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**STATEMENT OF JOANNE DOROSHOW, EXECUTIVE DIRECTOR
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BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

EXAMINATION OF LITIGATION ABUSES

March 13, 2013

Mr. Chairman, members of the Subcommittee, I am Joanne Doroshow, President and Executive Director of the Center for Justice & Democracy at New York Law School, a national public interest organization that is dedicated to educating the public about the importance of the civil justice system. I am also an Adjunct Professor of Law at New York Law School where I teach Civil Justice Through the Courts.

This oversight hearing is to examine litigation abuses. My testimony will address this topic directly.

As a result of hundreds if not thousands of so-called “tort reform” laws that have passed around the country in the last 30 years, a series of recent Supreme Court decisions that strip everyday people of their legal rights (including providing corporations with the ability to ban all class actions) and other action and inaction by Congress, the sick, injured, defrauded and violated in this country struggle to even get into civil court today. In particular, the new movement towards privatized justice, including forced arbitration, stands in stark contrast to the precepts of conservative economic theory: that the tort system’s economic function is deterrence of non cost-justified accidents, with the tort system creating economic incentives for “allocation of resources to safety.”¹ But as others have observed, like recent trends towards the privatization of government,² the privatization of justice has nothing to do with expanding the free market, but rather expanding “crony capitalism.”

It is important to note that while the rights of individuals continue to be limited, major corporations enjoy unfettered access to the courts to recoup their commercial losses resulting from a host of troubles – from trademark violations, contract breaches, patent infringements and other unfair competition claims to property damage, lost goods, unpaid bills or fraud. Indeed,

¹ See, e.g., William M. Landes, Richard A. Posner, *The Economic Structure of Tort Law* (1987).

² Paul Krugman, “Lobbyists, Guns and Money,” *New York Times*, March 25, 2012, <http://www.nytimes.com/2012/03/26/opinion/krugman-lobbyists-guns-and-money.html>.

tort cases now represent only 6 percent of all civil cases, having dropped for years, while monetary disputes (including debt collections, which have been soaring since the start of the recessions) represent 72 percent of all civil cases.³ In a state like Kansas, which keeps uniquely complete court records, in one recent year only 2.1 percent of civil cases were tort cases while 72.8 percent were debt collections.⁴ And considering that an enormous number of debt collections are in forced arbitration systems,⁵ it becomes clear how dominant this type of case is.

Indeed, while calling consumers' lawyers insensitive to the importance of keeping companies "litigation-free," corporate lawyers run to court at the smallest provocation. The largest "tort reform" corporate lobby in the nation – the U.S. Chamber of Commerce – sues the U.S. government on average three times a week.⁶

Aside from this obvious hypocrisy, there is also the very real problem of discovery abuse by defense litigators. In fact, expense and delay in litigation are often the result of improper attempts by corporate defendants to avoid disclosure of critical information, which they would prefer to keep secret not only from the plaintiff but also from the public. In 1997, I helped write a study on this topic for the consumer group, Public Citizen.⁷ We found evidence of repeated abuse by defendants in the pre-trial discovery process. Among the abuses: providing misleading responses to discovery requests – responses that obscured the fact that the defendant was deliberately withholding documents sought by the plaintiff; shielding mountains of documents behind the attorney-client privilege without demonstrating or even confirming that all such documents are subject to the privilege; seeking elaborate protective orders aimed at hiding damaging product information from the public, the media and government agencies – as well as from others who claim injury from the same product; and finally, forcing plaintiffs to agree to forever seal the records of a case – including, sometimes, the transcripts of a public trial. In addition, we found cases where defendants refused to comply even after judicial orders were issued. In other cases, defendants blatantly concealed and destroyed documents relevant to their defective products – often while denying that such records ever existed. These problems are certainly continuing⁸ and could become worse under new e-discovery rules.⁹

³ Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, National Center for State Courts (2012) at 11, <http://www.courtstatistics.org/Other-Pages/CSP2010.aspx>.

⁴ Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2007 State Court Caseloads*, National Center for State Courts (2009) at 10, <http://vis-res.com/pdf/examining2009.pdf>.

⁵ See, e.g., Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf.

