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Statement for the Record
Committee on the Judiciary, United States Senate
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Introduction

Public Citizen is grateful for the opportunity to submit this statement for the record in response to the Committee's hearing on "The Impact of Lawsuit Abuse on Small Businesses and Job Creators." Public Citizen is a national non-profit organization with members and supporters in every state. We represent consumers' interests on a broad range of civil justice issues through lobbying, litigation, administrative advocacy, research, and public education.

The House of Representatives has passed several bills that are mischaracterized as "technical changes" to the way that courts operate. However, taken together, these bills are a concerted effort to chip away at the ability of hardworking Americans, including business owners, to seek justice through the courts. We strongly oppose this package of bills.

Notably, although the hearing on these bills is framed in terms of the impact of lawsuits on small businesses, small businesses do not share this view. In 2016, members of the National Federation of Independent Business were asked to rank the importance of 75 issues. The issue of the "cost and frequency of lawsuits/threatened lawsuits" ranked 68.[1] Similarly, a survey by the U.S. Chamber of Commerce found that in a poll of 1,000 small business and operators, the threat of lawsuits was never mentioned.[2] Instead, small businesses frequently rely on our civil justice system to take on larger corporations and is critical to leveling the playing field for Main Street businesses.[3]

[1] National Federation of Independent Business, "Small Business Problems and Priorities," *available at* http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf, pg. 11 (Aug. 2016) (A representative from NFIB served as a witness for the majority) .
[2] *See generally* MetLife & U.S. Chamber of Commerce, "Small Business Index Q3 2017," https://www.uschamber.com/sbindex/files/SBI_Q3_082217_REL.pdf.
[3] *See generally* Letter from American Sustainable Business Council, Main Street Alliance, South Carolina Small Business Chamber of Commerce (on file with author).

Legislative Attacks on the Civil Justice System

Below is a summary of recent bills that have been passed or are under consideration in the House that could restrict the rights of small business owners, and which must not be taken up in the Senate:

Fairness in Class Action Litigation Act of 2017 (H.R. 985, passed House)

The grossly misnamed "Fairness in Class Action Litigation Act" bill would bar cases from proceeding as class actions by providing that only individuals who have suffered the "same type and scope of injury" could join together in a class action. This legislation would eliminate most class actions because very seldom are all members of a class injured in exactly the same way and to exactly the same extent.

Class actions often are the only way for consumers and employees to hold corporations accountable for harm, particularly when a large number of consumers have been ripped off by a corporation for relatively small dollar amounts. If allowed to become law, the bill would let corporations off the hook for systemic, widespread discrimination, unfair and deceptive practices, and consumer fraud. For example, several class action lawsuits that have been filed by small-town credit unions and consumers against Equifax over the release of compromised personal data may not be able to sue if this law was passed.

Lawsuit Abuse Reduction Act of 2017 (H.R. 720, passed House/S. 237)

The proposed changes to Federal Rule of Civil Procedure 11 would make federal litigation more complicated, costly, and inaccessible to consumers and employees.

Currently, judges have discretion to impose sanctions on a lawyer or a party in litigation to deter sanctionable conduct in pleadings, motions, and other court papers. The so-called Lawsuit Abuse Reduction Act, or LARA, would revise Rule 11 to *require* sanctions in certain circumstances, rather than leaving the decision whether to impose sanctions to the discretion of federal judges. This proposal would make litigation longer and more expensive.

The problems with this bill are not theoretical, but proven. In 1983, changes to Federal Rule 11 removed judicial discretion for issuing sanctions. Those changes were reversed a decade later, because the 1983 Rule caused a marked increase in business-to-business litigation and abusive Rule 11 motion practice by lawyers arguing more about sanctions than about the merits of the cases. The 1983 Rule removed lawyers' incentives to cooperate with each other, thereby prolonging litigation rather than advancing a just conclusion.

Furthering Asbestos Claim Transparency (FACT) Act of 2017 (Combined with H.R. 985, passed House)

The FACT Act would make it harder for plaintiffs injured by asbestos to get fair compensation for their injuries. The bill puts unworkable burdens on claims trusts—accounts set up to handle asbestos claims—slowing or virtually stopping their ability to compensate victims. Because people diagnosed with fatal asbestos-caused diseases such as mesothelioma have very short life expectancies, a delay in justice too often will lead to a denial of justice. The FACT Act also would invade the privacy of asbestos disease victims by requiring public disclosure of personal information, opening the door to identity theft and discrimination. In the era of Equifax and Wells Fargo, where personal information of consumers has been negligently disclosed, we should not legislate ways to increase the disclosure of sensitive data.

