TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

House of Representatives Committee on the Judiciary
Subcommittee on the Constitution

on the date of

March 13, 2013

on the subject of

“Litigation Abuses”

Thank you, Mr. Chairman and distinguished Committee members for inviting me to provide testimony regarding the tremendous negative effects lawsuits, and particularly the fear of lawsuits, are having on the millions of small business owners in America today. My name is Elizabeth Milito and I serve as Senior Executive Counsel of the National Federation of Independent Business (NFIB) Small Business Legal Center. The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business" the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

Although federal policy makers often view the business community as a monolithic enterprise, it is not. Small business owners have many priorities and often limited resources. Being a small business owner means, more times than not, you are responsible for everything – NFIB members, and hundreds of thousands of small businesses across the country, do not have human resource specialists, compliance officers, or attorneys on staff. For small business owners, even the threat of a lawsuit can mean significant time away from their business – time that could be better spent growing their enterprise and employing more people.

We would all like to think that attorneys comply with the highest ethical standards; unfortunately, that is not always the case. In my experience, this seems particularly true of plaintiffs' attorneys who bring lower-dollar suits – the type of suits of which small businesses are generally the target. In many instances, a plaintiff's attorney will just take a client at his word, performing little, if any, research regarding the validity of the plaintiff's claim. As a result, small business owners must take time and resources out of their business to prove they are not liable for whatever "wrong" was theoretically committed. As one small business owner remarked to me, "What happened to the idea that in this country you are innocent until proven guilty?"

Although that mantra refers to a defendant's rights in our criminal justice system, problems with our civil justice system can no longer be ignored. Although our

country's judicial system has much to be lauded, small business owners staring down a lawsuit find it hard to appreciate any praise of the courts. Today I want to discuss three areas that help drive abusive litigation practices that threaten small businesses. These include the following: (1) the climate of fear that pervades America's Small Businesses; (2) financial incentives that encourage frivolous litigation; and (3) fraudulent joinder.

The NFIB Legal Center applauds the Committee for holding this hearing in order to focus on the problem of litigation abuses.

1. Lawsuits Create a Climate of Fear for America's Small Businesses

The verdict is in and it's not good. The country's legal climate is hurting the economy and costing the nation jobs. The United States is one of the most litigious nations in the world.

How bad is it? It's bad. Four in five voters (78 percent) believe there are *too many* lawsuits in the U.S.[1] More than 15 million lawsuits are filed every year.[2] While some of these lawsuits have merit, many do not and these lawsuits are costing each and every one of us.

And the news is particularly dire for small business owners. When a business is facing an abusive lawsuit, it is often far less expensive simply to settle the lawsuit rather than incur steep legal fees fighting it in court. While the targeted business saves money in the short term, these quick settlements encourage unscrupulous attorneys to continue shaking down small businesses with more lawsuits.

NFIB members, and the millions of small businesses across the country, are prime targets for these types of suits because they do not have the resources to defend against them. Small businesses cannot pass on to consumers the costs of liability insurance or pay large lawsuit awards without suffering losses.[3]

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[1] Americans Speak on Lawsuit Abuse, Conducted by Luce Research (August 2012), available at http://atra.org/sites/default/files/documents/ATRA%20SOL%20Voter%20Survey%20Summary%20FINAL.pdf.

[2] Joseph Shade, *The Oil & Gas Lease and ADR: A Marriage Made in Heaven Waiting to Happen*, 30 Tulsa L.J. 599, 656 (1995) ("More than 15 million lawsuits are filed every year in the United States. Between 1964 and 1984 the per capita rate at which law suits were filed tripled.") (citing Peter Lovenheim , Mediate, Don't Litigate 3 (1989)).

[3] 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).