⁶ Chad Hemenway, "Regulators Are 'Taking Over the Joint': U.S. Chamber of Commerce CEO," *National Underwriter*, January 16, 2013, <http://www.propertycasualty360.com/2013/01/16/regulators-are-taking-over-the-joint-us-chamber-of>.

⁷ David Halpern, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, Public Citizen (July 1997), http://www.citizen.org/congress/article_redirect.cfm?ID=918.

⁸ See, e.g., "Court Awards \$750,000 as Civil Contempt Sanction For Discovery Abuse," *E-discovery Case Law Update*, April 15, 2011, <http://www.ediscoveryemploymentcounsel.com/federal-court/court-awards-750000-as-civil-contempt-sanction-for-discovery-abuse/>

⁹ These rule changes are before the Advisory Committee on Rules and I will not address them in this testimony.

In sum, this is how I would define litigation abuse. This is not how our Founding Fathers envisioned the nation as they fought the Revolutionary War in significant part over England's repeated attempts to restrict jury trials for everyday people and nearly defeated the U.S. Constitution over its failure to guarantee the right to civil jury trial – a problem eventually resolved by the Seventh Amendment.

BUDGETS AND CAFA

There are other forms of litigation abuse as well. I will now turn to budget cuts and the sequester, which threaten the very existence of this constitutionally-protected institution. Recently, the American Association for Justice, DRI – The Voice of the Defense Bar and the American Bar Association joined together to issue a dire warning about the impact of sequestration on our courts. They said, “Severe and indiscriminate federal court budget reductions through sequestration combined with chronically anemic state funding for courts threaten access to justice for every American and put court petitioners, staff and judges in physical jeopardy.”¹⁰ Indeed, it is now being reported that federal civil jury trials may be completely suspended beginning this fall.¹¹

In California, severe budget cuts are causing courthouse after courthouse to close. As explained by Judge Michael L. Stern of the Los Angeles Superior Court,¹² “Although there will be some closures and adjustments to criminal courts, constitutional and public safety imperatives dictate that criminal prosecutions will not be much impacted...” In other words, the civil justice system will principally take the hit. Expenses will go up dramatically for litigants, hitting the economically-disadvantaged hardest. Litigators there say it will take 3 to 4 years for a case to get to trial. Defendants typically do not settle cases without timely trial dates so the entire civil justice process will be impeded.

When it comes to class actions, these new federal cuts are exacerbating an already severe problem of clogged federal courts. In testimony before this very committee less than a year ago, Thomas M. Sobol of Hagens Berm Sobol Shapiro testified that the Class Action Fairness Act of 2005 (CAFA) has resulted in the routine denial of multistate class certification – especially when multiple states laws are at play.¹³ One reason for this is that CAFA had no accompanying increase in resources for the federal judiciary to deal with “an increased caseload and substantially more of these potentially complex cases. ...Single federal judges are now expected to do the work of multiple state court judges (and in the same amount of time.)”

¹⁰ “Joint Statement of Three Justice Organizations on Sequestration Cuts to Courts,” http://www.justice.org/cps/rde/xbcr/justice/sequestration_statement_AAJ.pdf.

¹¹ Todd Ruger, “Sequestration outlook bleak for federal courts,” *National Law Journal*, March 8, 2013.

¹² Michael L. Stern, “Fewer Courts, Less Justice,” *Los Angeles Times*, December 7, 2012, <http://www.latimes.com/news/opinion/commentary/la-oe-stern-la.-courts-justice-20121207,0,541449.story>.

¹³ Testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, “Class Actions Seven Years After the Class Action Fairness Act,” June 1, 2012, <http://judiciary.house.gov/hearings/Hearings%202012/Sobol%2006012012.pdf>.

