him continued success in his future efforts.

TRIBUTE TO WARREN BURGER

Mr. DOLE. Mr. President, a century-and-a-half ago, the great Daniel Webster said,

> We may be tossed upon an ocean where we can see no land—nor, perhaps, the sun or stars. But there is a chart and a compass for us to study, to consult, and to obey. That chart is the Constitution.

Today, Mr. President, the Senate joins with the rest of the country in mourning the passing of former Chief Justice of the United States, Warren Burger, a man who devoted his life to studying, consulting, and obeying the Constitution.

Chief Justice Burger's public life began in 1953, when he came to Washington to serve as an Assistant Attorney General in the Eisenhowewr administration.

Prior to that time, he was a respected attorney and civic leader in his home State of Minnesota. And when he arrived in Washington, he brought with him a great deal of midwestern common sense, practical experience, and an understanding of the importance of communities, neighborhoods, and families.

In 1956, President Eisenhower appointed Chief Justice Burger to the U.S. Court of Appeals for the District of Columbia circuit. He served there with distinction until 1969, when President Nixon selected him as Chief Justice of the United States.

During his 17 years as Chief Justice of the United States—a tenure which made him the longest serving Chief Justice in this century—Warren Burger authored over 244 majority opinions and assigned over 1,000 others.

Like most Americans, I agreed with some of those opinions, especially those that restored a sense of balance to our criminal justice system—and disagreed with others. But I never doubted Warren Burger's devotion to his country.

And I never doubted his devotion to making our judicial system and our courts run more efficently. Chief Justice Burger is due the credit he has received for the leadership he provided in improving education and training of judges and court personnel, and in the implementation of technological advances.

He created the National Center for State Courts, the Institute for Court Management, and the National Institute for Corrections, institutions which will continue to serve as his legacy for years to come.

Chief Justice Burger also spoke bluntly about the need of the members of the legal profession to always maintain the highest degree of ethics and professionalism.

When Chief Justice Burger left the court, he assumed the chairmanship of the commission honoring the Bicentennial of the Constitution. And he presided over that celebration's activities with great dignity and ability.

Warren Burger's devotion to increasing awareness of the Constitution continued until this year, when he published a book recounting 14 major Supreme Court cases.

Mr. President, I know all Senators join with me in extending our sympathies to Chief Justice Burger's son, Wade, his daughter, Margaret, and his two grandchildren.

AUTHORIZATION TO THE ARCHITECT OF THE CAPITOL

Mr. DOLE. Mr. President, at this time, on behalf of myself and Senator DASCHLE, I send a concurrent resolution to the desk and ask for its immediate consideration.

This resolution authorizes the removal of the catafalque from the Capitol to the Supreme Court where Chief Justice Burger's casket will lie in state.

The PRESIDING OFFICER. The clerk will report the concurrent resolution by title.

The legislative clerk read as follows:

> A concurrent resolution (S. Con. Res. 18) authorizing the Architect of the Capitol to transfer the catafalque to the Supreme Court for a funeral service.

The PRESIDING OFFICER. Without objection, the concurrent resolution is agreed to.

So the concurrent resolution (S. Con. Res. 18) was agreed to, as follows:

S. CON. RES. 18

Resolved by the Senate (the House of Representatives concurring), That the Architect of the Capitol is authorized and directed to transfer to the custody of the Chief Justice of the United States the catafalque which is presently situated in the crypt beneath the rotunda of the Capitol so that the said catafalque may be used in the Supreme Court Building in connection with services to be conducted there for the late Honorable Warren Burger, former Chief Justice of the Supreme Court of the United States.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

PRIVATE SECURITIES LITIGATION REFORM ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of S. 240, which the clerk will report.

The legislative clerk read as follows:

> A bill (S. 240) to amend the Securities Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act.

The Senate resumed consideration of the bill.

Pending:

Bryan Amendment No. 1469, to provide for a limitation period for implied private rights of action.

Mr. BENNETT. Mr. President, I have listened to the debate on this issue from both sides of the aisle with great interest and have several observations that I would like to share with you and the others in the Senate as we come to this point.

As is pointed out often to me, and sometimes as I have pointed out during my political career, I am not a lawyer. I have not been blessed with the experience of having gone through law school or passed the bar or practiced law or any of the other kinds of experiences that go with being an attorney, which so many of our colleagues in the Senate have. Indeed, a majority, Mr. President, of the Members of this body are lawyers.

I have not kept exact tally, but I believe that the vast majority, if not 100 percent, of the people who have commented on this bill, have been lawyers.

No, I must correct myself. Mr. President, the Senator from California [Mrs. BOXER] is not a lawyer, and she has been very forthright in her opposition to this bill. So I would back away from that. But most of the people who have spoken on this have been lawyers. And I have noticed that they have addressed this issue on the basis of what will happen in court if S. 240 were to pass.

They have argued that back and forth, with lawyers saying: Oh, no, if S. 240 were passed, why, then this is how the courts would be forced to rule. And then other lawyers have risen and said: You are wrong; if S. 240 passes, the courts would not have that ruling at all; they would rule this way. Back and forth, so the argument goes between those who have had the experience of a legal education.

I wish to share with the Senate my view of this, which is based not on a legal background but upon direct experience and observation with what has been happening with strike suits as these have come to be known.

My first experience is a vicarious one, but I do my best to make sure that it is accurate. It is the experience that my father had after he left the Senate and began his last career, which was back in the business world serving on a variety of boards of directors.

I have told this story in the committee hearing, but I think it is appropriate to repeat here because it makes the point I intend to make.

One of the boards that my father went on after he left the Senate was a board of a mutual fund. The compensation of the directors was tied to the performance of the mutual fund. This is the kind of thing people are saying we ought to do with directors and chief executives, not just set a compensation and let it stay there, but have a compensation tied to the performance of the fund.

Once a year, the compensation of the directors would be adjusted as a result of the better performance of the fund during the year, and since the fund, at least during the time my father served

on the board, always did better each year, the compensation went up each year.

My father received a stack of legal papers suing him for looting the assets of that particular mutual fund. He was a little startled, and he called the general counsel of the mutual fund and said, ''What is this all about?''

''Oh,'' said the general counsel, ''don't worry about that, Senator, it is just because 'Bennett' comes before all of the other directors in our alphabetical list, and there is a lawyer in New York who every year sues us, sues all of the directors, for looting the fund by virtue of the increase in compensation that comes as a result of the formula that we have.'' He said, ''Because, as I say, your name is first alphabetically, you are the one filed with the papers. You notice it says 'Wallace Bennett, et al.' The 'et al.' means all of the other directors. If we had another director whose name began with 'A,' he would be the one on whom the papers would be served. Don't worry about it. We'll take care of it.''

Dad said, ''How are you going to take care of it? This is a very impressive lawsuit.''

''Oh,'' he said, ''we have in the budget $100,000 to send to that lawyer in settlement of this lawsuit. We do this every year. He files the lawsuit, we send him a check for $100,000, he goes away. It is a standard kind of thing that we have built into our budget.''

''Why in the world are we paying this man $100,000 simply to file the lawsuit?''

''Well, Senator,'' he said, perhaps a little nonplused at my father's naivete, ''the legal bills of our fighting this suit would be substantially in excess of $100,000. So the financially responsible thing for us to do for our shareholders is to settle it at the lowest possible price, and we found that this fellow will go away if we send him $100,000. And, therefore, we do the financially responsible thing by sending him $100,000.''

Dad said, ''That's extortion, that's blackmail, that's like the protection rackets, if you will, that the mafia runs when they come in and say in a particular storefront, 'You need some protection from somebody who might bomb this place.' ''

He said, ''Well, Senator, we have better things to do than respond to these kinds of lawsuits. The cheapest way out of this dilemma is simply send the man his $100,000 every year.''

We are told during this debate, ''Oh, these are hypotheticals.'' We are told, ''Oh, we have to look at what might happen here, what might happen there.'' We are told, ''Oh, the proponents of the bill are raising scare tactics of the worst possible case, and that is not the normal procedure at all.''

I can assure you, Mr. President, this was an actual case, an actual circumstance where automatically the lawyer, by simply hitting the button on his word processor and turning out the same set of papers, received a check for $100,000 every year.

As I understand the case, to finish the story, that particular lawyer is no longer doing that, simply because he got greedy. He started to overreach and do this not only with the funds where my father was serving as a member of the board but other funds, assuming he would get the same treatment. Finally, one of them, managed by Merrill Lynch, decided to call his bluff and go to court with him.

Merrill Lynch had deeper pockets than the mutual fund on whose board my father sat, and they decided to reach into those pockets and pay the legal expenses necessary to close this operation down. So they called the man's bluff. They forced him to come up with the legal fees necessary to go to court, and he found he could not survive if he had to pay all the legal fees to actually prosecute the lawsuit and, thus, ultimately the whole thing was shut down.

I cite that because of the rhetoric that has surrounded this bill. We are not talking about what will happen in court in a theoretical lawsuit when we are talking about the impetus behind the writing and filing of this bill. We are talking about the fact that the vast majority of these lawsuits never get to court and do not intend to go to court. They are filed not because the lawyer has discovered some great evil on behalf of the investor. They are filed because the lawyer knows full well that the company or mutual fund or pension fund, or whatever it is that is being accused, will find it cheaper to settle out of court than go through the legal hassle of paying all the bills necessary to resolve the issue in the courts.

During the hearing on this bill, Ralph Nader made the statement: No one settles out of court unless he has something to hide, and challenged me personally on that issue saying, no CEO who is responsible would ever settle a lawsuit out of court unless he had something to hide, and he then proceeded to lecture me as to what my duty would be assuming, perhaps erroneously, that I was a lawyer.

I said to him and I say here on the floor today, again, I am not a lawyer but I was a CEO of a company who settled a suit out of court about which we had nothing to hide. Indeed, all of the issues that were involved in that lawsuit were clearly on the public record, but the legal bills to prosecute that lawsuit were bankrupting our company.

Now, the company at the time was very, very small, it was very fragile and our legal bills were running $25,000 a month. I spoke to our lawyer and said, ''What happens if we go to trial?''

Our lawyer said, ''They will then go to a minimum of $25,000 a week.''

There was no way that company could survive the drain of legal bills of $25,000 a week. So I said, ''What will it take to settle?''

We signed an agreement settling that lawsuit that called upon us to pay the other party $2,500 a month. Some of our shareholders did not like it. They said, ''Oh, we think it is terrible we have to pay them anything, because we're convinced we're right.''

I said, ''Look, you can be convinced you're right all you want. The issue is, can we afford to continue to press our legal position at a $25,000 a month tab all the way into court and then $25,000 a week? Swallow your pride about saying we want our position absolutely vindicated, take the $2,500 a month settlement and put this behind us and get on with our business.''

It was one of the smartest business decisions we ever made.

I pointed this out to Mr. Nader in the hearing. I resent the suggestion that the reason we settled out of court was that we had something to hide. And I say absolutely that settlements out of court are made, 90 percent of the time, on the basis of pure economics; it is cheaper to settle than to continue to litigate. And if it is, swallow your position about making a point, do the wise economic thing and settle this suit.

That is where these strike suits come from—lawyers who recognize that reality. Settlements out of court are made on the basis of economics. They are not made on any other basis. That is why so many of these suits are filed. That is why the vast bulk of these suits are settled out of court, and that is why this has become—as the Senator from New Mexico [Mr. DOMENICI], pointed out—a magnificent way for some lawyers to practice because, as the Senator said, this is a practice without clients. What could be more fun than to be a lawyer with a practice without any clients, and with, in the case that I have cited in my father's circumstance, a guaranteed $100,000 per year income doing nothing more than mailing off a set of documents to a company that will write out the check because it is easier to do that than to go to court.

I point out to those who say, ''Oh, this is not very widespread,'' that we had some testimony in the committee from a lawyer who says this is, in fact, never done. I asked him directly. I said, ''Are you telling us that no lawyer ever files a strike suit solely on the belief that he will get a settlement out of court and not have to litigate it?'' He said, ''Senator, no lawyer ever does that.'' At that point, the credibility of that witness disappeared, as far as I was concerned, because I knew that it was done.

Well, this practice has created enough concern that we have a bipartisan basis of support for this bill. Indeed, the initial supporter, the initial mover and shaker on this bill was the Senator from Connecticut [Mr. DODD]—not known for his hard right-wing propensities and leanings. He is one of my good friends. We disagree about a number of things. He is a liberal Democrat and I am a conservative Republican.

But I consider him one of the more thoughtful Members of this body. He was the moving force behind this bill in the first instance. He knows that these suits are filed for the purpose of getting settlements, not ever going to court. He was joined by Senator DOMENICI.

Senator DOMENICI told me over the weekend—we were in Utah together—he has been accused of the fatal sin of being a moderate by some portions of the conservative press. I said, ''What did you do, plead guilty?'' This is one of the more thoughtful Members of the Senate, as well. He is a careful lawyer. He understands all of the legal issues. He has pushed this bill right from the very beginning, and he, along with Senator DODD, is the principal cosponsor of the bill in this Congress.

It is a smokescreen, in my view, to spend all of your time talking about what may or may not happen in court if S. 240 passes, because that ignores the fact that the purpose of S. 240 is to deal with those people who file suits without any intention of going to court. We need to understand that as we are debating this bill.

Now, there have been some things said about this bill that I would like to set straight. One of the myths that has come out of this debate is that if S. 240 had been law at the time of the failure of the Lincoln Savings & Loan, Mr. Charles Keating would have gone scot-free and his victims would have been denied any kind of recovery. That is simply not the case, Mr. President. The safe harbor provisions of S. 240 would not have protected Keating and his co-defendants.

Keating's statements that bonds were federally insured and as safe as a bank deposit were fraudulent and obviously false and not covered by the safe harbor. The safe harbor applies to forward-looking projections, not to statements of fact that can be checked out in the past. For Keating to say the bonds were federally insured is not a forward-looking statement. Its very nature is a statement of past and existing circumstances, and they did not happen to be true. That is one of the reasons Mr. Keating is now out of the savings and loan business and under the protection and custody of the Federal Government.

Mr. SARBANES. Will the Senator yield for a moment?

Mr. BENNETT. Yes, I am happy to yield.

Mr. SARBANES. I wonder if we can get the time situation straightened out. Could I ask the Chair what time did we go on the bill?

The PRESIDING OFFICER. We resumed the bill at 12:16.

Mr. SARBANES. Mr. President, I ask unanimous consent that the time between 12:16 and 2 o'clock be treated as equally divided between the Senator from Utah and myself. When he completes his statement, I will put down the amendment. But the time he is using would come out of his side, and there will still be time left, unless he is going to go on for a very long time. I think that would equalize the situation in which we find ourselves.

Mr. BENNETT. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BENNETT. I know that the Senator from Maryland was scheduled to speak first, but no one was here, so I started. I would be happy to yield now if the Senator wishes to speak.

Mr. SARBANES. If the Senator would yield, I was going to offer an amendment on which the time would be equally divided. I am happy to withhold offering the amendment until the Senator completes his general statement. But I did not want the general statement to go on without getting this straightened out because there might not be much time left for the amendment.

Mr. BENNETT. I agree that the time of my statement will be charged against our time on the amendment.

Mr. SARBANES. Thank you.

Mr. BENNETT. I shall conclude so that we can move to the amendment of the Senator from Maryland.

We should understand that this debate and conversation about what may or may not have been the case in the Keating circumstance had S. 240 been in place is, in fact, irrelevant to the purpose of this legislation and to the direction that it will take in the future. The Keating codefendants could remain fully liable if S. 240 had been in place. The aiders and abettors would still be held accountable. The Keating claims are within the current statute of limitations, and the other 10(b)(5) reforms do not affect the recoveries.

So, Mr. President, I hope as we examine this whole circumstance, we keep in mind the purpose for which S. 240 was written in the first place. It is to deal with those people who file lawsuits without any expectation that they will ever come to trial but in the hope that the economics of the circumstance will force people to settle with them short of a trial, so that they can enjoy what, as I say, the Senator from New Mexico calls the ''perfect'' law practice—a law practice without clients and a law practice that does not require you to ever go to court, to ever hold discovery, to ever go through any procedure—simply file a set of papers and wait, as the lawyer in New York did who dealt with my father, for the check to arrive in the mail. That kind of thing is bad—it is bad for investors, it is bad for the country. That is the reason we are supporting S. 240.

I now yield the floor to the Senator from Maryland.

AMENDMENT NO. 1472

(Purpose: To amend the proportionate liability provisions of the bill)

Mr. SARBANES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Maryland [Mr. SARBANES] proposes an amendment numbered 1472.

Mr. SARBANES. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 134, strike line 6, and insert the following:

''(A) NET FINANCIAL WORTH.—Each

On page 134, strike lines 9 through 15, and insert the following: ''that the net financial worth of the''.

On page 134, line 23, strike ''50 percent'' and insert ''100 percent''.

Mr. SARBANES. Mr. President, I ask the Chair to state the time situation.

The PRESIDING OFFICER. The Senator from Maryland has 52 minutes. The manager of the bill has approximately 30 minutes.

Mr. SARBANES. Mr. President, before I turn to the provisions of the amendment, I want to make a few comments with respect to what my distinguished colleague from Utah said in his opening remarks on the consideration of this legislation today.

It is very important to understand that there are parts of this bill that Members are trying to amend and there are parts we are not trying to amend. There are parts which we think are desirable and worthwhile having. There are other parts that we think are excessive. They overreach. They go too far.

Those are the ones we are trying to correct. If we could get it corrected, we would have a total package of which one could be supportive.

Examples that are cited, many of them that are being cited, are, in fact, things we are prepared to try to correct with the provisions of this legislation, that we are not opposing. It is very important that that be understood.

The New York Times on Friday has an editorial headed ''Protection for Corporate Fraud.'' It says, speaking of the Senate security bill:

. . . goes far beyond their stated purpose of ending frivolous litigation. The Senate securities bill sets out to protect corporate officials from being sued when they issue overly optimistic predictions of corporate profitability that are simply innocent misjudgment. Sponsors cite cases for opportunist shareholders who waited for a company's share price to nosedive, then sued on the grounds that their investment was based on fraudulent representations of the company's health. But to solve this infrequent problem, the bill would erect a nearly insurmountable barrier to suing officials who peddle recklessly false information. It would block suits against the accountants, lawyers, and other professionals who look the other way when the companies they serve mislead investors. The bill requires that suits be filed within a short statute of limitations and threatens plaintiffs who technically violate the court's procedures with heavy fines, including payment of the defendant's legal fees. These provisions would ward off frivolous suits. But they just as surely ward off valid suits. Securities markets work well when investors are confident that the data on which they base

decisions is honest. The bill threatens that confidence.

Mr. President, I ask unanimous consent that that editorial be printed at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SARBANES. The Baltimore Sun has an editorial ''Safe Harbors for Financial Fraud.'' Let me quote very briefly from it:

In the wake of the Nation's savings and loan debacle, the financial derivative shock to U.S. pension systems, the junk bond manipulations of Mike Milken, one could expect Congress to bolster the rights of investors in securities fraud cases. Instead, Capitol Hill legislators are rallying to protect the interests of corporate executives, securities dealers, lawyers and accountants against the claims of victims of financial crimes.

Further on it says:

Originally drafted to reduce the number of frivolous investor lawsuits against corporations. . . .

And then it goes on to say:

But the sweeping protections included have fired the opposition of investor groups, advocates for the elderly and even the Federal Securities and Exchange Commission.

It closes by saying:

The arsenal of weapons against investors in the legislation shows that it is more about protecting the shadowy dealings of corporate leaders and their professional confederates than in limiting frivolous class action lawsuits.

This is the question. No one is protecting the frivolous class action lawsuit. The question is whether the provisions of the bill have gone beyond that and are excessive. We submit that they are. Those are some of the provisions we are now trying to change.

Mr. President, I ask unanimous consent that the Baltimore Sun editorial be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. SARBANES. Mr. President, I made reference to an article that appeared in the New York Times on Sunday, authored by Mark Griffin, the director of the Utah securities division who is a board member of the North American Securities Administrators Association, comprising the securities regulators from the 50 States. Mr. Griffin is chairman of the Securities Litigation Reform Task Force of the North American Securities Administrators Association. In other words, all of the 50 State securities administrators.

That article entitled ''Securities Litigation Bill Is Reform in Name Only.'' Just to quote briefly:

What's in a name? In the case of the Private Securities Litigation Reform Act of 1995, consumers will find a world class misnomer. Now before the Senate, the bill is more accurately described as securities litigation repeal. For millions of middle-class American investors, the fate of this bill—and the even more radical version passed by the House of Representatives in March—could spell the difference between recovering or losing billions of dollars from securities fraud.

Securities litigation reform began with the intent of putting some weights around the ankles of a few fleet-footed lawyers; but the measure now dangerously close to Senate passage would wind up being a noose around the neck of defrauded investors. While everyone agrees on the need for reasonable reform, numerous public-minded groups are strongly opposed to radical steps in the Senate bill, S. 240, that would snuff out key investor rights.

If securities litigation reform was the real goal here, the widespread support that exists for reasonable steps to curb lawsuit abuses would have ensured easy passage. But the bill now before the Senate would rein in frivolous lawsuits only by making it virtually impossible for consumers to pursue rightful claims.

He goes on later to say,

The reality is that the main intent of this legislation, despite what its proponents say, is to provide a shield for all but the most extreme cases of fraud.

Mr. President, I ask unanimous consent that this article be printed in the RECORD at the close of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 3.)

Mr. SARBANES. I will come back to this article because I think it is a perspective analysis of the situation in which we find ourselves.

Now, Mr. President, let me turn to the amendment which I sent to the desk, which deals with the issue of proportional liability and the departure from the concept of joint and several liability.

Let me recap very quickly the broader issue that was dealt with last and then the more narrowly focused amendment which I have offered and which I will then discuss. The bill changes the current system of joint and several liability to a new system of proportionate liability. Joint and several liability is the legal principle that says that each participant in a fraud may be held liable for all of the fraud victim's losses.

Under the Federal securities laws as they now are—not as they are being changed in this bill but as they are right now—each participant in a securities fraud—a corporate executive, an outside accountant, lawyer, investment banker—may be held liable for all of a victim's losses. In other words, if one of the fraud participants is bankrupt or if one of the fraud participants has fled the country, the other fraud participants make up the difference. So the burden, if one of the fraud participants is bankrupt or flees, does not fall on the innocent investor. It seems to me a rather simple concept. It is between those who have participated in the fraud—perhaps in varying degrees but nevertheless participated in it—they should be held accountable and have to sustain the burden before it is thrust upon the innocent investor. In fact, under the current system, the defrauded investors are able to recover their entire losses against any of the participants in the fraud. This bill will change that. The bill will change the system from joint and several liability to proportional liability for reckless defendants.

Who are reckless defendants under the securities laws as they now exist? The Federal securities law currently punishes two types of people who participate in a fraud: People who plan the fraud who intended to deceive the investors, and people who acted recklessly, who knew nothing about the fraud and did nothing about it—who knew about the fraud and did nothing about it.

The standard of recklessness used in the courts is not—last week, in fact, some of the people supporting this legislation talked about it as though it was negligent or just by chance that one got involved. The standard is—this is a quote out of the Sundstrand case:

. . . a highly unreasonable omission involving not merely simple or even gross negligence but an extreme departure from the standards of ordinary care and which present a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

The recklessness liability, under Federal securities fraud, is usually asserted against the fraud artist's professional advisers, his lawyers, accountants, appraisers, investment bankers, and so forth. Unfortunately, sometimes these people know about a fraud and do nothing about it. In those instances, the law holds them jointly and severally liable in that fraud. The bill changes that. It changes that. And the reckless participant will be liable only for a proportionate share of the investor's losses. If one of the fraud participants is bankrupt or fled the country or cannot be found, the losses will no longer be made up by other participants in the fraud. Instead, the innocent investor—the innocent investor will not recover his losses, even when other participants in the fraud are available to pay. Reckless participants in a fraud will be favored over innocent victims of a fraud, over individual investors, over State and local governments, over pension plans, over charitable organizations.

Securities regulators, Government officials, consumer groups, and others oppose this provision. The Chairman of the SEC wrote the Congress saying:

The Commission has consistently opposed proportionate liability.

The North American Securities Administrators Association, which represents the 50 State securities regulators, wrote, urging the Senate ''to lift the severe limitations on joint and several liability so that defrauded investors may fully recover their losses.''

The Government Finance Officers Association, representing thousands of county treasurers, city managers, and so on, people who invest taxpayer funds and pension funds, are opposed to this provision. They wrote, on June 8, in a letter that was printed last week in the RECORD—and I ask unanimous consent their letter, along with the one from

the North American Securities Administrators Association, again be printed at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 4.)

Mr. SARBANES. They wrote:

Fraud victims would find it exceedingly difficult to fully recover their losses. S. 240 sharply limits the traditional rule of joint and several liability for reckless violators. This means the fraud victims would be precluded from fully recovering their losses.

The National League of Cities, the Consumer Federation of America, the U.S. Conference of Mayors have all opposed this version of proportionate liability that puts fraud participants ahead of fraud victims. On Friday, we received a letter from the American Association of Retired Persons, which I would like to have printed in the RECORD.

I ask unanimous consent to do so.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

AMERICAN ASSOCIATION
OF RETIRED PERSONS,
Washington, DC, June 23, 1995.

Re S. 240, the ''Private Securities Litigation Reform Act.''

U.S. SENATE,
Washington, DC.

DEAR SENATOR: The Senate will soon be voting on S. 240, the Private Securities Litigation Act. While the American Association of Retired Persons (AARP) supports efforts to eliminate truly frivolous lawsuits, we cannot support this bill as reported out of the Banking, Housing, and Urban Affairs Committee. As currently written, many aggrieved investors with legitimate claims will be vulnerable to abusive practices in the securities marketplace.

More than 28 million Americans over the age of 65 rely in part on investment income to meet expenses. Though older investors once relied heavily on federally insured products such as certificates of deposit or savings accounts, lower interest rates have prompted many, including those who are not financially sophisticated, to invest in securities. In addition, because of the increasing use of defined-contribution (versus defined-benefit) pension plans, more and more people are using securities products when planning for retirement.

Older Americans fall prey not only to financial fraud, but also are injured by some practices within the ''legitimate'' investment industry. Some older investors are hit with hefty fees or subjected to ''churning'' of accounts to maximize profits for salespeople. Others routinely lose money in regulated investments that are unsuitable to their needs, are promoted in a misleading fashion, or are accompanied by inadequate and unclear disclosures. This money may represent a lifetime of savings, a lump sum pension payout, or proceeds from the sale of a home. Financial losses for retirees can mean a loss of basic support, with little opportunity to recapture lost income.

As currently drafted, S. 240 will shield wrongdoers from liability in a number of ways. As a result, the bill needs to be improved to help strike a better balance between protecting investors and eliminating claims without merit. AARP urges you to support amendments which may be offered calling for the following:

Maintenance of traditional joint and several liability among defendants. Under the bill as currently drafted, liability for reckless behavior would be narrowed to such an extent that it would be difficult, if not impossible, for small investors to be made whole for losses suffered. This amendment would protect investors against jailed, missing, or bankrupt malfeasors by restoring existing joint and several liability; and

Replacement of the safe harbor provision in the bill with a directive to the SEC to issue a rule which structures a safe harbor that protects both legitimate businesses and investors. S. 240 weakens current law by allowing an expansive safe harbor for forward-looking corporate statements that make exaggerated claims to attract investors, even if these statements are made recklessly. Clearly, such statements would harm investors greatly and should not be immunized from liability.

If AARP can be of further assistance or if you have any questions, please have your staff contact Kent Burnette at (202) 434–3800.

Sincerely,

HORACE B. DEETS,
Executive Director.

Mr. SARBANES. That letter states:

As currently drafted, S. 240 will shield wrongdoers from liability in a number of ways. As a result, the bill needs to be improved to help strike a better balance between protecting investors and eliminating claims without merit.

Last week, an amendment was offered by Senators SHELBY, BRYAN, BOXER, and I, to try to strike a better balance with respect to the broad issue of joint and several liability. That amendment was defeated. I very much regret that was the case. The amendment that has just been sent to the desk is, therefore, not dealing with the broader issue of joint and several liability, which I have just outlined, but with a more narrow aspect of it.

I urge my colleagues to focus very carefully on the fact situation. Even the authors of the bill that is before us recognize that it is unfair to favor reckless lawyers, accountants, and investment bankers who participate in a fraud entirely over the individual investor victimized by the fraud. In fact, the bill has two provisions, one that would require reckless accountants and reckless lawyers to pay investors more than the proportionate share of the reckless advisers when a fraud artist is bankrupt or has fled the country, and another provision designed to make up for the entire losses of so-called small investors.

Let me examine these two provisions, and the amendment goes to these two provisions. The first provision says that all the defendants shall be jointly and severally liable for the uncollectible share of the small investor, but only under these very limited circumstances—first of all, only if the net worth of the investor is under $200,000. The committee report says that net worth includes all of the plaintiffs' financial assets including stocks, bonds, real estate, and jewelry.

How many investors are we talking about here? People who are able to buy stocks, are going to have a net worth under $200,000, particularly when the net worth includes the value of their home? How many elderly people who have saved for a lifetime have a net worth over $200,000? Their home is usually paid for or close to it. They have some other assets. For such a person, $200,000 is not a large net worth. I guess they would have to value the engagement ring, value the wedding ring, value the heirlooms. So it is a $200,000 net financial worth of the plaintiff.

The other provision says that the plaintiff will be held whole only if the recoverable damages are equal to more than 10 percent of the net financial worth of the plaintiff. Listen to this. You are only going to protect—the bill supposedly makes an effort to protect the small investor. But the definition of the protection is that the investor's net worth has to be under $200,000, and then you protect recoverable damages only if they are equal to or more than 10 percent of the net financial worth.

(Mr. THOMPSON assumed the Chair.)

Mr. SARBANES. Mr. President, let me just give you this example. A retired person, a small investor, retired person has a $190,000 net worth. A fraudulent stock scheme is practiced upon this person, and he loses $17,000. The person who perpetrated the scheme, this scam artist, has gone bankrupt. They flee the country, or whatever. The lawyer who advised the scam artist knew about this or was reckless in terms of knowing about this fraud, the standard I quoted earlier. Under current law, that person would be jointly and severally liable and would have to pay all of the damages. Under this provision, since the damages are not 10 percent of the net worth, the investor does not get that protection.

What is the meaning of this provision in the bill, if it has that kind of exclusion that simply swallows up any meaning? Here is a small investor, $190,000 net worth, loses $17,000 which is not 10 percent of the $190,000, and the small investor is not protected in that situation, and the participants in the fraud are able to avoid having to make that small investor whole. If you really mean trying to provide some protection for the small investor, this provision needs to be corrected.

Clearly, as written, hardly anyone is going to be protected. And the amendment that I have offered, one part of it, provides greater protection to small investors, people of modest means. The bill says you are protected only if you lose 10 percent of your net worth in a fraud. In other words, you have to lose $20,000 of a $200,000 net worth or $15,000 of a $150,000 net worth. My amendment deletes this 10 percent requirement. It says you do not have to lose 10 percent of your net worth in the fraud. Regardless of how much you lose in the fraud, if your net worth is $200,000 or less, you are protected.

So you have the very small investor who ought to be protected, not the reckless advisers to the corporate scam artists who participated in the fraud.

So we strike the provision in the bill that requires that the damages be

equal to 10 percent of the net worth. So you have someone with a $200,000 net worth. If they lose something to this scam artist, they are going to be protected, and all the defendants will continue to be held jointly and severally liable in that instance. If you really want to talk about protecting small investors, you obviously have to make that change.

The second provision that is in this legislation, in the course of changing the joint and several liability scheme and shifting it to proportionate liability, even the authors recognize that was a very heavy weighting of the balance against the investors. So they said, ''Well, in all instances we are going to require the reckless participants in the fraud to pay investors an additional amount over their proportionate share.''

The additional amount, though, that is provided for is 50 percent. Let me give you an example. A con artist perpetrates a fraud. He is assisted by the reckless conduct of his lawyer or his accountant who knows about the fraud but does nothing to stop it. When the fraud is exposed, the con artist skips the country. The reckless adviser is found to be 10 percent responsible for the investor's losses.

Under the bill, there is an overage, and the reckless adviser could be held liable for up to 15 percent of the investor's losses; in other words, a 50-percent overage. So you give some additional marginal recovery to the investor.

The extra 50 percent payment required under the bill, in my judgment, does not go far enough toward making the investor whole. So the other part of this amendment increases the additional payment the reckless defendants pay, when the con artist is bankrupt or flees, from 50 percent of their proportionate share to 100 percent.

Under the example I gave a moment ago, a reckless adviser, a lawyer, investment banker, an accountant to the corporate swindler who did nothing to stop it was later found responsible for 10 percent of the fraud. As the bill is written, he could be held to 15 percent of it. This amendment would raise that to 20 percent. It would allow investors to recover a little bit more of their losses in cases of fraud.

I note that just on Friday when we were debating this bill my distinguished colleague from New York said in speaking about addressing this problem that we were outlining at the time:

> If the fraudulent defendant is bankrupt and cannot pay, we would double the liability of the other defendants. So if a defendant was found 5 percent negligent but the main defendant is not able to pay, the 5 percent negligent defendant would be held responsible for 10 percent of the damages.

Well, that is what my amendment is trying to accomplish. The bill as written provides a 50 percent overage. So if you were 5 percent liable, under the bill you would go to 7½ percent. I actually think that this was, in effect, really the recognition of an appropriate increase, and this would double it. In that instance, you go from 5 to 10. If they were 10 percent liable, they would go to 20 percent liable.

So those are the two amendments here. I disagree with abandoning the joint and several liability principle. That was voted on the other day. What we are now trying to do is to take the provision in the bill and to make it more reasonable with respect to the small investor. In some respects, I regard this as the ''have-you-no-shame'' amendment in terms of the provisions that are in the bill. We have provisions in this bill that if you are a very small investor with a net worth of under $200,000, you have to lose at least $20,000——

The PRESIDING OFFICER. The Senator has 20 minutes remaining.

Mr. SARBANES. Mr. President, I yield myself 1 minute.

You have to lose over $20,000 in order to be held whole by these defendants who have participated in this fraudulent scheme. If you are going to recognize the concept of the small investor and the need to provide some additional protection, do not render it meaningless by having this 10 percent requirement on losses. It is bad enough that you have defined the small investor as $200,000 of net worth including, including the person's home—including the person's home. Now, that is an awful lot of people.

The PRESIDING OFFICER. The Senator has 19 minutes.

Mr. SARBANES. I yield 1 more minute.

And then, in addition, to require that they lose at least 10 percent of their net worth, more than $20,000—you take a person, they have $200,000 of net worth. They have a home worth $150,000, which is modest in today's markets in most places in the country—worth $150,000. They have $50,000 worth of items for net worth which the bill has defined as including the jewelry and heirlooms and everything else. They are drawn into a fraudulent scheme. They lose $19,500, not 10 percent of the $200,000, and you are not going to hold them harmless. You are going to put the fraudulent perpetrators, the perpetrators of the fraud, ahead of the innocent investor.

Mr. President, it is an outrage. At a minimum we need to change this; otherwise, there is no shame left whatever.

Now, Mr. President, I understand that the Senator from the other side of the aisle has returned, and I will reserve the remainder of my time.

EXHIBIT 1

[From the New York Times, June 23, 1995]

PROTECTION FOR CORPORATE FRAUD

Two bills before Congress reveal how reckless the Republicans have become in their zeal to reduce regulation. The bills—which would ''reform'' laws governing securities firms and banks—go far beyond their stated purpose of ending frivolous litigation. What they would actually do is insulate corporate officials who commit fraud from legal challenge by their victims.

The Senate securities bill sets out to protect corporate officials from being sued when they issue overly optimistic predictions of corporate profitability that are simply innocent misjudgments. Sponsors cite cases where opportunistic shareholders waited for a company's share price to nosedive, then sued on the grounds that their investment was based on fraudulent representations of the company's health.

But to solve this infrequent problem, the bill would erect a nearly insurmountable barrier to suing officials who peddle recklessly false information. It would block suits against accountants, lawyers and other professionals who look the other way when the companies they serve mislead investors. The bill requires that suits be filed within a short statute of limitations and threatens plaintiffs who technically violate the court's procedures with heavy fines, including payment of the defendant's legal fees.

These provisions would ward off frivolous suits. But they just as surely ward off valid suits. Securities markets work well when investors are confident that the data on which they base decisions is honest. The bill threatens that confidence.

Banking legislation working its way through the House would also cause damage, both socially and economically. It would remove the Justice Department's authority to sue bankers and realtors who systematically block blacks and other minorities from renting apartments or getting mortgages. Apparently Justice has been too vigilant fighting discrimination for the G.O.P.'s taste. Astonishingly—in the wake of the fraud that brought down savings and loan institutions during the 1980's—the bill would weaken regulatory oversight over bank directors, requirements to provide independent audits and prohibitions against preferential loans to bank officials.

The bill leaves few customer protections in place. It would eliminate some requirements that banks report interest rates on customer accounts in uniform, easy-to-compare terms. It would also gut the Community Reinvestment Act, which requires banks to lend money in the neighborhoods where they take deposits or else possibly relinquish the right to merge or open and close branch offices. The act requires reform because enforcement is needlessly expensive. But the answer is to clarify and tighten standards, the solution the Administration has already taken.

The bill will make banks more profitable. But it will also invite some of the sordid practices that contributed to the $500 billion that the savings and loans failures cost taxpayers.

The Administration has expressed opposition to many of the banking provisions. But it has remained silent on the securities bill. Apparently, powerful Democrats, like Christopher Dodd of the insurance state of Connecticut, have pressured the White House to remain mum.

President Clinton seems eager to run as a candidate who could work with the Republican Congress but protect Americans from G.O.P. excesses. He could demonstrate his worth by vowing to veto the securities and banking bills—and any others that would put the interests of deceptive executives above those of ordinary voters.

EXHIBIT 2

[From the Baltimore Sun, June 26, 1995]

SAFE HARBORS FOR FINANCIAL FRAUD

In the wake of the nation's savings and loan debacle, the financial derivatives shock to U.S. pension systems, the junk bond manipulations of Mike Milken, one could expect Congress to bolster the rights of investors in securities fraud cases.

Instead, Capitol Hill legislators are rallying to protect the interests of corporate executives, securities dealers, lawyers and accountants against the claims of victims of financial crimes.

Legislation approved by the House and awaiting a Senate floor vote today would grant virtual immunity to these participants in securities fraud lawsuits. Executives who hype their companies' financial projections to jack up the stock price would be sheltered from legal action.

Bondholders defrauded by Charles Keating and his S&L scam, the largest in U.S. history, would find it almost impossible to sue the co-defendants for relief under the pending bill. They recovered $240 million from Keating's accountants, lawyers and securities dealers, although still losing nearly 40 percent of their money.