The costs of tort litigation are staggering, especially for small businesses. The tort liability price tag for small businesses in 2008 was $105.4 billion dollars.[4] Small businesses shoulder a disproportionate percentage of the load when compared with all businesses. For example, small businesses pay 81 percent of liability costs but only bring in 22 percent of the total revenue.[5] It is not surprising that many small business owners "fear" getting sued, even if a suit is not filed.[6]

That possibility – the fear of lawsuits – is supported by an NFIB Research Foundation National Small Business Poll, which found that about half of small business owners surveyed either were "very concerned" or "somewhat concerned" about the possibility of being sued.[7] The primary reasons small business owners fear lawsuits are: (1) their industry is vulnerable to suits; (2) they are often dragged into suits in which they have little or no responsibility; and (3) suits occur frequently.[8]

As I have stated – lawsuits (threatened or filed) impact small business owners. In nine years at NFIB, I have heard story after story of small business owners spending countless hours and sometimes significant sums of money to settle, defend, or work to prevent a lawsuit. And while our members are loath to write a check to settle what they perceive to be a frivolous claim,[9] they express as much, if not more, frustration with the time spent defending against a lawsuit. In the end, of course, time is money to a small business owner.

We must remember that small business owners do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them, or provide legal advice. Without a standing army of attorneys ready to address legal problems, small business owners are more vulnerable to lawsuits, as they often delay seeking counsel—for financial reasons—until a lawsuit has already been filed. And in many cases the business simply lacks the resources needed to hire an attorney or—for that matter—the time and energy that may be required to fight a lawsuit. These factors make small businesses particularly vulnerable targets for plaintiffs seeking to exact an easy settlement.

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[4] "Tort Liability Costs for Small Businesses," U.S. Chamber Institute for Legal Reform, 2010, at 11. In its most recent report, "2009 Update on U.S.Tort Cost Trends,"Tillinghast/Towers Perrin forecast that tort costs would reach $183.1 billion in 2011 for all businesses with NERA Economic Consulting estimates that, in 2011, $152 billion will fall on small businesses.

[5] *Id.*

[6] *Id*. at 7-8.

[7] NFIB National Small Business Poll, "Liability," William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002).

[8] *Id*. at 1.

[9] For the small business owner 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.

Of course, it is important to give victims of injustice their day in court. But lawsuit abuse victimizes those who are sued. And by lawsuit abuse, I'm referring to those claims where a plaintiff's attorney asserts a flimsy claim to get some money, to get more money than is fair, or sues a business that had little or no involvement but might have money. In all of these instances, small businesses must expend substantial resources to defend the business or risk the prospect of default judgments against them.

But there are other costs as well; the time and energy wasted defending meritless claims and the damage to an innocent business's reputation which is not automatically remedied just because the claim is successfully defended or dismissed.

In addition to the financial costs of settling a case, there are incalculable psychological costs. Small business owners threatened with lawsuits often would prefer to fight in order to prove their innocence. They do not appreciate the negative image that a settlement bestows on them or on their business. Settling a meritless case causes the business to look guilty, and some prospective customers cannot be easily convinced otherwise. Yet, unfortunately, the reality is that small business owners often have no choice but to settle, accept their losses and try to move on when threatened with a lawsuit.

Of course, for those small business owners who chose to stand on principle when they know they are in the right, there is no easy road. To vindicate their rights, they must prove their innocence in court. The NFIB members to whom I have spoken almost universally state that defending a meritless suit occupies their daily attention and costs them many sleepless nights.

2. Financial Incentives Encourage Frivolous Lawsuits

I have previously testified before this committee, explaining that frivolous lawsuits come in all shapes and sizes. This remains as true today as ever before. And it will remain true so long as plaintiffs' attorneys are incentivized to move forward with questionable claims. And while I think we all recognize the nationwide problem of frivolous litigation; it is important to remember that behind each case there are real stories. These suits impact real people and they threaten real jobs.

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 particular law. In such cases, the plaintiff generally is not as concerned with correcting the problem as he or she is in extracting a settlement from the small business owner. In many instances the plaintiff's attorney will initiate the claim, not with a lawsuit, but with a "demand" letter. 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.