And given the fact that these federal judges are “hamstrung by the increased attention to state law that these cases require,”¹⁴ with no guidance on how to proceed with multiple state laws, it is no surprise they are reluctant to grant class certification. As a result, “the denial of access to justice is not based on the merits of the case but on a technical procedural issue under the Federal Rules of Civil Procedure – manageability.”¹⁵ Sobol testified,

Worse yet, these certification refusals deny American citizens their Constitutional guarantee to a day in court and the opportunity to have their claims adjudicated. If consumers must band together in a class action to seek redress for their injuries, because any single individual’s claim is too small to justify the costs of litigation, and if such class actions can only proceed in federal courts that will not certify their claims, the courthouse doors effectively close, leaving consumers with no remedy.¹⁶

SUPREME COURT CASES

Continuing on the “no remedy” theme, I will now briefly address recent U.S. Supreme Court decisions that have not only magnified CAFA’s impact but also had a dramatic impact on the rights of those who have been violated or harmed. So far, Congress has failed to address any of them. I will begin with a brief discussion of forced arbitration and class action bans.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011), the Supreme Court held that the Federal Arbitration Act of 1924 (“FAA”) allows corporations to ban class actions and force consumers into a corporate-designed system of forced arbitration. The Court held that even when an existing state law protects individuals from abusive forced arbitration clauses, the FAA trumps these state laws.

The following are just a few of the problems faced by consumers who are forced into arbitration: Arbitrators are often on contract with the businesses against which a claim is brought. Often the company, not the victim, is allowed to choose the arbitrator. This creates inherent bias and self-interest on the part of the arbitrator – the arbitrator is motivated to rule in a way that will attract future company business. At the same time, arbitration companies have a financial incentive to side with corporate repeat players who generate most of the cases they handle. Arbitrators are also not required to have any legal training and they need not follow the law. Court rules of evidence and procedure, which tend to neutralize imbalances between the parties in court, do not apply. There is limited discovery, making it is much more difficult for individuals to have access to important documents that may help their claim. Arbitration proceedings are secretive. Their decisions are still enforceable with the full weight of the law even though they may be legally incorrect. This is especially disturbing since these decisions are binding. Often victims must split the sizeable costs of arbitration with the defense. Even if the defense handles the costs, this

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

still gives them the ability to “freeze” a proceeding in the rare situation where it seems the arbitrator is moving against them.¹⁷

But as noted by Public Justice in recent comments to the Bureau of Consumer Financial Protection, the abusive process – while horrible – is “comparatively less significant an issue than the huge number of cases that have been erased.”¹⁸ In other words, “The principal effect of forced arbitration is to wipe away claims,”¹⁹ a problem made exponentially worse by the class action ban upheld by the Court in *Concepcion*. Last week, Public Citizen updated a 2012 study²⁰ and found that, since *Concepcion*, over 100 potential class actions have been dismissed.²¹ However, the numbers are likely much higher than that since Public Citizen only counted cases where a posted opinion appeared in Westlaw’s database. Many dismissed cases would not show up there. As explained by Public Justice,²²

We are familiar with a number of cases where many thousands of consumers’ legal claims were tossed out by courts, without considering the legal or factual merits of the claims, as a consequence of the new legal rule invented by the Supreme Court in the *Concepcion* decision, and know that all or nearly all of the class members claims were not pursued. The claims simply disappeared....

And in its most recent *Workplace Class Action Litigation Report*, the class action defense firm Seyfarth Shaw found that *Concepcion* had already been cited in 325 rulings.²³

Of course, this result was not unexpected – even by the Court. Noted Public Citizen,

Justice Antonin Scalia acknowledged the dissent’s claim that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” ... In his dissenting opinion in *Concepcion*, Justice Stephen Breyer, writing for four Justices, described the consequences of the Court’s decision using the example of a case in which a company cheated 17 million people out of \$30 each. “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as

¹⁷ See, e.g., Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Public Citizen and National Association of Consumer Advocates, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident* (April 2012), <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

²¹ Public Citizen, “During National Consumer Protection Week, Consumer Advocates Warn About Harms of Forced Arbitration,” March 7, 2013, <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3830>.

²² Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf.