Originally drafted to reduce the number of frivolous investor lawsuits against corporations, the bill was pushed by Silicon Valley companies whose fortunes are highly volatile. But the sweeping protections included have fired the opposition of investor groups, advocates for the elderly and even the federal Securities and Exchange Commission.

The number of federal securities fraud cases has nearly doubled over the past decade. But the SEC, which polices securities fraud, says that investor lawsuits are important in accomplishing its mission. A study released last month by the Congressional Research Service finds the number of securities suits against companies ''exceptionally small.''

The loudest complaints have come from the elderly, whose retirement assets are most vulnerable to fraud. Senior citizens account for over 30 percent of securities fraud victims, according to a study by the Gray Panthers.

The House bill includes the chilling proviso that the losers of a fraud lawsuit must pay lawyer bills of those they sued. The Senate measure would limit defendant responsibility in lawsuits only to their degree of proven guilt, instead of making all parties liable for fraud settlements.

The arsenal of weapons against investors in the legislation shows that it is more about protecting the shadowy dealings of corporate leaders and their professional confederates than in limiting frivolous class action lawsuits. If the integrity of the marketplace is to be truly protected, the Senate will vote down this invitation to expanded investor fraud.

EXHIBIT 3

[From the New York Times, June 25, 1995]

SECURITIES LITIGATION BILL IS REFORM IN NAME ONLY

(By Mark Griffin)

What's in a name? In the case of the ''Private Securities Litigation Reform Act of 1995,'' consumers will find a world-class misnomer. Now before the Senate, the bill is more accurately described as securities litigation repeal. For millions of middle-class American investors, the fate of this bill—and the even more radical version passed by the House of Representatives in March—could spell the difference between recovering or losing billions of dollars from securities fraud.

Securities litigation reform began with the intent of putting some weights around the ankles of a few fleet-footed lawyers; but the measure now dangerously close to Senate passage would wind up being a noose around the neck of defrauded investors. While everyone agrees on the need for reasonable reform, numerous public-minded groups are strongly opposed to radical steps in the Senate bill, S. 240, that would snuff out key investor rights.

If securities litigation reform was the real goal here, the widespread support that exists for reasonable steps to curb lawsuit abuses would have insured easy passage. But the bill now before the Senate would rein in frivolous lawsuits only by making it virtually impossible for consumers to pursue rightful claims. Here we see the financial world's equivalent of the notorious Vietnam ''hamlet strategy'': we must destroy this village in order to save it.

The reality is that the main intent of this legislation, despite what its proponents say, is to provide a shield for all but the most extreme cases of fraud. Have the members of the Senate already forgotten the financial scandals of the 1980's that cost investors and taxpayers billions of dollars? Is it really good public policy to erect protective barriers around future wrongdoers who will be emboldened to emulate Lincoln Savings and Loan and Prudential Securities?

At the heart of consumer concerns over this legislation are two key problems.

Under current rules, public companies are prevented from deceiving investors by reasonable restrictions on statements concerning future corporate performance, known as ''forward-looking statements.'' The original S. 240 created a limited ''safe harbor'' for such statements, but the harbor was changed to an ocean. So now the Senate is considering a measure that protects any reckless or irresponsible statement by a company about its future as long as the statement is represented as forward-looking and notes that actual results may differ.

The Senate bill narrowly defines as fraudulent only those statements ''knowingly made with the expectation, purpose and actual intent of misleading investors.'' As if this was not a loose enough standard the bill require that each of the three conditions be proven separately in court.

Consequently, S. 240 is a dagger aimed at the heart of what makes possible strong public confidence in the markets: full, fair disclosure mandated under Federal securities law. Arthur Levitt, Jr., the Securities and Exchange Commission chairman, has noted: ''I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.''

Perhaps the clearest sign, however, that the bill's proponents have sold middle-class investors down the river is their refusal to lengthen the time in which consumers can bring cases to court. The current rule derives from a 1991 Supreme Court decision that created a statute of limitations for Federal securities law cases of one year from discovery of a misdeed or three years from the commission of the act in question. This represented a serious reduction in the time available for such lawsuits, since Federal courts previously had relied on state standards for statutes of limitation.

Currently, 31 states permit longer than the ''1 and 3'' standard for the filing of state securities cases. What possible case can the backers of this bill make for keeping the time limit as short as possible so that future swindlers who cover their tracks carefully will get off the hook for good?

Fortunately, efforts are under way to pull the measure back toward the interests of small investors. Among the amendments expected to be deliberated on the Senate floor this week are measures that would: replace the expansive safe harbor for forward-looking statements with a directive to the S.E.C. to continue its rulemaking efforts in this area; lengthen the statute of limitations for private securities fraud actions; fully restore aiding and abetting liability under the securities laws, an established concept that before it was recently removed by a Supreme Court decision, made it possible to sue even indirect participants in a fraud, and lift the severe limitations the bill imposes on joint and several liability, allowing investors to continue recovering from all participants in the fraud.

The difference between reform and repeal of securities litigation is an enormous one for middle-class investors in America. Based on current payments to securities class-action claimants, it should be expected that shutting the doors of America's courthouses over the next five years to securities fraud victims will result in 1.79 million investors losing the right to recover approximately $2.87 billion. Even these numbers may underestimate matters.

By loosening the Federal laws that now empower citizens to go to court to restrain misconduct in our financial marketplace, Congress has the potential to unleash a new, painful era of financial fraud.

EXHIBIT 4

GOVERNMENT FINANCE OFFICERS ASSOCIATION,
Washington, DC, June 8, 1995.

Hon. PAUL S. SARBANES,
U.S. Senate, Washington, DC.

DEAR SENATOR SARBANES: I am writing on behalf of the more than 13,000 state and local government financial officials who comprise the membership of the Government Finance Officers Association (GFOA) to bring to your attention serious concerns we have with the Securities Litigation Reform Act, S. 240, recently approved by the Senate Banking Committee. As you know, the GFOA is a professional association of state and local officials who are involved in and manage all the disciplines of public finance. The state and local governmental entities our members represent bring a unique perspective to this proposed legislation because they are both investors of billions of dollars of public pension funds and temporary cash balances, and issuers of debt securities as well.

We support efforts to deter frivolous securities lawsuits, but we believe that any legislation to accomplish this must also maintain an appropriate balance that ensures the rights of investors to seek recovery against those who engage in fraud in the securities markets. We believe that S. 240 does not achieve this balance, but rather erodes the ability of investors to seek recovery in cases of fraud.

The strength and stability of our nation's securities markets depend on investor confidence in the integrity, fairness and efficiency of these markets. To maintain this confidence, investors must have effective remedies against those persons who violate the antifraud provisions of the federal securities laws. In recent years, we have seen how investment losses caused by securities laws violations can adversely affect state and local governments and their taxpayers. It is essential, therefore, that we fully maintain our rights to seek redress in the courts.

S. 240 would drastically alter the way America's financial system has worked for over 60 years—a system second to none. Following are the major concerns state and local governments have with this ''reform'' legislation:

Fraud victims would face the risk of having to pay the defendant's legal fees if they lost. S. 240 imposes a modified ''loser pays'' rule that carries the presumption that if the loser is the plaintiff, all legal fees should be shifted to the plaintiff. The same presumption, however, would not apply to losing defendants. The end result of this modified ''loser pays'' rule is that it would strongly discourage the filing of securities fraud claims by victims, regardless of the merits of the cases. This is particularly true for state and local governments that have lost taxpayer funds through investments, involving

financial fraud in derivatives, for example, but who simply cannot afford to risk further taxpayer funds by taking the risk that they might lose their case and have to pay the legal fees of large corporations. The argument is made that a modified loser pays rule is necessary to deter frivolous lawsuits, but we understand there are only 120 companies sued annually—out of over 14,000 public corporations, and that the number of suits has not increased from 1974.

Fraud victims would find it exceedingly difficult to fully recover their losses. Our legal standard of ''joint and several'' liability has enabled defrauded investors to recover full damages from accountants, brokers, bankers and lawyers who help engineer securities frauds, even when the primary wrongdoer is bankrupt, has fled or is in jail. S. 240 sharply limits the traditional rule of joint and several liability for reckless violators. This means that fraud victims would be precluded from fully recovering their losses.

Wrongdoers who ''aid and abet'' fraud would be immune from cases brought by fraud victims. As you know, aiders had been held liable in cases brought by fraud victims for 25 years until a 5–4 Supreme Court ruling last year eliminated such liability because there was not specific statutory language in federal securities law. If aiders and abettors are immune from liability, as issuers of debt securities, state and local governments would become the ''deep pockets,'' and as investors they would be limited in their ability to recover losses. The Securities and Exchange Commission and the state securities regulators have recommended full restoration of liability of aiders and abettors and GFOA supports that recommendation.

Wrongdoers would be let off the hook by a short statute of limitations. We had supported the modest extension of the statute—from one year from discovery of the fraud but no more than three years after the fraud to two years after the violation was, or should have been, discovered but not more than five years after the fraud was committed—that was contained in an earlier version of S. 240. We are disappointed that this extension was removed in the Committee's markup of the legislation and hope it will be restored when the full Senate considers the bill.

Under S. 240, corporations could deceive investors about future events and be immunized from liability in cases brought by defrauded investors. Corporate predictions are inherently prone to fraud as they are an easy way to make exaggerated claims of favorable developments to attract investors. The ''safe harbor'' in S. 240 is a very broad exemption and immunizes a vast amount of corporate information so long as it is called a ''forward-looking statement'' and states that it is uncertain and there is risk it may not occur. Such statements are immunized even if they are made recklessly. We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

Access to fair and full compensation through the civil justice system is an important safeguard for state and local government investors, and is a strong deterrent to securities fraud. We believe. S. 240 as written does not provide such access to state and local governments or to other investors. Just as state and local government investors are urged to use extreme caution in investing public funds, the Senate should use extreme caution in reforming the securities regulation system.

We hope you will work to bring about needed changes in the legislation when it is considered by the full Senate. If there is any way we can help in this effort, please do not hesitate to call on us.

Sincerely,

CATHERINE L. SPAIN,
Director, Federal Liaison Center.

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.,
Washington, DC, June 20, 1995.

Re S. 240, the ''Private Securities Litigation Reform Act.''

Hon. PAUL S. SARBANES,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR SARBANES: The full Senate may consider as early as Wednesday or Thursday of this week, S. 240, the ''Private Securities Litigation Reform Act of 1995.'' On behalf of the North American Securities Administrators Association (NASAA), we are writing today to express the Association's opposition to S. 240 as it was reported out of the Banking Committee. In the U.S., NASAA is the national voice of the 50 state securities agencies responsible for investor protection and the efficient functioning of the capital markets at the grassroots level.

While everyone agrees on the need for changes to the current securities litigation system, not everyone is prepared to deny justice to defrauded investors in the name of such reform. Proponents of the bill make two claims: first, that they have modified the bill to satisfy many of the objections to the earlier version; and second, that the bill will not prevent meritorious claims from going forward. Neither claim is accurate. First, the changes made to the bill do little to resolve the serious objections to S. 240 raised by NASAA and its members. In fact, it may be argued that during the Banking Committee's deliberations the bill was made less acceptable from the perspective of investors. Second, it is NASAA's view that the bill succeeds in curbing frivolous lawsuits only by making it equally difficult to pursue rightful claims against those who commit securities fraud.

The reality is that the major provisions of S. 240 will work to shield even the most egregious wrongdoers among public companies, brokerage firms, accountants and others from legitimate lawsuits brought by defrauded investors. Do we really want to erect protective barriers around future wrongdoers?

NASAA agrees that there is room for constructive improvement in the federal securities litigation process. The Association supports reform measures that achieve a balance between protecting the rights of defrauded investors and providing relief to honest companies and professionals who may unfairly find themselves the targets of frivolous lawsuits. Regrettably, S. 240 as approved by the Senate Banking Committee fails to achieve this necessary balance.

Although this bill has been characterized in some quarters as an attempt to improve the cause of defrauded investors in legitimate lawsuits, that simply is not the case. Attempts to incorporate into the bill provisions that would work to the benefit of defrauded investors were rejected when the Banking Committee considered the bill. At the same time, the few provisions in the original bill that may have worked to the benefit of defrauded investors were deleted.

For example, during the Committee' deliberations: (1) the rather modest extension of the statute of limitations for securities fraud suits contained in the original version was deleted; (2) attempts to fully restore aiding and abetting liability under the securities laws were rejected; (3) a regulatory safe harbor for forward-looking statements contained in the original version of S. 240 was replaced with an overly broad safe harbor for such information, making it extremely difficult to sue when misleading information causes investors to suffer losses; and (4) efforts to loosen the strict limitations on the applicability of joint and several liability were rejected, making it all but impossible for more than a very few to ever fully recover their losses when they are defrauded. The truth here is that this is a one-sided measure that will benefit corporate interests at the expense of investors.

As state government officials responsible for administering the securities laws in our jurisdictions, we know the important role private actions play in the enforcement of our securities laws and in protecting the honesty and integrity of our capital markets. The strength and stability of our nation's securities markets depend in large measure on investor confidence in the fairness and integrity of these markets. In order to maintain this confidence, it is critical that investors have effective remedies against persons who violate the anti-fraud provisions of the securities laws.

When S. 240 is considered on the Senate floor, it is expected that several pro-investor amendments will be offered in an attempt to inject some balance into the measure. Among the amendments we expect to be offered are those that would: (1) extend the statute of limitations for private securities fraud actions; (2) fully restore aiding and abetting liability under the securities laws; (3) replace the expansive safe harbor for foward-looking statements with a directive to the Securities and Exchange Commission to continue its rulemaking efforts and report back to Congress; and (4) lift the severe limitations on joint and several liability so that defrauded investors may fully recover their losses.

On behalf of NASAA, we respectfully encourage you to vote in favor of all such amendments when they are offered on the Senate floor. If all four amendments are not adopted, we respectfully encourage you to oppose S. 240 on final passage.

NASAA regrets that the Association cannot support the litigation reform proposed as reported out of the Senate Banking Committee. The Association believes that this issue is an important one and one that should be addressed by Congress. However, NASAA believes that is more important to get it done right than it is to get it done quickly. S. 240 as it was reported out of the Banking Committee should be rejected and more carefully-crafted and balanced legislation should be adopted in its place.

If you have any questions about NASAA's position on this issue, please contact Maureen Thompson, NASAA's legislative adviser.

Sincerely,

PHILIP A. FEIGN,
Securities Commissioner, Colorado Division of Securities, President, North American Securities Association.

MARK J. GRIFFIN,
Director, Utah Securities Division, Chairman, Securities Litigation Reform Task Force of the North American Securities Administrators Association.

Mr. DOMENICI. Mr. President, we have 29 minutes on this amendment?

The PRESIDING OFFICER. There are 28 minutes 25 seconds.

Mr. DOMENICI. I yield myself 15 minutes.

Mr. President, I would like to speak to the Senate about this reform measure and in my own way lead up to the amendment which is the subject matter of today's discussion.

This new system—and that is what it is—builds a better system for investors in 12 very succinct, easy to understand ways.

First, it puts investors with real financial interests, not lawyers, in charge of the cases. It puts investors with real financial interests, not professional plaintiffs with one or two shares of stock, in charge of the case.

Second, it requires notification to investors that a lawsuit has been filed so that all investors can decide if they really want to bring a lawsuit. It is likely that people trusted to manage pension funds and mutual funds, that is, institutional investors, will get more involved under this new system. Actually, at this point, for the most part, they sit on the sidelines and let the class action lawsuit affecting them proceed, managed by the lawyer that filed it and the plaintiffs that were with them.

Third, this bill puts the lawyer and his clients on the same side. Reforms that change the economics of cases, proportionate liability, settlement terms and disclosure, are part of that.

Fourth, it prohibits special side deals where pet plaintiffs get $10,000, $15,000, or $20,000 for their part in a suit. It protects all investors, not just the lawyers' pet plaintiffs so that settlements will be fair to all investors.

Fifth, it stops brokers from selling names of investors to lawyers.

Sixth, it creates an environment where those running our corporations, CEO's or chairmen of the board, can and will talk about their predictions about the future without fear of being sued every time they make a prediction that turns out to be not exactly what happens to the company or somewhat off the mark. So it gives investors a system with better disclosure of important information. And this has to do with safe harbor, which will be discussed later today as we proceed with this bill.

Seventh, it provides better disclosure of how much a shareholder might get under a settlement and how much the lawyers will get so that shareholders can challenge excessive lawyers' fees.

Eighth, it prohibits secret settlements where attorneys can keep their fees a secret. This is a restriction on settlements under seal.

Ninth, limits the amount that attorneys can take off the top. Limits attorney's fees to a reasonable amount instead of the confusing calculations which are currently part of this system we want to amend and modify.

Tenth, provides a uniform rule about what constitutes a legitimate lawsuit. So that it will no longer matter where a case is filed. Investors in Albuquerque, N.M.; Atlanta, GA; New York City; or Nashville, TN, will have the same rules as investors in any of the other cities. That is pleading reform. It stops fishing expeditions where lawyers can force thousands of dollars, worth of discovery money and demand thousands of company documents before a judge can decide if the complaint really states a cause of action, so that it might be dismissed before the costs of discovery are ever incurred.

Eleventh, the last two make merit matter so that strong cases recover more than weak cases. It makes sure that people committing fraud compensate victims. It improves upon the current system so that victims will recover more than 6 cents on a dollar.

Twelfth, it will weed out frivolous cases. It gives lawyers and judges more time to do a good job to protect investors in meritorious cases. High-technology company executives can focus on running their companies and growing their businesses. Investors will get higher stock prices and bigger dividends.

This Senate bill, S. 240, which is before us does exactly what Chairman Arthur Levitt said the system should do—protect all investors, not just a few.

Having said that, obviously there are groups of Americans that may be considered to be more vulnerable than others in the American profile of people, but let me talk a little bit about senior citizen investors and what we were able to find out about what they want and what they do not want.

In March 1995, the National Investor Relations Institute commissioned a poll of Americans age 50 and over who invest in either stock or mutual funds.

Eighty-seven percent said they worried that lawsuits are diverting resources that could be used on product research and business expansion to create jobs; 79 percent said defendants should only pay damage awards according to their percentage of fault, the very issue that is partially at stake in the Sarbanes amendment; 81 percent said they would like to see mandatory penalties against lawyers who aid in bringing a frivolous suit; 70 percent said the lawyer of a frivolous lawsuit should pay the legal fees of both sides; 70 percent said at least one member of their household was a member of the American Association of Retired Persons.

I state that because this is what they think when asked about these subjects. Yet, the AARP seems somewhat on the other side, although it is hard to tell exactly what it is they want.

Those polls are correct. The Banking Committee record backs up the opinions of senior citizen investors.

Eighty-seven percent of senior citizen investors said lawsuits are diverting resources that could be used on product research and business expansion to create jobs. They are right. The Banking Committee hearing revealed, and I can go through a whole series of situations where precisely what that concern is, is revealed case by case by small- and medium-size and startup American companies.

John Doerr, venture capitalist was involved in three law suits: Settlement, $66 million; legal fees to defend, $12 million; management time, 20 person years, total over 10 years, $120 million.

The sum of $120 million will employ 200 first-rate engineers for a decade, creating faster, cheaper better products.

John G. Adler, CEO Adaptec, litigation costs of the ''million dollar fishing expedition'' would have paid for 20 additional engineers.

Dennis W. Bakke, AES spent an amount equal to one-half its annual budget for developing new power project throughout the world. Just one plant creates 1,300 jobs and $4 billion in economic activity.

D&O increased sevenfold over last decade. Adept Technology, the only U.S. robotics company, pays $450,000 for $5 million in D&O insurance. A similar Canadian company pays $40,000 for a $4 million policy.

The litigation tax represents a team of five or six engineers, a new product or new technology.

Ed McCracken, CEO Silicon Graphics: current system is ''uncontrolled tax'' on innovation that is ''impacting real creation of jobs.''

Seventy-nine percent of senior citizen investors say defendants should pay the damage award according to percentage of default. They are right. Present and former SEC Chairmen Levitt, Breeden, and Ruder agree with them, so do former SEC Commissioners Beese and Sommer.

Under current law, someone who is only 1 percent responsible can be made to pay the entire amount, the entire judgment, the entire award. Breeden, former SEC Chairman, called the present system ''inverted, disproportionate liability.'' Parties who are central to perpetrating a fraud often pay little, if anything. At the same time, those whose involvement might be only peripheral and lacked any deliberation or any knowing participation in the fraud often pay most of the damage.

Joint and several is the engine that drives abusive securities lawsuits. Plaintiffs' class action lawyers know this and use it to extract settlements. We should not turn professionals into insurers. We should not turn accounting firms, lawyers, and others who are the professionals involved in securities into insurers. Inclusion of deep pocket defendants increase the likelihood of settlement. Including an accounting firm or underwriter, they might add about one-third to the expected settlement value of the case. That is what the National Economic Research Associate study said.

One accounting firm was sued for $200 million, paid $999,000 in settlement, spent $8.4 million in defense in a case growing out of gross fees to that firm

of $91,000. No auditors for high-technology companies; hard-to-find directors—all of these things are happening—no choice but to settle. These are qualities that the current system is creating in our economic environment. No auditors for high-technology companies; hard-to-find directors; no choice but to settle.

These cases have a settlement rate between 85 and 95 percent. This is because no one can chance going to trial. The settlement rate for most civil litigation is 40 to 45 percent, a huge difference in these kinds of cases. Limiting joint and several liability will significantly reduce the number of frivolous suits brought against defendants who have done nothing wrong but are seen as deep pockets. One of the most active plaintiff class action lawyers wrote:

Class actions are judicial monstrosities.

Enacting two-tiered liability will make sure we have fewer frivolous judicial monstrosities. This bill, S. 240, would retain current law for defendants who engage in knowing fraud. So when we speak of safe harbor and proportionate liability, let us understand that in this new law, defendants who engage in knowing fraud are liable for the entire amount and there is no safe harbor for them. Other defendants who have some culpability are responsible for their share of the judgment, with two exceptions, and they are two items we are speaking about on the floor today.

Small investors: All defendants are jointly and severally liable for small investors; that is, a net worth of $200,000 or less who lost 10 percent or more of their net worth.

In a very real sense, what we are doing there is providing some insurance for them and saying that this system ought to provide that kind of insurance.

Also, in the case of insolvent codefendants, we say the solvent defendants must make an additional payment up to 50 percent of their own liability.

All of these were efforts to make this bill unquestionably fair and fair-intentioned.

Let us move on to 81 percent of the senior citizen investors said they would like to see mandatory penalties against lawyers who aid in bringing frivolous suits; 70 percent said the loser of a frivolous suit should pay the legal fees of both sides. S. 240 makes a modest step to do what the seniors want and what they want us to do. It makes the judges—and I repeat, it makes the judges—look closer at these cases and to discipline lawyers who file frivolous suits.

Whenever one of these lawsuits is finished, dismissed, settled, or taken to trial, the judge is required to make a determination regarding all attorneys: Did the attorneys comply with rule 11? Did the case have some basis? Did the defense have some basis? If not, the judge must impose penalties, and if the judge finds that rule 11 was violated, the case was frivolous and the case was thrown out of court on a motion to dismiss, the presumption is the class action attorney will pay the prevailing attorney's legal fees. That is a far cry from loser pay but a small step in the direction of trying to get what 81 percent of the senior citizen investors said, and that is bring some accountability to lawyers who file frivolous lawsuits in this area of the law.

Seniors in the poll thought Congress should go further. Frankly, I would have preferred something stronger, but this is a good compromise and it ought to be retained and clearly will be a step in the right direction.

Seventy percent of the senior investors said at least one member of their households was a member of the AARP. AARP wrote the committee a letter on May 24. They oppose loser pay even though the poll showed seniors said it was a good idea. The bill has no loser pay provision. It has the provisions I have just described.

They oppose proportionate liability, yet the seniors polled thought it was a good idea. Any attempt to raise scienter knowledge from the standard of reckless to intentional omissions. The bill does not alter the conduct actionable under the securities law.

The PRESIDING OFFICER. The Senator has consumed his 10 minutes.

Mr. DOMENICI. I yield myself 5 additional minutes. They added to their opposition a concern about safe harbor which we will discuss later.

I ask that as part of my discussion here this morning with the Senate, that these poll results in detail be printed in the RECORD. They are only 2½ pages long.

The PRESIDING OFFICER. Without objection, it is so ordered.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NEW POLL FINDS SENIOR AMERICAN INVESTORS SUPPORT SECURITIES LITIGATION REFORM

WASHINGTON, March 22.—By an overwhelming margin, Americans aged 50 and over who invest in stocks or mutual funds say they favor legislation that would make it harder for lawyers to file frivolous securities lawsuits against America's high growth companies.

Nearly seven out of ten investors surveyed say they favor legal reforms to crack down on lawsuit abuse. According to a new survey conducted by Public Opinion Strategies for The National Investor Relations Institute (NIRI), eight out of ten (81 percent) say they would like to see mandatory penalties against lawyers ''who aid in bringing a frivolous lawsuit''; more than two-thirds (70 percent) say the loser of a frivolous suit should pay the legal fees of both sides; and 79 percent say defendants should only pay damage awards according to their percentage of fault. Only 21 percent of those polled oppose litigation reform.

The survey, completed shortly after a 325–99 bipartisan vote by the House of Representatives for securities litigation reform, was released in advance of Senate consideration of reform measures.

It shows that older investors are concerned that excessive lawsuits hurt American competitiveness. Some (87 percent) say they worry that lawsuits are diverting resources that could be used on product research and business expansion to create jobs.

A similar number (88 percent) believe lawyers, not shareholders, are the primary beneficiaries of securities lawsuits. Asked about a variety of legislative options, investors favored measures to penalize those who abuse the system:

Question. Please tell me whether you would FAVOR or OPPOSE each of the following proposals.

[In percent]

	Total favor	Total oppose	Don't know/refused to answer
Requiring the loser of a frivolous lawsuit to pay legal fees for both sides	69	24	7
Requiring mandatory penalties for lawyers who aid in bringing a frivolous lawsuit	81	12	7
Forcing defendants to only pay damage awards according to their percentage of fault, instead of forcing them to pay damages they are not responsible for	79	12	9
Limiting so-called professional plaintiffs to five class action suits every three years	57	25	18
Prohibiting participation in a suit by an attorney owning the stocks or mutual funds at issue	58	31	11

Louis M. Thompson, NIRI President & CEO, said the survey demonstrates that many American investors are concerned that lawsuits erode the value of their investment savings as they near retirement age. More than one-third of those polled are age 65 or older and 70 percent said that at least one member of their household was a member of the American Association of Retired Persons.

''Frivolous lawsuits pose a direct threat to the financial well being of those Americans who are investing for their future, including retirement,'' Thompson said. ''These lawsuits don't just target companies, they paste a bulls eye on American investors.''

Survey respondents also say stock price declines are a normal investment risk and not, by themselves, evidence of fraud or grounds for a lawsuit. Only 15 percent say an annual decline of 50 percent in a stock's value was grounds for a lawsuit, and only one in ten believe a 10 percent decline in a few days is grounds for legal action. However, 85 percent say a company that knowingly provides false information to investors should be sued.

The survey of 800 American investors aged 50 or above was conducted by Public Opinion Strategies on March 18-21. The survey has a margin of error of plus or minus 3.5 percent. All those surveyed reported investments in stocks or mutual funds. Copies of the full study can be obtained by calling NIRI at 703-506-3570.

The National Investor Relations Institute, now in its 25th year, is a professional association of 2,650 corporate officers and investor relations consultants responsible for communication between corporate management, shareholders, security analysts and other financial publics.

Mr. DOMENICI. Mr. President, S. 240 is good for small investors. Investor empowerment increases control over lawsuits and settlements. The current system involves class members who sign on the dotted line to claim their share of a settlement or recovery, usually amounting to 6 to 8 cents on the dollar. Investors receive also insufficient settlement information.

Lawyers often compromise the classes' best interests to maximize lawyer

fees. Example: In the Prudential Insurance case, the attorneys wanted to settle for $37 million. The California securities director, Gary Mendoza, objected, and got the class $90 million. Then they wanted to base their fees on the bigger settlement, even though they originally were willing to settle the case for much less.

The bill shifts some of the power in these cases from the entrepreneurial class action attorneys to the people who have an expertise in managing retirement funds and other members of the class who are not ''pet plaintiffs.'' It also vests more power in the judges who have to be the final arbiter of these cases, including the money that goes to the lawyers.

It requires lawyers to actually locate plaintiffs who genuinely are aggrieved before filing the suit. Notice of settlement proposals have to be sent to the class, be in a user-friendly format which they can understand, provide clear and specific information relevant to investors' decision whether to accept settlement, challenge legal fees, opt out or say no thanks.

Under the current system, individuals can be bound by the settlement without knowing anything about it. But under S. 240 investors will get a phone number to call for information, and we can go on with more and more details that make this a good bill for the investors of this country. Small investors, large investors, institutional investors, I hope, will be playing a more significant role in the future as we move to the courts of our land on these kinds of class action suits.

Now, Mr. President, I ask unanimous consent that a statement I have prepared regarding millions of dollars for the lawyers and coupons for the plaintiffs be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MILLIONS FOR LAWYERS, COUPONS FOR PLAINTIFFS

Members of the plaintiff class each received a $400 nontransferable coupon good for a year toward a new Ford in litigation concerning leaky roofs in Ford Mustangs. The lawyers received about $1 million in fees and expenses and ''A Fistful of Coupons,'' New York Times, May 26, 1995.

Professors are known for their academic temperament. Professors are thoughtful and scholarly in their writings.

Professor John Coffee of Columbia Law School wrote about class action lawsuits where the plaintiffs get coupons and the lawyer takes the cash:

''These script settlements tend to be used by lawyers who are not zealous on behalf of the class.''

Plaintiffs weren't so scholarly in their commentary:

''The whole idea that the lawyer collects a million and the person collects nothing is the most asinine thing that I have ever heard.''

This plaintiff class would have benefited from S. 240: Most adequate plaintiff; disclosure of settlement terms; and attorney fee reform.

Mr. DOMENICI. Proportionate liability. According to Arthur Levitt, the current system is bad for all investors. So let me talk about that for a minute. Creating a sound liability scheme is a balancing exercise, all investors versus the plaintiffs' class action lawyers and investors who happen to be plaintiffs in the case. Investors who are plaintiffs get 6 to 14 cents on the dollar. The current system obviously is not working very well and, clearly, litigation has an adverse impact on investors and on businesses.

The current system is working even worse than many think. Investors are harmed when their company is frivolously sued. Stock prices are depressed. Dividends are less than they would have been, and management is sidetracked and loses much energy in figuring out what to do with a lawsuit instead of making the company work, grow, and prosper. Small companies cannot obtain outside directors and professional advisers; directors' and officers' insurance gets more and more expensive. That means they pay less for their company's activities. There would be smaller raises, fewer new jobs, and fewer new products.

Arthur Levitt, in his April 6 written testimony, after discussing the interest in compensating plaintiff/investors, said:

The Commission recognizes that there are competing policy considerations that are also derived from concern with the long-term interests of investors.

It is true that Chairman Levitt has made what I consider ''sequentially evolving statements.'' His three most recent pronouncements indicate that he disagrees with the premise of the Sarbanes amendment that joint and several liability is always appropriate when a codefendant is insolvent.

Arthur Levitt supports modifying joint and several liability in certain contexts. Support for a two-tier liability system is one modification and S. 240 is a two-tier system.

In response to questions from Senators D'AMATO and SARBANES during the April 6 hearing, Arthur Levitt said:

I think in those instances where conduct was willful fraud or in those instances where we're talking about an issuer, that joint and several liability should still apply.

The bill retains joint and several liability for knowing fraud.

Arthur Levitt said further:

I think when we're talking about other instances, a proportionate liability scheme that was limited to fraud on the market cases where the conduct may have been reckless, I believe that would be a fair way of balancing it.

A May 25 letter to Chairman D'AMATO identifying problems with the committee print did not mention joint and several liability.

In the SEC's submission to OMB, they did not oppose the joint and several provision of S. 240 and did not argue for change sought by this amendment.

The SEC did not indicate any dissatisfaction with the way responsibility is allocated in the event of an insolvent codefendant.

Jane Bryant Quinn's article in Newsweek endorses proportionate liability.

We have to be concerned about real world effect of these litigation rules.

Mr. President, I ask unanimous consent that the Boston Globe editorial called ''Stock Response,'' in which they end up saying the bill, as modified, before the Senate is a bill that should be adopted, be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Boston Globe]

STOCK RESPONSE

Younger, high-tech Massachusetts corporations give the state much of its economic vitality. But their volatility has provided fodder for litigants who exploit weaknesses in tort law to make extra bucks from the vulnerable. A bill now moving through Congress would tighten terms under which suits could be brought against corporations when performance fails to match expectations. It would also reverse the trend toward reducing information available to genuine investors.

So-called strike suits sometimes follow sharp drops in stock prices associated with unexpected bad news, usually failure to meet predicted performance in sales or profits. Such disappointments are more frequent among newer corporations that are often dependent on a single product or a narrow range of products. Performances are apt to be erratic, and the loss of a single customer can inflict serious but temporary injury to sales figures.

Enterprising lawyers specializing in identifying such situations sometimes team with stockholders—some with minor stakes—to bring quick suits when company officers had predicted better results. Too often it is the business equivalent of suing your tout sheet, or maybe the horse, if you lose money at the track. Managements frequently settle rather than engage in costly litigation, even though they might ultimately win at trial. Furthermore, they have become increasingly wary of making any projections, to the detriment of the full disclosure that underlies a free market.

A move to make such suits more difficult while protecting shareholders from fraud by unscrupulous managements has been evolving in Congress for three years. It permits managements, with important exceptions, to make forward-looking projections that identify risks involved.

Recent improvements in the bill have eliminated a loser-pays provision that would have chilled legitimate challenges to management practices, an important concession that preserves shareholder rights. It is essential that this protection be preserved in the conference committee as the bill inches toward final passage.

Mr. DOMENICI. Mr. President, State and local officials support reform. There are about 14 quotes from State officials who support it.

Mr. President, supporters of the securities litigation—we have about four sheets of them. And I just would like to call to the attention of the Senate in submitting these that State pension fund administrators and regulators from the States of Colorado, Delaware, Illinois, Massachusetts, North Carolina, Ohio, Oregon, South Carolina, and California are among those State supporters from the State regulatory side.

I ask unanimous consent that all of these be made a part of the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE OVERWHELMING CONSENSUS IN FAVOR OF SECURITIES LITIGATION REFORM

INVESTORS WANT REFORM

There is no denying that there are real problems in the current system—problems that need to be addressed not just because of abstract rights and responsibilities, but because investors and markets are being hurt by litigation excesses.—SEC Chairman Arthur Levitt (''Between Caveat Emptor and Caveat Vendor: The Middle Group of Litigation Reform,'' Remarks at the 22nd Annual Securities Regulation Institute, January 25, 1995).

Most shareholder suits are brought by people who care little, if at all, for shareholders as a group. The plaintiffs and their lawyers make grant statements about the integrity of the markets, but the primary motivation—and the primary outcome—is their own returns. Typically, plaintiffs get a small award, and their lawyers get a large one.—Nell Minow, LENS, Inc. (''Time to Wake the Sleeping Bear,'' Legal Times, February 13, 1995).

Our nation's securities laws were enacted to protect investors and to improve our capital markets. However, the perverse incentive of attorneys to file meritless claims has created the exact opposite of the intended effects of our securities laws. Abusive lawsuits triggered by a small group of lawyers, inflict tremendous harm on our nation's financial system and on the individuals and organizations drawn into them.—Richard A. Eckstom, State Treasurer, South Carolina (Letter to Sen. Hollings, April 17, 1995).

. . . [T]he current system is not working and needs reform. Under our current system, defrauded investors are receiving too little compensation while plaintiffs' lawyers take the lion's share of any settlement.—Managers of Ten Pension Funds representing: The Massachusetts Bay Transportation Authority; The Teachers Retirement System of Texas; New York City Pension Funds; Champion International Pension Plan; The Connecticut Retirement and Trust Funds; The Oregon Public Employees Retirement System; The State of Wisconsin Investment Board; State Universities Retirement System of Illinois; Eastman Kodak Retirement Plan and The Washington State Investment Board (Letter to Sen. Dodd and Sen. Dominici, July, 1994).

[T]he amount of damages that plaintiffs have typically recovered represents only a percentage of their initial claim; but the lawyers who bring the claim extract substantial fees from any lawsuit filed. A system that was intended to protect investors now primarily benefits their lawyers.—J. Kenneth Blackwell, Treasurer, State of Ohio (Letter to Sen. D'Amato, March 10, 1995).

Because shareholders are on both sides of this litigation, it merely transfers wealth from one group of shareholders to another. However, it wastes millions of dollars in company resources for legal expenses and other transaction costs that otherwise could be invested to yield higher returns for company investors.—Judy Baar Topinka, State Treasurer, State of Illinois (Letter to Sen. Moseley-Braun, March 16, 1995).

Investors are also being harmed by the current system, as it shortchanges people who are victimized by real fraud . . . The plaintiffs' lawyers who specialize in these cases profit from brining as many cases as possible and quickly settling them, regardless of the merits. Valid claims are being undercompensated in the current system because lawyers have less incentive to vigorously pursue them.—Janet C. Rzewnicki, Treasurer, State of Delaware (Letter to Sen. D'Amato, March 21, 1995).

The current situation in the law permits and even encourages the filing of lawsuits with very little merit against corporations. The benefits derived from these suits are going primarily to attorneys. However, the payments are actually coming from the pockets of serious, lifetime owners of the corporations like our members.—Thomas E. O'Hara, Chairman, National Association of Investors Corporation (Letter to Sen. Dodd, July 19, 1994).

Nearly seven out of ten investors surveyed say they favor legal reforms to crack down on lawsuit abuse. According to a new survey conducted by Public Opinion Strategies for the National Investor Relations institute, . . . [s]ome (87 percent) say they worry that lawsuits are diverting resources that could be used on product research and business expansion to create jobs. A similar number (88 percent) believe lawyers, not shareholders, are the primary beneficiaries of lawsuits.—National Investor Relations Institute (Press Release, March 22, 1995).

The system of penalties and incentives contemplated by Congress is turned upside down. The winners in these suits are invariable lawyers who collect huge contingency fees, professional ''plaintiffs'' who collect bonuses and, in cases where fraud has been committee, executives and board members who use corporate funds and corporate owned insurance policies to escape personal liability. The one constant is that the shareholders pay for it all.—Ralph V. Whitworth, President, United Shareholders Association (Testimony before the Securities Subcommittee, Senate Banking Committee, July 23, 1993).