Innocent Party Protection Party Act of 2017 (H.R. 725, passed House)

The so-called Innocent Party Protection Act would make harmful changes to policies regarding federal-court jurisdiction, adding to the federal-court backlog and making it harder for small businesses to have their state-law claims heard in state courts.

When a plaintiff has filed a case in state court, a defendant can remove the case to federal court only under certain specific conditions. One such condition is where "complete diversity" exists among the parties—that is, no plaintiff in the case resides in the same state as any defendant. If it appears that the plaintiff included a defendant from the plaintiff's home state solely for the purpose of avoiding diversity jurisdiction (and thereby keeping the case in state court), a defendant can remove the case based on diversity, arguing that joinder of the in-state defendant was "fraudulent." If, after removal the plaintiff moved to remand the case back to state court, the burden of showing improper joinder falls on the defendant who removed the case to federal court.

This bill would assist defendants in keeping cases in federal court and prolong disputes about jurisdiction. At this very early stage of the case, before discovery, the bill would require federal courts, when fraudulent joinder is the stated basis for removal, to do fact-finding on the case's merits. Such a huge shift in the procedures of the federal courts is unwarranted and would set a dangerous precedent for congressional micromanaging of federal judges.

Protecting Access to Care Act of 2017 (H.R. 1215, passed House)

This bill takes the unprecedented step of preempting a broad swath of state medical malpractice laws—an area of state law in which federal law provides no remedy. The far-reaching bill would deter injured patients from pursuing legitimate claims by capping non-economic damages at $250,000, setting a federal statute of limitations, abolishing joint liability, and restricting awards of attorney fees.

A Public Citizen report, *The Medical Malpractice Scapegoat*, illustrates that the real problem in the American health care industry is failure to prevent avoidable medical errors. The report also debunks the myth about "out of control" medical malpractice payments and illustrates how medical liability costs are at or near the lowest levels on record.

Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 (H.R. 469, passed House)

This bill targets consent decrees and settlement agreements involving congressionally mandated federal agency actions. If passed, this bill would undermine the enforcement of federal laws and impede the resolution of various consumer protection, anti-discrimination, environmental, and public health cases in federal court.

Stop Settlement Slush Funds Act of 2017 (H.R. 732, passed House/S. 119)

This legislation is intended to cut off proceeds from government settlements to "third-party" entities, to block funding for public interest community organizations, foundations, and similar groups. The bill would prohibit the government from including charitable groups in settlement payment terms, yet providing settlement funds to third-parties is often the best way to assure a remedy for wrongdoing. Third parties that receive third-party payments include nonprofits, community organizations, or trusts or foundations that provide vital services in their communities. Members of Congress should applaud the good work of these organizations that serve the public good rather than vilify them.

ADA Education and Reform Act of 2017 (H.R. 620)

The Americans with Disabilities Act (ADA) provides individuals with disabilities a guarantee of fair treatment and a right to bring cases in a court of law to enforce the right of access to public accommodations. This bill, however, would have the effect of allowing public venues to escape compliance with the law by barring claims until 180 days after a property owner has received notice of the violation, while imposing no requirement that the owner remove the access barrier in the interim. As a result of poor drafting, the bill has the effect of pitting small businesses against the disability community. For example, the bill in essence allows six months of non-compliance, during which time individuals with disabilities may be unable to access necessary facilities such as bathrooms or may be unable even to enter the non-complaint building.

Conclusion

These bills are not tailored to correct any real problems with our court system; they are intended to limit consumers' ability to have their day in court. They are unnecessary intrusions into the province of the federal courts, part of a concerted campaign to limit Americans' ability to seek justice in a court of law, and a grave threat to our civil justice system. We urge you to oppose

these bills and other threats to the rights of individuals and small business owners to access courts to vindicate their rights.

Thank you for the opportunity submit our views. If you have additional questions, please contact Remington A. Gregg, counsel for civil justice and consumer rights, at 202-454-5117.