²³ Seyfarth Shaw LLP, *Ninth Annual Workplace Class Action Litigation Report* (January 2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf.

only a lunatic or a fanatic sues for \$30,” Justice Breyer wrote, quoting Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.²⁴

The case *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), seems to be having an analogous impact on employment discrimination class actions. This case was brought on behalf of more than 1.5 million women who suffered similar discrimination at Wal-Mart. The Court basically ruled that the class was too big. Writes *Reuters*:

Since the *Dukes* decision, defendants in a variety of class actions have flooded courts with motions challenging discrimination and violation of labor laws. The defendants have argued that claims made by plaintiffs lacked commonality. Some defendants have also used the ruling as a tool to have class claims dismissed even before the issue of class certification is addressed.²⁵

In its most recent *Workplace Class Action Litigation Report*, the class action defense firm Seyfarth Shaw wrote:²⁶

As of the close of [2012], *Wal-Mart* had been cited a total of 541 times in lower court rulings, a remarkable figure for a decision rendered in June of 2011. ... *Wal-Mart* caused both federal and state courts to conduct a wholesale review of the propriety of previous class certification orders in pending cases, prompted defendants to file new rounds of motions for decertification based on *Wal-Mart* to attack all sorts of class theories (and not just those modeled after the nationwide class claims rejected in *Wal-Mart*), and reverberated in case law rulings on a myriad of Rule 23-related issues. ... Simply stated, *Wal-Mart* aided employers to defeat, fracture, and/or devalue employment discrimination class actions, and resulted in fewer settlements at lower amounts.

Even more ominous, employers have yet to take advantage of the class action ban allowed by *Concepcion*. That will change soon enough. As Seyfarth Shaw notes:

Although mandatory arbitration and class action waiver provisions are already common in retail contracts, the next major step is likely to be their broader introduction into employment contracts (where only collective bargaining agreements, at least in unionized companies, may impede their use).²⁷

²⁴ Public Citizen and National Association of Consumer Advocates, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* (April 2012), <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

²⁵ Andrew Longstreth, “Wal-Mart v. Dukes shakes up employment class actions,” *Thomson Reuters News and Insight*, January 9, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Wal-Mart_v__Dukes_shakes_up_employment_class_actions/.

²⁶ Seyfarth Shaw LLP, *Ninth Annual Workplace Class Action Litigation Report* (January 2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf.

²⁷ *Ibid.*

Yet these are not the only Supreme Court cases that have drastically limited plaintiffs' rights, including additional arbitration cases, over the past few years. The following are a few additional highlights, listed chronologically:

- *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). Here, the Supreme Court ruled that investment banks, lawyers, accountants, credit rating bureaus or other so-called “secondary actors” who knowingly help a public company deceive investors cannot be liable for the fraud if they did not make a material misrepresentation to shareholders. Again, the impact was immediate. In a March 2009 ruling, Judge Gerald Lynch (S.D.N.Y.) said, “It is perhaps dismaying that participants in a fraudulent scheme who may even have committed criminal acts are not answerable in damages to the victims of the fraud. ... This [law] may be ripe for legislative re-examination.”²⁸ So far, there has been no such legislative re-examination.
- *Riegel v. Medtronic*, 128 S. Ct. 999 (2008). In this case, the Court ruled that anyone injured by a Class III medical device, like a heart defibrillator or implant, has no remedy in court. The impact of this decision was immediate. In January 2009, a federal court dismissed over 1,000 lawsuits brought by victims of a Medtronic defibrillator flaw involving a defective Sprint Fidelis lead (the wire that connects the heart to the defibrillator) that fractured causing electrical shocks in patients. The judge said, “The court recognizes that at least some plaintiffs have suffered injuries from using Sprint Fidelis leads, and the court is not unsympathetic to their plight [but] the court simply cannot provide a remedy.”²⁹ Congress can fix this decision but so far has refused.
- *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), preceded by *Bell Atlantic Co. v. Twombly*, 127 S. Ct. 1955 (2007). Under these decisions, cases that fail to meet stringent new pleading standards are dismissed, even if parties have not been able to access any of the documents or conduct the discovery necessary to garner the information they need. University of Houston Law Professor Lonny Hoffman analyzed data collected by the Federal Judicial Center and found that, since *Iqbal*, plaintiffs have been twice as likely to face a motion to dismiss and more likely “in every case category examined that a motion to dismiss would be granted....”³⁰ In employment discrimination and civil rights cases, for example, “plaintiffs were negatively affected in at least one out of every four such cases.”³¹
- *Stolt-Nielsen S.A. v. Animal Fees International Corp.*, 130 S. Ct. 1758 (2010). The Court ruled that “a party may not be compelled under the [Federal Arbitration Act of 1924] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. ... All of this, supposedly, is based on the FAA and is what Congress intended when it passed the Act in 1924. If you like, you can think of it as a special

²⁸ *In re Refco, Inc. Securities Litigation*, 2009 WL 724378 (S.D.N.Y., March 17, 2009).