We are ones who are hurt if a system allows someone to force us to spend huge sums of money in legal costs by merely paying ten dollars and filing a meritless cookie cutter complaint against a company or its accountants when that plaintiff is disappointed in his or her investment. Our pensions and jobs depend on our employment by and investment in our companies. If we saddle our companies with big and unproductive costs that other countries do not pay, we cannot be surprised if our jobs and raises begin to disappear and our pensions come up short as the population ages.—Mayellen Andersen, Investor and Corporate Relations Director, Connecticut Retirement and Trusts Funds (Testimony before the Senate Banking Securities Subcommittee, July 21, 1993).

Shareholders . . . are likely to realize only a small percentage of their claims and have little active involvement in the lawsuit. Plaintiff's attorneys are clearly in the drivers seat.—Kurt N. Schacht, General Counsel, State of Wisconsin Investment Board (Letter to Sen. Domenici, September 27, 1993).

[T]he plaintiffs typically recover only a small percentage of their claim, as the lawyers extract large fees for bringing the suit. A system that was intended to protect investors now seems to benefit the lawyers.—Bill Owens, State Treasurer, State of Colorado (Letter to Sen. D'Amato, April 19, 1995).

The concern about, and the reaction to, meritless lawsuits has caused industry, as well as accounting, law and insurance companies, to increase their costs with price tags ultimately paid by the consumer and the investing public, including a large percentage of our retirees and pension holders.—Joseph D. Malone, Treasurer and Receiver General, Commonwealth of Massachusetts (Letter to Sen. D'Amato, March 22, 1995).

[M]eritless litigations cost companies millions of dollars—money that could be generating greater profit for the company and higher returns for investors.—Jim Hill, Treasurer, State of Oregon (Letter to Sen. Dodd and Sen. Domenici, June 21, 1994).

I believe there is a compelling need to reform the current system of securities litigation. The problem with the current system is two-fold. First, the current system too often promotes the filing of meritless claims. Perhaps more importantly, the current system does not adequately serve the interest it is designed to protect—the interests of defrauded investors.—Gary S. Mendoza, Commissioner of Corporations, State of California (Letter to Representative Fields, February 9, 1995).

Investors will be the beneficiaries of meaningful reform. The current system fails to distinguish cases of actual fraud from frivolous cases. Typical class members receive less than $.14 for their losses. A system where private attorneys have an incentive to seek out cases of genuine fraud and litigate them to conclusion will compensate investors properly and will not coerce settlements which are paid by the shareholders of innocent companies.—Christopher J. Murphy, Chairman, Association of Publicly Traded Companies (Testimony before the Securities Subcommittee, Senate Banking Committee, March 2, 1995, at 1).

[We] are all victims. The mere threat of a securities suit makes us reluctant to provide the marketplace with voluntary disclosures. This impedes the efficiency of the marketplace by preventing investors from receiving full and complete information. Investors are harmed because investment decisions will not be made on a fully informed basis and their stocks will be improperly valued. . . . Please help us turn the securities litigation system right side up by putting investors first and plaintiffs' attorneys last.—219 California High Tech Executives (Letter to Dianne Feinstein, July 21, 1994).

Much has been said about the fact that investors receive little, ''pennies on the dollar'', in terms of the actual settlement between the company and plaintiffs' attorneys. However, just as important is the point that the vast number of investors lost in these cases because during the period an emerging growth company is being sued its stock becomes moribund. Investors, large and small, are forced to wait the process out, sell off at a price that does not accurately reflect the company's true status and potential or exert pressure on company officials to settle the suit regardless of the fact that the suit is meritless.—James Morgan, President, National Venture Capital Association (Testimony before the Securities Subcommittee, Senate Banking, March 2, 1995, at 7).

Investors are ill-served by the present system. Because issuers fear abusive litigation, they have sharply curtailed the amount of information they are willing to disclose, leaving investors without information essential for intelligent decision making. To the detriment of shareholders, abusive securities litigation distracts companies from their principal tasks, discourages the development of new businesses and inhibits sound risk taking. Finally, the existing litigation system encourages suit regardless of merit and cost forces defendants to settle regardless of merit.—Lynn D. Dudley, Director of Retirement Policy, Association of Private Pension and Welfare Plans (Letter to Sen. Domenici and Sen. Dodd, March 17, 1995).

[M]eritless law class actions have skyrocketed. The need to defend unfounded litigation imposes a ''litigation tax'' on capital formation that must ultimately be paid by the investing public.—Marc E. Lackritz, President, Securities Industry Association

(Testimony before the Securities Subcommittee, Senate Banking Committee, March 2, 1995, at 3).

If a suit is filed, it should be to redress a legitimate wrong. If a company pays a settlement, it should be because the company did something wrong. If an injured investor sues, that investor should get more than a few cents on the dollar. I think it is fair to say that the views I express today are held by a majority of institutional investors.—Joh Lukomnik, Deputy Comptroller, City of New York (Testifying before the Subcommittee on Telecommunications and Finance, House Energy and Commerce Committee, August 10, 1994).

MANAGERS OF PRIVATE OR PUBLIC PENSION FUNDS

Champion International Pension Plan: Champion International Pension Plan controls over $1.8 billion in total assets.

Connecticut Retirement and Trust Fund: The Connecticut Retirement and Trust Fund invests over $11 billion on behalf of over 140,000 employees and beneficiaries.

Eastman Kodak Retirement Plan: Eastman Kodak Retirement Plan manages over $10.9 billion in total assets and is ranked as one of the largest 60 pension plans in the U.S.

Massachusetts Bay Transportation Association: With over 12,000 participants, the Massachusetts Bay Transportation Association controls over $772 million in total assets.

New York City Pension Funds: Over $49 billion have been invested in the fund to insure the retirement security of 227,000 retirees and 130,000 vested employees.

Oregon Public Employees' Retirement System: Assets controlled by the fund total over $17.2 billion. The Oregon Public Employees' Retirement System is ranked among the largest 30 pension plans in the U.S.

State of Wisconsin Investment Board: One of the 10 largest pension funds in the United States, the State of Wisconsin Investment Board manages over $33 billion contributed by the State's public employees.

State Universities Retirement System of Illinois: The State Universities Retirement System is ranked as one of the country's 100 largest pension funds with total assets of $5.3 billion.

Teachers Retirement System of Texas: The Teachers Retirement System of Texas controls over $36.5 billion in total assets on behalf of its 700,000 members.

Washington State Investment Board: With assets totaling over $19.7 billion, the Washington State Investment Board is ranked in the largest 25 pension funds.

STATE PENSION FUND ADMINISTRATORS AND REGULATORS

Commissioner of Corporations, State of California.
Treasurer, State of Colorado.
Treasurer, State of Delaware.
Treasurer, State of Illinois.
Treasurer, Commonwealth of Massachusetts.
Treasurer, State of North Carolina.
Treasurer, State of Ohio.
Treasurer, State of Oregon.
Treasurer, State of South Carolina.

Mr. SARBANES. What is the time situation, Mr. President?

The PRESIDING OFFICER. The Senator has 17 minutes, 30 seconds, with 6 minutes 48 seconds on the other side.

Mr. SARBANES. I yield myself 5 minutes. I say to my colleague that I listened carefully to his statement and it really does not address this amendment. The statement really addresses the overall bill and the provisions of the overall bill.

There were some of the points he made with which I agree and some with which I disagree, but it did not really get to the question of the amendment before us. We had the debate on Friday on the joint and several issue, on Thursday night and Friday on the broad principle. We are now addressing the provision that is in the bill.

I want the Senator to explain to me the fairness or equity—obviously, the proponents of this legislation have recognized a necessity to protect the small unsophisticated investor. What they have provided is that if a plaintiff has a net worth of less than $200,000, he will be regarded as such a person—$200,000. This, by their own statement, includes all of the plaintiff's financial assets, including stocks, bonds, real estate, and jewelry. So if you own a home, that is going to get an awful lot of people close to the $200,000 right there. But in addition, it would be bad enough if they said if your net worth is $200,000 or less—you have to have a net worth of $200,000 or less in order to be fully protected. If you are slightly above that figure, you do not get full protection.

In addition, there is also a requirement that to be fully protected on recoverable damages, you have to have lost more than 10 percent of your net worth by this fraudulent scheme. So, in other words, if you are at the $200,000 figure, you have to have lost more than $20,000 in order to be fully protected. Why should someone who has a net worth of only $200,000 not be fully protected if they get caught in a fraudulent scheme and they lose $12,000? Or $15,000? Or $18,000? Where is the equity or the fairness in that?

If you are going to limit the small people—I think the limit is too great at $200,000, but this amendment does not address that part of the provision that is in the bill. This amendment addresses the provision that in addition to being limited to a $200,000 net worth, you have to have lost more than 10 percent of your net financial worth if you are going to be fully protected in recovering your damages.

The small people are really going to be hit hard. The small people are really going to be hit hard because someone who has a $200,000 net worth, but only $5,000 of risk, loses it all.

We say, ''Well, that is too bad. You will not get full protection.''

I cannot, for the moment, begin to understand the equity of that provision, and therefore the amendment that I have sent to the desk seeks to change that in order to provide additional protection for the small, unsophisticated investors who have been recognized in this bill as requiring some form of special protection.

Mrs. BOXER. Will the Senator yield?

Mr. SARBANES. I yield for a question.

Mrs. BOXER. I want to thank the Senator for this amendment. I wonder if the Senator has seen the extraordinary list of national, State, county, and local public officials—it is really from A to W, from Alabama to Wyoming—that opposes this bill in its current form.

I say to my friend that if some of these amendments are passed, this is going to make a great difference to a lot of these people, and I think to this administration, and certainly to this Senator.

We have the Government Finance Officers Association against it, the Municipal Treasurers Association of the United States against it, the National League of Cities, the National Association of County Treasurers and Finance Officers, the North American Security Administrators Association, and attorneys general from all over the country, including, I notice, from New Mexico and others.

These are people that do not have an ax to grind. I wonder if my friend has seen this incredible list. It is 10 pages, single spaced, of all the people who oppose this bill, and I have not even mentioned the consumer groups on this issue.

Mr. SARBANES. I am not sure I have seen the list, but I hope the Senator will include it in the RECORD so your colleagues will have the benefit of seeing the list.

We have a clash amongst interest groups, no question about it. We have a group of lawyers who very much are involved in the securities litigation which my colleagues on the other side say are abusing the existing system. They are trying to address that. We also have a lot of corporate people who want to shield themselves from liability on the other hand.

So we have vested economic interests coming from both directions, most of the judgment coming from groups that have no vested interest in it, questioning the provisions of this bill as being excessive and as going too far.

As the article in the New York Times on Sunday by Mark Griffin, the director of the Utah Securities Division, states:

What's in the name? In the case of Private Securities Litigation Reform Act of 1995, consumers will find a world-class misnomer now before the Senate. The bill is more accurately described as securities litigation repeal.

In effect, what we have is a situation in which this is excessive; it goes too far. Even the proponents recognize that it went too far. They put this provision in that I am now trying to change, in a rather modest way, in order to make it have some meaning, rather than being almost meaningless.

It has a double requirement. You have to be below $200,000 net worth, and you have to lose 10 percent of your net worth. If you are some small, unsophisticated person with very limited means, below $200,000 net worth—that is, your house, your jewelry, your real estate, any stocks or bonds that you own, all of that added up gets you below $200,000—you would think at least we will protect that person fully, fully protect them.

Oh, no, no. In addition to having to be below the $200,000 net worth, you have to lose in this stock swindle more than 10 percent of your net worth. If your net worth is $195,000, all these things added up, you have to lose more than $19,500.

Suppose you are a small investor with a net worth of $195,000, all of these things I enumerated. Someone talks you into making an investment. A lot of elderly people get fast-talked on the telephone or in person and make an investment of $5,000. They lose it; they lose it. The stock swindler goes bust, flees. There is no recovery there. The people advise the stock swindler, who were participants in the fraud on a reckless standard—on a reckless standard, the stock swindlers, lawyers, accountants, investment advisor, people drawn into this thing—they are protected ahead of this innocent investor who has lost $5,000. I cannot understand it.

I said before that this is a ''have-you-no-shame amendment,'' I say to my colleagues on the other side with respect to what you are doing to these small investors. Senators recognize the problem of the small investor, the unsophisticated person, and fail to adequately give them any protection, is what it amounts to.

That is a very important aspect. I would like to get the response from the other side focused on the provisions of the amendment. All we do, we put the amendments forward, and then we hear a statement about the bill as a whole.

We said earlier, at the very beginning of the debate, that we accept certain aspects of this bill. The real question now is on the amendments which go to particular provisions in the legislation.

I yield the floor. Perhaps we can get a focus on this particular amendment and its provisions.

Mr. DOMENICI. Mr. President, I think the distinguished Senator knows that I was one of the Senators, along with Senator DODD, that introduced this legislation. I did not serve on the Banking Committee when this legislation was marked up.

Let me see if I can explain. I do not have any apologies for this. I think the committee went, in one sense, too far. We are here to say, ''Okay, that is fine.'' Here is the theory: The Senator now would like to say this bill has gone a long way to try to get rid of the problems that joint and several liability brings to this kind of class action suit.

Now, if one does not believe that joint and several has created any problems for deep pockets who are almost in an infinitesimal amount involved in this case and makes them liable for the whole thing; if one does not believe that the accountants are not necessarily as liable unless knowingly participating in the fraud, that they should not be liable for the whole settlement or the whole verdict, if one does not believe that, obviously, those Senators ought to be for the Sarbanes amendment.

If a Member is for changing that—and I spent a considerable amount of time, not necessarily as well as it can be done—explaining that the unfairness of the application that law to cases of this type by lawyers in America today, if a person does not believe it has been applied unfairly, or that it is causing litigation to be filed that is meaningless, putting huge burdens on America's startup companies, if Members do not believe that and they want to go forward, then go with Senator SARBANES.

If you want to leave joint and several liability as it is, this essentially means no matter how much of the culpability is yours, you pay the whole amount whatever that amount is. We know what that is doing to the system. It is not helping clean up the system at all.

It is causing everybody in the chain of this kind of activity to buy huge insurance policies. We have an example here of one that I put in the RECORD. If you were in business in the United States, and exactly the same kind of business with exactly the same kind of activity in Canada, in one country it would cost $40,000, and in America it would cost $450,000.

That would not matter to some who do not think it matters what business has to pay. If that is a medium-sized business, $450,000 versus $40,000 for insurance coverage is a pretty big deal. It is like six to eight full-time engineers that could work at one of these companies. But they pay it in insurance so you can have this liability of joint and several. So every board of directors, every official, everybody in the company, the CPA's and everyone else, can be liable for the entire malfeasance of one.

If you do not agree with that statement, if you do not agree with that position, which is basis of this new bill, S. 240, which reformulates class action suits on securities, then you start considering, who should we exclude? Who should we exclude from what is now perceived to be a more fair system for everybody at large? I would assume that if you want to change that joint and several, that you no longer consider each and every possible defendant as the insurer of stockholders—whether they are little stockholders or big stockholders—they are not the insurer, that they will not lose money because somebody in the chain of this company did something wrong.

So what did the committee do? I say to my fellow Senators, they said OK, there could be some situations when we want to provide more than the proportionate liability, when we want to give a little bit of a break to some small investors who are poor. It did not mean that they were throwing the new system out. In fact, they have gone to great lengths in this bill saying the new system of proportionate liability will be better for everyone.

The answer to Senator SARBANES is much the same as one would give if we were on the floor discussing a Federal statute. When I was practicing law, if you stole $51 you committed a felony. If you stole $48 it was a misdemeanor. So you would come to the floor and say why $50? Or why did we not do $80? Or why did we not do $52? Why did we not cover the next little step? Just $51 should not be guilty of a felony. You have to draw the line somewhere.

So the committee said, we want to take care of a small group of investors whom this change in the law might affect adversely. So they drew some lines. That is all they did.

The Senator would like to draw the lines differently. Of course. The Senator from Maryland would like to draw a line very differently. He would like to throw this whole bill out. That is the line he would like. He would like to leave it like it is with maybe a few little soft amendments. He clearly does not want this bill to pass.

From my standpoint, there is no answer to why you draw lines of this type. If you want to have a debate in the Senate and say instead of $200,000 worth of net worth it should be $300,000, have the debate. If you want to say it should be $250,000, have the debate. Sooner or later you will draw the line somewhere or you will return to the old law.

Mr. SARBANES. Will the Senator yield on that point?

Mr. DOMENICI. I will be pleased to yield.

Mr. SARBANES. I have not tried to draw the line on the net worth issue at all. The Senator says if you want to put it at $250,000 or $300,000—I have not tried to change that line. I have not drawn that line at all. I have left the line at $200,000.

That response does not go to the amendment in any respect.

Mr. DOMENICI. OK. So, I answer the Senator's question before he finishes it by saying you delete the requirement that small investors lose at least 10 percent of their net worth.

Mr. SARBANES. That is right.

Mr. DOMENICI. You say it does not matter how much they lose of their net worth.

Mr. SARBANES. I am saying if you have a small investor, $200,000 worth of net worth—I am not trying to change the Senator's net worth—it could be $300,000, could be $100,000—your net worth includes their home, includes everything they have——

Mr. DOMENICI. So the Senator does not want any?

Mr. SARBANES. I am saying keep it at $200,000.

Mr. DOMENICI. Right.

Mr. SARBANES. But do not require, before they are held harmless they lose 10 percent of their net worth. You have someone with a $200,000 net worth, they loose $5,000 and you say, ''Tough.'' That is a small investor. It is an unsophisticated person who is taking a real pounding. I am saying, why do you not let them at least collect what they lost? You have limited it to a class of less than $200,000 net worth. At least whatever they lose, let them recover.

Mr. DOMENICI. Let me just say, from this Senator's standpoint, as I look at this law, proportionate liability is fair. It is better for the entire system than the joint and several before. And there have been hours of statements on the floor on why the new system is better for the country, more fair and all the other things that have been said about it.

If you want to start talking about changing that small group of investors that, somehow or another, the committee in reporting out this bill wanted to protect in some way, then I am not going to say the committee was perfect in every one of its lines. But I do not believe we ought to start with the premise that it is unfair when it could have been that there would not have been any exceptions, and that would have been a fair system. They decided to help small investors in some specific way. What they have done is not unfair. It may be unfair to you, Senator, and maybe to enough Senators to vote with you.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. SARBANES. I just point out to the Senator that the notion that it was unfair was encompassed by the Senator when he put his bill in. This was in the bill, put in by the Senator. So the Senator himself departed from the absolutely rigorous application of moving to proportionate liability because he recognized it was not fair.

I am just making the point, the way it has been defined makes it so restrictive that these small, unsophisticated investors—which my colleague is asserting he is providing some protection for —are not going to get protection. I am urging my colleagues to change it in this respect in order to provide protection for these small people.

The fact of the matter is, the shift the Senator is doing is he is shifting the burden of uncollected damages off of the codefendant, who has abused the system, over to the insolvent defendant, the victim.

The Senator used an example between a misdemeanor and a felony, and he says you have to have a line. The line you have is you are still punishing the wrongdoer. The shift from a misdemeanor to a felony does not enable you to put the burden off on the victim of the crime. Here we are throwing it off on the victims, and you are doing it in such a way that they have no adequate protection. I think these small investors ought to be protected. I think the proportionate liability ought to be doubled. As the Senator from New York indicated the other day himself in making a statement, that is what this is directed to do. I say to my colleague, the way it is written now my colleague is going to have someone with a small net worth, they lose a small amount of money—he says, ''Too bad.''

They say, ''But this fellow was a participant in the fraud. They were in this scheme that cheated me.''

''Tough. Very sorry.'' And Mr. and Mrs. Small investor, all across the country, are going to feel the brunt. They are going to feel the brunt of this.

I should have tried to amend the net worth as well. I think the figure is much too low. But for the sake of drawing the distinctions we left the net worth. We just said all right, you got $200,000 net worth, you lose $15,000 in this fraudulent scheme. The person who directly perpetrated the scheme has fled. But his lawyer is around, his accountant is around, his investment counselor is around. And all of them were so reckless that they became participants in the scheme. They did not blow the whistle on this person and therefore you are entitled to collect from them. And I think you ought to be able to collect if you are the small person.

If you have lost less than 10 percent, you have a smaller loss—why should they not? That may be the only investment funds these people have. We are not talking about wealthy people here. And you are putting the burden—it is very important to understand, the law to date has been that all of the defendants can be held. If one of them goes bankrupt, then the others can be brought in and made to pay. And the victim is held harmless.

Now we are making the perpetrators of the fraud harmless as opposed to the victims.

Mr. President, what is the time situation?

The PRESIDING OFFICER. The Senator's time has expired. The hour of 2 o'clock now having arrived, the Senator from California is recognized to offer an amendment on which there will be 90 minutes debate.

The Senator from California.

AMENDMENT NO. 1473

(Purpose: To instruct the Securities and Exchange Commission to report to the Congress on whether senior citizens and retirement plans need enhanced protection from securities fraud)

Mrs. BOXER. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from California [Mrs. BOXER] proposes an amendment numbered 1473.

At the appropriate place, insert the following:

SEC. . STUDY AND REPORT ON PROTECTIONS FOR SENIOR CITIZENS AND QUALIFIED RETIREMENT PLANS.

(a) FINDINGS.—The Congress finds that—

(1) senior citizens and qualified retirement plans are too often the target of securities fraud of the kind evidenced in the Charles Keating, Lincoln Savings & Loan Association, and American Continental Corporation situations;

(2) this Act, in an effort to curb unfounded lawsuits, changes the standards and procedures for securities fraud actions; and

(3) the Securities and Exchange Commission has indicated concern with some provisions of this Act.

(b) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Securities and Exchange Commission shall—

(1) determine whether investors that are senior citizens or qualified retirement plans require greater protection against securities fraud than is provided in this Act and the amendments made by this Act; and

(2) if so, submit to the Congress a report containing recommendations on protections that the Commission determines to be appropriate to thoroughly protect such investors.

(c) DEFINITIONS.—For purposes of this section—

(1) The term 'qualified retirement plan' has the same meaning as in section 4974(c) of the Internal Revenue Code of 1986; and

(2) the term 'senior citizen' means an individual who is 62 years of age or older as of the date of the securities transaction at issue.

Mrs. BOXER. Mr. President, thank you very much.

The reason I had the wonderful employee of the Senate read the amendment in its entirety is that it is pretty straightforward. As has been stated before, I am not an attorney. Because I tend to see these things in a very straightforward way, I have a rule that I have to really be able to show my amendment to the people I represent and make sure that they speak clearly to the point.

Is it not the case, Mr. President, that I have 45 minutes on my side, and Senator DOMENICI has 45 minutes on his side?

The PRESIDING OFFICER (Mr. FRIST). That is correct.

Mrs. BOXER. Mr. President, I yield myself such time as I might consume, but I ask if the President will let the Senator know when she has used about 20 minutes.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, since we are putting into the RECORD names of people and organizations, I wanted to make the point that in California a partial list of those who think this bill goes too far is as follows: The California State Association of Counties, the county of San Francisco, Napa County Deputy District Attorney, the Stanislaus County Board of Supervisors by resolution, the city of Barstow Finance Director, the city of El Monte Treasurer, the Glendale Treasurer, the city of Whittier Clerk-Treasurer, the Modesto Irrigation District, and that is a partial list.

I ask unanimous consent that be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATE-BY-STATE OPPONENTS TO S. 240, AS OF JUNE 22, 1995

ALABAMA

City of Mobile, Investment-Treasury Officer Arthur J. Barnes.

Pike County Commission, Administrator Steven W. Hicks.

State of Alabama, Securities Commission, Director Joseph P. Borg.

ARIZONA

City of Bullhead City.

City of Yuma, Accounting Director Gerald A. Zochowski.

ARKANSAS

City of Stuttgart, Finance Officer Jane W. Jackson.
Craighead County, Treasurer Russell H. Patton III.
State of Arkansas, Attorney General Winston Bryant.

CALIFORNIA

ACC Bond Holders.
California State Association of Counties, Executive Director Steven C. Szalay.
California Labor Federation—AFL–CIO.
City of El Monte, Treasurer Henry J. Velasco.
City of Barstow, Finance Director Evelyn Radel.
City of Glendale, Treasurer Elizabeth W. Evans.
City of Whittier, Clerk-Treasurer Gertrude L. Hill.
Congress of California Seniors, President Lois Wellington.
Congress of California Seniors—Los Angeles.
County of San Francisco, Chief Administrative Officer William L. Lee.
Gray Panthers of Marin, Convenor John Kouns.
Modesto Irrigation District, General Manager Allen Short.
Napa County, Deputy District Attorney Daryl A. Roberts.
Stanislaus County Board of Supervisors, Chairman Paul W. Caruso (resolution).
Contra Costa Times editorial opposing S. 240 (April 17, 1995).

COLORADO

Abbey of St. Walburga, Boulder.
Adams County, Treasurer Helen HIll.
Alamosa County, Treasurer Charlene Cockrum.
Arapahoe County, Treasurer Bernie Ciazza.
Benet Hill Monastery, Colorado Springs.
Capuchin Province of North America, Denver.
City of Denver, District Attorney A. William Ritter, Jr.
City of Denver, Employees Retirement Plan, Executive Director Michael Heitzman.
Chafee County Board of Commissioners, County Administrator Frank M. Thomas.
Colorado AFL–CIO, Jack Hawkins.
Colorado AFSCME, Cathy Bacino.
Colorado County Treasurers' Association, President Sherry M. Rose (resolution).
Colorado Public Interest Research Group, Rich McClintock.
Colorado Senior Organization of Active Retirees of International Steelworkers (SOAR), President Matt Peulen.
Colorado Seniors Lobby, President Richard Tucker.
Denver Federation of Teachers, Local 858, President Fleta Nockels.
Eagle County, Treasurer Sherry Brandon.
Freemont County, Treasurer Jenny Woltemath.
Gray Panthers of Colorado, President Eric Boyer.
Gunnison County, Treasurer Alva May Dunbar.
Jefferson County, Treasurer Bob Bammerlin.
La Plata County, Treasurer Edward Murray.
Machinists Union, District Lodge 86, President Ray Rivera.
Mesa County, Treasurer Gena Harrison.
Moffat County, Treasurer Joy Hammat.
Morgan County, Treasurer Robert Sagel.
National Council of Senior Citizens, Region 8, Director Matt Peulen.
Oil, Chemical & Atomic Workers Union of Colorado, Robert Wages.
Otero County, Treasurer Dennis Smith.
Ouray County, Treasurer Ramona Radcliff.
Retired Mens' Organization of International Steelworkers of Colorado, President Mike Baca (resolution).
Rio Grande County, Treasurer Peggy Kern.
San Miguel County, Treasurer Sherry Rose.
Sisters of St. Francis of Colorado Springs.
Sisters of St. Francis of Penance, Denver.
State of Colorado, Division of Securities, Commissioner Philip A. Feigin.
Summit County, Treasurer Larry Galliland.
Weld County, Treasurer Arthur Willis.
Yuma County, Treasurer Mary Lou Rose.

CONNECTICUT

City of New Britain, Finance Director John Jedrzejczyk
City of Shelton, Finance Director Louis M. Marusici
Connecticut Government Finance Officers Association, President Glenn S. Klocko
Newington Public Schools, Business Administrator Alfred L. Villa
Town of Darien, Finance Director Kathleen A. Clarke
Town of Stonington, First Selectman David S. Burdge
Town of Waterford, Finance Director Arthur H. Davis III

DELAWARE

City of Dover, Finance Director Mike Karia
City of Newark, Finance Director Patrick E. McCullar
Delaware Association of Government Finance Officers, President Patrick E. McCullar

FLORIDA

Benedictine Sisters of Florida
Broward AFL–CIO
Consumer Fraud Watch
Dade County Board of Commissioners (resolution)
Dade League of Cities, President Helen L. Miller (resolution)
Delray Senior Citizens
Escambia County Board of Commissioners, Chairman Willie J. Junior (resolution)
Florida AFL–CIO
Florida AFSCME
Florida Association of Court Clerks and Comptrollers
Florida Association of Tax Collectors
Florida Chapter, National Bar Association
Florida Coalition to Protect Investor's Rights, Coordinator Susan Glickman
Florida Consumer Action Network
Florida Education Association
Florida Government Finance Officers Association, President Rick Atkinson
Florida Public Interest Research Group
Florida Silver Haired Legislature, Inc.
Florida State Council of Machinists
Florida State Council of Senior Citizens
Gray Panthers of Sarasota-Manatee
Gray Panthers of South Dade
Northeast Florida Area Council of Senior Citizens
Palm Beach County Sheriff's Office, Sheriff Charles A. McCutcheon
South Florida Water Management District, Director of Finance E. Barrett Atwood, Sr.
United Faculty of Florida
United Teachers of Dade
Palm Beach Post editorials opposing S. 240 (June 3 and 5, 1995)

GEORGIA

City of Albany, Controller Chuck Olmsted
City of Columbus, Mayor Bobby G. Poters
City of Forest Park, Finance Director Sarah Davis
Gwinett County, Director of Financial Services Charlotte J. Nash
Municipal Electric Authority of Georgia, President and General Manager Frank L. Olson
Municipal Gas Authority of Georgia, Executive V.P. and CFO Richard W. McCullough
State of Georiga, Employees' Retirement System, Director Rudolph Johnson

HAWAII

State of Hawaii, Employees Retirement System, Administrator Stanley Siu
City and County of Honolulu, Finance Director Russell W. Miyake

IDAHO

City of Pocatello, Clerk-Treasurer Peter B. McDougall

ILLINOIS

American Province of Little Company of Mary Sisters, Provincial Offices, Evergreen Park
Benedictine Sisters, Chicago
Chicago and Suburbs Senior Senate, President Joseph Ramski
Christian Brothers of Ireland, Chicago
City of Alton, Treasurer Daniel V. Beiser
City of Chicago, Mayor Richard Daley
City of Danville, Comptroller Ron E. Neufeld
City of Darien, Accoutant Marie Plunkett
City of Decatur, Treasurer Beth B. Couter
City of Galena, City Administrator Richard A. Schutlz
City of Joliet, Management and Budget Director Robert D. Fraser
City of Moline, Finance Officer Kathleen A. Carr
City of Peoria, City Treasurer Mary A. Ulrich
City of Rolling Meadows, Acting City Manager Gerald Aponte
City of West Chicago, Director of Finance W.C. Warren
Coalition of Active and Retired Employees P.A.C. (Police & Firemen)
Cook County, Assessor Thomas C. Hynes
Felician Sisters, Mother of Good Council Province, Chicago
Illinois Government Finance Officers Association, Executive Director William Stafford
Illinois Municipal Treasurers Association, President Judith E. Madonia
Illinois State Council of Senior Citizens' Organizations, President Gerald Prete
LaSalle County, Treasurer Thomas C. Setchell
Madison County, Chief Deputy-Treasurer Robert H. Chappell
Missionary Sisters of St. Charles Borrome, Melrose Park
Passionist Community, Holy Cross Province, Rev. Michael J. Hoolahan
School Sisters of St. Francis of Christ the King, Lemont
Servants of the Holy Heart of Mary, Provincial Administration Kankakee
Sisters of Mercy of the Americas, Regional Community of Chicago
Sisters of St. Casimir, Chicago
Sisters of St. Francis, Joliet
Village of Bolingbrook, Deputy Village Treasurer Harriet C. Allbee
Village of Carol Stream, Finance Director Stan W. Helgerson
Village of Carpentersville, Finance Director A. Donald Mazza
Village of Niles, Finance Director/Treasurer George R. Van Geem
Village of Sauk Village, Finance Officer Bev Sterrett

INDIANA

Conference on Corporate Responsibility of Indiana and Michigan, Chairperson Mary John Walsh

IOWA

Iowa Association of Counties, Executive Director Bill Peterson
Iowa Municipal Finance Officers Association, President Marian K. Karr
Jackson County Board of Supervisors, Chair John J. Wiley

City of Cedar Rapids, Controller-Auditor Robert E. McMahan
City of Iowa City, Finance Director Donald J. Yucuis

KENTUCKY

Commonwealth of Kentucky, Kentucky Retirement Systems, General Manager Pamela S. Johnson

LOUISIANA

Parish of St. Charles, President Chris A. Tregre
Parish of Terrebonne Consolidated Government, Chief Administrative & Financial Officer Doug Maier

MAINE

City of Lewiston, Finance Director Richard T. Metivier
Maine Council of Senior Citizens, President John H. Marvin
Maine Municipal Association, State and Federal Relations Director Kenneth C Young, Jr.
Maine Retired Teachers Association, Vice President Philip A. Gonyar
Maine State AARP, Legislative Committee, Chair William H. Layman
Maine State Employees Association, Retirees Steering Committee Chair Eunice Cotton
Southern Maine Area Agency on Aging, Executive Director Laurence W. Gross

MARYLAND

Howard County, Director of Finance Raymond F. Servary, Jr.
Marianist Provincial House, Baltimore
State of Maryland, Office of the Attorney General, Securities Division, Commissioner Robert N. McDonald

MASSACHUSETTS

AFSCME Council 93, Executive Director Joseph M. Vonavita
Augustinians of the Assumption, Brighton
Citizen Action of Massachuetts, Director Edward Kelly
Essex County, Retirement Board, Chairman-Treasurer Katherine O'Leary
Fraternal Order of Police, Greater Boston Lodge, President Michael Giannetti
Hampshire County Commission, Legislative, Charter, and Code Committee, Chairman Vincent J. O'Connor
Industrial Cooperative Association Group, Director James Megson
Massachusetts Association of County Commissioners, President Robert Stone
Massachusetts Consumers' Coalition, Chairman Paul J. Schlaver
Massachusetts Jobs with Justice, Director Rand Wilson
Massachusetts Public Interest Research Group, Executive Director Janet Domenitz
Massachusetts Teachers Association, Vice President Melanie Kasperian
Norfolk County Board of Commissioners, President William O'Donnell (resolution)
Plymouth County Board of Commissioners, Chair John R. Buckley, Jr.
Sons of Mary, Framingham
State of Massachusetts, Attorney General Scott Harshbarger
Tax Equity Alliance for Massachusetts, Director Jim Braude
Teamsters Local 25, Recording Secretary/Field Representative Richard Reardon
Teamsters Local 122, Secretary/Treasurer John Murphy
Teamsters Local 504, Secretary/Treasurer Dave Robbins
Town of Concord, Finance Director Anthony T. Logalbo
Town of Wellesley, Treasurer/Collector Marc V. Waldman
Xaverian Brothers, American Northeastern Province, Milton

MICHIGAN

City of Ann Arbor, Finance Director Allen D. Moore
City of Bay City, Treasurer Judy M. Volk
City of Berkeley, Clerk/Treasurer Leona M. Garrett
City of Grayling, Treasurer Verna M. Meharg
City of Kalamazoo, Administrative and Financial Services Managing Director R. Keith Overly
City of Mount Pleasant, Finance Director Rick L. Sanborn
City of Southfield, Treasurer Roman J. Gronkowski
Charter Township of Ada, Treasurer Soberberg
Charter Township of Delta, Board of Trustees (resolution)
Charter Township of Garfield, Treasurer Judy McManus
Charter Township of Independence, Treasurer John Lutz
Charter Township of Van Buren, Treasurer Helen Foster
Conference on Corporate Responsibility of Indiana and Michigan, Chairperson Mary Joan Walsh
Genesee County, Controller Leonard D. Smorch
Grand Rapids Dominicans, Prioress Barbara Hansen
Macomb County Treasurer Association, President Pamela Kondziolka
Michigan Association of Counties, Executive Director Timonthy K. McGuire
Passionist Community, St. Paul of the Cross, Rev. Michael Hoolahan
Saginaw County, Treasurer Marvin D. Hare
State of Michigan, Auditor General Ramona Henderson Pearson

MISSISSIPPI

State of Mississippi, Office of the Secretary of State, Assistant Secretary of State for Securities and Business Services Susan Shands

MISSOURI

Boone County, Treasurer Kay Murray
Chesterfield Fire Protection Distric, District Administrator John W. Klos
City of Blue Springs, Director of Financial Isabel Stocklein
City of Brentwood, Finance Officer Susan L. Zimmer
City of Des Peres, Director of Finance Brett Vuagniaux
City of Ellisville, Director of Finance David S Daniels
City of Ferguson, Director of Finance Jo Ann Bordeleau
City of Fulton, Chief Financial Officer Jerry D. Ponder
City of Harrisonville, Mayor C. A. ''Chuck'' Jones
City of Lee's Summit, Treasurer Kathy VanGordom
City of Lexington, City Administrator Abigail Tempel
City of Macon, Finance Clerk Cathay Swan
City of Manchester, Director of Finance C. Lynn Wei
City of Moberly, Director of Finance and Personnel Nick Burton
City of O'Fallon, Director of Finance Laura Lashley Chiles
City of Richard Heights, City Manager Carl L. Schwing
City of Rolla, Finance Director Daniel L. Murphy
City of Sedalia, City Controller/Treasurer Pamela Burlingame
City of Shelbina, City Clerk Charlette Schwieter
City of Sugar Creek, City Clerk/Finance Officer Veronica A. Powell
City of Webster Groves, Acting City Manager Milton W. Matthews
Clay County, Treasurer Beverly Corum
Communication Workers of America District 6, Vice President Vic Crawley
Hickory County Commission, Presiding Commissioner Bob Breshears
Jesuits of the Missouri Province, St. Louis
Little Blue Valley Sewer District, Finance Director Jay Sells
Missouri AFL–CIO, State Director Daniel J. ''Duke'' McVey
Missouri AFSCME, Council 72, Bob Carico
Missouri Citizen Action
Missouri Council of Senior Citizens
John R. Perkins, Former Securities Division Director, Missouri Secretary of State
Municipal Finance Officers and Treasurer Association of Missouri, President Daniel L. Murphy
Society of the Sacred Heart, United States Province, St. Louis
St. Charles County, Finance Director Joseph M. Kernell
St. Louis County Municipal League, Executive Director Tim Fischesser
St. Mary's Institute, O'Fallon
Sistors of the Most Precious Blood, O'Fallon
State of Missouri, Attorney General Jeremiah W. (Jay) Nixon
Union of American Hebrew Congregations--Missouri
United Auto Workers, Region 5
St. Louis Post Dispatch editorial opposing S. 240 (May 9, 1995)

MONTANA

Butte Area Chapter of AARP, President Harold Kammerer
Butte Human Rights Coalition, Chair George Waring
Carbon County, Commissioner Mona Nutting (MACO resolution)
Coalition of Montanans Concerned with Disabilities, President Michael Regnier
Custer County Commission, Commissioner Janet Kelly (Custer resolution)
Dawson County, Treasurer Cindi Byron
Fergus County, Commissioner Vern Petersen (MACO resolution)
Flathead County, Commissioner Howard Gipe (MACO resolution)
Gallatin County Commission, Chairman Kris Dunn (resolution and MACO resolution)
Gallatin County, Treasurer Stan Hughes
Hotel Employees & Restaurant Employees Union, Local 427, Organizer Secky Fascione
Montana Association of Counties, Executive Director Gordon Morris (Resolution)
Montana Coalition For Nursing Home Reform, President Alice Campbell
Montana People's Action, Executive Director Jim Fleischman
Montana Public Interest Research Group, Executive Director Linda Lee
Montana Trial Lawyers, Executive Director Russel Hill
State of Montana, State Auditor Mark O'Keefe
Stillwater County, Commission Chairman Vicki Hyatt (MACO resolution)
Yellowstone County, Commissioner Mike Mathew (MACO resolution)