The scenario works as follows: an attorney will send a one and a half to two-page letter alleging the small business violated a particular statute. The letter states that the business owner has an "opportunity" to make the whole case go away by paying a settlement fee up front. Time frames for paying the settlement fee are typically given. In some cases, there may even be an "escalation" clause, which raises the price the business must pay to settle the claim as time passes. So, a business might be able to settle for a mere $2,500 within 15 days, but if it waits 30 days, the settlement price "escalates" to $5,000. Legal action is deemed imminent if payment is not received.

In California, attorneys have been known to rake in several million dollars a year fleecing small business owners. One particular attorney, Harpreet Brar, received hundreds of settlements of $1,000 or more from "mom and pop" stores throughout the state after suing them for minor violations of the state business code. Mr. Brar sued many of these businesses for allegedly collecting "point-of-sale" device fees from his wife without proper disclosure signs.

Doug Volpi, an NFIB member who owns a paint store in Southern California, provides a vivid example litigation abuse. He received a summons in the mail notifying him that his business Frontier Paint was a defendant in a multi-million dollar asbestos lawsuit. Mind you, the allegations in the complaint stated that the plaintiff had been exposed to asbestos in the 1960s and 1970s from use of a product called "Fixall." The manufacturer of Fixall has long since gone bankrupt leaving small businesses who allegedly sold the product holding the bag. Mr. Volpi bought his Southern California business in 1997 – over twenty years after the plaintiff's alleged exposure. Moreover, the plaintiff lived in San Francisco nowhere near the location of Mr. Volpi's Southern California store.

Upon receipt of the summons – Mr. Volpi first panicked, then he went to work. According to Mr. Volpi as soon as he read the papers he said to his wife "we're going to need to hire a lawyer." And they did. Then Mr. Volpi himself spent hours on-line researching the plaintiff's claims and discovered that the plaintiff's attorney's firm had a known reputation trolling for defendants. In Mr. Volpi's words this attorney "dropped a net, dragged it around, and pulled it up to see if there was any halibut." Thanks to the work of Mr. Volpi's attorney – Frontier Paint didn't become halibut. But dismissal of Mr. Volpi's business came at a significant cost to Frontier Paint. Mr. Volpi and his wife paid what was to them significant fees just to get their business removed from a complaint in which it should never have been named in the first place.

Mr. Volpi's story, unfortunately, is not unique. Class action cases are rife with stories like Frontier Paint's. In these cases, plaintiffs' attorneys use a shotgun approach - hundreds of defendants are named in a lawsuit, and it is the

defendants' responsibility to prove that they are not culpable. In many cases, plaintiffs name defendants by using vendor lists or even lists from the Yellow Pages of certain types of businesses (e.g., auto supply stores, drugstores) operating in a particular jurisdiction.

Another NFIB member has been targeted in asbestos litigation. The family-owned commercial construction business, which was founded over 40 years ago, has been named in over 10 asbestos lawsuits. According to the member, his company has been targeted in recent years as many asbestos manufacturers have gone bankrupt leaving a void of solvent defendants. As a result, attorneys are now trolling for construction firms that existed in the 1960s, that are still in existence, and preferably with deep pockets, today.

The NFIB member, who wishes to remain anonymous for fear publicity surrounding his company's involvement in asbestos litigation will cause more attorneys to target the business, has never been sued by an employee – all suits have been filed by individuals who allege that the NFIB member company was one of potentially dozens of subcontractors on a particular job site where the plaintiff worked and was allegedly exposed to an asbestos product. In several instances, it was later shown the plaintiff could never have worked at a site alongside the NFIB member, such as when exposure allegedly occurred at a marine construction site or before the company even existed. Still, to get dismissed from these cases the NFIB member spends thousands of dollars in attorney's fees and discovery costs.[10]

Substantive reforms limiting tort liabilities or setting evidentiary and recovery standards would certainly help disincentive plaintiffs' attorneys from taking brash and cavalier legal positions. But, in crafting solutions here, we must acknowledge the practical circumstances of the small business owner threatened with protracted legal battle. Regardless of whether the plaintiff's claims are meritorious, the small business defendant faces a difficult—and often impossible—dilemma.