²⁹ Janet Moore, “Judge Dismisses Suits Over Fidelis Lead,” *Minneapolis Star Tribune*, January 6, 2009, <http://www.startribune.com/business/37183974.html>.

³⁰ Lonny Hoffman, “Rulemaking in the Age of *Twombly* and *Iqbal*,” *U.C. Davis L. Rev.* (forthcoming 2013), <http://ssrn.com/abstract=2123325>.

³¹ *Ibid.*

clear-statement rule of federal common law – a rule that elevates hostility to class actions above ordinary principles of contract interpretation....”³²

- *Rent-A-Center v. Jackson*, 130 S.Ct. 2772 (2010). Until this decision, “consumers and employees had the right, under Section 2 of the Federal Arbitration Act, to go to court and ask a judge to find an arbitration agreement unconscionable or unfair and therefore unenforceable.”³³ This ruling left many challenges even to the very worst abuses “entirely in the hands of arbitrators themselves,”³⁴ so that companies can “impose one-sided terms or select clearly biased arbitrators with close ties to the company, secure in the knowledge that any challenge to the fairness of arbitration will be decided by the arbitrator whose very authority comes from the challenged arbitration agreement. ... Justice Stevens pointed out that neither party had urged the rule adopted by the Court and characterized the Court’s reasoning as ‘fantastic.’”³⁵
- *Pliva v. Mensing*, 131 S.Ct. 2567 (2011). In the last Congress, U.S. Senate Judiciary Chair Patrick Leahy introduced the “Patient Safety and Generic Labeling Improvement Act” to try to address this decision. He explained the impact: “If a consumer takes the brand-name version of drug, she can sue the manufacturer for inadequate warnings. If the pharmacy happens to give her the generic version, she will not be compensated for her injuries. The result is a two-track system that penalizes consumers of generic drugs – even though many consumers have no control over which drug they take, because state law and their health insurance plan require them to take generics if they are available.”³⁶ So far, Congress has taken no action to fix this decision, and the Court is now poised to extend this reasoning to all cases involving generic drug defects.³⁷

Finally, the upcoming Supreme Court case, *American Express v. Italian Colors Restaurant*, should give individuals and small businesses grave concern. Past Supreme Court decisions have held that arbitration with “prohibitive costs” cannot prevent victims with federal statutory claims from effectively vindicating their rights. In *American Express*, the plaintiffs – small business merchants – are claiming exactly this. Their merchant contracts with AmEx contain forced arbitration clauses and class action bans. They argue that forcing them to arbitrate their anti-trust claims individually would be so prohibitively expensive that they could not vindicate their federal rights. However, the Court majority seems to be moving in AmEx’s favor.

³² Deepak Gupta, “Supreme Court Decides Stolt-Nielsen: No Class Arbitration Where Clause is ‘Silent,’” *Public Citizen Consumer Law & Policy Blog*, April 27, 2010, <http://pubcit.typepad.com/clpblog/2010/04/supreme-court-decides-stoltneilsen-no-class-arbitration-where-clause-is-silent.html>.

³³ “Supreme Court Decides Rent-a-Center v. Jackson: Companies Can Delegate Unconscionability Challenges to the Arbitrator,” *Public Citizen Consumer Law & Policy Blog*, June 21, 2010, <http://pubcit.typepad.com/clpblog/2010/06/supreme-court-decides-rentacenter-v-jackson-companies-can-delegate-unconscionability-challenges-to-t.html>.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Office of U.S. Senator Patrick Leahy, “Leahy To Introduce Bill To Protect Consumers Who Take Generic Drugs,” March 26, 2012, <http://www.leahy.senate.gov/press/leahy-to-introduce-bill-to-protect-consumers-who-take-generic-drugs>.