NEBRASKA

General Drivers and Helpers, Local Union No. 554, Secretary Treasurer Jerry Younger
Nebraska Association of Public Employees, Executive Director Bill Arfman
Nebraska Citizen Action, Director Walt Bleich
State of Nebraska, Department of Banking and Finance, Assistant Director Jack E. Herstein

NEVADA

City of Las Vegas, Treasurer Michael K. Olson
City of Wells, Clerk Michael T. Cosgrove
Clark County School District, Treasurer Kenneth D. Selch

NEW JERSEY

Consumers for Civil Justice

New Jersey Conference of Mayors, Executive Director Don Fauerbach
New Jersey Fraternal Order of Police, President Richard Whelan
New Jersey Government Finance Officers Association, President Barry Eccleston
Tax Collectors and Treasurers Association of New Jersey, President Vincent A. Belluscio

NEW MEXICO

City of Farmington, Mayor Thomas C. Taylor
New Mexico Federation of Labor, President George ''Jeep'' Gilliland
New Mexico Pro-PAC, President Gerry Bradley
Progressive Alliance for Community Empowerment, President Pablo Trujillo
New Mexico Public Interest Research Group, Executive Director Matthew White
San Juan County, Treasurer Sid Martin
State of New Mexico, Attorney General Tom Udall
State Representative Mimi Stewart (Bernadillo)

NEW YORK

AFSCME, District Council 37, Executive Director Stanley Hill
AFSCME, New York State, Political and Legislative Director Edward F. Draves
American Military Retirees Association, National and New York President Thomas E. Burton
Citizen Action of New York
City of Newburgh, Director of Finance/Comptroller Hargovind S. Patel
City of New York, Public Advocate Mark Green
Congregation of Christian Brothers, Eastern American Province, New Rochelle
Interfaith Center on Corporate Responsibility, Executive Director Tim Smith
Long Island Progressive Coalition, Executive Director David Sprintzen
New York Government Finance Officers' Association, President Michael A. Gealto
New York Hotel Trades Council, AFL–CIO, Pensioners Society
New York Public Interest Research Group, Legislative Director Blair Horner
New York State Council of Senior Citizens, Executive Director Maureen H. Campbell
New York Statewide Senior Action Council, Board of Directors President Max Berman
Presbyterian Senior Services, Executive Director Dave Taylor
Sisters of Mary Reparatrix, Bronx
State of New York, State Comptroller H. Carl McCall

NORTH CAROLINA

Raleigh News & Observer editorial opposing S. 240 (May 27, 1995)

NORTH DAKOTA

North Dakota AFL–CIO, President David L. Kamnicz
North Dakota AFSCME, Kevin Riconas
State of North Dakota, Treasurer Kathi Gilmore
State of North Dakota, Securities Commissioner Cal Hoovestol

OHIO

Ashtabula County, Treasurer Robert L. Harvey
City of Barberton, Finance Director Raymond E. Flickinger, Jr.
City of Cleveland, Treasurer Mary Christine Jackman
City of Dublin, Finance Director Marsha I. Grigsby
City of Jackson, Auditor Carl Barnett
City of Lyndhurst, Finance Director Joseph G. Mirtel
City of Mansfield, Finance Director Sandra L. Converse
City of Painesville, Director of Finance James W. Onello
City of Tallmadge, Treasurer Steven C. Brunot
City of Upper Arlington, Finance Director Pete Rose
City of Vandalia, Finance Director Linda Chapman
City of West Carrolton, Finance Director Roberta A. Donaldson
City of Zanesville, Treasurer Walter K. Norris
County Commissioners Association of Ohio, Executive Director Larry L. Long
County Treasurers Association of Ohio, President John Donofrio
Cuyahoga County Board of Commissioners, President Mary O. Boyle
Euclid City Schools, Treasurer Lowell B. Davis
Glenmary Home Missioners, Director Robert Knueven
Greene County, County Auditor Luwanna A. Delaney
Lake County, Treasurer John C. Crocker
Municipal Treasurers Association of the United States and Canada, Ohio Chapter, Chairman Anthony L. Ianiro
Montgomery County Board of Commissioners, President Vicki Pegg
Summit County, Treasurer John A. Donofrio
Village of Edgerton, Clerk-Treasurer Kathleen Whitman
Village of North Kingsville, Clerk-Treasurer Barbara R. Lambert
Village of Richfield, Finance Director Eleanor Lukovics
Dayton Daily News editorial opposing S. 240 (5/10/95)

OREGON

City of Astoria, Finance Director John J. Snyder
City of Coos Bay, Finance Director Gail George
City of Coquille, Recorder/Finance Director Shirley J. Patterson
City of Gresham, Financial and Information Services Manager Axel Bergman
City of Rouge River, City Recorder/Treasurer Leahnette M. York
City of West Lynn, Finance Director Willie Gin
Crook County, Treasurer Mary J. Johnson
Curry County, Treasurer Trudi J. Sthen
Deschutes County, Treasurer Helen Rastovich
Douglas County, Treasurer Joanne L. Motschenbacher
Gray Panthers of Salem, Convener Nate Davis
Jefferson County, Treasurer Bonnie K. Namenuk
Josephine County, Treasurer Jan Elsnasser
Lincoln County, Treasurer Linda Pitzer
Linn County, Treasurer Shannon Willard
Malheur County, Treasurer Janice L. Belnap
Multnomah County, County Auditor Gary Blackmer
Northwest Oregon Labor Council, AFL–CIO, Executive Secretary Ron Fortune
Oregon Public Employees Union/Local 503, President Karla Spence
Oregon State Council of Senior Citizens, Secretary Lois Prince
Oregon State Public Interest Research Group
Oregon Trial Lawyers Association, President A. Michael Adler
Polk County, Treasurer Carolyn Wall

PENNSYLVANIA

City of Philadelphia, Mayor Edward G. Rendell
Commonwealth of Pennsylvania, Securities Commission, Chairman Robert M. Lam
Lehigh County Authority, General Manager Aurel M. Arndt
Pennsylvania State Council of Senior Citizens President David M. Lockhardt
Vincentian Sisters of Charity
Philadelphia Inquirer op-ed opposing S. 240 (June 4, 1995)

SOUTH CAROLINA

Aiken County, Administrator William M. Shepherd
Berkeley County, Supervisor James H. Rozier, Jr.
City of Columbia, Mayor Robert D. Coble
City of Greer, Finance Director Mary P. Greer
City of Mount Pleasant, Cheryll N. Woods-Flowers
City of Sumter, Mayor Stephen M. Creech
City of Union, Mayor T. Burton Williamson, Sr.
Lexington County, Treasurer William O. ''Bill'' Rowell
State of South Carolina, State Comptroller General Earle A. Morris, Jr.
South Carolina Association of Counties, Executive Director Michael B. Cone

SOUTH DAKOTA

Charles Mix County, Auditor Norman Cihak
Marshall County, Treasurer Nelva Kristofferson
South Dakota AFL–CIO, President Jack Dudley
South Dakota AFSCME, President Paul Aylward
State of South Dakota, Department of Commerce and Regulation, Division of Securities, Director Debra M. Bollinger
Yankton County, Commissioner Kathleen Piper

TENNESSEE

East Tennessee International UAW Retired Workers Council, President James W. Renshaw
Hamilton County, County Executive Claude Ramsey
Tennessee Association of County Executives, Executive Director Fred E. Congdon
Tennessee State Senate Majority Leader Ward Crutchfield

TEXAS

City of Cleburne, Finance Director Greg Wilmore
City of Meadows, Secretary/Treasurer Elaine Herff

UTAH

State of Utah, Division of Securities, Director Mark J. Griffin
City of Bountiful, Treasurer Galen D. Rasmussen
City of Ferron, Treasurer Brenda S. Bingham
City of Ogden, Department of Management Services, Treasury Division, Fiscal Operations Manager J. Norman Burden

VERMONT

AFSCME Council 93, Vermont Coordinator George A. Lovell, Jr.
Central Vermont Council on Aging
City of Burlington, Mayor Peter Clavelle
Council of Vermont Elders
Older Women's League
Southwestern Vermont Council on Aging
State Representative Jerry Kreitzer, Chair, House Government Operations Committee
State Representative Kathleen Keenan, Chair, House Commerce Committee
Teamsters Union Local 597
Vermont Labor Forum
Vermont NEA, President Marlene R. Burke
Vermont Public Interest Research Group
Vermont State Labor Council, AFL–CIO
Vermont Trial Lawyers Association

VIRGINIA

Benedictine Sisters of Virginia, Bristow

City of Falls Church, Treasurer H. Robert Morrison
City of Hopewell, Finance Director Elesteen Hager
City of Roanoke, Finance Director James D. Grisso
City of Suffolk, Finance Director Carroll L. Acors
City of Waynesboro, City Auditor Frank Fletcher
Commonwealth of Virginia, State Corporation Commission, Division of Securities and Retail Franchising, Director Ronald W. Thomas
Henrico County, Finance Director Dennis W. Kerns
Montgomery County Board of Supervisors, County Administrator Betty Thomas
Town of Rocky Mount, Finance Director Don E. Fecher
Town of Warrenton, Mayor J. Willard Lineweaver
Vinginia Association of Counties, General Counsel C. Flippo Hicks

WASHINGTON

Association of Washington Cities, President Judy Boekholder
City of Anacortes, Finance Director George Khtaian
City of Chelais, Finance Director Jo Ann Hakola
City of Spokane, Mayor Jack Geraghty
Clark County, Treasurer Doug Lasher
Cowlitz County, Treasurer Donna Rolfe
King County, County Executive Gary Locke
King County Union Retirees Council, AFL–CIO, President E.G. Kroener
Seattle Community College District, Edward Woodel
Skagit County, Treasurer Judy Menish
Thurston County, Treasurer Michael J. Murphy
State of Washington, Department of Financial Institutions, Securities Administrator Deborah R. Bortner
State of Washington, Department of Retirement Systems, Director Sheryl Wilson
State of Washington, Treasurer Daniel K. Grimm
The Seattle Times editorial opposing S. 240 (May 29, 1995)
Seattle Post-Intelligencer editorial opposing S. 240 (June 2, 1995)

WEST VIRGINIA

City of Bridgeport, Finance Director Keith L. Boggs
State of West Virginia, Treasurer Larrie Bailey
State of West Virginia, Board of Investments, Executive Director H. Craig Slaughter

WISCONSIN

City of Green Bay, Assistant Finance Director Brian C. Ruechel
City of Horicon, Clerk-Treasurer David J. Pasewald
City of Hudson, Clerk-Treasurer Gerald P. Berning
City of Oak Creek, Treasurer Barbara R. Davison
City of Oshkosh, Finance Director Edward A. Nokes
Holy Cross Sisters, Merrill
Milwaukee County, Treasurer Thomas W. Meaux
School Sisters of St. Francis, Milwaukee
Sisters of the Divine Savior, Milwaukee
Sisters of the Sorrowful Mother, Brown Deer
Town of Delavan, Treasurer Dorothy Fladten
Village of Greendale, Clerk-Treasurer Dianne S. Robertson
Wisconsin State Council of Senior Citizens, President Charlie Williams

WYOMING

Wyoming Association of Municipal Clerks and Treasurers, President Kathleen Whitney.

Mrs. BOXER. Mr. President, my amendment takes a very conservative approach to what I think could be a terrible, unintended consequence of this bill.

Many times when we pass legislation with the best of intentions, with the best of minds, we come up short and we find out that in fact we hurt people instead of helping them. Since I know that every one of us is here to help people, every one of us is here to protect investors, every one of us is here to show that we are fair, reasonable and that we are just, I think the amendment I am offering ought to be accepted by the other side. I hope it will be.

It simply asks the SEC to report to us in 180 days as to whether senior citizens and qualified retirement plans need more protection than that which is called for under S. 240.

All I am doing in this amendment is ensuring that the most vulnerable targets of securities fraud, the elderly, are not going to be even more vulnerable as a result of this bill, S. 240. Frankly, I am afraid that they will be. This is not just my opinion; many senior groups oppose this bill in its current form. They want us to amend it. They are very concerned about the impact of this bill on their retirement plan, on their ability to not become a burden to their families.

This bill's entire focus is to make it more difficult to bring a class action lawsuit involving fraud. That is its purpose. I understand it. We want to make sure there are no frivolous lawsuits filed. We do not like these strike suits. We want to get rid of them. But I am concerned that, if the proconsumer amendments continue to be beaten back in this Senate as they were in committee and the first one which was here in the Senate, clearly the ones who will be hurt the most are the ones who are the clearest targets for crooks.

I want to share with my colleagues a couple of articles that appeared in the recent press showing that senior citizens are, in fact, the target of crooks. I am going to show you a couple of articles. Here we have an article from the AARP Bulletin, a publication of the American Association of Retired Persons.

''Targeting the Vulnerable.''

''Stock Schemes a New Peril.''

I am going to read it.

To Earl Bonsey of Dover, Maine, it sounded almost too good to be true. As it turned out, it was. The 69-year-old retired carpenter thought he was investing $15,000 in a safe, high-yield mutual fund. Instead, he got a high-risk junk bond fund and lost a third of his money.

Thousands of older Americans now find themselves in similar situations, and the problem is worsening, experts say. ''Although there are no firm statistics, we know that countless numbers of older persons are being bilked out of millions of dollars every year—dollars that often represent the savings of a lifetime.''

Here is an article from the New York Times just last month.

''If the Hair is Grey, Con Artists See Green.'' ''The Elderly Are Prime Targets.''

I am going to read just a portion of this.

Finding victims is simple. Older people are fairly easy to contact, either through zip codes or mailing lists. Sometimes they are taken for a ride by a parent or friend, whether it is young people who turn up on their doorsteps offering to carry groceries, or middle-aged people . . . in church groups. Even trusted local business people can turn into predators. The elderly ''just like the Marcus Welby view of the world, believe that people in business are basically honest,'' says Philip Feigin, Colorado's Communities Commissioner and President of the North American Securities Administrators Association which tracks investor fraud.

And I might add that that organization, the North American Securities Administrators Association, opposes S. 240. This is what he says:

So many times when we track a scam the investors who call us are absolutely furious that we broke it up. Of course, any investment made at any age can go sour, but if you blow it when you are 30, you have 35 years to make it up before you retire. If you blow it at 65, you may have to go back to work for the rest of your life.

Now, my God, the last thing we want to do here is send people back to work at age 65 and 70 when they have lost their life savings or part of their life savings. That is just what happened in the Keating case, so let us be careful with what we do here.

Now, the next chart shows the Keating scam in all its beauty. It is a draft; it is actually used here as a salesman's training course where they showed their scam artists how to go after the elderly and it just shows how they look at the elderly: ''Edna Snidlip, 1 Geriatric Way, Retiredville, CA.''

That is the person they put up as the target here, and they are trying to get her to write a $20,000 check, and that is how they refer to her. And I think more important than that is the next chart which shows what Keating said to his staff.

Capitalize On This.

And always remember the weak, meek and ignorant are always good targets.

It is unbelievable what goes on with certain bad apples in this country, who would target the elderly and call them the ''weak, meek and ignorant.'' That is why senior citizens oppose this bill, and they are going to remember what we do with this bill. To me, that is the most extraordinary thing. This is the way they talk about our grandmas and grandpas—''the weak, meek and ignorant.'' They are going to target them, and they are going to get them into some scheme. And then, if we do not strengthen this bill, they are not going to be able to recover. And so Senator SARBANES is offering some amendments, I will be offering some amendments, Senator SHELBY, Senator BRYAN, and others. I hope we will get some support.

Let me give you some of the stories of the senior citizens who were hoodwinked by Charles Keating, and let us be clear. The laws we are amending in S. 240 are the very laws that were used by these seniors to go after Keating and his cohorts.

Last week, Senator BRYAN was questioned by the chairman of the committee, who said: How does this have anything to do with the Keating people? It is very clear. We have the pleadings of the people who were hoodwinked by Keating, collected under these very laws. So when you change it—and by the way, there were forward-looking statements put out by Charles Keating which I will show later in the debate.

When you change the laws, you make it harder for these people, whether it is on the proportionate liability or the safe harbor or the pleading requirements or any of the other things that we change by S. 240. That is why. SEC has problems with this. The SEC has many problems with many of the provisions—with the safe harbor provision, with the lead plaintiff provision—and we are trying to fix this bill so that it is, indeed, a good bill and what it winds up doing is making sure we protect the good business people, not the bad ones. I wish to protect the good business people of California, of which there are many, most. But there are some who are not. And I used to be a stockbroker, and I can tell you this from that experience. People are very nervous when they give you their money to invest. It is a sacred trust. And to call these people ''weak, meek and ignorant'' does not deserve to be rewarded by legislation that makes it easier for these crooks.

We should be careful. These seniors are warning us not to go too far. The seniors who were bilked by Keating showed up here in Washington, DC, to stand with some of us. Here is one of their stories. Barbara Marks of Burbank, CA. Here is what she says.

I have my home. I have my car, but I have no savings. I invested my savings but Charles Keating swindled it from me. I lost $25,000 in American Continental Corporation bonds I bought at Keating's Lincoln Savings. I've received about 50 percent back from class action lawsuits. It's made things much more difficult. I hate having no money,

she says.

I live check to check. If I didn't have any pension and Social Security, I'd be on skid row. If a check doesn't show up, I have nothing. Everything I do I have to pay on time. If my battery goes, I have to pay. I cannot go to the bank and draw out money if I don't have food or coffee. I have to wait until the next check. Last week I had no money for 3 days.

This is a woman who was swindled out of her money. Why would we want to do anything to make it harder for her to recover, or others like her? I ask that question. Now, I know my friends on the other side and my friends on this side who support S. 240 say I am wrong on this point. I say do not listen to me. Listen to the hundreds and hundreds of people and organizations and consumer groups that absolutely oppose S. 240 in strong form. Join with me in this amendment so that we can have a study done by the SEC to tell us if we have gone too far and we are hurting seniors. Let us see what else she says.

As an older person you want to think people are honest. I thought everything was protected and everything was on the up and up. I thought my investment was insured. People should be able to collect the money taken from them from all who are responsible,

she says.

This goes to Senator SARBANE's amendment.

We should benefit from those who benefit from taking from us. The money belongs to us. The Senate shouldn't take away our rights.

I ask unanimous consent to have printed in the RECORD the statement of Ms. Jeri Mellen and Ms. Joy Delfosse, both of Nevada, Don and Judy Maxfield of Arizona, John and Ethel Rabkin, Granada Hills, CA, and Evangeline Ivy of Glendale, CA.

There being no objection, the material was ordered to be printed in the the RECORD, as follows:

PEOPLE WHO WERE SWINDLED BY CHARLES KEATING AND WHO OPPOSE S. 240 WASHINGTON, D.C. VISIT, JUNE 13, 14, 1995

NEVADA

1. Ms. Jeri Mellon, Henderson, NV.

Jeri Melon lost $40,000 in American Continental Corp. (ACC) bonds, which she purchased at Lincoln Savings & Loan in Sherman Oaks, California in the last 1980's.

She says, ''The bank had set aside a desk near the front of the bank so that you were seen coming and going. The individual selling the bonds was always a well-dressed, young college graduate. He was charismatic, charming, good-looking, attentive, and very well versed in his approach to clients.

''The tellers advised you to put your money in the bonds rather than a CD. Lincoln Savings was insured, so I felt that if the bank was endorsing these bonds, they would have to be insured.''

2. Ms. Joy Delfosse, Henderson, Nevada.

Joy Delfosse lost $21,000 in ACC bonds that she purchased at Lincoln Savings & Loan in Sherman Oaks, Ca. She had been a customer of Lincoln Savings since 1969; and when a CD of hers came due, the Lincoln tellers she trusted convinced her to put her money into ACC bonds.

ARIZONA

1. Don and Judy Maxfield,

Don and Judy Maxfield lost $21,000 in ACC bonds, when they were living in Lakewood, CA. in the 1980's. They purchased the bonds at their local Lincoln Savings bank in the Lakewood Mall. when their CD's came due, Lincoln tellers persuaded them to put their money into ACC bonds. At the time, the Maxfields were looking forward to retirement and felt the bonds were an attractive investment, since they were being sold by Lincoln Savings.

CALIFORNIA

1. Sam and Ethel Rabkin, Granada Hills, CA.

Sam and Ethel Rabkin lost $100,000 in ACC bonds, which they purchased at the Lincoln Savings & Loan where they banked at Granada Hills, CA. They said, ''Lincoln was a family bank with all the tellers knowing you by your first name and they made you feel part of the family.''

2. Evangeline (Van) Ivy, Glendale, CA.

Evangeline (Van) Ivy and her husband lost $100,000 in ACC bonds, which they brought at the Lincoln Savings & Loan in their town of Glendale CA. They were regular customers of the Lincoln Savings in Glendale; they purchased their bonds when their CDs came due, based on information from Lincoln sales people that the bonds were safe.

Mrs. BOXER. Sam and Ethel Rafkin lost $100,000 in junk bonds. They said:

Lincoln was a family bank with all the tellers knowing you by your first name and they made you feel part of the family.

Sure, they did. But in the back rooms they laughed at them and called them the ''weak, meek and ignorant.''

We better be careful when we change our securities laws that we do not as an unintended consequence—I do not think anyone, of course, intends to do that—reward that kind of crook. We know Charles Keating targeted the elderly. We know many others target the elderly. I showed you some of those articles. Charles Keating ran afoul of the securities laws. The securities laws that this bill will change will be changed deeply and adversely: 18,000 of the 23,000 people who bought Charles Keating's junk bonds were elderly—well, we know why; they targeted the elderly; junk bonds that did not drop 10, 20, or 30 percent in value but junk bonds that became 100 percent worthless; 18,000 people swindled. That is a small city. Make no mistake, the elderly are the target, and that is why my amendment is such a good amendment, because it simply says to the SEC: Take a look at what the Senate has done and the House has done with S. 240 and let us know in 180 days. Should we take some actions to make sure that senior citizens are better protected?

Mr. President, have I used up the 20 minutes at this time?

The PRESIDING OFFICER. The Senator has used 16 minutes.

Mrs. BOXER. I say we better make sure we know what we are doing. We better make sure that at the end of the day, as the proponents of S. 240 celebrate their victory, it is not a short lived victory, because I will tell you, Mr. President, there is no wrath like the wrath of the elderly. There is no wrath like the wrath of people who took their hard-earned retirement money and invested it, only to turn around and find out they were swindled. And that wrath will come down on those people who changed the laws in such a way that good people like this could not invest.

Let me give you another unintended consequence, and it is something that my friend, CHRIS DODD, has said over and over and over again, and he is right on this particular point. We have to make sure that people are interested in making investments in this Nation. We want to make sure they feel good about it, they feel protected. Or what will happen? Money will dry up. They will buy a Government bond. Why would they not? At least they know it is protected by the FDIC and that the full

faith and credit of the Treasury stands behind it.

But we want people to invest in the business world. We want the capital to flow to innovation, to new technology so that jobs are created. So what I am saying is, as an unintended consequence of this bill, we better be careful that we do not go so much to one side because we do not want frivolous lawsuits that we, in fact, make people afraid that the protections are not there, that they will never collect if they are swindled and, therefore, they refuse to invest their money in the private sector. And they might very well.

I will tell you, I would have a lot of pause. I know a lot about this rewrite of securities laws, and I am very concerned.

Investment schemes that target the elderly are not the exception; they are the rule. The Senate Committee on Aging held hearings 2 years ago on elderly and retirement investor fraud. The assistant commissioner from my State securities regulators testified. Let me quote from his testimony:

> If I were conducting a seminar on investment fraud techniques for aspiring con artists, lesson one would be: Target the elderly and the retired.

So we have proof from people who are out there that the elderly, senior citizens, and retirement plans are the focus of some of these bad appeals, these swindlers, these crooks, these corrupt people who have no heart at all. I used to call them hard-hearted. I do not think they have a heart. How do you have a heart when you take a grandma's money, a widow? She has $20,000. You imply that it is safe, as I read to you before the case of that elderly person. How do you take that money and lose it knowing all along that is what was going to happen and then even claim to have a heart?

No. 1, target the elderly and the retired.

The State securities regulators announced what they described as an alarming surge in investment schemes targeting IRA's.

The PRESIDING OFFICER. The Senator has used 20 minutes.

Mrs. BOXER. Mr. President, I yield myself 5 minutes. They reported that tens of thousands of unwary Americans already have invested hundreds of millions of dollars of their savings for old age through IRA's and other tax-deferred savings.

So we know who the targets are. And the Boxer amendment simply says to the SEC, ''Help us out a little. After S. 240 is the law of the land, take a special look, from the standpoint of our seniors and retirement plans, and let us know if there is something we should do to strengthen the law.''

I would be surprised if people fight us on this amendment. If they do, I will listen to their arguments, but it is hard for me to understand why we would not want to have this information.

Mr. President, today I took an early morning walk around the Capitol on the west front, and I do not know if you have ever seen the statue of John Garfield. It was put up there by his Army buddies.

For the first time, I decided to take a look at it. It is surrounded by five classical sculptures, and one of them is a man who is holding a tablet, and the tablet has three words on it: Law, justice, prosperity. Those three words—law, justice, prosperity.

I thought to myself, how interesting that I happened to look at that this morning. Law, justice, and prosperity. What we are trying to do here is to make sure in S. 240 that our companies can be prosperous by protecting them from frivolous lawsuits. Law, justice, prosperity. But, on the other hand, there is a balance. Are we going to go too far and take prosperity away from our seniors or, shall I say, survival away from our seniors? So, law, justice and prosperity. We are dealing with those words today. We do not want to protect the bad guys; we want to help the good guys, and we certainly do not want to hurt the senior citizens and those who are saving diligently for their retirement.

I know lawyer bashing is the latest thing of the nineties. We bash everything in the nineties, but particularly we bash lawyers, and I am against lawyers who file frivolous lawsuits. I will do whatever I can to stop that.

But let us be clear, we are doing a lot more here. We are going very far, as this Congress has done on a number of issues, we are going too far. We are going to hurt our grandmas and grandpas and average, decent people who deserve to be protected and they do not deserve to have a law that protects them literally torn apart—torn apart—so that they can be sitting targets: ''the weak, the meek and the ignorant with no laws to help them.'' That is wrong.

We are changing many rules about securities laws in S. 240. The least we can do—the least we can do—is require that the SEC come back to us in 180 days telling us what they believe the impact of these changes are on senior citizens and retirement plans. I hope my colleagues on both sides of the aisle can support the Boxer amendment.

I retain the remainder of my time, Mr. President. I yield the floor at this time.

I suggest the absence of a quorum and ask unanimous consent that the time be charged equally to both sides.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. D'AMATO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I was listening to the concern my colleague from California raised that senior citizens might be particularly vulnerable to unscrupulous predators who prey on them because of their lack of sophistication and, in many cases, take advantage of an established fiduciary relationship to defraud senior citizens of their savings.

I agree with my colleague that, in the case of Charles Keating and his bank, it is hard to imagine that a large and reputable institution, insured by the Federal Deposit Insurance Corporation, would engage in the kind of reprehensible activities which defraud depositors and investors of hundreds of millions of dollars. People often think that banks have the Federal Government's stamp of approval and that they are therefore protected from these kinds of fraudulent practices, because of the various supervisory agencies—the Federal Reserve, the Office of the Comptroller—which review these banks. However, I reject the Senator's contention that S. 240 would open the door to this kind of activity. Fraud is not countenanced by this bill. Indeed, deliberate or intentional misstatements do not receive the safe harbor or any other protections. In fact, those who make intentional misstatements can be held liable, potentially, for all of the damages, even damages beyond those which they are found to be directly responsible. Further, the Securities and Exchange Commission is empowered under this legislation to bring suits that before now they did not have the authority to bring.

This legislation's purpose is to control the race to the courthouse by greedy, avaricious lawyers, who look not to the benefit of innocent investors or the elderly who have been defrauded, but look only to enrich themselves. They have become legal holdup artists. Ninety-three percent of these cases are settled because it costs less for defendants to settle them than the millions of dollars they cost to try. The lawyers win their settlements by alleging fraud; they do not prove fraud.

It is about time that we say we are not going to allow the American judicial system to be used in this manner; to allow lawyers to pirate profits from companies who have done nothing wrong, whose only mistake is that they are in business and that they are subject to the marketplace fluctuations. It is about time that we stood up to the lawyers who have made filing these cases a business. These lawyers are not concerned with the interests of the investors who have been abused.

I do not want to see people's rights to seek redress limited. However, this bill does not do that. Later, I intend to refer to a statement by Mr. Levitt, in which he is highly complimentary of many of the provisions of S. 240. Also I intend to point to a comparison between our bill and the bill that was passed in the House of Representatives.

I have not heard anybody point out that this bill does stop these attorneys from racing to the courthouse, and prohibits them from hiring plaintiffs so

that the people with real financial interests are represented. These attorneys would rather file suit on behalf of a person who owns 10 shares of stock and who the lawyer selects than have to consider the interests of the defrauded investor. S. 240 stops this abusive behavior and it should be complimented for that. S. 240 would also legislate that if you are an accountant, and you discover fraud, you have an obligation to bring that up to the board of directors. However, S. 240 goes further than that; it requires that your obligation does not end with the board of directors. If the board of directors does not act, you have to go one step further, and report the fraud to the SEC. These provisions protect the senior citizens.

I am tired of hearing this nonsense that this legislation will just open up the doors to take advantage of people. People are being taken advantage of, this legislation tries to put a stop to that. Where do you think those senior citizens invest their money? They invest in pension funds that account for 25 percent of all the moneys invested. However, I did not hear my colleagues say, you have done a good thing by giving to these pension funds the authority to pick their lawyers and control their litigation. While I share my colleagues' concern that senior citizens not be hurt, I think it is unfair, that it is beyond the pale, to say that this bill protects fraud. I have heard that statement a half dozen times from my colleagues. But this bill does not protect fraud. I ask my colleagues to show me where in this legislation we protect fraud. Any intentional misstatement and you can be held liable. There is no safe harbor for fraud. It is neither right nor accurate to say that we protect fraud in this bill, and I resent the fact that my colleagues continue to make these statements.

For several weeks, my colleague has been talking about offering amendments to help protect senior citizens. I have yet to see those amendments. This is the first amendment that has been introduced. It calls for a study. I believe that it is reasonable, and I am prepared, under certain circumstances, to accept this amendment. But I do not think it is unreasonable for me to ask what other amendments are going to be offered so that they are not just sprung on us. I hope that my colleagues are willing to share their amendments so that we can see if we might be able to accept them. I would like to be able to do that, but I certainly cannot accept amendments blindly.

I yield the floor.

Mrs. BOXER. Mr. President, how much time do I have left?

The PRESIDING OFFICER. Twenty minutes.

Mrs. BOXER. Before I yield to my good friend from Alabama, I want to respond to my friend from New York. My friend from New York, the chairman of the committee, worked very hard on S. 240. He simply has a different view of the consequences. You know, if it all was exactly the way my friend said it was, everyone would be supporting S. 240. But I have already put into the RECORD the names of hundreds of people from Alabama to Wyoming, people who are there to look out for the people, who have said S. 240 goes too far.

I already mentioned the Congress of California Seniors. Listen to what they said, and they are smart people:

> DEAR SENATOR BOXER: In behalf of the Congress of California Seniors, I want to reiterate our strong opposition to S. 240 as it emerged from the Senate on May 25. This bill threatens the retirement savings of every Californian.

My friend can pound the podium all he wants. He is effective when he does that. But so can I.

Listen:

> This bill threatens the retirement savings of every Californian. It is one of the most anti-senior citizen pieces of legislation to be considered by the Congress in recent years.

That is such strong talk from the Congress of California Seniors.

So I just have to say there is a legitimate disagreement here. I am very hopeful that my friend, the chairman, will accept my amendment, because I think that is the minimum we can do. I hope that he will. But we can all pound the table and get upset because we see the bill differently, which is what the legislative process is about. I hope my friend will not take it personally that I see it in a different way than he does.

At this time, I yield 10 minutes to my friend from Alabama, Senator HEFLIN.

Mr. HEFLIN. Mr. President, I rise in support of the Boxer amendment which basically is to require a study as to the effect of securities litigation on senior citizens and to then come forward with ideas on how basically they might be protected in the event there are disadvantages that arise relative to the matters that are involved in securities litigation.

I also rise in opposition to the bill. This bill has been called a reform bill. I think that is really a misnomer. It has been called by some—and they go, I think, a little too far—the crooks and swindlers protection act. However, the bill which proclaims to curb frivolous lawsuits would essentially put at a substantial disadvantage and penalize the victims of securities fraud and give protection to corporate wrongdoers and their aiders and abettors.

This bill has many opponents, including the very people who are responsible for investor protection and overseeing capital formation in the States, the North American Securities Administrators Association. Also the Association for Retired People, AARP; the U.S. Conference of Mayors, and the Government Finance Officers Association number among those that are opposed to S. 240.

All oppose the bill for good reason, as noted by the Raleigh News Observer, ''The bill is bad news for investors private and public and it would tie victims in legal knots while immunizing white-collar crooks against having to pay for their misdeeds.''

The sponsors of this bill claim, with very little supporting evidence, that there is a litigation explosion in the securities class action arena. The studies regarding the number of these types of cases do not reflect anything close to an explosion. In fact, they prove that the level of actual cases has remained constant for the past 20 years. In 1993 alone there were only 140 companies sued; there are over 20,000 companies registered with the Securities and Exchange Commission. This small number of companies sued, only 140, hardly amounts to a litigation explosion.

The proponents of the bill also claim that most of the cases which were filed are frivolous and that companies feel that they must settle the cases to avoid protracted litigation expenses. Well, if we were to base this reform bill only on what companies believe are frivolous suits, we would believe that the charges filed against the accountants, lawyers, and brokers involved in the Charles Keating, Lincoln Savings fraud case were frivolous. Although they claimed the charges were frivolous, they settled for ten's of millions of dollars with investors who had lost considerably.

There probably are cases in which companies have been wrongly sued for stock price decreases not due to fraud or based on actions for which they should not be held accountable. Predominately this is not the case. In fact, according to a study performed by the University of California for 3 years ending in 1990, only 20 companies were hauled into court of the 589 companies whose stocks dropped more than 20 percent in 5 days around the time of a disappointing earnings report. In many of those 20 cases, executives were telling the public that everything looks great, while bailing out of the company and selling their own stock.

The amendments offered by Senators BRYAN and SARBANES will go far to achieve a balance between protecting the rights of defrauded investors and providing protection from frivolous lawsuits to honest companies. These amendments include language which was part of the original version of S. 240. I believe that the cosponsors of the original version of S. 240 will agree that the bill as reported out of the Banking Committee steeply tilts the playing fields against investors. Without these amendments, I cannot support this legislation which will strip the rights of defrauded investors.

The amendments are supported by the Securities Regulators Association, Government Finance Officers Association, and many others. Acceptance of them could resolve many concerns of these organizations. One amendment would allow the SEC to fashion through its rulemaking an effective

safe harbor for forward-looking statements. The SEC and others are concerned that the safe harbor in the bill makes it possible for defendants to avoid liability for false statements. Another amendment would extend the statute of limitations to allow investors enough time to file a securities fraud suit. Currently the bill provides for a time period which is widely regarded as too short.

Other amendments which greatly improve this bill involve the ability to pursue accountants, brokers, and other professionals who may have aided in a securities fraud and the apportionment of damages to those secondary violators. One amendment would return to prviate parties the ability to pursue aiders and abetters in securities fraud suits. This amendment is supported by State securities regulators as well as by the SEC. Both of these enforcement agencies have limited resources available and realize the need for private actions to pursue aiders and abetters. The other amendment would allow the innocent victim to be compensated rather than penalized due to the bankruptcy of the primary violator. This amendment would simply restore joint and several liability so that the equities are in favor of the innocent investor.

It seems odd that now we are moving to reform securities litigation with a result that would protect those who may create investor scams. If any reform needs to be addressed, based on the current actions on Wall Street, it should come in the form of greater investor protection, not making it easier for corporations and stockbrokers to mislead investors. There is currently a recent frenzy of mergers and takeovers. According to the New York Times securities regulators are opening investigations into insider trading at a rate not seen since the 1980's. Unfortunately, I believe that if this bill were to become law, many of its provisions would soon be tested to the detriment of investors.

Our financial markets do not run on money, they run on public confidence. The stock market is trading at all-time highs and companies are earning record profits. This is greatly due to the confidence that investors have in the marketplace. This confidence will be drastically altered if investors come to believe that not only are they at risk of being defrauded, but that they have no recourse to fight back against those who defraud them.

I urge my fellow Senators to support all the amendments offered to put investor protection back into this bill. If these amendments are not adopted I will find it difficult to vote for a bill which supports those involved in fraud while tearing down long-standing protection in our securities law.

In closing I would like to quote from a letter I received from Mr. Joe Borg, the director of the Alabama Securities Commission. In his letter, Mr. Borg considers the question of whether this bill would achieve a balance between protecting investors and granting relief to honest companies and professionals. He concludes that ''the bill would tilt the balance too far in favor of corporate interest and would have the effect of depriving many defrauded investors of the ability to recover their losses.'' He further states that ''I agree there is room for constructive improvement of the Federal securities process. However, S. 240 as reported by the Banking Committee goes beyond the stated goal of curbing frivolous lawsuits and instead would in practical effect, eradicate most private actions under the Federal securities laws.''

Mr. President, I ask unanimous consent that the full letter be printed in the RECORD at the conclusion of my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

ALABAMA SECURITIES COMMISSION,
Montgomery, AL, June 19, 1995.

Via facsimile: 202–224–3149.
Attn: Winston Lett.
Hon. HOWELL HEFLIN, U.S. Senate, Washington, DC.
Re: S. 240, the ''Private Securities Litigation Reform Act''.

DEAR SENATOR HEFLIN: I understand that the Senate may consider as early as this week S. 240, the ''Private Securities Litigation Reform Act.'' In my capacity as the Director of the Alabama Securities Commission, I am writing today to express my serious concerns with S. 240 as it was reported out of the Senate Banking Committee. As you know, the Alabama Securities Commission is responsible for investor protection and for overseeing the capital formation process in Alabama.

In evaluating the variety of securities litigation reform measures that have been introduced in the 104th Congress, I applied one test: Does the bill achieve a balance between protecting the rights of defrauded investors and provide relief to honest companies and professionals who may find themselves the target of a frivolous lawsuit?