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; however, we must remember that the typical small business operates on razor thin margins and maintains 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.

This means that—in many cases—the small business owner may be risking financial ruin if the owner refuses to settle. And the plaintiffs' bar knows that most

[10] *See also As Asbestos Claims Rise, So Do Worries About Fraud*, THE WALL STREET JOURNAL, March 11, 2013 (discussing increase in fraudulent asbestos claims and the impact of asbestos-related manufacturers' bankruptcies on remaining solvent businesses).

small business owners realize that the costs of fighting a legal battle often outweigh the benefit to be had in mounting a defense. Indeed, at the NFIB Legal Center, we regularly speak with small business owners facing serious legal issues, who are nonetheless hesitant to seek out legal counsel because they know that attorney fees are extremely costly. They also know that litigation is always a gamble, no matter how outlandish a lawsuit may be.

Just last week, we spoke with a small business owner in Florida who has been dealing with an ongoing legal battle for the last four years in case that he believes is entirely frivolous. Mr. Scott Schroeder runs a modest business as a contractor, but he says he is about to go out of business because he has incurred over $20,000 in attorney's fees trying to defend his business from a wrongful claim. He said, "If I get to court, I will win. But, I don't have any money left… They are just trying to drain me because they know I won't be able to afford it because it's just been going on too long."

Today Mr. Schroeder says that it probably didn't make sense in terms of dollar-and-cents to fight to defend against this suit, but he wanted to stand on principle because he says "it just isn't right" to give in to a wrongful lawsuit. Unfortunately, if he cannot resolve this case soon, or procure an attorney who can take this case on *pro bono*, he will likely go out of business or be forced to settle after already sinking substantial resources into the fight. Sadly, this is the plight of most small business owners in these sorts of cases.

Since there is no guarantee that, at the end of the fight, the defendant will prevail, small business owners often rationally opt to avoid the costs of litigation by agreeing to settle claims that they believe to be without merit. For example, one small business owner, who wishes to remain anonymous, recently told us about a messy lawsuit that has cost his business over $500,000 in legal fees—more than $400,000 above what his attorney's originally estimated the case would cost to litigate. Unfortunately for this business owner, there is no apparent end in sight. And in cases like this where protracted legal battles result in staggering legal bills, business owners are often forced to fold—regardless of how strong their position may be from a legal standpoint.

Most small business owners seek to avoid these sorts of open-ended financial liabilities by settling up-front. Indeed they will rationally decide to settle in cases where they realize that the probable cost of litigation will exceed the benefit of winning in court. Moreover, even the threat of a lawsuit will require small business owners to expend time and energy dealing with the issue. Furthermore, lawsuits inevitably cause stress and an emotional toll on small business owners.

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 the majority of 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.

3. Perverse Incentives for Fraudulent Joinder

As I have explained, in many cases overly aggressive plaintiff attorneys will target small businesses with an aim to force a settlement or in the hope that one of their claims might "stick" in court. But in other cases small businesses are named as defendants because they represent convenient targets for the purpose of forum shopping. In these cases small business owners are forced to incur substantial financial costs in defending their business, they must dedicate their time and energy to the case, and they must deal with the heavy emotional toll that a wrongful suit may cause—all because they have been named as a defendant for an improper reason.

Public policy should encourage plaintiffs' attorneys to prudently assess the viability of their clients' potential claims *before* initiating a lawsuit and discourage plaintiffs from taking unfounded or improvidently cavalier positions. Along these lines, we should aim to create strong disincentives against naming a small business as a defendant in a case where the claim against the business is particularly weak, especially where the plaintiff's apparent motive is to use the defendant as "body-shield" against invocation of federal jurisdiction. But unfortunately, as the law currently stands, plaintiffs actually have perverse *incentive* to bring weak or attenuated claims against small business defendants for the sake of defeating federal jurisdiction.[11]

