting a legal battle often outweigh the benefit to be had in mounting a defense. For these reasons, plaintiff attorneys have a perverse incentive to threaten or initiate a legal action, even when the plaintiff has only an outside chance of recovery in court. They know that most cases settle, and that even outlandish claims sometimes "stick" in court. So why not move forward with questionable claims? Indeed, this perverse incentive is the root cause of litigation abuse. And it remains a nationwide problem both in terms of the economic impact it has on business and in terms of the culture of fear that it fosters in the business community.*

- f. How does this possibility influence the degree to which class action lawsuits encourage firms to comply with the rule of law, instead of merely imposing unnecessary costs on companies whose actions should not have been punished?

*Unfortunately, frivolous litigation diverts resources from correcting a legitimate problem to paying legal fees. For instance, one of the most prevalent forms of lawsuit abuse occurs when plaintiffs or their attorneys are merely trolling for cases. A plaintiff, or an attorney, will travel from business to business, looking for violations of a law, such as the Americans with Disabilities Act. In such cases, the plaintiff generally is not as concerned with correcting the problem as he or she is in extracting a quick settlement from the small business owner.*

5. Numerous small business owners have expressed concern over being the target of frivolous or unfair lawsuits, a fear which has influenced their business decisions. Can you explain how this fear is addressed or alleviated by the use of arbitration?

*Unfortunately, small business owners lack the resources of larger corporations such as in-house counsel. When a small business owner is forced to spend resources on legal fees in order to defend disputes in court – the business suffers. NFIB supports arbitration where it provides parties an opportunity to resolve their difference without a lengthy and costly court battle.*

6. Are arbitrations clauses ironclad, or are there situations where exceptions allow for a waiver of the arbitration agreement?

*The specifics of arbitration clauses can vary significantly. NFIB believes, however, that arbitration can provide a fair and neutral process for the resolution of legal disputes.*

7. What consumer protections are in the typical arbitration clause?

*Thank you for the question, but NFIB is unable to answer it. NFIB members typically do not use consumer arbitration clauses.*