Regrettably, S. 240, as it was reported by the Senate Banking Committee, does not achieve this balance. Instead, the bill would tilt the balance too far in favor of corporate interests and would have the effect of depriving many defrauded investors of the ability to recover their losses.

It is my understanding that pro-investor amendments will be offered at the time S. 240 is considered on the Senate floor. Among the amendments expected to be offered are the following: Extending the statute of limitations for civil securities fraud actions; fully restoring liability for aiding and abetting securities fraud; narrowing the scope of a safe harbor for forward looking statements so that the Securities and Exchange Commission (SEC), which has the necessary expertise, is directed to engage in rulemaking to develop a reasonable and effective safe harbor without giving corporate executives free rein to make misleading statements; and modifying the severe limitations on joint and several liability so that innocent defrauded investors have a chance to fully recover their losses.

The Securities and Exchange Commission, the North American Securities Administrators Association (the organization representing the 50 state securities regulators of which I am a member), and others generally have expressed concerns over the bill's treatment of these issues. The amendments expected to be offered on the floor (as discussed above) respond to those concerns and are deserving of your support. Please vote in favor of these amendments when they are offered on the floor.

If these amendments are offered and rejected, I respectfully encourage you to vote against S. 240 on final passage.

I want to emphasize that I agree there is room for constructive improvement of the federal securities litigation process. However, S. 240 as reported by the Banking Committee goes beyond the stated goal of curbing frivolous lawsuits and instead would, in practical effect, eradicate most all private actions under the federal securities laws.

In closing, I want to stress that our financial markets do not run on money; they run on public confidence. It is my view that the confidence that investors have in the marketplace will be dramatically altered if they come to believe that not only are they at risk of being defrauded, but that they have no recourse to fight back against those who have defrauded them. I urge you to support balanced and targeted reform measures and to reject S. 240 if it does not incorporate the amendments discussed above.

You may reach me at 334–242–2984 should you have any questions or need additional information.

Sincerely,

JOSEPH P. BORG,
Director.

Mr. HEFLIN. Mr. President, I yield my remaining time to the distinguished Senator from California, Senator BOXER.

Mrs. BOXER. Mr. President, I reserve the balance of my time.

The PRESIDING OFFICER. The Senator from California will have 8 minutes, with 36 minutes on the other side.

Mr. D'AMATO. I would like to take a moment to state, as I indicated to the Senator from California, that we certainly would like to review her amendment. While I might have difficulty with the language used in the amendment, I do not have a problem asking the Securities and Exchange Commission to look at the impact this legislation would have, particularly as it relates to senior citizens.

Certainly, I think that is reasonable. I say that in the spirit of cooperation I hope that we can iron out our differences. I would also like to point out, Mr. President, that I have a statement from the chairman of the Securities and Exchange Commission, who indicates that he, as a businessman, finds there is a need for a stronger safe harbor.

I quote from Chairman Levitt:

> The current rules have largely been a failure and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements.

He goes on to say:

> . . . I know all too well the punishing costs of meritless lawsuits—costs that are ultimately paid by investors. Particularly galling are the frivolous lawsuits that ignore the fact that a projection is inherently uncertain even when made reasonably and in good faith.

That is the Chairman of the Securities and Exchange Commission who my colleagues like to quote so often.

My colleagues would have us believe that all is well with the securities industry. All is not well. All is not well when you have a band of lawyers who literally hire the people they represent, race to the courthouse to file the suit and allege fraud, and are then selected as lead counsel.

The statement that we are protecting fraud, gets the hackles up on this Senator. Not only are we not protecting fraudulent conduct, but we are making sure that people are held liable for intentionally making a misstatement. Again, I say there is no safe harbor anyplace for fraud. There were other legislative proposals that would have brought such a safe harbor, but not this bill. It is a disservice to this legislation to say it protects fraud. There is neither intent nor language in this bill nor is there any way to interpret this bill to say that fraudulent conduct is protected under S. 240.

The cost of these abusive cases is incalculable. It has cost business the ability to communicate and to give the information to people to which they are entitled. This inability is particularly troublesome to the small startup business in the high-technology area. It has a chilling impact on these firms and it is wrong.

The fact is that there were $1.3 billion worth of settlements, settlements in 1993–94, that is 93 percent of the cases filed. No one can afford to stand up defend themselves in these cases. Do we really believe out of all 300 cases that were brought, every one of them engaged in fraudulent conduct? That is absurd. Those cases were not tried they were settled. What we are attempting to do in S. 240 is to seek balance; to demonstrate that those who truly commit fraud will not be let off the hook, but by the same token, we will not expose an entire class of people who are associated with the securities business to meritless suits. That is what this legislation does, and it does strike a balance.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRAMS). Without objection, it is so ordered.

The Senator from Tennessee.

Mr. FRIST. Mr. President, I rise to speak today in support of S. 240, the Private Securities Litigation Reform Act of 1995, and against the proposed amendment.

S. 240 is a moderate and carefully balanced compromise bill that permits investors in securities to continue to file and win legitimate lawsuits. However, the bill does something that is much needed at this time: It gives issuers of securities the ability to quickly dismiss meritless and abusive lawsuits.

The current system of securities litigation is clearly broken. Why? Because it makes millionaires out of attorneys who repeatedly file frivolous lawsuits. As a matter of fact, securities litigation costs American industry $2.4 billion a year, one-third of this amount being paid to plaintiffs' attorneys. This results in companies being forced to lay off workers and consumers paying higher prices for goods and services.

The bottom line is that the current system of securities litigation does not benefit investors or consumers: It benefits a handful of attorneys.

Here is how this perverse system of securities litigation currently works: There are a handful of plaintiff law firms in this country today that specialize in filing securities class action lawsuits. This is shown by the fact that seven plaintiff law firms in this country receive 63 percent of the legal fees generated by securities class action cases. That is seven law firms receiving 63 percent of all of these legal fees.

These law firms monitor the stock prices of businesses with computers every day. When a corporation stock price suffers a major drop, the plaintiff's law firm immediately files a lawsuit. Indeed, some 20 percent—or one out of five—of these securities lawsuits are filed within 48 hours of a major drop in the stock price.

The reason these law firms are able to file their lawsuits so quickly is that they sue on behalf of professional plaintiffs. These professional plaintiffs actually receive a fee, in many cases, for permitting themselves to be named in the lawsuit. The Securities Subcommittee found that there were some plaintiffs who had as many as 14 securities action lawsuits filed on their behalf.

These law firms justify the filing of these lawsuits by generally alleging that the drop in the stock price was caused by the corporation or its management acting fraudulently or recklessly. The lawsuits seek the corporation to pay to its shareholders damages in the amount of the difference between the stock price before and after the stock's drop in value.

Even if the lawsuit is meritless, the corporation is forced to settle, even if it is meritless, even if it does not make sense? Why? First, litigating a lawsuit is costly—even if your only goal is to get the lawsuit dismissed for failing to state a cause of action. This is because it is very difficult to dismiss such lawsuits, and defense expenses for complex securities class action lawsuits can total between $20,000 and $100,000 a month.

Second, the depositions and extensive document review associated with these lawsuits are so time consuming that they disrupt the management of the business. On average, companies that are sued devote as much as 1,000 management and employee hours per case per suit.

The end result is that it is worthwhile for a business to settle even a frivolous securities litigation lawsuit because there is rarely, if ever, any cheap way of dismissing it.

Opponents to securities litigation reform are going to tell you that notwithstanding all of the foregoing, investors still benefit from the current system of securities litigation. But I submit that the current system actually harms investors.

The first problem, as was stated by former SEC Commissioner Carter Beese, is that the current system encourages, and I quote Mr. Beese, ''. . . counsel to settle for amounts that are too low for fees that are too high.'' The plaintiffs in a securities class action have a conflict of interest with their lawyers. The lawyers' incentive is for an uncomplicated settlement and avoidance of a trial. This is because the difficulty and time-consuming work for the plaintiffs' attorneys comes at the trial phase. If it can be avoided by a settlement, the lawyers still get their percentage for relatively little effort. Thus, the lawyer-driven nature of these lawsuits tends to shortchange investors who have truly been defrauded and would benefit from litigating the lawsuit to conclusion.

The second problem is that in securities class action lawsuits, when a corporation makes a settlement payment to a class of shareholders, the shareholders who still own the corporation's stock are not really getting any tangible benefit in return. If the settlement amount is coming from the corporation's money, then it is no more than a type of quasi-dividend, with a law firm taking on average a 33-percent cut for giving the shareholder the privilege of having the quasi-dividend occur.

This will generally cause the corporation's stock price to drop, which indeed nullifies the benefit of the settlement. If the settlement amount comes from the corporation's directors and officers liabilities insurance, the corporation will be faced with partly paying it back through a staggeringly high premium the very next year. Either way, an investor who continues to own a share of stock in a sued corporation does not gain much from settlement of the lawsuit.

The third and final problem is that investors can no longer get useful forward-looking information about corporations. As former SEC Commissioner Carter Beese testified before the Securities Subcommittee:

> Companies go out of their way to disclose every conceivable bit of innocuous information, but very little useful forward-looking information. At the same time, legions of lawyers scrub required filings to ensure that disclosures are as milquetoast as possible, so as to provide no grist for the litigation mill.

With all of these problems we have with our current system of securities litigation, the moderate relief offered by S. 240 is necessary to protect investors, to protect consumers, and to protect jobs.

I urge all of my colleagues to vote against amendments which weaken the

very carefully balanced aspect of S. 240 and to vote for S. 240's final passage.

I thank the Chair. I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mrs. BOXER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. Mr. President, do I have 8 minutes remaining? Is that accurate?

The PRESIDING OFFICER. That is correct.

Mrs. BOXER. I will not take but 2 minutes of my time.

My friend from New York is going to yield back his time so we can get to a very important amendment by the Senator from Nevada.

I am very pleased that the chairman has indicated to me, although he has not said it definitively, that he may well be supporting my amendment.

I think that we have pointed out by virtue of charts and some very serious examples that I do not think I need to repeat because they are very, very difficult here in this Chamber where senior citizens have been the target of fraud.

I believe, because we are changing so many aspects of the law in this bill, that the SEC ought to take a look at what we have done and all the amendments that we have incorporated or turned down should this bill become the law of the land, and then tell us whether or not senior citizens are as well protected as they should be.

So I think that this amendment should have broad support. It will give me some comfort to know that in 180 days, we will have a report from the SEC which has expressed reservations about this bill.

I ask unanimous consent to have printed in the RECORD at this time some of the comments they have made regarding many aspects of this bill. They have questions about a lot of areas, including the safe harbor, which is the basic provision of the bill, proportionate liability, appointment of lead plaintiff, aiding and abetting, and damages.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

RESPONSE TO OMB REQUEST FOR VIEWS OF THE SECURITIES AND EXCHANGE COMMISSION REGARDING S. 240

The Securities and Exchange Commission submitted testimony on S. 240, as introduced by Senators Domenici and Dodd, on April 6, 1995.[1] As noted in the testimony, the Commission supported many of the provisions of S. 240 as introduced. The Commission views S. 240 as ordered reported on May 25, 1995 by the Committee on Banking, Housing, and Urban Affairs as a significant improvement over its counterpart in the House, H.R. 1058. However, the Commission has significant concerns regarding certain provisions of S. 240 as reported, and also believes that the legislation should address certain additional issues not included in S. 240.

Provisions of S. 240 endorsed by the Commission—The Commission supports, or does not oppose, the following measures:

Class Action Reform Provisions: Except as discussed below, the Commission supports, or does not oppose, the measures set forth in Section 101, ''Elimination of Certain Abusive Practices,'' and Section 102, ''Securities Class Action Reform.''

Requirements for Securities Fraud Actions: The Commission supports, or does not oppose, the measures set forth in Section 104, ''Requirements for Securities Fraud Actions,'' and Section 106, ''Written Interrogatories.''

RICO: The Commission supports the provision of Section 107, eliminating the overlap between private remedies under RICO and the Federal securities laws.

Contribution and Settlement Discharge: The Commission supports those provisions of Section 202 that provide for a right or proportionate contribution among defendants, and for the reduction of a judgment upon a settlement by an amount equal to the greater of the settling defendant's percentage of responsibility or the amount of the settlement.

Fraud Detection and Disclosure: The Commission supports Section 301,''Fraud Detection and Disclosure.''

Limitation on Rescission under Section 12(2): The Commission does not oppose the amendment offered by Senator Bennett that would allow a defendant to avoid rescission under Section 12(2) of the Securities Act and reduce the damages upon proof that part of the plaintiff's loss was the result of factors unrelated to the fraud.

Provisions that should be included in S. 240—The Commission has recommended that Congress adopt the following measures, which are not included in S. 240:

Statute of Limitations: The Commission recommends extending the statute of limitations for private securities fraud actions to five years after a violation occurs. Although S. 240 as originally introduced addressed this issue, the provision was deleted from the reported bill.

Aiding and Abetting in Private Actions: The Commission has recommended restoring liability for aiding and abetting in private actions. As discussed below, Section 108 of S. 240 only provides authority for the Commission to bring actions based on aiding and abetting under the Exchange Act, and limits such actions to persons who act knowingly.

Recklessness: The Commission has recommended that Congress expressly provide that recklessness is sufficient for liability under Section 10(b), and codify the definition of recklessness which was enunciated by the Seventh Circuit in the Sundstrand case.[2] S. 240 provides that defendants are proportionately liable unless they commit ''knowing securities fraud,'' which necessarily implies that there is liability for reckless conduct, but does not expressly provide that recklessness is sufficient.

Provisions of S. 240 that the Commission does not support—The Commission opposes the following measures as currently set forth in S. 240:

Safe Harbor Scienter Standard: Section 105 creates a safe harbor for forward-looking statements. The Commission believes that the complex task of fashioning an effective safe harbor for forward-looking statements would be better addressed through Commission rulemaking pursuant to express statutory authority. The safe harbor in S. 240 contains important exclusions, not present in H.R. 1058, that address some areas of particular concern. However, the measure might make it possible for some defendants to avoid liability for certain false statements.

We believe that the safe harbor scienter standard would be better if modified to include the following exclusions.

(c) Exclusions—The exclusion from liability under subsection (a) with respect to a ''forward—looking statement'' that is materially false or misleading is not available: (i) for a natural person, if such person made such statement knowing that such statement was materially false or misleading when made; or (ii) for an issuer, if such statement was made by or with the approval of an executive officer (as defined by the Commission) of that issuer, if such executive officer made, or approved the making of, such statement knowing that such statement was materially false or misleading when made.[3]

Provisions of S. 240 that cause concern or that need clarification—The following provisions raise concerns or need clarification and may require some adjustment in order to achieve the desired effect:

Proportionate Liability: Section 202 generally limits the application of joint and several liability to defendants determined to have committed knowing securities fraud. Other defendants would be proportionately liable; except that, if a defendant's share of the damages were uncollectible, each proportionately liable defendant would be liable for a proportionate share of the uncollectible amount, up to an additional amount equal to 50% of his own share.

The Commission has recommended that Congress first enact other reform measures before adopting any form of proportionate liability under which the burden of uncollectible damages owned by an insolvent defendant must be borne by the defrauded investor, rather than by solvent co-defendants who violated the federal securities laws. If Congress determines to adopt a system of proportionate liability, such as that provided in S. 240, the Commission has recommended that it not include issuers (who should remain liable for all damages suffered) and that it be limited to fraud-on-the-market cases, rather than applying also to cases of direct, considered reliance.

Damages: Section 201 limits a plaintiff's damages to the difference between the price paid by the plaintiff and the value of the security during the 90-day period following correction of the misstatement or omission. This provision should be limited to fraud-on-the-market cases. In other cases, this measure of damages may be wholly inappropriate. In addition, the 90 day period should be shortened since losses attributable to fraudulent statements may be offset by price rises that are unrelated to the fraudulent activity.

Aiding and Abetting in Commission Actions: Section 108 clarifies the availability in Commission actions under the Exchange Act of liability for ''knowingly'' aiding and abetting. This provision should also cover reckless aiding and abetting and should be extended to the Securities Act, and the Investment Company Act.

Appointment of Lead Plaintiff in Class Action: One provision of Section 102 requires the court generally to appoint as lead plaintiff the class member that has the largest financial interest in case. While this approach has merit, it may create additional litigation concerning the qualifications of the lead plaintiff, particularly when the class member with the greatest financial interest in the litigation has ties to management or interests that may be different from other class members. The Commission believes that there should be greater clarification as to how this concept will work in practice.

Footnotes at the end of article.

FOOTNOTES

[1] Testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission, Concerning Litigation Reform Proposals, Before the Subcommittee on Securities, Committee on Banking, Housing, and Urban Affairs, United States Senate (April 6, 1995).

[2] In *Sundstrand Corporation v. Sun Chemical Corporation*, 553 F.2d 1033, 1045 (7th Cir.), *cert denied*, 434 U.S. 875 (1977), the court used the following definition of recklessness: ''a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.''

[3] If the scienter standard is modified as suggested, the Commission would support the safe harbor in S. 240. If, however, the scienter standard is not so modified, the Commission believes that the definition of forward-looking statement in the safe harbor should be further narrowed, although Commissioner Wallman believes that certain forward-looking elements of the financial statements should receive safe harbor protection, such as stock option valuation disclosures.

Mrs. BOXER. Mr. President, the SEC has questions about this bill.

I look at the Boxer amendment as a way to say OK, in 180 days, let us have a written report from the SEC to tell us if in fact this bill puts a greater burden on our seniors, takes away some of their privileges and their rights.

Mr. President, I am going to retain the remainder of my time, although I will not use it unless some of my colleagues make some comments that I feel I must respond to. So I will reserve the remainder of my time only to be used in case that does occur.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, I intended to yield back our time because I believe that we will accept the Senator's amendment as it relates to the study of the SEC. That will be my recommendation. Having said that, I know Senator DODD, who is a cosponsor of this amendment, would like to speak to it so I yield such time as he will need.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. I thank the Chair. Let me thank my colleague from New York. Let me just say to my very good friend—and those words are used lightly around here; when I speak of my colleague from California, they are meant as more than just a collegial gratuity—my very good friend from California has offered a good amendment. My intention is to support it because none of us, as I said the other day, Mr. President, can say with absolute certainty every time we change the law what the implications will be. We think over 4 years and more than 4,000 pages of congressional hearings and testimony, having put together what we think is a balanced bill here, we know what the implications will be.

We made strong efforts in this legislation to try and protect those who are truly defrauded, and hence proportionate liability does not apply in those cases. We try and take care of smaller investors with a net worth of $200,000 or less, so that they are protected as well.

I would like to say to my colleagues I am absolutely 100 percent certain that there will not be some implications here for smaller investors and seniors. I think the amendment covers seniors and smaller investors.

Mrs. BOXER. Seniors and retirees.

Mr. DODD. Looking at this makes some sense. I think they would have done it anyway but requiring it here in the law is not a bad provision to have. If I may point out to my colleague—and I do not know whether she is interested in doing it—I do not know what the timeframe on the study is.

Mrs. BOXER. It is 180 days.

Mr. DODD. It is 180 days from passage. I might suggest that not only you do it then, but it may be done every 6 months for a space of 2 or 3 years because I would suggest that in just 6 months you may not get a picture. It may not be an adequate picture. You may need a bit longer time to get at various increments along the way as to what the implications are. Sometimes in 180 days you may not see any indication and you may get a false reading as to whether or not we have done something here that has a negative implication.

So the Senator may want to modify the amendment to require it at various stages along the way here so we do get snap shots taken at various milestones over the next several years. So I appreciate the comments of my colleague from New York that this is an amendment we ought to accept, and I would concur in that conclusion and thank my colleague from California for offering the amendment.

Let me if I can just briefly, Mr. President, also address, while I have the floor, the amendment raised by our colleague from Maryland. Let me first of all point out here when we set a net worth figure of $200,000 or less, we did it with the understanding that the average median net worth of people in this country is quite a bit less. We had two different studies, I would say to my colleagues. One study done by the Census Bureau in 1993 has the median net worth of all people in this country at $37,587. Another study done by the Federal Reserve has the median net worth—this is a 1992 study—at $52,200 a year. So when Senator D'AMATO, myself, and Senator DOMENICI set a net worth of $200,000 or less a year, we are going extensively beyond the median net worth of families in this country. Depending on which study, either the Census Bureau or the Federal Reserve at $37,000 or $52,000, our figure at 200,000 goes well beyond the median income of people in this country, to try and protect the smaller investor. In fact, it goes four times beyond the median net worth.

I do not know the percentage of families, but I suspect it is in the top 5 percent or so, maybe less, who would have net worth in excess of $200,000 a year.

So we made a significant effort here to not only just protect smaller investors. Now, maybe the people who live in Washington and those of us who serve in Government with our incomes being what they are fail to recognize that most people in this country have net worth substantially less than what people in Washington, DC, might accept as a reasonable net worth.

At any rate, we set it at that level, and anyone who has a net worth less than that and has a loss of 10 percent of their net worth, obviously, is protected by the joint and several and not proportionate liability.

Now, with regard to the 10-percent figure, let me suggest that if we were to eliminate that, you are in effect eliminating proportionate liability because, as I said, it is such a high level that you basically exempt almost everybody in the country except for maybe 5 percent of the population. So you really have not done anything in terms of trying to inject proportionate liability into the process, which is what the goal of S. 240 is, to apply proportionate liability where you do not have the kind of intentional fraud and you have people who are not that wealthy.

Now, why did we do that? Why proportionate liability? Is this some gratuitous favor to try and bail out some people here who would otherwise be held fully accountable?

It is not that at all, Mr. President. I would say the core, central issue here, aside from one of simple fairness, where someone who is marginally, marginally involved gets saddled with the full load of paying up all of these costs—and as we have pointed out over and over again over the last several days of debate—it is not that we are getting litigated results. It is not litigated results; 93 to 98 percent of these cases are settled. Why are they settled? They are settled because your company lawyer says, ''Let me tell you something, Mr. CEO, or Ms. Chief Executive Officer, or Mr. Chief Financial Officer, or Ms. Chief Financial Officer. You run the risk here of losing everything. If you go to trial on this, you lose everything.'' You have a choice of settling or losing everything. And they opt to say, ''Look, we will settle.'' That is what they do in 93 to 98 percent of the cases. They settle.

Now, you say, well what is so terrible about all of that? I would draw my colleagues' attention to an article in today's Wall Street Journal, which is entitled ''Big Accounting Firms Weed Out Risky Clients.'' The article points out the problem, and my colleagues ought to come to appreciate why there is a sense of urgency about trying to deal with this problem. Lee Berton, the author of the article, points out that the large accounting firms—and the large accounting firms, particularly in this country, are like the Good Housekeeping seal of approval for a firm—are abandoning these clients.

They are not picking them up, and there is a real economic danger, I think, in this country to have that trend line continue.

I quote from the article:

Big accounting firms say they have begun dropping risky audit clients to lower their risk of lawsuits for allegedly faulty audits. New companies, which have a particularly high chance of failure, are affected most, because almost nothing triggers lawsuits against accountants faster than company failures.

. . . Peat Marwick, the fourth-biggest U.S. accounting firm, is currently dropping 50 to 100 audit clients annually, up from only zero only 20 years ago. . .. ''When a client we audit goes bust . . . it costs a bundle in court if we're sued by investors, whether we win or lose the case.''

. . . Mr. Lambert says that legal costs were ''staggering'' for a lawsuit filed in a Federal court in Texas, alleging a faulty review of a bank's books by Peat [Marwick]. The bank was taken over by the Federal Government in 1992 after big losses. The jury ruled in Peat's favor in 1993.

So you had a lawsuit that did not end up going anywhere—actually, it went to trial in this particular case, and the decision was for Peat Marwick. Then listen to what happens.

The jury ruled in Peat's favor in 1993, but the firm had to spend $7 million to defend itself.

The contract to handle the account that got them involved in the lawsuit was $15,000. That was the contract, but the lawsuit cost them $7 million, even though they won in the end. The intelligent business decision here is to say, ''Look, stay away from these firms, these new technologies that are emerging where there is a lot of volatility in them, don't go near them.''

The net effect of all this is we are losing the benefit of having the top accounting firms in this country get in where they can make a huge difference in these firms, but because of the fear of expending amounts vastly in excess of what the contracts are worth to them, they stay away.

Arthur Andersen ''has either dropped or declined to audit over 100 companies'' in the past 2 years.

I ask unanimous consent that this article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, June 26, 1995]

BIG ACCOUNTING FIRMS WEED OUT RISKY CLIENTS

(By Lee Berton)

If you have a big-name auditor, hold on tight. It's getting tougher to find—and keep—prestigious outside auditors to certify annual financial statements.

Big accounting firms say they have begun dropping risky audit clients to lower their risk of lawsuits for allegedly faulty audits. New companies, which have a particularly high chance of failure, are affected most, because almost nothing triggers lawsuits against accountants faster than company failures.

But established companies are getting the ax too. KPMG Peat Marwick, the fourth-biggest U.S. accounting firm, is currently dropping 50 to 100 audit clients annually, up from only zero to 20 five years ago, says Robert W. Lambert, the firm's new director of risk management. ''When a client we audit goes bust,'' he says, ''it costs us a bundle in court if we're sued by investors, whether we win or lose the case.''

Mr. Lambert says that legal costs were ''staggering'' for a lawsuit filed in a federal court in Texas alleging a faulty review of a bank's books by Peat. The bank was taken over by the federal government in 1992 after big losses. The jury ruled in Peat's favor in 1993, but the firm had to spend $7 million to defend itself ''even though the fee for the job was only $15,000,'' Mr. Lambert says. ''We just can't afford to take on risky audit clients anymore.''

Lawrence Weinbach, managing partner of Arthur Andersen & Co., another leading accounting firm, says his organization has either dropped or declined to audit more than 100 companies over the past two years. ''When a company has a risky profile and its stock price is volatile, we're just not going to jump in and do the audit and invite a lawsuit,'' says Mr. Weinbach.

Audit clients dropped by the Big Six are often furious because investors tend to feel safest with companies audited by the biggest accounting firms. A Big Six opinion is ''like the Good Housekeeping Seal of Approval on Wall Street,'' maintains Chriss Street, chairman and chief executive of Comprehensive Care Corp., a Newport Beach Calif., medical-rehabilitation center operator that Andersen recently dropped.

But the accounting firms say they have no choice. Litigation settlement costs of the Big Six accounting firms now exceed $1 billion a year. The firms say that even after insurance reimbursement, these costs equal 12% of their annual audit and accounting revenue.

No risky client can pay us enough money to defend ourselves after the client develops problems,'' asserts J. Michael Cook, chairman of Deloitte & Touche, the third biggest U.S. accounting firm. ''We must reduce our legal risks to remain viable.''

And he and other heads of Big Six firms say that if Congress doesn't pass pending legislation reducing accountants' litigation exposure, the firms will turn down even more audit clients.

The biggest legal drain on accounting firms involves settling lawsuits brought by disgruntled investors against the auditors of collapsed companies. These suits usually accuse the auditors of professional negligence in failing to warn the public of the problems of a troubled client company.

To protect his firm against these costs, Mr. Cook says, Deloitte has begun weeding out audit clients with potential problems and refusing to handle the audits of companies making initial public offerings, or IPOs, because so many of them fail. And all of his competitors among the Big Six are doing likewise. The portion of all IPOs audited by these prestigious firms declined to 75% last year from 84% in 1992, according to Emerson's Audit Change Report, a trade publication.

Andersen's Mr. Weinbach says his firm uses new computer software to measure the litigation risk of an audit client. The software looks at the company's financial health, industry performance, stock fluctuations and financial controls among other information. Other firms have begun asking clients to agree to arbitration or mediation rather than filing lawsuits in case of disputes over fees or performance.

Andersen now asks tax and consulting clients to sign indemnification clauses that require the client to pay Andersen's court costs if the accounting firm is sued by a third party. For instance, litigation might arise if a real-estate buyer got into a dispute over a project's performance or price with the seller and Andersen had provided a financial projection for the project. ''If the client doesn't agree to indemnify us, we generally won't do the work,'' says Mr. Weinbach.

BDO Seidman, the ninth-biggest U.S. accounting firm, two years ago began asking clients of five U.S. offices to agree to arbitrate disputes over fees and service quality rather than go to court. And Ernst & Young, the second biggest U.S. accounting firm, says that later this year it will begin asking clients to agree to resolve disputes with it through arbitration or mediation rather than by court suits. Philip Laskawy, Ernst's chairman, says this shift will save Ernst and its clients ''millions of dollars in legal fees.''

The accounting firms are swinging hardest at companies that have actually experienced financial trouble. For instance, Mr. Street of Comprehensive Care is irate that his company recently got a terse letter from Andersen saying the company no longer meets Andersen's audit profile and should seek another auditor.

Andersen had been Comprehensive's auditor for three years for an annual fee of $125,000. But in the past two years, Andersen has ''qualified'' the company's annual report, questing whether Comprehensive could continue as a ''going concern.'' The company has reported losses in each of its past five years, totaling close to $100 million.

Mr. Street, who was brought into Comprehensive about a year ago, says that Andersen gave no warning that it planned to drop the company. ''We were caught completely off guard and were in the midst of restructuring and recapitalizing the company with Andersen's help,'' he says. ''We feel that Andersen abandoned us when we most needed them.''

Andersen won't comment specifically on why it dropped Comprehensive as an audit client. But it says that ''in the current litigious business environment, accounting firms are forced to assess risks associated with current and future clients.'' It adds: ''Comprehensive's historic performance speaks for itself.''

Mr. DODD. Mr. President, it goes to the very heart of why we put this bill together. We saw the trend lines where we are losing the expertise and ability. One of the provisions, by the way, we put in this bill is to require these accounting firms, if everything else is adopted, to seek out a report when they discover problems of fraud. That has not been a requirement in the law in the past, to actually serve as a quasi-governmental agency, if you will.

Obviously, the Federal Government cannot go around and audit every firm in the country to determine whether it is doing its job or not. But having these accounting firms do it, requiring them to report when they discover any kind of wrongdoing, I think, is going to enhance tremendously our ability to pursue those firms where you have the intentional fraud, but also cause these firms to be far more careful about how they do their business.

So if we adopt the Sarbanes amendment by eliminating the 10 percent, in effect, it is just the median income of $200,000, you have just destroyed the whole purpose of proportionate liability. It goes right to the heart of what this Wall Street article points out today—the fact you are seeing these firms leave these audits, audits that serve all of us and also serve the investor.

That investor making the decision about where to put those hard-earned dollars is going to be less inclined to

invest in these firms that may be, in the overwhelming number of cases, highly deserving of that investment, because they do not have that ''Good Housekeeping seal of approval.'' The investor would probably shy away from it. Everybody loses in that kind of situation.

We are trying to help solve that problem by the provisions we have included in S. 240. Is it perfect? Is it guaranteed success? Absolutely not. I would be the first one to tell you, no guarantees here. We think it will go to the heart of the problem, maybe help us solve it. But as the Senator from California has offered with her amendment to take a good look and see what the implications of this are, I think, makes good sense, is sound judgment.

For those reasons, I support her amendment. But I oppose the amendment offered by our colleague from Maryland. I would rather there be an amendment offered eliminating proportionate liability, just striking all proportionate liability because that is the net effect of the amendment.

If you just have a net worth of $200,000, you have only 5 percent of your investors at that, so it is really gone, in effect. It seems to me when median net worth is either $37,000 or $52,000—we have set it at $200,000—it is really going, to a large extent, beyond what many have suggested we ought to do here. But I thought, and the Senator from New York did, that by setting that higher bar, as well as including the 10-percent loss, that what we were trying to protect against with this provision is the total economic devastation of someone. Again, obviously, if you eliminate that 10 percent, you lose that altogether.

So with that, Mr. President, I urge, with all due respect to my friend and colleague from Maryland, rejection of his amendment, that we accept the amendment by the Senator from California, and I gather next we will be talking about an amendment which I support, which is the amendment being offered by the Senator from Nevada dealing with the statute of limitations.

With that, Mr. President, I will be happy to yield the floor.

Mrs. BOXER. Mr. President, I ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mrs. BOXER. I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, at a later time, I will ask the Senator from California to consider whether she really wants to vote on this amendment, because we are willing to accept it. Having said that, I want to commend my colleague, the prime sponsor of this legislation, Senator DODD, for very eloquently and very cogently stating the incredible burden that has been placed on the fine accounting firms of America.

I might refer those who are interested to the report of the committee. I quote:

> Accounting firms particularly have been hard hit by securities litigation. The six largest firms face $10 billion worth of 10b-5 claims. Their gross audit-related litigation costs amounted to $783 million in 1992—more than 14 percent of their audit revenues for that year. Former SEC Commissioner Sommer, who heads the Public Oversight Board, the independent body that oversees the accounting profession's self-regulatory efforts, testified that, in view of ''some recent judgments and the amounts being sought in pending cases, it is not beyond the pale to believe, and some responsible people do believe—that one or more major [accounting] firms may ultimately be bankrupted.''

But the problem goes beyond just bankruptcy. The accounting firms are being priced out of the marketplace. They cannot afford, as Senator DODD indicated, to give their services to clients due to the great exposure they face, through no fault of their own, to being brought in to suits because they are the deep pockets, particularly where there is a small firm or small company as the primary defendant.

That small firm then, or many small firms, are being deprived of having the best accounting firms; the American public are being deprived of having the audit capacity and functions of our best; and, third, the accounting profession is placed unnecessarily under a great, great strain.

It is just simply intolerable and unfair. Part of this bill is crafted to eliminate that unfairness. It will eliminate the situation where people have no choice but to surrender to these lawsuits—something that happens in 93 percent of these suits. They cannot afford to go to trial and I do not think that is what the capital system should be about.

AMENDMENT NO. 1472

Mr. MCCONNELL. Mr. President, the doctrine of joint liability permits an injured plaintiff to collect the full judgment from any defendant found liable for any part of the injury. It means that no matter how remotely connected a defendant is to the events leading to plaintiff's injury, a defendant could be required to satisfy the entire judgment.

The result is that lawyers for the plaintiffs add a whole host of defendants to a lawsuit in an effort to ensure the plaintiff can get the full judgment paid. With joint liability, it doesn't matter if you had anything to do with the events leading up to the plaintiff's injury. Instead, the chances of your getting sued depend upon how deep your pockets are. The deeper the pocket, the more likely to be sued.

I'll illustrate with a negligence case: if a drunk driver injures an individual on someone else's property, the property owner will be joined in the lawsuit. It happened to the Cincinnati Symphony Orchestra, only it wasn't even the property owner. The accident happened near one of the orchestra's performance facilities. And the orchestra, a nonprofit entity, was needlessly dragged into a $13 million lawsuit and put at risk for the judgment.

Nonprofit organizations, municipalities and small businesses can be hardest hit by joint liability. Although we don't think of these defendants as wealthy or rich, they are usually adequately insured, which also makes them good candidates to be deep pockets. New York City spends more on personal injury awards and settlements—$270 million—than it spends on funding public libraries.

In securities litigation, accountants, bankers, and insurers are targets of abusive suits because of their deep pockets. One Big Eight accounting firm, Laventhol & Horwath, went bankrupt because the cost of fighting these suits became too prohibitive. The consequence of dragging these professional firms into these kinds of lawsuits is obvious: it becomes increasingly difficult for new businesses to get advice from business professionals. And, it gets harder to find people to serve on corporate boards due to the fear of lawsuits.

This litigation explosion burdens the economy, retarding economic growth. It is essentially a tax imposed on every American. And every potential defendant has to take account, in the prices they set, for the possibility of being dragged into a lawsuit.

During the product liability debate, I received a letter from the Institute for the National Black Business Council, an association of minority business owners. Mr. Lou Collier, the president of the council, wrote in support of expanding the product liability bill. Without an expansion of the joint and several liability reform, Mr. Collier states, ''Millions of small businesses—restaurants, gas station owners, hair stylists, nearly every small business you can think of, would still face the threat of bankruptcy. That includes most African-American firms.'' The latest census data shows that 49 percent of all black-owned firms are service firms, and Mr. Collier, on behalf of minority small business owners, asked us to improve the climate for small business, ''Small business owners and entrepreneurs have to overcome staggering odds to build a successful company. They shouldn't have to face a legal system where one frivolous lawsuit can force them to close their doors.''

The same arguments ring true in the context of securities litigation. This amendment must be defeated because restoring joint liability means little improvement in the litigation climate.

Injured plaintiffs will still recover their full economic loss. But for the subjective noneconomic loss, each defendant would be responsible only for his or her proportionate share of harm caused.

This bill is fair and consistent with principles of individual responsibility. It will put an end to the gamble taken

by the trial bar when they join everyone in sight of an alleged harm. I urge that the amendment be rejected.

AMENDMENT NO. 1469

The PRESIDING OFFICER. The pending business is the Bryan amendment No. 1469.

Mr. BRYAN. Mr. President, am I correctly informed? I believe we have a time agreement of 1½ hours equally divided. Am I correct, I inquire of the Chair?

The PRESIDING OFFICER. The Senator is correct.

Mr. BRYAN. Since I am the advocate of the amendment, may the Senator from Nevada presume that he controls 45 minutes of the time that is allotted to those who are in support of the amendment?

The PRESIDING OFFICER. That is correct.

Mr. BRYAN. I yield myself 15 minutes at this point, Mr. President.

My colleagues will recall that we began the debate on this amendment last Friday shortly before we recessed for the weekend. I want to make just a couple of points in general about this. There are a number of things that have divided us as we have debated S. 240, but there are some things in which the prime sponsor of this legislation, Senator DODD, and I are in agreement, and I acknowledge, as he has previously indicated on the floor, Senator DODD, as the prime sponsor of S. 240, is in support of the amendment, which I will describe in a moment.

But first let me give a little bit of background. My colleagues will recall in 1991 the Supreme Court of the United States decided the Lampf case, as it was called—and the Lampf case, in effect, imposed a statute of limitations which is a bar to securities litigation 1 year from the point that the plaintiff discovers the fraud and in no event more than 3 years in the actual occurrence of the fraud.

Now, that came as quite a shock and surprise to those that are in the securities business, because the accepted interpretation prior to that had been that you looked to the statute of limitations in the State in which the action originated. Immediately, as a result of that, because the Court's decision was retroactive; that is, there were a number of cases pending, as well as prospective; that is, to place a bar on any actions to be filed in the future, a number of us came to the floor, and the Senate Banking Committee at that time unanimously reported out the 2-to-5-year statute of limitations proposal—2 years from the date of discovery of the fraud, in no event beyond 5 years. That is what this amendment does. Under the current print, 1-to-3 is the statute of limitations timing. Under the Bryan amendment, it could be 2 to 5 years. This is what the Banking Committee, in 1991, had unanimously agreed should go forward.

Moreover, I think it is important for my colleagues—and there are approximately 50 of them who have signed onto this legislation—S. 240, as introduced, contains the 2-year/5-year statute of limitations. So this amendment, somewhat of an anomaly, does not change the original language of S. 240 but seeks to restore to the bill the language which was originally in the bill at the time it was introduced and language, at least by implication, that 50 of our colleagues, as cosponsors of the legislation, have supported.