³⁷ Katie Thomas, “Justice to Take Up Case on Generic Drug Makers’ Liability,” *New York Times*, March 4, 2013, <http://www.nytimes.com/2013/03/05/business/justices-to-take-up-case-on-generic-drug-makers-liability.html>.

SMALL BUSINESSES

Lobbyists for groups like the National Federation of Independent Businesses (NFIB) seem so intent on joining with the U.S. Chamber of Commerce to push for so-called “tort reforms” that they have disconnected from developments that could really harm their members, like the *AmEx* case. In fact, while NFIB lobbyists have made “tort reform” a top legislative priority, survey after survey shows that their members actually do not care about “lawsuits” or “tort reform,” and are rather concerned about far more pressing issues for their own survival and growth.³⁸ Small businesses virtually always put “lawsuits” or “liability” at the bottom of their list of concerns, if they mention them at all. Here is what we know about the concerns of small businesses:

National Federation of Independent Businesses (NFIB)

- NFIB’s latest survey *Small Business Problems & Priorities* (August 2012) ranks “Costs and Frequency of Lawsuits/Threatened Lawsuits” at #71 out of 75 issues, a lower rank than how to use Twitter.³⁹ In looking only at concerns about costs as a problem cluster, “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked *last* among cost issues.⁴⁰ In fact, NFIB calls this issue, one of the “10 least severe problems for small-business owners of the 75 business problems assessed...”⁴¹

National Small Business Association (NSBA)

- In December 2012, NSBA released the results of its Small Business Congress priority vote. Neither “lawsuits” nor “tort reform” are mentioned.⁴²

Small Business & Entrepreneurship Council (SBE)

- Similarly, SBE’s January 2013 list of 10 small business issues to watch in 2013 does not include “lawsuits” or “tort reform.”⁴³

CONCLUSION

The topic of this hearing is “Examination of Litigation Abuse.” For the last 30 years, corporations and their insurers have been relentlessly attacking the civil justice system with one

³⁸ National Federation of Independent Businesses, *Small Business Problems and Priorities* (August 2012) at 14, 35, 36, <http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf>.

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 5.

⁴² National Small Business Association, “NSBA Members Vote on Priorities for 113th Congress,” December 5, 2012, <http://www.nsba.biz/?p=4688>; National Small Business Association, “NSBA Members Vote on Priorities for 113th Congress,” December 5, 2012, <http://www.prnewswire.com/news-releases/nsba-members-vote-on-priorities-for-113th-congress-182221211.html>.

⁴³ Small Business & Entrepreneurship Council, “Ten Small Business Issues To Watch In 2013,” <http://www.sbecouncil.org/2013/01/22/ten-small-business-issues-to-watch-in-2013/>.

goal in mind – to limit their liability exposure by stripping Americans of their legal rights. This is one way that I would define “litigation abuse.” Another way I would define it is having corporations engage in discovery abuse, as well as immunize themselves from wrongdoing with forced arbitration clauses and class action bans. I would also define it this way: a company steals or cheats people out of millions of dollars (as found by a court) and then expects never to be held accountable for this because its customers are dead or cannot be found. Eliminating the *cy pres* mechanism is simply another tactic to weaken the class action system, which is already in freefall thanks to recent U.S. Supreme Court decisions. And I would also define “litigation abuse” as the DC-based U.S. Chamber of Commerce dumping millions of dollars into local judicial races for the purpose of electing judges who are answerable to them and then attacking attorneys who try to protect the rights of their clients and maximize their chance of success (just as defendants do), while having to navigate that landscape. The ultimate irony here is that the federal Class Action Fairness Act of 2005 is “the epitome of forum-shopping [since] if defendants do not want to be in state court, they no longer have to be.”⁴⁴

I thank you for your time and would be happy to answer any questions.

⁴⁴ Testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, “Class Actions Seven Years After the Class Action Fairness Act” June 1, 2012, <http://judiciary.house.gov/hearings/Hearings%202012/Sobol%2006012012.pdf>.