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LIMITING LAWSUITS: SMALL BUSINESSES' LEAST CONCERN

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INTRODUCTION

The U.S. Chamber of Commerce and the National Federation of Independent Business (NFIB), mammoth partisan lobbying organizations that claim to represent the interests of small businesses, have long been criticized for lobbying on issues that run counter to small business interests, favoring instead the priorities of large corporations.¹ The recent COVID crisis has only served to amplify this problem.

Among the industries the U.S. Chamber directly serves is the property/casualty insurance industry. The Chamber's Board of Directors includes representatives from industry powerhouses like State Farm and Allstate.² Property/casualty insurance is an industry with vast power and economic control over the ability of small businesses to survive the pandemic. Yet the only thing the Chamber and its insurance allies have seemed inclined to do is to work against the interests of its small business members.³

For example, before the pandemic hit, many small businesses dutifully paid premiums for "business interruption" insurance coverage, expecting claims would be paid when they were forced to close due to the 2020 lockdown. Instead, insurers have denied all such claims and fought small businesses in court, which has resulted in the single largest category of COVID-related litigation to date.⁴ The U.S. Chamber is actively supporting the denial of these claims.⁵ As Bob Hunter, a former Texas insurance commissioner and current Director of Insurance at Consumer Federation of America, put it, "lobbying dollars flowing to the U.S. Chamber from small businesses are being used against them."⁶ In other words, they are "paying to build [their] own scaffold for where they're going to hang [them]."⁷

Instead, both NFIB and the U.S. Chamber have made "tort reform" – and during the pandemic, corporate immunity – one of their top legislative priorities at the federal and state level,⁸ hiding behind small businesses to do it. This is even though the Chamber's own recent surveys show that small businesses could hardly care less about the issue. According to the Chamber's push poll – done in conjunction with an insurance company – only 36 percent of small businesses believe that limiting lawsuits is an important issue. Yet in order to get the number even that high, the Chamber had to include businesses with as many as 500 employees in its sample set, which some would not consider small. When it comes to "Mom and Pop" stores (*i.e.*, those with 1 to 5 employees), the percentage drops down to a tiny 22 percent who believe this to be an important issue.⁹

For many years, the Center for Justice & Democracy has taken a look at small business surveys to examine what small businesses really think about the issue of "lawsuits" and "liability." Consistent with the recent U.S. Chamber survey, internal small business surveys time and again

show that restricting lawsuits, or the “cost” of lawsuits, is an issue of less importance to small businesses than almost any issue they could possibly face, or on which they want lawmakers to focus.¹⁰

In fact, in NFIB’s 2020 survey, small business members were asked to rate the importance of 75 issues on their operations. “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked 69th. It was listed among the problems of least concern to small business members and of less concern to small businesses than “Access to High-Speed Internet” (#63).¹¹ What’s more, NFIB created 10 small-business problem clusters containing all the survey’s problems related to that topic. “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked *last* in importance.¹²

When it comes to the issue of “litigation,” there are great disparities between what small business owners actually believe and what businesses lobbyists tell lawmakers they believe. In light of this fact, lawmakers who pursue an anti-litigation, corporate immunity agenda are clearly dishonoring and disregarding the expressed views of small business owners.

THE SURVEYS

National Federation of Independent Business (NFIB)

NFIB is a lobbying group that says it represents 300,000 small businesses in all 50 states and Washington, D.C.¹³ It claims to be “the only business organization whose policy positions are established by the members directly, not by executive staff or the Board of Directors. That’s what makes us credible, widely respected, and effective.”¹⁴

Small Business Problems & Priorities

Every four years, NFIB publishes a member survey “to provide those interested in small business issues outside NFIB an accurate list of small-business owner concerns. Claims are often made regarding the problems and interests of small-business owners with little or no empirical evidence to support them. If there is no systematically collected data to establish a benchmark, these claims can mislead and attribute interest when none exists (and vice versa). The data in *Small Business Problems & Priorities* therefore provide a standard against which others can measure their hypotheses.”¹⁵

National results (2020). NFIB members were asked to rate the importance of 75 issues on their operations. “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked 69th. It was listed among the problems of least concern to small business members given it’s an issue of “limited exposure to most small business owners.” Indeed, this issue was of less concern to small businesses than “Access to High-Speed Internet” (#63).¹⁶

NFIB created 10 small-business problem clusters containing all the survey’s problems related to that topic. “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked *last* in importance among the 19 problems that fell under the “Costs” cluster.¹⁷

Regardless of business sector, “Cost and Frequency of Lawsuits/Threatened Lawsuits” ranked low on the list of concerns across all industries – #64 (Agriculture, Forestry and Fishing), #67 (Construction), #73 (Manufacturing), #72 (Wholesale Trade), #72 (Retail), #67 (Transportation/Warehousing), #46 (Finance, Insurance, Real Estate, Rental), #60 (Professional Services) and #68 (Non-Professional Services).¹⁸

“Cost and Frequency of Lawsuits/Threatened Lawsuits” consistently ranked low in importance regardless of number of years of business ownership – #71 for those with ≤ 3 years of business ownership, #70 for the 4-5 year group, #72 for the 6-10 year group, #69 for the 11-20 year group and #67 for the ≥ 21 years group.¹⁹

State-specific results: California (2020). “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked very low on the list of concerns...#65 out of 75 problems.²⁰

State-specific results: New York (2020). “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked very low on the list of concerns...#71 out of 75 problems.²¹

State-specific results: Ohio (2020). “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked very low on the list of concerns...#70 out of 75 problems.²²