So this is not something that comes as after the fact—2-to-5 years.

Why is the 2-to-5 years important? I realize that people are not literally hanging over the edges of their seats in the galleries as we discuss what appears to be a very abstract legal issue. First, let me say that it has absolutely nothing about frivolous lawsuits—not one thing. We are talking about a lawsuit which, by definition, is meritorious but cannot be filed under the current law if indeed it is after the 1-year point in which the plaintiff discovers the fraud, or in no event beyond 3 years.

So this does not have a thing to do with frivolous litigation. I understand the concern of my colleagues and I share it. We ought to act against frivolous lawsuits, and there are provisions in S. 240 that deal with rule 11 and some other provisions that I think are meritorious. So no one who is approaching this amendment ought to be misled that somehow a vote against this amendment protects the innocent from frivolous litigation. This simply gives you the right to get into the courthouse door. Without this amendment, you are saying 1 year, 3 years, and you are barred.

Now, who supports the amendment? Well, first, let me indicate to my colleagues that the Chairman of the Securities and Exchange Commission has repeatedly testified in favor of extending the statute of limitations. Most recently, on April 6, 1995, Chairman Levitt testified before the subcommittee that:

> Extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward a perpetrator of a fraud who successfully conceals its existence for more than three years.

So the present Chairman of the Securities and Exchange Commission says that it is important to protect innocent investors who have been defrauded from those who are inherently clever enough to conceal it to provide for a longer statute of limitations. Then he went on by way of explanation to say that even with all of the resources that are available to the SEC, the staff that is available with the expertise that they have, with all of the kind of background information they have as to what is happening in the marketplace generally, that it takes approximately 2.25 years to complete an investigation. Now, that is beyond the period of time that the 1-to-3 year statute would provide. This is not partisan, this is not a Democratic chairman and the Republican SEC under President Bush who felt differently. The former chairman, the last Republican chairman was Richard Breeden. He had this to say about the proposed 2-to-5 year statute, and specifically about the unfairness and the limiting ability of a 2-year statute:

> Had a 3-year statute of limitations been in effect and had it been applied to the SEC, approximately one-half of the cases against Drexel Burnham, a large part of the case of Equity Funding, one of the largest frauds in the history of the United States, and the entire case against E.F. Hutton for check kiting would have been barred from the courthouse.

Again, these were meritorious cases. The recovery would have been prevented because the statute of limitations would have constituted a bar. In that period of the 1980's where we have talked about Charles Keating and we talked about Ivan Boesky, another name has had prominence and that is Michael Milken. Here is what the sentencing judge had to say to him with respect to the complexity of securities matters and their difficulty:

> You may have committed only subtle crimes—

This was being addressed to Mr. Milken at the time of sentencing.

> . . . not because you were not disposed to any criminal behavior but because you were willing to commit only crimes that were unlikely to be detected. We see often in this court individuals who would be unwilling to rob a bank, but who readily cash Social Security checks that are not theirs when checks come to them in the mail because they are not likely to be caught in doing so . . . You also committed crimes that are hard to detect, and crimes that are hard to detect warrant greater punishment in order to be effective in deterring others from committing them.

These are crimes that are very hard to detect and are particularly very difficult to detect when we are talking about small plaintiffs who do not have the resources available to them that the Securities and Exchange Commission, the North American Association of Securities Dealers and others might have.

In the Lampf case itself, which was a very narrowly divided case, 5–4, one of the dissenting Justices, Justice Kennedy, had this to say:

> Concealment is inherent in most securities fraud cases. The most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action under the 1934 act. Ponzi schemes, for example, can maintain the illusion of a profit-making enterprise for years, and sophisticated investors may not be able to discover the fraud until long after its perpetration. The practicalities of litigation, indeed the simple facts of business life, are such that the rule adopted today—

Referring to the majority of the court that adopted the more limiting 1 and 3 year statute of limitations.

> will ''thwart the legislative purpose of creating an effective remedy'' for victims of securities fraud. By adopting a 3-year period of repose, the Court makes a section 10(b) action all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file a

suit within 3 years after the violation occurred.

In its brief before the Supreme Court, the SEC pointed out the difficulty that the shorter limitation period ''would deprive many defrauded investors of a satisfactory opportunity to vindicate their rights.'' Here is what the SEC, in the brief, went on to say:

Especially in complex cases, plaintiffs often ''do not discover the fraud until long after its perpetration.'' Violations involving financial fraud, for instance, often go undetected until the enterprise fails, an event that may occur years after the violation. Moreover, as the securities markets have grown in size and complexity, frauds have become increasingly difficult to discover.

An example of that, Mr. President, is the municipal bond. They are particularly susceptible to concealment. In a typical municipal bond offering, 2 to 3 years of interest payable to the bondholder is placed in an escrow account, so the bondholders can have no inkling anything has gone awry until they do not receive an interest payment—oftentimes many years after the closing of the offering. The average timespan between issue date in municipal bonds and the date of default in repayment is approximately 4.5 years.

Limited partnerships have the same susceptibility. Again, as the North American Securities Administrators Association—and some of my colleagues may not have had the opportunity to interface with them; these are the securities administrators of the 50 States, who are charged with enforcement of securities law at the State level—as they have testified, limited partnerships in which investors have poured more than $150 billion since 1980—

. . . often run for as many as 7 to 10 years. Customer account statements—a primary means of detecting fraud or misconduct—reflect only the original purchase price of the partnership, not the current market value. Therefore, it may only be at the expiration of the partnership that an investor uncovers misconduct or wrongdoing. Under Lampf, [the 1- to 3-year statute decided in that case] that investor would be precluded from seeking redress in the courts, for no reason other than the decision to purchase a long-term investment. Holders of zero coupon bonds will face similar difficulties in uncovering fraud in the short period of time allowed under Lampf.

The point, I think, that is to be made here is that we have talked a great deal about balance. Every provision that I can see that is contained in S. 240 is designed to provide additional protection for securities underwriters. Aiders and abetters are not included. Safe harbor statements are made more generous.

The wealthiest investor, in effect, becomes the chief of the last, and one can go on and on. Of all of the provisions contained in this legislation, in its original form, only the extension of the statute of limitations could be fairly said to benefit the innocent investor.

For those of my colleagues who are truly seeking balance as they approach this legislation, and who support and will vote for the final version of S. 240, this is really your only opportunity at this stage to provide that kind of balance by extending the statute of limitations.

Here is what Mark Griffin, who is the head of the Utah Securities Division, had to say in testimony before the Banking Committee. He said the current period for filing fraud actions is ''unduly short.'' Going on, he said:

. . . [it] is the experience of State securities regulators that victims of investment fraud often have no way of knowing, nor reason to suspect for what may be many years, the truth about the mishandling or abuse of their investments.

That comes from the security administrator in the State of Utah.

Mr. President, in looking at what States have done, the testimony is that 60 percent of the jurisdictions have longer statutes, and ''13 States recognize the concept of equitable tolling, in which the limitations period starts running only after the fraud is discovered.''

Among those States are Alabama, Arizona, Kansas, Massachusetts, New Jersey, Washington, and Wisconsin. Many other States have longer statutes, as well, including California, Pennsylvania, my own state of Nevada, Michigan, Ohio, Florida, Texas, Illinois, and New York.

It seems to me that in an era in which we believe that not all wisdom resides in the banks of the Potomac, looking at the experiences at the State level could be particularly instructive as we process this statute of limitations amendment.

The effect of the shortened statute of limitations is simply devastating, and has absolutely nothing, Mr. President, to do with frivolous lawsuits.

For example, had the Lampf rule been in effect, investor cases with respect to such notorious fraud as Lincoln Savings and Loan, Washington Public Power Supply System, Executive Life Insurance, Home-Stake Production Co., and Crazy Eddie would have been barred.

Mr. President, I yield myself an additional 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BRYAN. Mr. President, I thank the Chair for keeping me cognizant of the time.

In fact, Charles Keating attempted to have his case dismissed on Lampf grounds, and that was the genesis of our effort to keep those cases alive. The Congress responded by making sure that the Court's decision did not have a retroactive effect on those cases that were pending. According to a study released by the House Subcommittee on Telecommunications and Finance in 1991 after the Lampf decision, over $5 billion in pending fraud claims were dismissed or threatened with dismissal based on the shortened statute of limitations.

This amendment tracks the exact formula that is urged upon us by the SEC, an extension that would allow cases to be filed up to 5 years after violation has occurred, provided they are brought within 2 years after discovery of the violation.

As I pointed out at the outset, S. 240 in its original form contained an extension of the statute of limitations. I commend my colleague and good friend, the distinguished senior Senator from Connecticut, who has taken a lead on this case. He has long supported the longer statute of limitations. I commend his effort.

I might say that in previous Congresses, subsequent to the Lampf decision, efforts to make changes in the securities litigation system have all recognized the wisdom of the longer statute of limitations of 2 to 5 years.

I note it is somewhat anomalous—we have the situation in which the amendment on the floor is designed to restore what the introducer of the bill must surely have intended, because they cast it in the identical language that we are seeking to place back into the bill.

In addition to the securities regulators at the national level and the State level, this amendment enjoys the support of the Consumer Federation of America, the Public Citizen, the Council of Institutional Investors, the United Shareholders Association, the Bond Investors Association, the U.S. Conference of Mayors, the Government Finance Officers Association, and the National Association of County Treasurers and Finance Officers, to list but a few.

So for my colleagues who may have some motivation in saying ''Look, the lawyers are responsible for all of the ills in America and have done terrible things with respect to the securities litigation,'' they have an opportunity to support other provisions in the law.

Please, in the interest of striking back at these securities lawyers, do not deprive, do not undermine the right of innocent investors to simply present their case, to simply present their case; simply give them the key to get into the courthouse door. And all these other provisions that are included with respect to lawyer sanctions, which I happen to agree with if it is a frivolous case, then they can come into place and operate to serve as a bar to the frivolous case.

This is a case that deprives the innocent investor with a meritorious cause of action from ever having his or her case presented because of the cleverness of the wrongdoer, the defrauder. We ought not, it seems to me, as a matter of public policy, say, ''Look, we ought to provide the benefits in our society to those who are clever enough to conceal their wrongdoing and perpetrate frauds before the victims find out.''

I do not think any Member of the Senate can defend that kind of a public policy.

I note the distinguished majority leader is on the floor and may seek recognition. I reserve the balance of my time.

The PRESIDING OFFICER. Who yields time on the pending amendment?

The Senator from New York.

Mr. D'AMATO. Mr. President, let me point out that one of the finest, most skilled, and eloquent lawyers, when it comes to interpretation of the law, is my friend, the Senator from Nevada. I find myself at a distinct disadvantage when having to take any position that is contrary to one that he is expounding on. Such is the case here. I do not pretend to be his equal.

However, I will attempt to explain a concern to my colleagues regarding the extension of the statute of limitations. That concern is that if we extend the statute of limitations we will open the door to more mischief.

At first, I was ambivalent on this particular question, as to whether the statute of limitations should be 1 and 3 years or 2 and 5; I considered extending the time as is done in some of the State statutes. My friend and colleague explained how this came about, how we had, actually, no statutory law until the Supreme Court in its Lampf decision in 1991 said: the 1-year and 3-year statute of limitations is rooted in common law and should be the uniform limit.

Some said that this statute would preclude meritorious suits. Indeed, there may be some curtailment of individual investor suits, However, having said that, this statute of limitations will not preclude suits being brought under longer State statutes, nor will it preclude the Securities and Exchange Commission from bringing suits in cases of fraud, where the SEC has no statute of limitations.

There are examples of the SEC bringing suits, after the statute of limitations has expired; suits in which large settlements have been recovered. In one rather recent case, the Prudential case, there the settlement was $660 million. The SEC has recovered notable settlements in some other large cases—the Drexel-Burnham-Lambert case brought $400 million in disgorgement. Again, the statute of limitations is not a bar for the SEC.

So, while the statute of limitations may be a bar to some individuals are aggrieved, if there is a serious case there is no doubt in my mind, nor, I think, in anybody's mind, that the Securities and Exchange Commission will bring a suit. My staff has reviewed some of the historical debate on the general question of how long the statute of limitations should be.

Back in 1934, when this issue was first debated in the context of the need for a fraud statute, Senator Kean made a statement on what he felt was the reason we should limit the filing of suits to within 1 year from the actual time of discovery. I quote from Senator Kean:

> If a man buys something today and discovers tomorrow that some mistake has been made and perhaps he has grounds to sue because of fraud, under the terms of the bill he must bring the suit within 1 year. But suppose he thinks perhaps the bonds I have bought will go up. I will not bring suit until I find out about that. If the bonds go down, then I will have the option of suing these people and trying to recover. If the bonds go up, then I will not sue because I can get a profit on them.

Mr. President, I suggest to you that by extending the statute of limitations, what we do is open the door for those people who wait and see if anything comes out over time. It becomes much easier to create a lawsuit and to force a settlement if we allow a longer period of time for something, anything, to be discovered. This extended statute of limitations opens the door to the kinds of litigation we see now, but these enterprising entrepreneurial lawyers will have a longer period of time in which to bring their claim. Certainly this Senator does not want to protect anyone who has been involved in fraud. Again, if there has been an egregious fraud, there is no doubt in this Senator's mind that the Securities and Exchange Commission will do the business of the people, which they have done in the past.

But businesses are entitled to some certainty that they will not be sued. I think my friend, Senator DODD, quite aptly stated his argument as it relates to the inventive, creative entrepreneurial petitioner of the law. I believe my friend called them buccaneering barristers. I think extending the statute of limitations just gives them a longer period of time to practice their craft of filing suits without merit.

If there is a legitimate fraud, even if it is discovered and 10 years down the road and it has brought harm, then as far as I am concerned I want the situation to be rectified. I know that there is a body who can do that; that is, the Securities and Exchange Commission.

Let me say again this is an area where I think reasonable people can have some differences. I, myself, have gone back and forth on this issue. It was only when I was convinced that there was the opportunity to close down some of the people who are not practicing law as they should, who are more interested in creating situations where they force settlement, and at the same time we would not leave that door open for defrauded people to be further victimized, that I decided on the statute of limitations in this legislation.

That is why I will be forced to oppose my colleague's amendment, as thoughtfully and as articulately as he has presented it.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. BRYAN. Mr. President, I yield time to the distinguished senior Senator from Connecticut, after which I hope to be able to respond to the debate of my good friend, the distinguished chairman.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, will the Senator from Nevada yield to me 5 minutes?

Mr. BRYAN. I do.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, I rise to support this amendment by my colleague from Nevada.

Like my good friend from New York, I understand the arguments on the other side. I suppose one might say in this debate what is magical about 1 and 3 or 2 and 5? I presume that if we made it 2 and 5, there would be those who would say it ought to be 3 and 7, or 4 and 8. You could run the string out. Then there are some who think you should not have any statute of limitations, I say to the distinguished Presiding Officer. So you are never going to satisfy everybody with some of these provisions.

Senator DOMENICI and I originally offered this bill back several years ago, and we included an extension of the statute of limitations here to 2 and 5 years on the theory that it contributed to the balance of the legislation. It is a crucial part of the balance between investor's and defendant's rights, plaintiff's and defendant's rights. Our colleague from Nevada has promptly pointed out the legislative or legal history of this.

The Supreme Court decision in Lampf versus Gilbertson established the limits of 3 years after fraud occurred, or 1 year after it was discovered. It is simply too little time, in my view, to ensure that investors have the necessary time to bring an action. Justice Anthony Kennedy, in his dissent in the Lampf decision said, and I think it is worth noting: ''Concealment is inherent in most of the securities fraud cases.'' And it is tough fraud to find, I point out to the Chair.

> The most extensive and corrupt schemes may not be discovered within the time allowed. Ponzi schemes, for example, can maintain the illusion of a profit-making enterprise for years, and sophisticated investors may not be able to discover the fraud until long after its perpetration.

The SEC and the Council of Institutional Investors support extending the statute of limitations, and, frankly, I am concerned that unlike S. 240, this amendment does not contain language that requires an investor to use reasonable diligence.

This is the one point on which I have some disagreement with on the amendment offered by my colleague from Nevada. Even though we disagree on this point, I still intend to support the amendment. I think requiring reasonable diligence on the part of investors is not asking too much. There has to be some burdens and responsibilities people assume when they engage in this activity. In our original bill that included an extension of the statute of limitations, we required reasonable diligence on the part of the investor. That reasonable diligence is no longer included in the amendment being offered by the distinguished Senator

from Nevada. The reason I say that is because I think it ought to be a distinction made between the lazy investor and the diligent investor. We make no distinction with this amendment; that is, the current standard in most private actions under our securities laws.

Frankly, I am concerned that the unintended impact of this amendment, should it be adopted, will be to grant more time in effect to investors who know nothing about their investments or care nothing about them and those who exercise reasonable care.

I think we ought to be trying to inject responsibility on the part of everybody involved in these activities. While this is a significant departure from the original Domenici-Dodd language on the statute of limitations, as I mentioned a moment ago, I will not oppose the amendment on that basis alone.

So when this amendment is considered and voted on, I will cast a vote for it for the reasons I have identified. I think in this day and age of technology, being what it is with the sophistication that is out there, it is an awful lot to expect even a knowledgeable investor to be able to pick up on some of these activities, as they might have even a few short years ago, in the absence of high technology.

So trying to keep pace with that high technology, providing a bit more time here, is not an unreasonable request in my view.

For that reason, I commend the Senator from Nevada for his comment. I urge my colleagues to support it.

I yield the floor.

Mr. BRYAN addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. BRYAN. Mr. President, may I inquire how much time do I have under my control?

The PRESIDING OFFICER. The Senator controls 20 minutes and 4 seconds.

Mr. BRYAN. I thank the Chair. I yield myself 7 minutes.

The able distinguished chairman of the Banking Committee, who is my friend, raised two objections as I understand the thrust of his argument. I must just say as an aside, it makes me very, very nervous when the able chairman lavishes great praise upon a more junior member of the committee because no one is more sophisticated than the distinguished chairman in making his point. He speaks in the idiomatic language of the street and people understand where he is coming from, and he speaks with clarity that every lawyer in America can only hope to equal. So I am quite concerned when I receive this praise.

He made two points. One, he said that by extending the statute of limitations as we propose to do in this amendment we would thereby increase the amount of litigation.

Let me just suggest that the experience shows quite to the contrary. My colleagues will note that I have had a chart prepared tracing the experience of the past 20 years, from 1974 to 1993. As my colleagues will note, that represents a fairly level activity. In fact, the most number of cases filed in any one year was 315. Last year was 290. And as you will note, the statute of limitations case was not cited until 1991. Prior to that, the longer statute of limitations existed. There were actually in many years fewer cases than had been filed since the statute of limitations result.

So may I say, with all due respect, I think the experience is contrary to his assertion that more cases would be filed. In point of fact, I think an argument can be made that the shorter statute of limitations may encourage haste in filing such actions which is clearly contrary to the purpose that he and I and I think all of our colleagues have in terms of trying to discourage such litigation.

Second, he makes the point that the SEC is available, and he is quite correct, but I think it is important to point out that when the SEC brings an action, it brings an action to impose a fine, penalty or sanction, but it does not—I think this is a very important distinction—seek to recover money that investors have lost. So it is a philosophically different role. One is akin to a prosecutorial agency in which sanctions, fine and imprisonment may result. The purpose of the individual filing is to recover his or her loss.

Even if one thought the SEC might do an adequate job, the testimony by Mr. Breeden, the former chairman, was that it would require another 800 to 900 people serving in that office to offset the inability of private causes of action to be brought under S. 240 as constituted, and in the committee report on this particular bill it indicates that the cost of providing those additional resources to the SEC would be another $250 million over the previous 5 years.

Let me say that I think, like most of us, we gain considerable insight over the years as we have served, and I was pleased to have my friend's support and his leadership in 1991 when we sought to do the very thing we are seeking to do in the Chamber this afternoon, and that is to extend the statute of limitations from 1 to 3 to 2 to 5. And I wish to give my friend an opportunity to engage me in a colloquy if he chooses to do so. But may I respectfully say I think the Senator from New York was absolutely right in 1991, as we sought to process the corrective legislation in the aftermath of the Lampf case by supporting then a 2- to 5-year statute of limitations, and I hesitate to say he has not grown in wisdom over the intervening years but I think that he clearly was more correct then than he is now.

I would be happy to engage my colleague in any conversation he might care to in terms of this debate. I just do not see that there is any reason today, of course, not to go for the 2- to 5-year statute of limitations. The same circumstances exist, it seems to me, and I want to give my good friend a chance to share with me the benefit of his additional wisdom.

Mr. D'AMATO. I appreciate the opportunity to engage my friend in dialog in the spirit of the Senate. As I said, I was ambivalent on this issue. I have had numerous constituents and groups who have come to me and said: Senator, we are very much concerned that leaving the door open, particularly extending the statute of limitations to 5 years, will just create added exposure to these suits. We cannot extend the statute of limitations, unfortunately, because of those individuals who do not and have not practiced law with the same spirit and enlightenment of my colleague from Nevada.

I understand he has joined with us and voted with us on a number of matters, which some might consider procedural but are awfully important, aimed at reducing the abuses in this system; the race to the courthouse, the buying of people to put oneself in a position to bring these suits, and the plaintiffs for hire who let their names be used for bonuses.

When my colleague says to me he wants to stop this abuse, I know that to be the case. But those in the industries, in the emerging companies say, ''You know, if you keep that door open, there is just a stronger likelihood that there will be that inventive lawsuit later on that holds them harmless.''

I feel I must be supportive of those companies and that theory. We must not abandon these firms. Let me say once again, even if there has been fraud and it is discovered only 5 years or 6 years after the statute of limitations has expired the Securities and Exchange Commission can bring suit.

Nor have we placed a disproportionate burden on the SEC. They have repeatedly said that they do not want to be in the position where they have to be the eyes and ears for all, that, there is a proper place for individuals and their lawyers to bring these class action cases.

I think that by limiting private rights of action to 1 and 3 years and yet having no limit, no statute of limitations for the Securities and Exchange Commission, that we strike a proper balance. It was in that spirit that I came to this decision.

Second, it was also in that spirit that I could put together a majority——

Mr. BRYAN. May I interrupt my friend?

Mr. D'AMATO. To pass out this bill. I want to be candid.

Mr. BRYAN. And I appreciate that. The concern that I have is that we are engaging in this discussion and the time may run out.

Mr. D'AMATO. I yield to my friend any time that he may need.

Mr. BRYAN. Will the Senator be willing to take part of his time to engage in the colloquy?

Mr. D'AMATO. Oh, yes. I ask unanimous consent that the last 5 minutes be charged to myself.

Mr. BRYAN. I thank the Senator.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. I finished my statement, and I will be glad to yield to my friend any additional time. How much time remains, might I inquire of the Chair?

The PRESIDING OFFICER. The Senator from New York has 31 minutes 40 seconds remaining and the Senator from Nevada has 17½ minutes remaining with the exchange of time conceding 5 minutes.

Mr. BRYAN. I think we are going to be fine. Let me say, I appreciate his fairness. He did not have to do that, and I think that speaks well for him. I did not want to cut him off. I did not want to be precluded from making final comments. If the Senator has concluded, I would like to make a response and yield the floor back to him.

Mr. D'AMATO. I had completed my observations how we find ourselves in this position. And there is that necessity, in any attempt to craft legislation—I have to say that my colleague is offering amendments because he is not happy with all the provisions of this bill and wants to make it better, to enhance the bill—to put together a package that can build a coalition, and this was a major concern to quite a few Senators on my side, a very, very big concern.

I can see their point. If I had my druthers, I might say what is wrong with 2 and 5, but I heard from many groups, and numerous associations, who were quite persuasive as to why this would be a retreat.

One last observation. In this legislation we are attempting to reduce the exposure to unfair suits; it sends a very different message if we extend the statute of limitations. How can we say this cuts down on frivolous suits when people think ''My gosh, you are broadening the time to bring them.''

The Supreme Court has said 1 year and 3 years is sufficient, and now we have amendments to extend it to 2 and 5. We cannot support that. I must tell you there are a number of my colleagues who felt very, very strongly, that 1 year and 3 years was the right statute of limitations and that is why, given the fact I knew we had the support of the SEC, I supported this position. I share that with my friend and colleague.

Mr. BRYAN. I thank the distinguished chairman. I ask unanimous consent to yield 2 additional minutes to myself.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BRYAN. Let me say, I appreciate the explanation the chairman has given. It is a matter of balance. Again, I respond with great respect that the role of the SEC is not to recover those losses, and that is something that greatly troubles me, that individuals who have lost money, who are totally innocent, although the SEC would not be precluded from bringing an action, that action is not to recover money for them but simply to impose the appropriate fine, penalty, sanction, that may exist for the violation.

Second, I, too, was exposed to the arguments made by those who reach a different conclusion than I do that the shorter statute of limitations protects them from some lawsuits.

On the other hand, I must say that in balancing, I found the arguments of the securities regulators—the SEC, the States securities, the State and local government finance officials—who all argued that the 2 to 5 was necessary. We all put into the scales of justice our individual component parts, and I would just respectfully say, engaging my good friend in colloquy, that ultimately that is what persuaded me on the longer statute.

Mr. SARBANES. Will the Senator yield?

Mr. BRYAN. I will be pleased to yield.

Mr. SARBANES. I would like to ask the Senator, as I understand it, not only the SEC but the FDIC and State securities regulators all joined the SEC in seeking to, in effect, overturn the Lampf decision and go to the 2-and-5-year standard for the statute of limitations; is that correct?

Mr. BRYAN. That is correct. The distinguished ranking member from Maryland is correct. They all uniformly support that position.

Mr. SARBANES. And, in fact, I have a quote from SEC Chairman Breeden. This was in 1991. This is the Republican Chairman of the Securities and Exchange Commission, in which he said:

> The timeframe set forth in the Supreme Court's decision is unrealistically short and will do undue damage to the ability of private litigants to sue.

He then went on to point out that in many cases:

> Events only come to light years after the original distribution of securities and the cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse.

Will the Senator yield me just 3 minutes?

Mr. BRYAN. I will be pleased to yield to the distinguished ranking member such time as he needs.

Mr. SARBANES. Mr. President, what is the time situation?

The PRESIDING OFFICER (Mr. D'AMATO). The Senator from Nevada has 14½ minutes; the Senator from Minnesota has 30 minutes 27 seconds.

Mr. SARBANES. I will defer and let the Senator from Minnesota proceed before we use the time on this side.

Mr. GRAMS addressed the Chair.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. GRAMS. Mr. President, I rise in opposition to the amendment offered by the Senator from Nevada. In Lampf versus Gilbertson, the U.S. Supreme Court established the period of time in which attorneys may file claims under the implied right of action found in 10b-5, and that was 1 year after the plaintiff knew of the alleged violation and 3 years after the alleged violation occurred.

While critics of this legislation have seized upon the statute of limitations as a wedge to defeat this important reform measure, they have failed to present a convincing case of why this period should be extended. In the years since the Lampf decision, we have not seen a surge in the number of actions dismissed because of the limitation period. Instead, the evidence points to just the opposite conclusion. Since the Lampf decision, we have witnessed an increase in the number of complex claims filed within days, even hours, after a movement in the market.

Plaintiffs with meritorious claims have more than enough time to file their claims, but, unfortunately, so do strike suit attorneys. There are a number of reasons, however, why the current statute of limitations should be preserved. For example, a longer period of limitations makes it more difficult for innocent defendants to defend themselves in court. As a result, strike suit attorneys will have an easier time forcing these defendants into exorbitant settlements.

These settlements, by the way, rarely benefit any real injured class of investors. They simply go to enrich an attorney and, worse, the result of these settlements are higher prices for consumers, lost jobs for workers, and a weaker economy. In other words, consumers lose, it is the workers who lose, victims of real valid securities fraud actions lose—everyone loses, again, except for the attorneys.

S. 240 is designed to reverse this trend, to weed out the frivolous litigation that robs consumers of their hard-earned dollars, to make it easier for innocent parties to defend themselves against meritless charges, to free our economy from the litigation bonanza that has made us less competitive in the global marketplace.

If the Senate adopts this amendment, it will do the opposite, and we will do a major disservice to the people we represent.

Again, for these reasons, I urge my colleagues to reject this amendment.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. Will the Senator from Minnesota yield for a question?

Mr. GRAMS. Yes.

Mr. SARBANES. The chart that the Senator from Nevada put up back there indicates that there was no major number of lawsuits filed subsequent to the Lampf decision. I do not know where, in fact, the highest figure preceded the Lampf decision. As I understand it, that was 315, and since then, it is now 290. On what basis does the Senator make the assertion that following the Lampf decision there was an upsurge in the number of cases filed?

Mr. GRAMS. Well, I hate to differ, but the statistics, according to some of the research that we have done, do not correspond with the statistics that the

Senator from Nevada has produced. So we still maintain that the 1 and 3——

Mr. SARBANES. These figures, as I understand it, are from the Administrative Office of the U.S. Courts. What figures is the Senator using? What are they, and where do they come from?

Mr. GRAMS. I was talking with my staff, and that is according to the SEC and, I guess, also the Judicial Conference begs to differ with the numbers that the Senator from Nevada presented. I also wanted to comment on what the Senator from Connecticut had mentioned in talking about the new technologies and the speed with which things are done and the complexity of the programs.

That also gives an advantage to those who are able to find fault, or to find fraud, or to find these problems and have a real advantage then in trying to file these claims within a year or within the 3 years. So the technology has probably worked in favor of those, as well as against them. And this timetable, if I am not mistaken, was adopted in 1934, and has served those years since. That would also provide adequate time. The main thing is that it would weed out the frivolous lawsuits and, as the Senator from New York pointed out, even if these time periods elapse and real fraud is found, they can still be rectified in the courts.

Mr. SARBANES. How would they be rectified in the courts if the statute of limitations had run? That is the whole problem. See, the people who file a——

Mr. GRAMS. The SEC would be able to bring the suits.

Mr. SARBANES. The people who file the frivolous suits, by the Senator's own statement, would file them within the 1-year period. He was just complaining about that, and he said subsequent to Lampf, the numbers jumped because they were doing exactly that. Our numbers do not show that.

In fact, the SEC used these numbers when they testified before the committee in 1993. But the frivolous suits, the persons that are doing these things with a cookie-cutter, they can file them within the 1-year period. The people that are going to be blocked out by the 1 and 3 requirement are people who really have reasonable claims and do not find out about them. By definition, there is a lot of deception that goes on here, and a lot of people with meritorious claims are going to be blocked out by the failure to adopt this 2 and 5-year amendment, which I think is a very constructive proposal.

Mr. GRAMS. I wanted to make one note, that all these what we would consider frivolous lawsuits are not filed within hours, but some wait 3 to 5 years, requiring businesses to produce even more records, which would make it even more expensive to debate or fight this in court.

Mr. BRYAN. Would the Senator yield for a question?

Mr. SARBANES. Mr. President, what is the time situation?

The PRESIDING OFFICER. The Senator from Maryland has 14 minutes 15 seconds, and the Senator from Minnesota 23 minutes.

Mr. SARBANES. Is this colloquy on the time of the Senator from Minnesota?

The PRESIDING OFFICER. Yes. Who yields time?

Mr. GRAMS. I will yield to the Senator from Nevada for a question.

Mr. BRYAN. If I might inquire of my good friend. The Senator from Minnesota made the point that a 2-year statute of limitations will help investors and disadvantage lawyers. If that were the case, I would argue on behalf of his position. But if in his State of Minnesota, or in my State of Nevada, an innocent victim of fraud, because of the cleverness of the perpetrator of the fraud, does not discover that fraud until after 3 years from the date of its occurrence, would not the Senator agree that, in that situation, the investor recovers not at all? The SEC can bring an action, but it is not brought to recover on behalf of the investor. The investor may be penalized civilly or criminally, but the recovery is not on behalf of the investor. I would be interested in the Senator's response.

Mr. GRAMS. Sometimes all the cleverness is not on behalf of the defendant but on behalf of the plaintiff who is bringing the suit. This is basically the attorney. So I believe that with the speed and technology, this always can be a debate or an argument of who benefits most from that. But I do believe that in the far majority of the cases, the plaintiff has adequate time, and in the serious cases where real fraud has been perpetrated by such a company, would always have an opportunity, if I am not mistaken, for the SEC to bring legal action.

Mr. SARBANES. If the Senator will yield on that point, the SEC can bring action against the bad actor to punish the bad actor, but that action would not recover the damages for the innocent investor. I ask the Senator from Nevada, is that not correct?

Mr. BRYAN. That is the point.

Mr. SARBANES. For the private party to recover the damages, the private party must bring this suit. So your private party would be left, in effect, holding the bag.

Mr. GRAMS. I was just advised that the plaintiff can recover from the disgorgement fund if this were the case.

Mr. BRYAN. If the Senator might answer one other question about frivolous litigation——

The PRESIDING OFFICER. Does the Senator yield on his time?

Mr. GRAMS. Yes.

Mr. BRYAN. If I might engage in a continuing dialog, we all agree—and there is no disagreement—with respect to taking the appropriate action against the frivolous lawsuits, as I have commended the chairman of the Banking Committee. There are provisions in there that I agree with, as do the Senator from Minnesota and the Senator from Maryland, with respect to the sanction provisions under rule 11. But I must say—and I ask the Senator this—when you have the SEC, the Securities and Exchange Commission, the State Securities Administrators, the North American Association of Securities Administrators, you have the State Government Finance Officers, the local government finance officers, all of whom advocate the 2- and 5-year statute, is it the Senator's view that they are advocating that on behalf of the Nation's trial lawyers as opposed to the public? Unless there is a conspiracy I am not aware of, I would be interested in the Senator's response.

Mr. GRAMS. I think as you noted in your colloquy, there have been arguments on both sides. And in weighing the differences in those two arguments, you might agree with the group that you have just mentioned. But I also agreed with some of the others and agree that the 1 and 3 still provides adequate protection.

Mr. BRYAN. I respect the response of the Senator. I yield the floor, reserving the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. What is the time situation?

The PRESIDING OFFICER. The Senator from Nevada has 14 minutes 15 seconds.

Mr. SARBANES. Will the Senator yield 4 minutes?

Mr. BRYAN. The Senator from Nevada will be happy to yield 4 minutes.

Mr. SARBANES. I thank the Senator.

Mr. President, first of all, I want to have printed in the RECORD a letter from the American Bar Association expressing its opposition to S. 240, and stating:

> In its present form the ABA opposes S. 240 since many of the provisions of the legislation would dramatically reduce the protection now afforded shareholders who are defrauded. The ABA agrees that some adjustments to existing procedures and securities class actions are warranted.

They are making a very important point. I say to my distinguished colleagues, I hear the assertions, the people proposing the amendments want no changes made. That is not the case.

From the very first in this debate, we agreed to the proposition that some changes needed to be made. The question now is, what changes, how far? We are trying to cut back on the excesses.

Here is a letter—and many others I have quoted take exactly the same position—which concludes by saying, urging us:

> . . . to amend many of the proposals in S. 240. Instead of accomplishing the laudable purposes that the proponents assert, the legislation in its present form will have a fundamental negative effect upon private enforcement of the securities law which is an essential and effective ingredient to maintaining the integrity of our markets.

Mr. President, I ask unanimous consent that the full text of the letter be printed in the RECORD at the end of my statement.

The PRESIDING OFFICER (Mr. GRAMS). Without objection, it is so ordered.

(See exhibit 1.)

Mr. SARBANES. Mr. President, I very strongly support the amendment offered by the Senator from Nevada. I think it is important to restore some balance to this bill.

The statute of limitations governs a period of time that an investor has to bring a securities fraud lawsuit. If it is not brought within that period of time, it cannot be brought at all, no matter how valid the claim is.

So, it is very important to understand the impact the statute of limitations will have upon all suits. It is being portrayed here as impacting only frivolous suits. It will, in fact, impact all suits, including meritorious suits.

For over 40 years, the courts held that the statute of limitations for security fraud actions is the State statute of limitations determined by analogous State law. While these statutes varied, they afforded securities fraud victims sufficient time, generally speaking, to discover fraud and to file suits. More than 60 percent of the States had statutes of limitations longer than what has now been provided in the Lampf case and that is in this bill.

That was a 5-to-4 decision, that the lawsuit must be brought within a year after learning of the fraud, and in no event, more than 3 years after it takes place, even if you do not know about it —even if you do not know about it.

There are two standards. One, you know; how soon must you bring your suit? The other is, you do not know about it; how many years must transpire before you are closed out? If you find out about it 7 years later, even under the old statute of limitations, well, it is too long. Now that is being cut from 5 to 3 years.

The time period in this bill is shorter than the statute of limitations for private security actions under the law of 31 of the 50 States. Security law experts say the statute of limitations imposed by the Supreme Court is too short. It does not provide investors with enough time to discover a fraud and then to file a lawsuit.

I quoted earlier a quote from Chairman Breeden, in which he said that it could ''well mean that by the time investors discover they have a case, they are already barred from the courthouse.''

As my distinguished colleague from Nevada has pointed out, not only the SEC but State securities administrators and the FDIC have all agreed that the shorter period as reflected in this legislation does not allow individual investors adequate time to discover and pursue violations of securities law. In fact, the State securities regulators said about the shorter statute of limitations, that it:

> . . . effectively forecloses any means of recovery for defrauded investors whose only mistake may be to not discover a concealed fraud.

We are talking about people who are the victims of fraud. Their only mistake is they have not discovered this concealed fraud.

I want to commend Senator BRYAN for offering this amendment. It is a matter he has pursued before. In fact, it was without opposition, adopted as an amendment to a banking bill in 1991. Many here thought it was important. In fact, this bill, as initially introduced by Senator DOMENICI and Senator DODD, contained this provision. In fact, it was put right in the title:

> To amend the Securities and Exchange Act of 1934 to establish a filing deadline.

Obviously, it was regarded as an important matter, since it was put front and center.

As I indicated, the objective, independent parties have all testified that the 2 and 5 years is the standard that we ought to have. The Government Finance Officers Association wrote:

> Wrongdoers would be let off the hook by a shorter statute of limitations.

Mr. President, I very strongly support this.

Let me close with this observation: Extending the statute of limitations has nothing to do with frivolous cases. It will allow individual investors more time to bring legitimate cases, time they need, because fraud artists often conceal their fraud. The experts in this area, the securities regulators, know more than anyone about bringing securities fraud cases. They have been supportive of the proposition being offered by my distinguished colleague from Nevada.

I very much hope my colleagues will support this amendment. I yield the floor.

EXHIBIT 1

AMERICAN BAR ASSOCIATION,
GOVERNMENTAL AFFAIRS OFFICE,
Washington, DC, June 26, 1995.

Hon. CHRISTOPHER J. DODD,
Committee on Banking, Housing and Urban Affairs, U.S. Senate, Washington, DC.