The plaintiffs' bar knows that frivolous suits are much more likely to be dismissed in federal court.[12] Accordingly, plaintiffs' attorneys usually seek to file in state court and they draft their complaints with an aim to prevent defendants from removing to federal court.[13]

On the other side of the equation, defendants prefer to be in federal court because federal courts tend to have a better grasp on the issues and the proper procedures, and because there is more predictability in federal courts.[14] Thus out-of-state defendants often seek to remove tort cases from state to federal court. They are entitled to do so under federal law, provided that there is

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[11] *See* Melissa R. Levin and Heather K. Hays, *Fraudulent Joinder: Successful Removal of Actions to Federal Court*, Pharmaceutical & Medical Device Law Bulletin, Vol. 4, No. 4 (April, 2004).
[12] Plaintiffs' success rate is only 34 percent in federal court after removal. Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 Fla. L. Rev. 119, 183 (2006)
[13] John Merrill Gray, III, *Motions—Refining the Standard in Motions in Alleging Fraudulent Joinder*, 36 Am. J. Trial Advoc. 225, 231 (2012) ("Joining an in-state defendant to defeat diversity is a common tool used by parties seeking to remain in state court.").
[14] *See* Levin and Hays, *supra* at 1.

"complete diversity" between the defendants and the plaintiff.[15] In other words, removal is allowed only where *all* of the defendants are from a different state than the plaintiff.[16] For example, a case may be removed from Kentucky State court where the defendant corporations are based in New York and California.

Accordingly, an aggressive plaintiff's attorney—always employing new and ingenious forum-shopping games—has a strong incentive to find someone else to name as a defendant in the plaintiff's home-state. In the foregoing example, the Kentucky plaintiff has a much better chance of prevailing if he or she can add a Kentucky defendant to the suit because this will most likely ensure that the case will remain in state court.

Knowing that the plaintiff is more likely to prevail in state court, the plaintiff's attorney has an incentive to name another defendant, even if he or she can only muster a weak or attenuated claim. And this is often going to be a local small business that had only a tangential or peripheral role in the case or controversy at issue because they are convenient target.[17] For example, in a typical products liability case, the plaintiff will be suing an out-of-state manufacturer on the theory that the manufacturer was negligent in designing the product. In such a case, the local merchant who sold the product is a convenient defendant—not necessarily because the plaintiff intends to hold the merchant liable so much as because the plaintiff wants to prevent the manufacturer from removing the case to federal court. But, once more, we maintain that the plaintiff should not be incentivized to drag a small business owner into litigation for such a Machiavellian purpose.

In theory the out-of-state manufacturer in such a case could seek to remove the case to federal court on the ground that the plaintiff fraudulently joined the local merchant as a defendant simply for the purpose of defeating federal jurisdiction.[18] But, this is generally an uphill battle for the defendant.[19] To avoid remand back to state court, the defendant must demonstrate that the plaintiff falsely or fraudulently misstated facts in adding the in-state defendant or that there is no chance of the defendant prevailing.[20]

While the federal courts vary in how they approach this issue, the differences between the circuits pertain to deference provided to the plaintiff.[21] This means that, in the best case scenario, it is going to be hard for a defendant to prevail. Indeed, plaintiffs predominantly succeed in getting federal courts to remand

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[15] *See* 28 U.S.C. § 1332(a)(1) (2005) (stating that the district courts have original jurisdiction over all cases and controversies between citizens of different states).
[16] Richardson, *supra,* at 166.
[17] *See e.g.*, Gray, *supra* at 225-227 (discussing the facts of a case where out-of-state defendants were prevented from removing their case to federal court because the plaintiff also named a local landlord was as a defendant).
[18] *See* Levin and Hays, *supra* at 1.
[19] *See* Richardson, *supra* at 133-34.
[20] *Id*.
[21] *Id*.

these cases back to state court.[22] Courts generally remand any case if the plaintiff might prevail in his or her claim against the in-state defendant.[23] This plaintiff-friendly standard only emboldens plaintiffs to aggressively name local defendants even when there are serious questions as to their likelihood of success in the end.