State-specific results: Texas (2020). “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked very low on the list of concerns...#64 out of 75 problems.²³

Survey trends (all years). Time and again, lawsuits rank low on the list of NFIB small-business owner concerns, if at all.²⁴ More specifically,

- In 2020, “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked 69th, right after “Obtaining Short-Term (less than 12 months or revolving) Business Loans.”
- In 2016, “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked 68th, right after “Bad Debts (not delinquencies) and/or Bankruptcies.”
- In 2012, “Costs and Frequency of Lawsuits/Threatened Lawsuits” ranked 71st, right after “Using Social Media to Promote Business (Facebook, Twitter, etc.)”
- In 2008, “Costs and Frequency of Law Suits/Threatened Suits” ranked 65th, right after “Solid and Hazardous Waste Disposal.”
- In 2004, “Costs and Frequency of Law Suits” ranked 64th, right after “Solid and Hazardous Waste Disposal.”
- In 2000, 1996, 1991, 1986 and 1982, “lawsuits” was not even included on the list of concerns for members to consider.

National Small Business Association (NSBA)

NSBA describes itself as a “uniquely member-driven organization where the small-business members drive our policy agenda.”²⁵ It claims its “membership comprises more than 65,000 small businesses in all 50 states and representing every industry”²⁶ and represents “the 70 million owners and employees that comprise American small business.”²⁷

Mid-Year Economic Report and Year-End Economic Report

NSBA sees its Biannual Economic Reports as continually “providing a snapshot of what’s on the mind of America’s small-business community....”²⁸

2018 Mid-Year Survey. When NSBA asked members, “What are the three most significant challenges to the future growth and survival of your business?” lawsuits was not among the 17 options listed. In addition, when asked, “Which one of the following issues do you believe Congress and President Trump’s administration should address first?” only *1 percent* of respondents selected “tort reform” from the list.²⁹

Survey Trends. NSBA has never listed lawsuits among the most significant challenges to the future growth and survival of small businesses in these surveys.³⁰ Moreover, in the 2013, 2014, 2015, 2016 and 2017 year-end surveys, only *1 percent* of respondents selected “tort reform” as a first-priority issue for Congress and the president.³¹ In the 2012 year-end survey, only *2 percent* of respondents chose “tort reform” as a first-priority issue for the federal government.³² And in the 2010 and 2011 year-end surveys, “tort reform” wasn’t even listed by NSBA.³³

“Top Priority Issues”

“Every two years, at the beginning of a new Congress, NSBA holds the Small Business Congress where small-business owners discuss, debate and then vote on our Priority Issues.”³⁴ Ten priority issues were voted on at the 2018 meeting; restricting lawsuits was not among them.³⁵ The same is true when looking at NSBA’s 2009, 2011, 2015 and 2017 congressional agendas.³⁶ “Limiting medical liability” has only been cited once in nearly a decades’ worth of NSBA’s Top 10 lists.”³⁷

National Association of Manufacturers (NAM)

The NAM is “the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states,” self-described as “the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.”³⁸

Manufacturers’ Outlook Survey

These results reflect responses from small, medium-sized and large businesses. That said, small businesses (*i.e.*, “those with fewer than 50 employees”) and medium-sized businesses (*i.e.*, “those with between 50 and 499 employees”) are the vast majority of respondents, totaling roughly 70 percent or more of responses in all of the following surveys.

Q3 2020 Survey. Respondents were asked to check their biggest business challenges from a list of options. Lawsuits was not on the list.³⁹

Q2 2020 Survey. Respondents were asked to check their biggest business challenges from a list of options. Lawsuits was not on the list. The same was true when respondents were asked “Has the COVID-19 outbreak had any of the following impacts on your business?”⁴⁰

Q1 2020 Survey. Respondents were asked to check their biggest business challenges from a list of options. Lawsuits was not on the list.⁴¹

Survey Trends. The NAM has never listed lawsuits among the most significant challenges to businesses in any of its surveys.⁴² Moreover, in the 16 surveys where respondents have been “given the opportunity to provide other challenges affecting their business aside from the choices

given for the survey question,” lawsuits has *only been mentioned once* in 220 sample comments included in survey reports.⁴³

Bank of America

Small Business Owner Survey

Fall 2019 Survey. Over 1,600 small business owners were asked about top economic concerns. Lawsuits was not on the list.⁴⁴

Spring 2019 Survey. Over 1,800 small business owners were asked about top economic concerns. Lawsuits was not on the list.⁴⁵

Survey Trends. Since 2012,⁴⁶ Bank of America has surveyed small businesses twice a year about their top economic concerns. Lawsuits has never made the list.⁴⁷

Wells Fargo

Small Business Survey

Q3 2020 Survey. When 600 small business owners were asked, “What do you think is the most important challenge facing you as a small business owner today?” lawsuits were not mentioned. When asked to “select the reason why you feel you might have to close” as a result of the pandemic, lawsuits wasn’t on the list.⁴⁸

Q2 2020 Survey. When over 1,475 small business owners were asked to indicate challenges experienced as a result of COVID-19, lawsuits wasn’t among the list of 14 options. When asked, “Thinking ahead to the next 12 months, as a small business owner, what do you need to feel confident you could recover from the economic impact of COVID-19?” limiting lawsuits was not mentioned.⁴⁹

Q1 2020 Survey. When 600 small business owners were asked, “What do you think is the most important challenge facing you as a small business owner today?” lawsuits weren’t mentioned.⁵⁰

Survey Trends. A review of survey data spanning Q2 2013-Q3 2020 reveals that lawsuits have never been among the most important challenges facing small business owners.⁵¹

NOTES

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