DEAR SENATOR DODD: I write on behalf of the American Bar Association concerning legislation entitled Reform of Private Securities Litigation—S. 240—presently before the United States Senate. In its present form the ABA opposes S. 240 since many of the provisions of the legislation would dramatically reduce the protection now afforded shareholders who are defrauded.

The ABA agrees that some adjustments to existing procedure in securities class actions are warranted. Legislative amendments which require full disclosure of settlement terms, promote finality in settlements and encourage voluntary and non-binding ADR foster those goals without sacrificing the integrity of our markets and the interests of public investors. Accordingly, we support provisions of S. 240 which contain such reforms.

The ABA's concerns are directed to those provisions in proposed legislation which would, in effect, eviscerate the remedy which makes the capital market in the United States the envy of the world. In particular, we oppose the ''Loser Pays'' provisions, the change in the long-standing principle of joint and several liability, and the expanded ''safe-harbor'' which will not protect even fraudulent forward looking statements. In addition, we oppose the mandating of heightened requirements for pleading scienter, and mandatory stay of discovery when a motion to dismiss is filed, the limitations on discovery even after a complaint has been sustained, and the limitation to a single amendment to a complaint in a securities class action.

The legislation detailed above, if enacted, would not simply, as proponents assert, prevent frivolous litigation. It would dramatically undermine the ability of public shareholders who have been injured through violations of the federal securities laws to achieve redress. In our view, the federal class action for securities fraud remains a vital and necessary component of the federal regulatory scheme. Moreover, the present trend in the case law to eliminate frivolous claims and to ensure adherence to relatively stringent pleading and proof requirements, calls into question the need for many of the provisions of S. 240.

At a minimum, any proposed changes to Federal rules of Civil Procedure should follow the Rules Enabling Act in which Congress specified such changes will go to the Judicial Conference of the United States which receives input from the public, the bench and the bar. The need for this review by the Judicial Conference is particularly compelling given the provisions of the legislation which seek to have different pleading, proof and discovery rules for federal securities fraud cases, a dramatic departure from the uniform approach to all claims taken by the Federal Rules of Civil Procedure ever since their enactment in 1937.

The reasons for our objections to particular provisions of S. 240 are detailed below:

MODIFIED ''LOSER PAYS'' UNDER RULE 11

The requirements of Section 103 (a) and (b) requires the court (i) to make specific findings on compliance by all parties and all attorneys with regard to each requirement of Rule 11(b) and (ii) mandating sanctions for any violations. The court is also directed to presume that the appropriate sanction is reasonable attorneys' fees and expenses of the opposing party. Although this presumption may be rebutted by evidence that such sanctions would impose an undue burden on the violator, we agree with Chairman Levitt of the SEC that this section ''may have the unintended effect of imposing a 'Loser Pays' scheme''.

The in terrorem effect of such a change in the law will largely close the Federal courts to securities class actions including the most meritorious of cases because the vast majority of litigants are unable to run the risk of being forced to pay for the other side's fees. The merits of litigation are rarely, if ever, clear at the outset and what is one side's clearly meritorious case is often the other side's frivolous litigation. Thus, in the absence of assurances from counsel, which counsel will be unable to provide, all but the very wealthy likely will be prevented from bringing a securities action in Federal court and no one likely will ever bring a class action.

If any ''Loser Pays'' provision is enacted, securities class actions in the federal courts will largely become a thing of the past, and private securities litigation in general may all but disappear, except for disputes between wealthy adversaries. The resulting loss in accountability, investor confidence, and the proper functioning of our capital markets would be wholly against the public interest. A major deterrent to corporate wrongdoing would be lost. This cannot be the desire of Congress and we urge you to reject these proposals.

EXCESSIVE SAFE HARBOR FOR FORWARD LOOKING STATEMENTS

S. 240, in Section 105, adopts a sweeping exemption from fraud liability for forward looking statements by including a scienter standard which, in the words of Chairman Levitt of the SEC, ''may be so high as to preclude all but the most obvious frauds.'' S. 240 should be amended to assure that there is no safe harbor for a forward looking statement that is materially false or misleading.

ENDING OF JOINT AND SEVERAL LIABILITY

The ABA strongly supports the existing joint and several liability principles of today's laws. As SEC Chairman Levitt stated, ''[t]he Commission has consistently opposed proportionate liability, because [u]nder the existing system of joint and several liability, the solvent defendants [in cases where one of the wrongdoers in insolvent] must bear the share of the bankrupt defendants. Under a system of strict proportionate liability, the defrauded investors would be required to absorb the loss.'' As he elaborated: ''although the traditional doctrine of joint and several liability may cause defendants to bear more than their proportional share of liability in particular cases, this is because the current system is based on equitable principles that operate to protect innocent investors. Joint and several liability is based on the equitable principle that, as between defrauded investors and defendants who are found to have knowingly or recklessly participated in a fraud, the risk of loss should fall on the latter. The goal of ensuring that defrauded investors are fully compensated for their losses, in other words, overrides any distinction based on the relative culpability of the defendants. . . .

S. 240 should therefore be amended to restore the joint and several liability princples.

PLEADING AND DISCOVERY, AND LIMITATIONS ON AMENDED PLEADINGS AND DISCOVERY

S. 240 mandates a number of procedural requirements none of which have serious merit and all of which represent a violation of the procedures established by the Rules Enabling Act. Simply put, the cumbersome nature of these proposals and their unintended consequences demonstrate anew why the far more thoughtful process established by Congress in the Rules Enabling Act ought to be followed here.

Rule 23 contains ample safeguards today to assure that named plaintiffs adequately represent the class and their lawyers pursue the cases vigorously. The new pleading and discovery proposals of S. 240 are troublesome in that for the first time under the Federal Rules special requirements are established for a particular class of cases. Moreover, the proposals contradict the present Rule 9(b) of the Federal Rules of Civil Procedure. Given the evidence that courts are already enforcing heightened pleading requirements today, the proposal is not only mischievous but unnecessary. The last thing Congress should be endorsing is the dismissal of meritorious cases at the pleading state. The pleading standards in S. 240 require a plaintiff to plead the ''state of mind'' of each defendant, which is impossible to do prior to any discovery.

Finally, the limitations on the ability of plaintiffs to amend their pleadings and to pursue discovery while undoubtedly having the effect of preventing frivolous claims from going forward, also has the pernicious effect of barring claims with substantial merit. It is only through significant discovery and repleading that these important claims get adjudicated, an unlikely result if these proposals are adopted.

In sum, the American Bar Association urges you to amend many of the proposals in S. 240. Instead of accomplishing the laudable purposes that their proponents assert, the legislation in its present form will have a fundamental negative effect upon private enforcement of the securities law, which is an essential and effective ingredient to maintaining the integrity of our markets.

Sincerely,

ROBERT D. EVANS.

Mr. D'AMATO. Mr. President, the question before us, on the statute of limitations, is an interesting one.

I think we really have to ask whether or not you really cannot discover a fraud in the 3 years?

Now, there have been some Ponzi schemes and other schemes that have gone on and worked for a long time. There have been some fraudulent investment practices at large, very well respected, institutions, where it has taken a period of time for people to bring them to the bar. In those cases, I suggest that it has been the SEC who has brought these cases. They have done it because people have broken the law, people have committed fraud. They have not filed specious, frivolous suits.

That does not mean every time they bring a suit, the are right; but more often than not, they are. Indeed, where people have defrauded investors and have made profits unfairly, the SEC has been quite successful in gaining penalties and fines, and in some cases disgorgement of those ill-gotten gains. Again I state that the SEC is not precluded by the statute of limitations. In the Prudential case the SEC got $660 million in disgorgement. The wonderful thing is that when the SEC recovers in a case those moneys go to the people who have been victimized. It is not a case where they recover pennies on the dollar.

If we look at most of the successful cases that have not been brought by the SEC, the cases brought by the private sector bar, they literally recover pennies, pennies on the dollar of lost investment. As a matter of fact, there have been a series of articles that after these cases have been settled—most of these cases end in settlements being made—the people who the lawyers settle on behalf of get literally nothing, in some cases box tops, or the ability to receive even more products that they do not want. They say, ''What was this? What did I gain from this suit?'' But, the lawyers got millions and millions of dollars.

We are really here making a statement, saying, we will put into law what the Supreme Court, in its wisdom, feels is right. Of course we have a right to disagree, but they said 3 years is plenty of time in which to discover that fraud; 1 year after the time of discovery and I agree.

Let me raise a question. Why should it take 2 years to bring a lawsuit after the time of discovery?

Mr. SARBANES. Will the Senator yield?

Mr. D'AMATO. Why, after 1 year upon discovery, can you not bring a suit?

Mr. SARBANES. Will the Senator yield on that point?

Mr. D'AMATO. I am happy to yield. But on my colleague's time, because we are pretty much even now. I have done that deliberately, evened it up.

Mr. BRYAN. I yield such time as the Senator needs.

Mr. SARBANES. As I understand it, the Senator from Nevada said it takes the SEC 2.2 years from the time they start working on it to bring the case. So if it takes the SEC 2.2 years, I do not think it is unreasonable that a private party ought to have 2 years.

The SEC cannot recover. The disgorgement which the Senator made reference to is only for illegal gains that a party realizes. Then you can force them to disgorge it. They may not have illegal gains, or the disgorgement may not be enough to pay the private parties. The private party suit goes against the wrongdoer with respect to all of their assets. The disgorgement only gets at some bonanza which they have hit upon which you force them to give back and then you can allocate that out. That does not begin to cover the problem of the plaintiff recovering.

But, in any event, on the particular point, the SEC takes 2.2 years. I do not think it is unreasonable to give private parties 2 years to bring their suit.

Mr. D'AMATO. If I might, the point is, if after the discovery of a fraud it takes more than a year to bring that case I think we are just really holding captive and in bondage, so to speak, a small business entrepreneur who is the possible plaintiff of a suit. Also, I think that the SEC does not take 2.2 years to bring that case; but I believe to finish that case; not to just investigate that case.

Let me suggest that, extending the statute of limitations makes it possible to hold this sword of alleged fraud over someone; I have found it or someone will find it. Instead of bringing a case within a year they dangle it over the company for 18 months, 2 years, attempting to get a settlement, then maybe file the papers just before that 2 years is up—I do not think we want to do that. How is that advancing the cause of justice?

If there is wrongdoing this Senator wants to see the people who have undertaken that wrongdoing punished. I want to see their illegal profits given back. And again, there is a procedure whereby those who have gotten ill-gotten gains who have profited by defrauding others can be brought to justice by the Securities and Exchange Commission. And the SEC has used that authority. They have done it in the case of Prudential, and, I daresay, that in other cases where outrageous practices have taken place they will continue to bring suit.

Mr. President, what we are seeking here is a balance. I think to basically double the statute of limitations will not bring about the kind of balance we are looking for. I think it would be a mistake.

Again, this Senator has been willing to look at this question carefully but I think the overwhelming body of opinion in the business community, in the legal community, and in the Congress, is that 3 years is a sufficient period of time given the fact that the SEC has authority to bring suit.

By the way, there may be cases that the SEC should not undertake, which it does, but there is the difference. I have some trust in them. I do not have any trust in the entrepreneurial spirit of a handful of lawyers who have managed to hold captive, to a certain extent, legitimate business activities in this country. When the accountants of this country are placed in the position that some of them may go out of business because of the incredible liability that they face in practicing their profession as a result of these type lawsuits, then it is time to say, ''Enough is enough. We have to change this.''

That is what we are attempting to do with this legislation, and that is why the 1 and 3 years statute of limitations is the provision we used. I recognize reasonable people may disagree, but I hope I have been able to lay out the methodology and the motive, for why we have chosen what we think is a fair balance. One year from the time the fraud is discovered, 3 years from the time the fraud has been committed; I think that is very, very reasonable.

I yield the floor.

Mr. BRYAN. May I inquire of the Chair, how much time remains?

The PRESIDING OFFICER. The Senator from Nevada has 4 minutes and 45 seconds remaining. The Senator from New York has 12 minutes and 7 seconds remaining.

Mr. BRYAN. Mr. President, it is my understanding that a motion will be made shortly to seek unanimous consent, to which I have no objection, to have the rollcall begin at 5:30. If in fact the Senator from Nevada is correctly informed of that, I inquire of the distinguished chairman of the Banking Committee whether he would be agreeable to providing a little additional time for us to engage in discussion?

Mr. D'AMATO. May I ask if my colleague might like an additional 15 minutes or half-hour equally divided?

Mr. BRYAN. That I would think would be fair. If we do not need it all, we can yield it back.

Mr. D'AMATO. Mr. President, I ask unanimous consent we be given an additional 30 minutes to debate, 15 minutes on each side.

The PRESIDING OFFICER. There is about 15 minutes remaining in the debate.

Mr. D'AMATO. I am asking an additional 15 minutes and extend the time for voting an additional half-hour.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Nevada.

Mr. SARBANES. Mr. President, will the Senator yield for just a moment?

Mr. BRYAN. The Senator from Nevada will be happy to yield.

Mr. SARBANES. Will the Chair indicate the parliamentary situation for us now?

The PRESIDING OFFICER. Will the Senator repeat the question, please?

Mr. SARBANES. Will the Chair repeat the parliamentary situation now?

The PRESIDING OFFICER. There was just consent given for an additional 30 minutes of debate.

Mr. SARBANES. Equally divided?

The PRESIDING OFFICER. Equally divided, 15 minutes for each side.

Mr. D'AMATO. That would bring us to 5:45.

Mr. SARBANES. Then when would the vote occur?

Mr. D'AMATO. At 5:45.

The PRESIDING OFFICER. Right, under the time that was just consented to, it would be at 5:45.

Mr. SARBANES. As I understood the request, it was to move the vote to 5:30 and have half an hour equally divided. The vote is now scheduled for 5:15, is that correct?

The PRESIDING OFFICER. The request was for an additional 30 minutes of debate time and there was 15 minutes remaining on the clock between the two sides, so that would now give 45 minutes debate remaining, equally divided between both sides.

Mr. SARBANES. That was not my understanding.

Mr. BRYAN. Mr. President, if I might?

The PRESIDING OFFICER. The Senator from Nevada.

Mr. BRYAN. If I misspoke myself I apologize.

What I was seeking to do was to get a combined 30, which was the time that, as I understood it, the vote was to occur, and the use of additional time. I am not trying to preclude my friend from New York from exercising the full amount of his time.

Mr. D'AMATO. Mr. President, might I ask that the two votes that are scheduled after the Bryan vote be limited to 10 minutes each?

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SARBANES. When will the first vote occur under this request?

The PRESIDING OFFICER. According to the unanimous-consent agreement, it would be at 5:45.

Mr. SARBANES. The subsequent two votes would be 10 minutes each; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. SARBANES. The time between now and 5:45 will be divided equally?

The PRESIDING OFFICER. The additional time is divided equally. The Senator from Nevada would now have 16 minutes and 57 seconds; the Senator from New York would have 28 minutes and 1 second. But the additional 30 minutes was equally divided between the two sides.

Mr. BRYAN. Mr. President, again, I think I created some confusion. I apologize. It was my intent to get additional time but to begin our voting at 5:30. The reason I say that to my friend from New York is to try to accommodate him. I intend to offer several amendments this evening. I think the sooner that we get to those probably the better off we are.

So somehow the state of the Record might reflect that whatever time the Senator needs, I would like a little bit more time, and start voting at 5:30. It is not my intent by some parliamentary artifice to reduce or limit his time. But I need a little bit more time. That is why I was requesting that be done in that fashion.

Mr. SARBANES. Mr. President, I think maybe we can work this out if we begin the vote at 5:45, and divide the time between now and then equally and make the two votes after the first vote 10-minute votes.

Mr. D'AMATO. I have no objection.

The PRESIDING OFFICER (Mr. ABRAHAM). Is there objection? But the time is still not divided equally with the 45 minutes remaining.

Mr. D'AMATO. Let me ask that the time from this time on be divided equally; that both sides start off with the same time, and we commence our first vote at 5:45.

Mr. SARBANES. And then the subsequent two votes will be 10-minute votes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The PRESIDING OFFICER. Who yields time?

Mr. BRYAN addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. BRYAN. Mr. President, I think this has been an interesting and a constructive debate.

Let me just say that this is an issue that I know is dry as dust, but I think it is important to point out that across the country there is some understanding that we are not just talking about legalisms, and what we are about to do will have a serious impact on millions and millions of Americans.

I invite my colleagues' attention to a number of editorial responses from across the United States, from a broad number of newspapers, not regionally focused, not philosophically on one side, but I think a broad spectrum. They raise very, very legitimate concerns about S. 240 in its present print.

The Miami Herald, ''License to Steal''; the Bergen County Record, ''Protection for Con Artists''; the News & Observer, ''Safe Harbor for Fraud''; the New York Times, ''Protection for Corporate Fraud''; Jonesboro Sun, ''Bad Measure''; the Denver Post, ''Senate Bill Would Give Free Ride to Securities Fraud''; the Seattle Post-Intelligencer, ''Securities Bill Hurts Investors''; the Napa Valley Register, ''Securities Fraud Bill is a Fraud''; the Palm Beach Post, ''One Big Stock Swindle''; North Sioux City Times, ''Your Money At Risk''; the Seattle Times, ''Congress is Wrong to Limit Investor Suits''; Dayton Daily News, ''Securities 'Reform' Bill Backwards''; St.

Louis Post-Dispatch, ''Don't Protect Securities Fraud''; Contra Costa Times, ''Shielding Securities Fraud''; Los Angeles Times, ''This Isn't Reform—It's a Steamroller''; and, again, the Palm Beach Post, ''Making the Nation Safe for Fraud.''

So the notion that somehow this is an argument that only involves those who are involved as securities lawyers I think can misstate the scope and the concern of this provision.

Let me say that if you look at the history of what has occurred since the last case in 1991, that issue was brought before the Congress. At that time, my good friend, the distinguished chairman of the Banking Committee, was a cosponsor with me in trying to extend the statute of limitations from 1 to 3 years, as that court decided the case, to 2 to 5. The distinguished Senator from Connecticut was a supporter of that change, as well. He continues to support the 2-to-5-year statute of limitations.

His very able cosponsor, the distinguished senior Senator from New Mexico, Senator DOMENICI, also expressed his support in 1991. The only concern the Senator had was that he felt that the statute of limitations issue ought not to be considered in an isolated sense. This is what he had to say on the floor of the U.S. Senate on November 19, 1991.

First, I am not opposed to the extension or retroactivity if we are able to attach some amendments that address the issues of attorney fees, who pays the cost for these various lawsuits which are going to be extended, all of which is done in S. 240.

So we have those people who have been over the years most actively involved at one time or another, all of whom supported S. 240 with a 2-to-5-year statute of limitations.

Those who know the circumstances best, those who investigate fraud at the State level and at the Federal level, the North American Securities Administrators Association and the Securities and Exchange Commission, all say that one fact that is central to securities fraud is the cleverness of the defrauders in concealing their fraud. They have from time to time pointed out the Ponzi scheme, in which you do not know until at the very end that you have been a victim of a fraud; or municipal bond fraud, which has front loaded an escrow account in which payments are made for several years so the unwary investor is totally unaware that he or she has been defrauded. You have limited partnerships, in which those frauds are not detected for years, and the SEC itself saying that to conduct an investigation takes an average of 2.25 years.

That strikes me as a very persuasive argument for a 2-to-5-year statute of limitations.

In addition, you have the State financial officers and local government financial officers. Now, I am not unmindful of the fact that accountants and securities underwriters and others do not like the longer statute of limitations, and they are obviously entitled to make their point. But I do not think it would shock anybody on the floor to suggest that their positions are tinged with self-interest.

Who speaks for the public? The Congress of the United States ought to speak for the public. And those who represent the public interest in both Republican and Democratic administrations, the Chairmen of the SEC, each have expressed their support for a 2- to 5-year statute of limitations. State securities administrators, many of whom, I suspect, probably most, are appointed by Governors directly representing the people of their respective States, have also spoken in behalf of the 2- to 5-year statute of limitations. State financial officers, many of whom are directly elected by the people, others of whom may be appointed by the Chief Executive of the respective States, again representing the public interest, have expressed their support. And the same thing is true with local government financial officers.

Mr. SARBANES. Will the Senator yield on that very point?

Mr. BRYAN. The Senator would be happy to yield.

Mr. SARBANES. In just yesterday's New York Times an article appeared written by Mark Griffin, the director of the Utah Securities Division. He is a board member of the North American Securities Administrators Association, which comprises the 50 States' securities regulators. In fact, he is the chairman of the Securities Litigation Reform Task Force and testified in front of our committee, and I think, in fairness, all members of the committee would agree that he was a very rational, thoughtful witness. Now, he in this article, in which he takes a very strong position, says, ''The securities litigation bill is reform in name only.'' But on this very point that the Senator is now arguing, having addressed other provisions of the bill that he thought were deficient, he said, and I quote him:

> Perhaps the clearest sign, however, that the bill's proponents have sold middle class investors down the river is their refusal to lengthen the time in which consumers can bring cases to court. The current rule derives from a 1991 Supreme Court decision that created a statute of limitations for Federal securities law cases of 1 year from discovery of a misdeed or 3 years from the commission of the act in question. This represented a serious reduction in the time available for such lawsuits since Federal courts previously had relied on State standards for statute of limitations. Currently 31 States permit longer than the 1 and 3 standard for the filing of State securities cases.

And then he closes this discussion on this very point with this question:

> What possible case can the backers of this bill make for keeping the time limit as short as possible so that future swindlers who cover their tracks carefully will get off the hook for good?

Mr. President, this is not a party to the issue. This is not someone who has a vested economic interest on one side or another of this. This is a State director of the State securities division.

I thank the Senator for yielding.

Mr. BRYAN. I think the Senator makes a very compelling point, and I think he speaks on behalf of the Nation's security regulators at the State level. And that view is shared by his counterpart at the Federal level.

I would yield the floor and reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, I think we just have a fundamental difference of opinion. There are those people who advocate extending the period of time to 5 years to detect fraud. To them I say, look at the sophistication to study markets and to review documents that we have today. Given the ability to learn more about a company, more about its activities, given all of the information that is available, I think that extending the statute of limitations gives this group of hawks—that is a kind word; more descriptive would be ''vultures''—who look at every turn to seize an opportunity to bring suit, not on behalf of the poor or the downtrodden but on behalf of themselves, too much time and opportunity to find something with which to bring a frivolous suit. There is a page in the Committee report on S. 240 which quotes a lawyer who talks about his clientele. He is one of those lawyers who brings these meritless suits, and he describes it.

I do not pretend, nor do I suggest at all, all lawyers operate in this manner, because they do not. That would be wrong. That would be a disservice. But a sufficient number operate in this way in this particular area. I have asked if we could get some figures on this. It would be very interesting to ascertain, for example, in the second circuit, where one law firm in particular brings all these suits, how many of the plaintiffs are the same. I mean, they are the same people and they own almost no stock whatsoever—sometimes as little as 10 shares each. They just get shares in every company. And if stock in that company goes up or down—even if it goes up—then they sue. They say: You did not tell us; you withheld information from us; and we should have known; and I am injured. They sue, and they get paid. They get paid for loaning their names. These lawyers, these same lawyers pay these individuals. This one lawyer said—I do not want to give the wrong name:

''I have the greatest practice of law in the world,'' this one lawyer said. He acknowledges once telling a meeting of corporate directors—imagine telling this to a group of corporate directors—''I have the greatest law practice in the world.'' And why? Why? Senator BOXER talks about the aged, the sick, the infirm, the poor investors, here is what

he thinks about them. Here is what he thinks about them; he said, ''I have no clients.''

He is operating for himself. He is just looking to make money, pile it up. Here it is on page 6 of the committee report, which has been submitted, ''Report of the Committee of Banking, Housing and Urban Affairs,'' I knew it was here because I did read it. The comment by one plaintiff's lawyer:

I have the greatest practice in the world. I have no clients.

''William T. Barrett, 'I have no clients,' Forbes, October 11, 1993.'' The fellow's name was Bill Barrett. Mr. Barrett was a partner in the law firm that brings most of these suits perhaps even more than anybody else. And he is proud of that. He is proud of that.

I do not think that is something to be proud about. If you want to say I recover on behalf of the little guy, and I take on those who have inveigled them and swindled them, I understand that. But when you brag: I have the greatest practice of law in the world—''I have no clients''—that is a heck of an admission.

I do not want to give Mr. Barrett and those who practice with that kind of attitude an additional period of time to chum up the waters, to try to create situations, to try to look for that which does not exist. I will support them if they are bring cases that involve fraud absolutely, that involve deliberately giving misinformation, absolutely, but I will not support the creation of specious lawsuits, lawsuits that are not well grounded and only designed to shake down—shake down—businesses, shake down insurers, shake down people, to make them pay.

That is wrong, and we have got to stop it. The fact is we are paying billions of dollars out and consumers are paying because we have allowed this practice to continue, and it has become a very sophisticated art form. Look at the record. Just look at the record. Ninety-three percent of those cases are settled, and they are not settled because anybody was going to prove fraud. They are settled because a small company or even a large successful company cannot afford to carry that litigation on for many years; litigation that costs them millions of dollars. Even if they win, they lose.

You heard my friend, Senator DODD, bring up the case where the accounting firm was sued and won, they won the lawsuit. It cost them $6 million to win. They were only paid on the initial contract $15,000. That probably epitomizes the worst of what takes place, but it takes place too often.

Open the door longer? No, I do not see what benefit that would hold. And I really have a difficult time understanding, and I do not refer to my colleagues, those in the media who say we are trying to give a license to people to commit fraud. Why do they not wake up? They could not operate under the same standards that business does. They are given a shield. We are simply saying, in this legislation, that you ought to be able, if you discover the fraud within a year, to bring the suit. Why would you need 2 years?

Now, it is true that at the Securities and Exchange Commission, once they have completed all their depositions; they go through very thoroughly; takes 2-plus years to bring suit.

But in 2.2 years their suit is absolutely totally ready, they have laid the cupboard bare and have made all their discoveries, they use the power of their office to bring suit where there is fraud and they can recover for the investors. So, indeed, it may take them 2 years to completion. We are not saying somebody has to complete their lawsuit in 2 years, but certainly, they should be able to start it within 1 year if they believe a fraud has really taken place. Extending it to 2 years just goes beyond the realm of reason.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. BRYAN. Mr. President, may I inquire how much time remains?

The PRESIDING OFFICER. On your side, 11 minutes 30 seconds, and Senator D'AMATO has 12 minutes 56 seconds.

Mr. BRYAN. I yield as much time as the Senator from Maryland desires.

Mr. SARBANES. If the Senator will just yield me 3 minutes.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, I want to again commend the Senator from Nevada for offering this amendment. It is a very important amendment. This is an issue he has dealt with over the years with a great deal of attention and understanding and thought.

The distinguished Senator from Nevada is, of course, a former Governor of that State, and prior to that the attorney general of the State of Nevada, and before that a member of the Nevada Legislature on the judiciary committee. So he has had experience in dealing with these issues, and I am sure out of his tenure as attorney general can appreciate what small investors come up against when they are confronted with these fraud situations.

This provision to extend the statute of limitations does not reach the kind of horror examples that people on the proponents of this legislation are asserting.

This statute of limitations issue affects meritorious suits as well as frivolous suits. There are other ways in the bill that we are trying to do away with the frivolous suits, to which the Senator from New York was just making reference. And, in fact, many of us trying to amend this bill have indicated that we support many of the provisions aimed at dealing with the frivolous suits. But we have to draw the line when the provisions are carried to excess, when you have overreaching and, in effect, you are negatively going to impact upon the small investor who has been bilked, who has been taken gross advantage of.

This statute of limitations we previously dealt with here with relatively little controversy. As a matter of fact, most people, when we previously considered it, were supportive of the 2- to 5-year period, which is what the standard has been for 40 years under the securities laws, for 40 years.

The 1- to 3-year standard that is now in this bill is shorter than what applies in over 60 percent of the States. If you know about the fraud, you ought to be able to bring a suit within a year. The SEC takes over 2 years to bring a suit once it knows about it. So I think it is unfair to expect the private party to meet a higher standard than you expect the Securities and Exchange Commission to meet with all the expertise and with all the resources that it has.

The 3 years, in effect, says if you perpetrate a fraud and no one finds out about it and 3 years go by, you are scot-free.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SARBANES. Will the Senator yield me 1 more minute?

Mr. BRYAN. I will be pleased to.

Mr. SARBANES. What that says is if you do a fraud, you are a fast operator, you perpetrate a fraud, and you manage to conceal it for 3 years, that under this statute, you are then scot-free. What the distinguished Senator from Nevada is saying is that period at least ought to be 5 years.

Some say why should it not even be longer and some States, in fact, have a longer period. The argument for having a statute of limitations generally speaking in the law is that at some point you want to have finality, you want to bring things to an end, you do not want to have always open the prospects of a lawsuit. So you try to have a reasonable statute of limitations. The one we have always used in this area now for more than four decades has been 5 years in terms of the period that could run in which you could then find out about the fraud.

Now it is proposed to cut that back to 3 years. So if the fast operator can conceal and deceive his fraud for a 3-year period, then he escapes, he comes out scot-free.

I say to my colleagues, I suggest to you this is a very meritorious amendment, and I very much hope the Members will support it.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO. How much time remains?

The PRESIDING OFFICER. Twelve minutes fifty-six seconds.

Mr. D'AMATO. I yield the Senator 5 minutes.

The PRESIDING OFFICER. The Senator from Utah.

AMENDMENT NO. 1472

Mr. BENNETT. Mr. President, I appreciate the opportunity to come—and I understand there will be stacked

votes—and talk on several amendments, one that was the subject of debate earlier. I asked my distinguished chairman if I could make a quick comment on it, and he agreed that might be appropriate.

There is an article in today's Wall Street Journal that I think has bearing on the debate, today's news today, if you will, which says: ''Big Accounting Firms Weed Out Risky Clients.''

If you have a big-name auditor, hold on tight. It's getting a lot tougher to find—and keep—prestigious outside auditors to certify annual financial statements.

The statement that I think is appropriate in this article, to this debate, referring to a partner at Peat Marwick, is where he talks about:

When a client we audit goes bust . . . it costs us a bundle in court if we're sued by investors, whether we win or lose the case.

Mr. Lambert says that legal costs are ''staggering'' for a lawsuit filed in a Federal court in Texas alleging a faulty review of a bank's books by Peat. The bank was taken over by the Federal Government in 1992 after big losses. The jury ruled in Peat's favor in 1993, but the firm had to spend $7 million to defend itself even though the fee for the job was $15,000. Mr. Lambert says, ''We just can't afford to take on risky audit clients anymore.''

That is what will happen if we do not pass this legislation, Mr. President. People are going to be denied access to accountants, who will not run the risk of a $7 million legal fee, even when they are exonerated, for a $15,000 auditing fee. They will simply not be available, and the end that we are all seeking in this legislation, which is to protect investors, will be frustrated if the amendment dealing with the joint and several liability is adopted.

Mr. SARBANES. Will the Senator yield on that point?

Mr. BENNETT. I will be happy to.

Mr. SARBANES. The other day, we rejected the amendment that would have restored joint and several. So the bill now has proportionate liability in it. The only thing the amendment offered earlier addresses is a provision in the bill that would still keep joint and several for small investors.

So if you had a small investor with a net worth of under $200,000—and that figure is retained—we would drop out of it the requirement that that small investor had to lose at least 10 percent of his net worth, namely $20,000. So if he lost $15,000 or $5,000, he could be held whole instead of the participant in the fraud escaping the burden.

Mr. BENNETT. Mr. President, we are talking about strike suits on behalf of professional plaintiffs, and a professional plaintiff could easily fit within the category of the Senator's amendment.

Mr. DODD. Will my colleague yield?

Mr. BENNETT. I will be happy to yield.

Mr. DODD. My colleague from Maryland was not here when I expressed my remarks. I will say to the Senator from Utah, I submitted that article for the RECORD.

Mr. BENNETT. I apologize.

Mr. DODD. If you go to the Census Bureau and Federal Reserve study on what the median net worth is in this country, you get two different numbers. The Census Bureau says the median net worth is $37,000. The Federal Reserve said in 1992 it is $52,000.

When you set the standard at $200,000 of net worth, which we do, basically, you are including about 95 percent of the people in this country. Only a small percentage is left that have a net worth in excess of $200,000. So if you then do not have some of the standard here, then de facto—not de jure, but de facto—you have eliminated proportionate liability.

Mr. SARBANES. I ask the Senator from Connecticut, what is the net worth of the median investor?

Mr. DODD. I do not have that statistic.

Mr. SARBANES. I know, but you are——

The PRESIDING OFFICER. The Senator from Utah has the floor.

Mr. BENNETT. I think my time has probably expired. I thank my colleague from Connecticut. I apologize that I was not listening to him when that was put into the RECORD. I will not ask that it be printed in the RECORD.

Mr. D'AMATO. I yield another 2 minutes to the Senator from Utah.

AMENDMENT NO. 1469

Mr. BENNETT. The amendment before us is on the statute of limitations. We have heard all of these arguments. I do not want to repeat them over and over again. Simply, from my business experience, I tell you the impact of the statute of limitations which is hanging over business. If you have a statute of limitations that is 5 years, you have to keep all your records for 5 years; you have to be concerned about what is going to happen to you in 5 years, even though you know nothing has gone wrong, and you get yourself into that circumstance.

If there were time, I could describe circumstances where the lawyers wait until the last moment before the expiration of the statute, no matter when it is, in order to panic the situation. It becomes a device, if you will, that plays into the hands of the people that are seeking to do the kinds of things we are talking about here.

I believe 3 years is long enough. I believe that it is a salutary thing to say to the lawyers, if you suspect there is fraud, get on with it quickly and do not play the game of playing it out those extra 2 years and hoping in that extra 2-year period that people will be a little sloppy in recordkeeping and you will be able to create greater uncertainty than you would if you acted in a timely fashion. Memories fade after 3 years, legal suits become much more difficult to pursue after 3 years. I think the 3 years that are in the bill are appropriate. For that reason, I am opposing the amendment. I thank the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO. The Senator from North Carolina would like 3 minutes.

I yield to the Senator from North Carolina.

Mr. FAIRCLOTH. Mr. President, I want to address some of the amendments that have been discussed on the Senate floor today. First, I oppose extending the statute of limitations for securities private rights of action. I think the current 3-year statute is quite adequate. The Securities and Exchange Commission Act of 1934 put this into law. That was 60 years ago. It has been unchanged ever since.

Certainly, in this age of computers, fax machines, and the rapid communications that we have, particularly in the financial community, I do not see the need to extend the statute that has been more than adequate for 60-plus years.

Mr. President, there is little evidence that a longer period is needed. Three years from the discovery of a securities fraud violation is adequate.

The problem has not been a longer period—the problem has been that class action suits are now filed literally within hours of a stock price dropping. I cannot understand why anyone would think that a longer period is justified with the current practices that we are dealing with.

I am also concerned that by extending the statute to 5 years, we make it harder for firms to defend themselves against lawsuits that are totally baseless to begin with.

Companies will have to search business records that have not been used for years. They will have to interview employees whose recollections are hazy. Moreover, they will have to track down employees that probably no longer work for the firm and probably are on the other side of the country. All of this is to defend themselves against a possible claim for 5 years. Business records and recollections get hazy, and 5 years gets to be a long time.

In my home State of North Carolina, we have a 2-year statute of limitations, and to my recollection, no one has ever suggested that it needed to be changed.

With respect to Mr. SARBANES' amendment, I think the Senate has covered this ground already. On Friday, the Senate defeated Mr. SHELBY's amendment by a large margin.

Mr. President, S. 240 already has an extremely balanced and reasonable proportionate liability section. First, it requires that in the case where other defendants are insolvent, every other defendant must pay an additional 50 percent of the losses he caused to help pay the plaintiffs.

Also, the bill takes care of small investors. It covers those with a financial net worth of under $200,000.

Mr. President, this covers 90 percent of the families in the United States. There is no need to go further, as Senator SARBANES is suggesting. Yes, there are many victims and some victims who are not made whole. But there are

very few. If, however, we do not leave this provision alone, there will be many victims on the other side of the equation, those companies that are sued simply because they have deep pockets.

These companies are often forced into settling because large lawsuits loom and it is cheaper to settle. They, too, are victims of a flawed legal system and untrustworthy lawyers. This needs to be changed. S. 240 changes this, and that is why I am opposed to the Sarbanes amendment.

The PRESIDING OFFICER. Who yields time?

Mr. BRYAN. I yield to the Senator from Connecticut.

Mr. DODD. I will take 1 minute. Again, for the purpose of debate and discussion here, my colleagues will not be surprised. The original bill we put in, of course, did include a statute of limitations very much along the lines being offered by the Senator from Nevada. I support this amendment. There is one major difference here between this amendment and what was originally proposed, and that is the requirement of reasonable diligence on the part of the investor to determine whether or not there has been any fraud. Reasonable diligence is not included in this amendment. I regret that because I think there is a difference between the investor who must bear a responsibility to keep an eye out for what is going on and the one that does not pay any attention whatsoever. The absence of that language is not so fatal that I oppose the amendment. There is a difference between the original language and the language here. So you treat both investors alike and people who engage in this activity bear a responsibility to watch out for themselves in many ways, which is not included in the amendment.

I think that technology being what it is, the world having changed to the point where you can actually have pretty sophisticated operations today, makes it difficult for the average investor to be aware of what is going on. I support the language Senator DOMENICI and I originally had in the bill and, for that reason, I support this amendment.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO. How much time is remaining?

The PRESIDING OFFICER. Two minutes two seconds, and Senator BRYAN has 4 minutes 44 seconds.

Mr. BRYAN. Thank you very much, Mr. President. This has been an interesting discussion. Because the time is running out, let me be brief on several points. For my colleagues who are concerned about the abuses that lawyers visit upon the system, let me suggest that this amendment is not at issue. The able chairman and the sponsor of the bill have crafted a number of provisions—prohibition of referral fees to brokers, prohibition on attorney's fees paid from SEC disgorgement funds, and several others.

Let nobody be misled that this bill or debate is about whether you favor reforms in the litigation system as it deals with attorney abuse. We have dealt with that issue. I find myself a bit confused. The distinguished Senator from Utah is arguing against my amendment and he says if the statute of limitations is extended, those lawyers who file suits will wait until the last minute. He has extensive experience in business, and I greatly respect him. The distinguished Senator from North Carolina, also experienced in business, tells us that the problem is that lawyers file instantaneously when the stock prices go down. I must say, I do not think it can be both ways.

The basic problem here is one of concealment. The very nature of these frauds that are perpetrated upon the investment public involve the concealment of fraud through any artifice or device possible, and although there is much new technology out in the market, the technology changes are not a response to the basic cleverness of those who perpetrate these frauds in keeping their frauds from the victim.