Moreover, plaintiffs are further incentivized to proceed with questionable claims—and for the purpose of avoiding federal jurisdiction—by naming local small business defendants because federal statutes prevent defendants from appealing when a federal court remands a case back to state court.[24] And, conversely, courts give plaintiffs an unfair advantage over defendants because the plaintiff can appeal if the federal court holds that the in-state defendant was inappropriately joined.[25]

Finally, federal statutes discourage defendants from challenging a fraudulent joinder because the plaintiff can collect attorney's fees if the challenge fails.[26] Here again, plaintiffs are given an unfair advantage over defendants because defendants *are not* entitled to seek attorney's fees if they prevail in convincing the federal court that the in-state defendant was fraudulently joined.[27] Accordingly, plaintiffs have little to lose and much to gain from naming another defendant—even if they are climbing out on a limb in doing so. Federal statutes have thus created all of the wrong incentives here.

Solutions for Small Business

To fulfill our role in representing the interests of the small business community in the nation's courts, the NFIB Legal Center filed over 40 amicus briefs on a whole host of issues last year, including in cases where aggressive plaintiffs sought to set a precedent that would have exposed small business owners to new or greater liabilities for alleged torts. And we anticipate the need to continue filing in these sort of cases to defend small business interests because the plaintiffs' bar continues to push the proverbial envelop in encouraging courts to adopt expansive tort liability rules. Personal injury attorneys advocate rules that will open small businesses up to new and expanded liabilities because they are

[22] *Id*. at 134 ("The removing defendant bears a heavy burden to show fraudulent joinder, and the burden is heavy in large part because issues of both law and fact are to be resolved in favor of the plaintiff.").
[23] *Id*.
[24] *Id*. at 134 -135 (If defendants lose on the motion to remand, they are left without a remedy because the order cannot be appealed, pursuant to federal statute.) (citing 28 U.S.C. § 1447(d) (2005)).
[25] *Id*. at 138 ("If the motion is denied, then the order may be appealed after final judgment, and the district court may proceed to dismiss the non-diverse defendants under Rule 21.").
[26] *Id*. at 134 ("Even worse, if defendants lose on the motion to remand, the district court is empowered by federal statute to award costs to the plaintiffs.") (citing 28 U.S.C. § 1447(c)).
[27] *See* 28 U.S.C. § 1447(c) (stating that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal").

looking for more parties to hold liable and to make it easier to prevail in their cases.

For these reasons, NFIB Legal Center maintains that it is imperative that we change the incentives driving our litigious culture. This may be accomplished to some extent through substantive reforms limiting tort liabilities or setting evidentiary and recovery standards. But, we should remember that the fundamental problem facing small business owners in these cases is a lack of financial resources necessary to successfully fend off frivolous claims.

Given the tremendous costs of litigation, and the inevitable risk that a plaintiff might prevail if the case goes before a sympathetic jury or an errant judge, we must also address the reality that small business defendants are rationally discouraged from vindicating their rights. And so long as this remains true, plaintiffs' attorneys will inevitably weigh the benefits of pursuing a questionable claim as outweighing the risks.

Accordingly, we encourage the adoption of rules that encourage plaintiffs to make prudent decisions and that discourage them from taking cavalier and abusive positions in litigation. And we should promote policies that encourage defendants to stand up for themselves when they are wrongly accused or inappropriately named as a defendant.

Conclusion

Lawsuits hurt small business owners, new business formation, and job creation. The cost of lawsuits for small businesses can prove disastrous, if not fatal, and threaten the growth of our nation's economy by hurting a very important segment of that economy, America's small businesses. We must work together to find and implement solutions that will stop this wasteful trend. On behalf of America's small business owners, I thank this Committee for holding this hearing and providing us with a forum to tell our story.

We are hopeful that through your deliberations you can strike the appropriate balance to protect those who are truly harmed and the many unreported victims of our nation's civil justice system – America's small businesses.

Sincerely,

Elizabeth Milito, Esq.
NFIB Small Business Legal Center