The North American Association of Securities Administrators and the SEC point out to a number of those cases—municipal bond frauds, limited partnership, to cite just two.

Mr. President, I think it also needs to be made note of those who have looked at this over the years, as Senator D'AMATO, Senator DOMENICI, and Senator DODD have all at one point taken the position the statute of limitations ought to be extended from 2 to 5 years.

I recognize there are those that have a vested financial interest who want to preclude suits from being filed. I understood that. That ought not to dictate policy response.

Those who have the public interest and the public trust at issue as to their only responsibility, the SEC, State Securities Association, the State Financial Officers, Local Government Financial Officers, all are together. All of the regulators agreed that in the interest of fairness, the statute of limitations ought to be extended from 2 to 5 years. That represents both a national perspective, a State perspective, and a local government perspective.

Unless we subscribe to a conspiracy in history, all cannot be in league with trial lawyers. They have reached the conclusion, as I have, based upon the compelling evidence before us, concealment is the problem, and 2 to 5 years is a reasonable time to provide an opportunity for plaintiffs to file.

Mr. D'AMATO. Mr. President, this is admittedly incomplete, but let me just share some statistics from one law firm in New York between 1990 and 1992. One plaintiff was a plaintiff in 14 cases—14. The second plaintiff was in 10; the third fellow, 7; another fellow, 7; another fellow, 7. I will not mention the names of these plaintiffs, because I want to be respectful and not embarrass them. But, I should mention their names, because I am sure these plaintiffs are not legitimately aggrieved. It is incredible. I would like to find out how many shares they owned in each of these firms—I bet not more than one owns more than 10 shares. These plaintiffs buy shares in multiple companies so the firm can be designated lead counsel, and then the plaintiffs get paid a bonus.

That is the kind of practice we have had taking place. I do not think we should keep this door open for 5 years for these lawyers to find supposed frauds so they can bring these kinds of cases. That is why I have to oppose this amendment.

Do I want to hurt those who truly have been hurt? Absolutely not. When I see one plaintiff in 14 cases in 3 years, and another plaintiff in 10, and 1, 2, 3, 4, 5, 6 others who have been involved in a multiplicity of cases during this same period, I say it is time to change things.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada has 1 minute and 18 seconds remaining.

Mr. BRYAN. I think this perhaps has been discussed fully. I want to acknowledge the leadership the ranking member, Senator SARBANES, provided in viewing this legislation. I thank him very much for his leadership; and the courtesy of the chairman of the committee. Although we find ourselves in disagreement, his courtesy is much appreciated.

Mr. D'AMATO. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. D'AMATO. I move to table.

The PRESIDING OFFICER (Mr. BROWN). The question is on agreeing to the motion to table the amendment numbered 1469, offered by the Senator from Nevada [Mr. BRYAN].

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Texas [Mr. GRAMM] and the Senator from Pennsylvania [Mr. SANTORUM] are necessarily absent.

Mr. FORD. I announce that the Senator from Illinois [Ms. MOSELEY-BRAUN], the Senator from New York [Mr. MOYNIHAN], and the Senator from Illinois [Mr. SIMON] are necessarily absent.

I further announce that the Senator from Rhode Island [Mr. PELL] is absent on official business.

I further announce that, if present and voting, the Senator from Illinois [Ms. MOSELEY-BRAUN] would vote "aye."

I further announce that, if present and voting, the Senator from Rhode Island [Mr. PELL] would vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 52, nays 41, as follows:

[Rollcall Vote No. 283 Leg.]

YEAS—52

Abraham	Faircloth	Mack
Ashcroft	Feinstein	McConnell
Baucus	Frist	Murray
Bennett	Gorton	Nickles
Brown	Grams	Packwood
Bumpers	Grassley	Pressler
Burns	Gregg	Pryor
Campbell	Hatch	Robb
Chafee	Hatfield	Simpson
Coats	Helms	Smith
Cochran	Hutchison	Snowe
Coverdell	Inhofe	Stevens
Craig	Jeffords	Thomas
D'Amato	Kassebaum	Thompson
DeWine	Kempthorne	Thurmond
Dole	Kyl	Warner
Domenici	Lott	
Exon	Lugar	

NAYS—41

Akaka	Ford	Levin
Biden	Glenn	Lieberman
Bingaman	Graham	McCain
Boxer	Harkin	Mikulski
Bradley	Heflin	Murkowski
Breaux	Hollings	Nunn
Bryan	Inouye	Reid
Byrd	Johnston	Rockefeller
Cohen	Kennedy	Roth
Conrad	Kerrey	Sarbanes
Daschle	Kerry	Shelby
Dodd	Kohl	Specter
Dorgan	Lautenberg	Wellstone
Feingold	Leahy	

ANSWERED ''PRESENT''—1

Bond

NOT VOTING—6

Gramm	Moynihan	Santorum
Moseley-Braun	Pell	Simon

So the motion to table the amendment (No. 1469) was agreed to.

AMENDMENT NO. 1472

The PRESIDING OFFICER. The question now occurs on the Amendment 1472 offered by the Senator from Maryland, Mr. SARBANES. Is there a request for the yeas and nays?

Mr. D'AMATO. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mrs. BOXER. Mr. President, parliamentary inquiry? It was my understanding that the author of the amendment had the option to take a minute of time before the vote was taken. I understand that it was part of the unanimous consent agreement. I want to make sure that I am correct on that, because I would like that opportunity with my amendment. I was not certain whether the Senator from Maryland waived that right or what the parliamentary situation was.

The PRESIDING OFFICER. The Senator is correct. That time is available if Senators wish to take it. It certainly would be available to the Senator from California when her amendment is considered.

The question is on agreeing to the amendment of the Senator from Maryland. On this question, the yeas and nays have been ordered.

Mr. BYRD. Mr. President, the explanation of the amendment was included in the order. I ask that the explanation be given.

The PRESIDING OFFICER. The agreement called for an explanation, and the explanation is requested. The Senator from Maryland is recognized.

Mr. SARBANES. Mr. President, I will be very quick.

This amendment takes a provision that is in the bill that departs from proportionate liability. The bill says that in a situation in which you have a small investor, with a net worth of less than $200,000, and if that small investor loses over 10 percent of his net worth—in other words, $20,000—then you will in effect hold them harmless, all the defendants will continue to be jointly and severally liable. I leave the $200,000 net worth provision but eliminate the 10 percent requirement as to the amount of loss, so if someone has a net worth of $200,000 and loses $5,000, they still would be protected. The notion of this is to try to protect small investors, and I am very frank to tell you I think they ought to be protected.

Under the other provision in the bill, they provide—

Mr. CONRAD. May we have order, Mr. President, so we can hear.

Mr. SARBANES. That in an instance of proportionate liability——

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from New York is recognized.

Mr. D'AMATO. Mr. President, this amendment is really another attempt to knock out one of the most meaningful provisions of S. 240 and double the amount that defendants would have to pay if there was an insolvent codefendant. The basis upon which we attempt to give some relief is to say, yes, for some small investors, if they have under $200,000 and a 10 percent cap. What we are doing here is just knocking it aside. We have to stop people going after people just because they have deep pockets, just because they have lots of money. And so I urge my colleagues to vote no.

The PRESIDING OFFICER. The question now occurs on agreeing to amendment No. 1472 offered by the Senator from Maryland, Mr. SARBANES. The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

Mr. LOTT. I announce that the Senator from Texas [Mr. GRAMM] is necessarily absent.

Mr. FORD. I announce that the Senator from Illinois [Ms. MOSELEY-BRAUN], the Senator from New York [Mr. MOYNIHAN], the Senator from Illinois [Mr. SIMON] are necessarily absent.

I further announce that the Senator from Rhode Island [Mr. PELL] are absent on official business.

I further announce that, if present and voting, the Senator from Illinois [Ms. MOSELY-BRAUN] and the Senator from Rhode Island [Mr. PELL] would each vote nay.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 29, nays 65, as follows:

[Rollcall Vote No. 284 Leg.]

YEAS—29

Akaka	Feingold	Leahy
Biden	Graham	Levin
Boxer	Harkin	McCain
Bradley	Heflin	Rockefeller
Breaux	Hollings	Sarbanes
Bryan	Inouye	Shelby
Cohen	Jeffords	Snowe
Conrad	Kennedy	Thompson
Daschle	Kerrey	Wellstone
Dorgan	Lautenberg	

NAYS—65

Abraham	Feinstein	Mack
Ashcroft	Ford	McConnell
Baucus	Frist	Mikulski
Bennett	Glenn	Murkowski
Bingaman	Gorton	Murray
Brown	Grams	Nickles
Bumpers	Grassley	Nunn
Burns	Gregg	Packwood
Byrd	Hatch	Pressler
Campbell	Hatfield	Pryor
Chafee	Helms	Reid
Coats	Hutchison	Robb
Cochran	Inhofe	Roth
Coverdell	Johnston	Santorum
Craig	Kassebaum	Simpson
D'Amato	Kempthorne	Smith
DeWine	Kerry	Specter
Dodd	Kohl	Stevens
Dole	Kyl	Thomas
Domenici	Lieberman	Thurmond
Exon	Lott	Warner
Faircloth	Lugar	

ANSWERED ''PRESENT''—1

Bond

NOT VOTING—5

Gramm	Moynihan	Simon
Moseley-Braun	Pell	

So the amendment (No. 1472) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. SARBANES. Mr. President, as I understand it, under the unanimous consent request, the Senator from California now has the opportunity to address the substance of her amendment for 1 minute and the Senator from New York has 1 minute to reply; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. SARBANES. Mr. President, I make the point of order that the Senate is not in order, and I request the Chair to obtain order in the Senate before we go to the explanation of the amendment and the response thereto, out of courtesy to our colleagues.

The PRESIDING OFFICER. The Senator's point is well taken. The Senate will be in order. Members will cease conversation.

The Senator from California is recognized.

AMENDMENT NO. 1473

Mrs. BOXER. I will be less than 1 minute. Mr. President, I say to my friends, S. 240 changes many aspects of our securities laws, and many senior citizen groups have voiced concern.

My amendment simply says if S. 240 becomes law, the Securities and Exchange Commission shall report to the Congress in 180 days as to its impact on senior citizens who are the main targets of securities fraud.

So we are calling on the SEC to come and report to us as to the impact of this legislation on senior citizens.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. D'AMATO. Mr. President, we have agreed to ask the Securities and Exchange Commission to make this statement. We understand the vulnerability of seniors. We are prepared to accept the amendment without a rollcall vote.

Mrs. BOXER. Mr. President, I ask for a rollcall vote in accordance with the previous order.

The PRESIDING OFFICER. The yeas and nays have been ordered.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The distinguished majority leader is recognized.

ORDER OF PROCEDURE

Mr. DOLE. This is in reference to the remainder of the evening, so it will be important to every Member. I understand we are not able to convince anybody to continue on this evening, except there will be amendments offered and there will be debate this evening, but there will be no more votes after this rollcall vote.

There will be votes starting at 10:30 a.m. tomorrow: Two votes, under the same provision. There will be 2 minutes to explain before each vote, and then following those two votes, I understand there will be another amendment laid down. Senator SARBANES will be recognized to lay down his amendment at about 11:15, I assume. We still very much would like to finish this bill in the early afternoon. There are five amendments, I understand, outstanding.

Mr. D'AMATO. It appears there are five amendments.

Mr. DOLE. Again, there has not been any delay on either side. There has been a lot of good debate all day today. But we would like to complete action on this bill to move to something else, hopefully regulatory reform. There will be no more rollcall votes tonight, but two votes starting at 10:30 a.m.

Mr. ROCKEFELLER. Will the majority leader yield? The Senator was just interested in when the Medicare Select conference report will take place?

Mr. DOLE. I hope that will happen this evening. As I understand, the Senator from West Virginia wanted 20 minutes for debate. We will dispose of that this evening.

Mr. ROCKEFELLER. I thank the majority leader.

VOTE ON AMENDMENT NO. 1473

The PRESIDING OFFICER. Under the previous order, the question is on agreeing to amendment No. 1473 offered by the Senator from California, Mrs. BOXER. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

Mr. LOTT. I announce that the Senator from Texas [Mr. GRAMM] is necessarily absent.

Mr. FORD. I announce that the Senator from Illinois [Ms. MOSELEY-BRAUN], the Senator from New York [Mr. MOYNIHAN], and the Senator from Illinois [Mr. SIMON] are necessarily absent.

I further announce that the Senator from Rhode Island [Mr. PELL] is absent on official business.

I further announce that, if present and voting, the Senator from Rhode Island [Mr. PELL] and the Senator from Illinois [Ms. MOSELEY-BRAUN] would each vote ''aye.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 93, nays 1, as follows:

[Rollcall Vote No. 285 Leg.]

YEAS—93

Abraham	Feingold	Lieberman
Akaka	Feinstein	Lott
Ashcroft	Ford	Lugar
Baucus	Frist	Mack
Bennett	Glenn	McCain
Biden	Gorton	McConnell
Bingaman	Graham	Mikulski
Boxer	Grams	Murkowski
Bradley	Grassley	Murray
Breaux	Gregg	Nickles
Brown	Harkin	Nunn
Bryan	Hatch	Packwood
Bumpers	Hatfield	Pressler
Burns	Heflin	Pryor
Byrd	Helms	Reid
Campbell	Hollings	Robb
Chafee	Hutchison	Rockefeller
Coats	Inhofe	Roth
Cochran	Inouye	Santorum
Cohen	Jeffords	Sarbanes
Conrad	Johnston	Shelby
Coverdell	Kassebaum	Simpson
Craig	Kempthorne	Smith
D'Amato	Kennedy	Snowe
Daschle	Kerrey	Specter
DeWine	Kerry	Stevens
Dodd	Kohl	Thomas
Dole	Kyl	Thompson
Domenici	Lautenberg	Thurmond
Dorgan	Leahy	Warner
Exon	Levin	Wellstone

NAYS—1

Faircloth

ANSWERED ''PRESENT''—1

Bond

NOT VOTING—5

Gramm	Moynihan	Simon
Moseley-Braun	Pell	

So the amendment (No. 1473) was agreed to.

Mrs. BOXER. I move to reconsider the vote.

Mr. SARBANES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HATCH. Mr. President, I am very pleased to offer my enthusiastic support to the Private Securities Litigation Reform Act of 1995.

I was an original cosponsor of S. 240, and have been deeply interested in remedying the current abuses in the securities litigation system—particularly those abuses that have arisen from the misuse of class action lawsuits to prosecute securities fraud. Companies in Utah as well as across the country are being adversely affected by unfair lawsuits brought under the current system.

This is only one area of the law in which litigation abuse has become rampant, and I commend the many cosponsors of this bill—who number over 50—for their recognition that it is time to address some of the significant litigation abuses in this country.

In particular, I would like to commend and thank Senators DODD and DOMENICI for their longstanding leadership on this issue. They have once again worked long and hard to come up with an excellent bill, which so many of us have been able to support wholeheartedly. I also want to thank Senator D'AMATO for his support of securities litigation reform and for his key role in developing the fine version of the bill reported out of the Banking Committee that we are considering here on the floor today.

This bill seeks to make securities litigation more fair by curbing the abusive litigation practices that have been employed by a small number of plaintiffs' lawyers in securities litigation class action lawsuits. The hallmark of this small group has been the so-called strike suit. In such suits, attorneys typically file a securities fraud lawsuit against a company as soon as possible after the company's stock drops in price—often regardless of whether there has been any fraud on the part of the company.

In the complaint, those attorneys accuse the company of securities fraud, either in issuing the stock or in other company statements, and seek to obtain damages to make up for the stock price drop—a drop that is in fact typically caused by nothing more than natural market forces.

Here is one example. In a case—or I should say cases—filed in New York this past year, Philip Morris had announced that it was reducing the price of Marlboro cigarettes by 40 cents per pack. [*In re Philip Morris Securities Litigation*, 1995 U.S. Dist. LEXIS 92 (S.D.N.Y. Jan. 6, 1995).] Shortly thereafter, the company's price per share lost nearly 24 percent of its value. That is not so surprising in a reactive market that could easily have interpreted such action as leading to a loss in profits, at least in the short term.

What was surprising was the reaction of lawyers. Within just 2 business days, 10 securities litigation lawsuits involve 34 law firms were filed against Philip Morris. That kind of litigiousness on such short notice is absolutely astounding. Unfortunately, that kind of action has become commonplace and is plaguing our finest companies, be they large corporations or smaller businesses.

It is so widespread that a 1992 National Law Journal article reported that of 46 stock fraud cases studied, 12 were filed within 1 day and another 30

within 1 week of the publication of unfavorable news about the defendant company. [Source: Milt Policzer, ''They've Cornered the Market,'' National Law Journal, April 27, 1992.]

In 1990, when L.A. Gear, the sportswear and sneaker manufacturer, announced lower than expected earnings, one law firm filed 15 lawsuits just three days after the announcement. [Source: William Lash, ''Securities Law Reform: Too Little, Too Late'' (Center for the Study of American Business, Washington University, May 1995).]

Particularly hard hit by strike suits have been high technology computer companies. A Stanford University law professor who conducted a study of shareholder class actions filed in the early 1980's, most involving high tech firms, found that every single company that experienced a market loss in stock price of at least $20 million was sued. Every single company. [See Janet Cooper Alexander, ''Do the Merits Matter? A Study of Settlements in Securities Class Actions,'' 43 Stan. L. Rev. 497 (1991).] That is mindboggling. These are some of the most successful American companies in recent decades, and they are being besieged with lawsuits. Why could this be?

The answer is found in the securities litigation system. In her study, the Stanford professor—Professor Janet Cooper Alexander—concluded that, due to the pressures of the litigation system, companies were being sued for reasons that had little or nothing to do with the presence of any real underlying securities fraud and that companies were being forced into settlements that had nothing to do with the merits of the case. That is not how the legal system is supposed to work, and that is now how the securities laws were meant to be used.

Although the securities laws were designed to punish and prevent fraud and abuse in the securities market, they are currently being abused by certain attorneys who seek to make a profit from simple stock losses. But the securities laws were not designed to insure against stock loss. Far from it. The securities laws were designed to protect American investors from fraud.

When most of our major high-technology firms have been the target of a securities fraud class action lawsuit, and when hundreds of millions of dollars are spent each year on the litigation costs relating to such suits, a number of which show no evidence of wrongdoing whatsoever on the part of the defendant, I think we have to take a long hard look at this and ask ourselves—is corporate fraud really so widespread that it exists in every single firm in America? Or is this system encouraging litigation when there is no evidence of any wrongdoing whatsoever on the part of the defendant?

I think the answer is clear. I think the reason these suits yield so many costly settlements has to do with the high costs to companies of defending against these suits. Due to the threat of exorbitant legal fees that would be required to defend against such strike suits, companies will settle securities lawsuits even when those suits are entirely meritless. The plaintiffs' attorneys then collect a hefty portion of that settlement through their contingent fees.

While accurate statistics are not available on the breakdown of attorneys fees, because this information is often not public, the Banking Committee has heard testimony that plaintiffs in these types of lawsuits typically receive only 14 cents for every dollar of damages while the attorneys collect 39 percent of the settlement. Other studies have suggested even lower recoveries by the shareholders.

This area of legal abuse is truly the work of a few attorneys. It has been widely reported—both in congressional testimony and in cases and articles—that only a small number of law firms are involved in these abusive strike suits. Often, the firms use the same professional plaintiffs in multiple suits. Some will pay referral fees to get plaintiffs. Typically, these firms will rush to the courthouse to try to be the firm that files suit first.

One problem is that, under current law, that firm will often be designated the lead class counsel and will be able to receive a larger share of the settlement. Clearly, with so many suits being filed on such short notice, the law firms involved cannot possible have thoroughly considered the possible existence of fraud. Instead, these firms are simply reacting to the skewed incentives in the current system that reward them for filing a lawsuit first.

These few, rapacious law firms have made this kind of abusive litigation their specialty. They are the ones who have taken advantage of the system and harmed our businesses and our economy. Let us all be perfectly clear in our understanding that the only group this bill harms is that small group of specialized lawyers.

Their actions come at a very high cost. Companies pay needless litigation, settlement, and insurance costs with money that could be going to create jobs or to further research and development. Testimony before the Banking Committee demonstrated again and again how much excessive securities litigation costs companies, who must then pass those costs on.

Let me just mention one example. Testimony was received about a Silicon Valley corporation named Adept Technology. Adept Technology is the only U.S. robotics corporation and it employs over 275 people. They were contemplating an initial public offering of shares, or what is commonly referred to as going public. They were advised, however, that due to the threat of litigation if they went public, they would have to carry a liability insurance policy of $5 million in coverage which would cost upwards of $450,000 per year. They were advised that they had to bear that cost, because, as a high-technology company going public, they would undoubtedly be sued for securities fraud within a year or two of going public. The upshot of securities litigation lawsuit abuse is that Adept must pay a litigation tax in order to be a publicly traded company. The money spent this way could easily pay for five or six engineers who might be creating new products and helping keep American business competitive.

By limiting the access of some firms to the capital market—for example, those that decide they cannot afford to go public—the current system damages our economy and stunts its ability to grow. The irony is that, while securities litigation laws were designed to safeguard investors, in reality the current system ends up hurting investors. It harms those investors who could have invested successfully in those companies, had they gone public, and it hurts those investors who could have earned more profits on their shares, had those companies been more profitable. In this system, whose intent was to protect investors, the sad fact is that investors end up getting hurt while certain lawyers rake in exorbitant fees.

Another cost this abusive system imposes is in the perverse incentives created when companies decide to disclose less information about their companies simply for fear that they will inevitably be sued on the basis of the information. That goes completely against the grain of the securities laws—all of which were designed to encourage openness and full information in our securities markets.

These costs must be addressed. We need to eliminate abuses in the system, so that we can efficiently preserve the core values of the American stock market—honesty, integrity, openness, and the free exchange of information. Those values are what gives the American stock market its respect, both here and abroad.

This act is an attempt to do just that. It represents the culmination of a bipartisan effort that has evolved over several Congresses. I believe this bill balances several competing interests. There can be no question that it ensures that the class action device will remain available for those shareholders who have been the victims of securities fraud. It also improves on that class action device so that injured investors—not a small group of greedy lawyers—can control the litigation and have a greater share of any settlement.

The bill does this in a number of ways.

First, the bill contains a number of reforms of securities litigation class actions that are designed to increase participation of the real shareholder plaintiffs and decrease the control of attorneys. For example, the court will select the most adequate plaintiff who will then direct litigation decisions. Securities lawsuits have often been brought and controlled by a relatively

small group of lawyers whose incentives are frequently at odds with those of the plaintiffs and with the goals of the securities laws. This provision would ensure that litigation decisions are truly in the best interests of the shareholders and are not merely in the best interest of the law firm that won the race to the counthouse door.

Where the parties enter into a class action settlement agreement, the bill requires the disclosure of settlement terms to class members so that plaintiffs know what they are getting and the attorneys fees involved.

The bill increases pleading requirements so that a potential violation must be clearly laid out in a complaint. In securities actions involving misleading statements or omissions, plaintiffs will have to specify each allegedly misleading statement or omission and why it is misleading. Where a defendant's state of mind must be proven, plaintiffs must plead specific facts supporting that state of mind.

Those provisions make sense. They do not require a plaintiff to prove the entire case at the pleading stage. Instead, they merely require that that case be set out and that all the allegations be supported by sufficient allegations of fact.

The bill also provides for a stay of discovery during the pendency of any motion to dismiss, unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice. This reduces one of the highest litigation costs that have been used to badger defendants into settling. This way, some of the merits of the case can be considered by the court before the defendant can be forced to settle through the threat of mounting unpayable legal bills.

Another problem the bill addresses is the problem of predictive of so-called forward-looking statements. Some companies have faced damaging lawsuits merely on the basis of vague but optimistic projections that they would do well even though it was clear that the preduction was somewhat speculative and future-orented. The bill does so by establishing what has been referred to as a safe harbor to protect issuers and others from liability under the securities laws for forward-looking statements.

This provision has been mischaracterized by opponents of this legislation. It should be clearly understood, however, that intentionally misleading statements would never be covered by the safe harbor provision. In addition, a number of other exceptions apply to insure that investors can be protected adequately from fraud. In this way, the bill does not permit companies to misrepresent their future performance or intentions knowingly. It simply permits them to suggest what they predict their future will entail without being subject to harassing lawsuits when, for one reason or another, reality differs from their suggestions.

The bill also reforms joints and several liability in private securities lawsuits. Often, accounting firms and others involved in issuing securities have been held liable and ultimately responsible for fraud that was at best the primary responsibility of the issuing company. This provision is carefully structured to be fair, and to ensure that injured investors are protected to the greatest extent possible. As a general rule, liability would be several only, in proportion to a defendant's responsibility for wrongdoing.

Significantly, in cases involving knowing fraud, defendants would remain jointly and severally liable. That is something that opponents of this bill seem to have missed entirely. Where any defendant engages in knowing fraud, that defendant can be liable for the investors' entire loss. This bill does not give any leeway to knowing wrongdoers.

In addition, the bill also employs certain modifications to the joint and several rule where one defendant's share may be uncollectible. Those are designed to fairly balance the responsibilities and needs of plaintiffs and defendants. Thus, it helps improve a shareholder's ability to gain full recovery, for instance, where the defendant company has gone bankrupt. In those cases, the other defendants' contributions will be stepped up.

While this bill will grant some relief to accountants and others who have been unfairly held jointly and severally liable, at the same time the bill seeks to ensure that accountants take responsibility for detecting fraud. The bill requires accountants to put in place procedures to detect securities fraud. Then, if the accountant discovers or suspects fraud, the accountant must inform management. If management fails to act accordingly, the accountant must then notify the SEC concerning the suspected fraud.

In another provision designed to balance the need to ensure that true fraud does not go unpunished, the SEC is given authority to prosecute those who aid and abet securities fraud. By giving this authority to the SEC, it will not be misused by some of the securities lawyers who have misused so many other provisions of the securities laws.

As one final point, I emphasize that the pervasive litigation abuses in securities class action lawsuits are not the only litigation misuses plaguing our civil justice system. In other areas of the law, reform is needed just as desperately.

I was very proud to see the Senate pass product liability reform in May, and I look forward to the passage of securities litigation reform. I only note that these two areas of legal reform are only the tip of the iceberg. Americans have been subject to all sorts of litigation abuses that are imposing unjustifiable costs on our economy, our businesses, and our workers.

Those costs are passed on throughout the Nation and they cause harm whenever a company, a school, or a volunteer organization must defend against outrageous legal claims. That occurs whether the lawsuits are securities litigation lawsuits, product liability actions, or garden variety fraud, breach of contract, or other types of civil lawsuits.

I hope to have the Senate consider the problem of the multiple imposition of punitive damages for the same act or course of conduct. While it is not my intent to offer to this legislation amendments that pertain to other, broader civil justice reforms, I see this bill as one step in a progression of more extensive reforms to improve our litigation system. I am pleased to see the support for this bill, and I look to my colleagues for continuing efforts against litigation abuse.

Again, I thank Senators DOMENICI, DODD, and D'AMATO for their leadership and commend them for their efforts.

Mrs. MURRAY. Mr. President, I rise today in support of S. 240—the Private Securities Litigation Reform Act.

Mr. President, Americans need to be assured that their investment are secure—that our money has been invested in good faith.

And, if an American investor has been the victim of fraud—no matter how big or little—how rich or poor—they should get equal treatment under the law.

Guilty parties must be held accountable.

Mr. President, I am not rich. I know that investments are risky. There is no guarantee that you will make money in the stock market, or the bond market, or on any investment.

I learned a long time ago—from my parents—that you should not invest money you cannot afford to lose. So, now as a parent myself, I am very conservative in my investments.

I believe in personal responsibility.

But, Mr. President, there is an appropriate Federal role in this process, as well. We cannot abdicate our responsibility to protect the American people.

And, Mr. president, we in Congress have a unique role in promoting investor confidence.

We have a duty to encourage critical investments—it is needed for capital formation—it is needed for economic growth and job creation.

This is especially true in my home State of Washington—where many consumers invest in small high-technology companies.

For Washington State and for the entire country—we must be vigilant to ensure proper protection for investors.

That is why I am a big supporter of the work of the Securities and Exchange Commission: Chairman Arthur Levitt and his staff do a great job in exposing fraud and protecting even the smallest of investors.

Section 105 of this bill gives the SEC new authority to sue for damages from securities fraud—so that victims of fraud will recover more of their losses.

Right now, Americans—who have been defrauded—have been getting only pennies on the dollar for their losses. Victims of fraud deserve better; they deserve more. This bill will help change that.

Mr. President, that is why this bill is so critical. It returns some common sense to our legal system.

I have been pleased to work with my good friend from Connecticut, Senator DODD, on this legislation. He has provided real leadership on this issue together with the distinguished chairman of the Budget Committee, Senator DOMENICI.

This bill is the best of bipartisan cooperation—it passed the Banking Committee by a vote of 11 to 4, with the majority of Democrats, voting in favor of this much needed reform.

I have heard from so many people in my home State of Washington on this issue. Many have told me the present system operates at the expense of the investors it was intended to protect—everyday, hardworking Americans.

We have all heard the stores of court cases which diminish investments. They inhibit job creation. They slow economic growth.

How many times do small business people settle suits out of court just to make them go away?

And, as I said, how many times do small investors—who have actually been the victims of fraud—only receive pennies on the dollar of their investment?

This bill returns power and benefits to the little guy. Sections 101 and 102 of the D'Amato substitute are critical in this regard.

This reform will provide a mechanism for real plaintiffs—instead of a few lawyers—to take charge of the cases.

That way, the interest of plaintiffs are taken into account.

And, investors are the ones who lose money when fraud occurs—they have a right to have more of a say in steering the course of litigation.

Right now, small investors lose out—we all lose out—because company resources are wasted on settling suits, instead of inventing new products.

Biotech companies waste their resources on settling nuisance lawsuits instead of finding the cure for AIDS and breast cancer.

High-technology companies waste their time and resources on legal fees—instead of giving us a cutting technological edge that will bring us into the 21st century.

I have heard from many of these companies in my home State. Companies such as these—new, growing, forward-looking—are a point of civic pride in the Pacific Northwest. They reflect the high-technology, high-wage economy of the future.

I have real letters from real people expressing the importance of this bill. I ask unanimous consent that these letters be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

THE NORTHERN GROUP,
Seattle, WA, June 1, 1995.

Senator PATTY MURRAY,
U.S. Senate, Washington, DC.

DEAR SENATOR MURRAY: I would like to voice my strong support for Senate Bill 240. This long overdue legislation is critical to the continued success of our nation's entrepreneurial underpinnings.

It is unfortunate that our judicial system has allowed a small group of unscrupulous attorneys to create such havoc among the community of public companies, particularly given the evidence that shows the lawyers as primary beneficiaries.

Enough! S. 240 deserves your full support.

Sincerely,

GLENN KALNASY,
President.

IMRE CORP.,
Seattle, WA, June 7, 1995.

Re Senate Bill 240.

Hon. PATTY MURRAY,
U.S. Senator, Washington, DC.

DEAR SENATOR MURRAY: We urge you to continue to support SB 240, a bill which would reduce the ability of parties to bring groundless stockholder suits. IMRÉ Corporation is a small, publicly held, biomedical company which is seeking to develop therapeutic products to treat patients with certain immunologically mediated conditions such as rheumatoid arthritis and difficulties with kidney transplants. Given the investor environment for biotechnology companies, wide fluctuations in a company's stock price can occur because of rumors, perceptions, and other factors outside the control of the company.

While there are circumstances in which shareholder suits should be brought to protect investors, many stockholder suits which are filed are based solely on a sudden drop in stock price which may have nothing to do with information that was or was not disseminated to the public by the company. Groundless shareholder suits consume vital corporate resources that should be used for more productive purposes such as research and development.

If we can be of any assistance in answering questions that you or your staff may have about this subject matter, please call me at (206) 298–9400.

Sincerely yours,

EDWARD M. YOSHIDA, ESQ.,
Director, Legal Affairs.

WASHINGTON NATURAL GAS,
Seattle, WA, May 25, 1995.

Hon. PATTY MURRAY,
Senate Russell Building, Washington, DC.

DEAR SENATOR MURRAY: I am writing to urge your support of S. 240, the Private Securities Litigation Reform Act of 1995. This legislation, designed to curb abusive securities suits, is very important to Washington Energy Company (WECO). We believe that it is time to restore balance and fairness to the securities litigation system.

The number of shareholder suits have escalated dramatically in recent years. Many are unsubstantiated, however, companies are forced to address them in protracted and extremely costly processes. In addition, these suits may produce indirect expenses, such as insurance costs and stock price fluctuations. As you may know, Washington Energy Company currently is involved with a shareholder suit. While the court dismissed the claim as one without merit, we've been forced to commit considerable resources. These costs will continue to climb as the decision has been appealed.

S. 240 seeks to establish disincentives against filing frivolous suits. It encourages voluntary disclosures, transfers control of suits from lawyers to investors, and enhances ways to address bona fide shareholder claims.

The Senate Budget Committee soon will be considering the "Chairman's Mark" which reflects a good compromise. Your support would be greatly appreciated.

Sincerely,

WILLIAM J. WORTLEY,
Vice President Public Affairs.

KEY TECHNOLOGY, INC.,
Walla Walla, WA, June 5, 1995.

Re S. 240, The Securities Litigation Reform Act.

Hon. PATTY MURRAY,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR MURRAY: I am writing to express my support for the provisions in the Private Securities Litigation Reform Act (S. 240). This reform will benefit the growth of companies, like Key Technology, that provide jobs and economic expansion in our local communities. In addition, the proposed reform will provide protection for those who have invested these companies.

It is important that we work to provide a more fair basis on which to establish the degree of liability for defendants, to provide a safe harbor for statements by a company regarding future economic performance, and to put an end to litigation suits filed without any substantial evidence.

I am pleased to see that you are a co-sponsor of S. 240 and encourage your continued support of this needed reform. Thank you for taking a leadership position on this important issue.

Sincerely,

TOM MADSEN,
President.

WHIRLPOOL CORP.,
Benton Harbor, MI, May 24, 1995.

Hon. PATTY MURRAY,
U.S. Senate, Washington, DC.

DEAR SENATOR MURRAY: As a company with a constituent facility in Redmond, I am writing to request your support of the Securities Litigation Reform Act. Senate Banking Committee Chairman D'Amato's substitute for S. 240 is scheduled to be marked up in the Senate Banking Committee on Thursday, May 25, 1995.

We especially request your support for a "safe harbor" which would correct the "chilling effect" on voluntary disclosure of information to investors by providing companies with protection from investor lawsuits based upon forward-looking information. Disclosures that would be protected by a safe harbor provision are predictive statements on business trends, possible price movements and other market factors which investors want and expect companies, such as Whirlpool, to provide.

Unfortunately, the threat of private securities litigation, should these predictions not be realized, is causing many companies to hesitate before sharing such information. A strong safe harbor provision will help correct the chilling effect on disclosure and will force American businesses to redirect their focus away from baseless lawsuits. In turn, this will allow us to redirect scarce resources toward competing more effectively in the global market place.

Thank you for your consideration of this important issue. Please support the Securities Litigation Reform Act with a safe harbor provision as it is considered in future Committee and Floor action.

Very truly yours,

ROBERT KENAGY,
Associate General Counsel.

DARWIN MOLECULAR CORP.
Bothell, WA, June 6, 1995.

Hon. PATTY MURRAY,
U.S. Senate, Washington, DC.

DEAR SENATOR MURRAY: I am writing on behalf of Darwin Molecular, a start-up biotechnology company based in Bothell. It has come to our attention that the U.S. Senate is contemplating SB 240, a bill that would dramatically reduce the ability of lawyers to file meritless stockholder lawsuits. I am writing to encourage your continued support for this bill.

As you well know, high technology business and especially biotechnology companies face many uncertainties on the road to produce development. This is an industry whose potential may continue to be in jeopardy because of the inherent difficulty of balancing out the financial opportunities and obligations against truly innovative scientific and medical productivity. It is difficult enough to raise sufficient funding to do useful and beneficial research without the additional burdens imposed by other types of ''risks'' often from individuals who may be looking to enhance their own situations. New companies in particular are vulnerable to these risks.

Reform legislation in this area would be extremely beneficial not only to assist companies but most importantly to provide a more productive marketplace for the ultimate beneficiary, the consumer.

We thank you for your support of this bill.

DIANE ISONAKA,
Director, Scientific and Business Development.

CONDUCTIVE RUBBER TECHNOLOGY, INC.,
Bothell, WA, June 6, 1995.

Hon. PATTY MURRAY,
U.S. Senator, Washington, DC.

DEAR SENATOR MURRAY: As the President of a small, high-tech company in Bothell, Washington, I am concerned about the S. 240 legislation drafted to curb the extravagant number of meritless lawsuits filed against high tech companies. As it now stands, the bill has been altered from its original intent and purpose and no longer provides the ''safe harbor'' provision for forward-looking and predictive statements by companies.

S. 240 is a modest, reasonable and balanced piece of legislation which assured the right of private action as a deterrent to fraud. The high-tech community has acted very responsibly in their desire to provide access for truly defrauded investors to sue for recovery. The U.S. House of Representatives has already passed Securities Litigation Reform Legislation by a veto-proof majority of 325 to 99.

I am asking you to support the original intent and purpose of S. 240 by cosponsoring the bill and further to add your vote to strengthening amendments for safe harbor, without which reform will be meaningless for the high-tech community.

Please give your unqualified support to this important bill. I look forward to the successful passage of S. 240 as soon as possible.

Best regards,

R.B. LAWRENCE,
President.

LEASE CRUTCHER LEWIS, CONTRACTORS,
Seattle, WA, June 8, 1995.

Hon. PATTY MURRAY,
U.S. Senate, Washington, DC.

DEAR SENATOR MURRAY: I understand that the U.S. Senate is considering a bill (SB 240) which would reduce frivolous stockholder lawsuits. As both a small investor and an employee of a company that provides services to high technology companies, I strongly encourage your support of such legislation.

High-tech companies, particularly high risk biomedical companies, are susceptible to what amounts to extortion by attorneys bringing meritless lawsuits. By nature, their stock values fluctuate widely, and almost any sharp drop can trigger a stockholder suit.

Officers of high-tech companies have become so fearful of stockholder suits that disclosure of information of any type can be a risky proposition. Such an intimidating business atmosphere stifles the entrepreneurial spirit found in most young high-tech enterprises.

Unscrupulous attorneys have stunted the growth of high-tech companies, have cost the small investor money, and have made themselves rich in the process. Again, I strongly encourage your support of SB 240, as such legislation is a positive step in limiting stockholder suits to only those cases which have merit.

Respectfully,

MARK JOHNSON,
Division Manager, Biomedical Projects.

EAGLE HARDWARE & GARDEN,
June 2, 1995.

Hon. PATTY MURRAY,
Russell Senate Office Building, Washington, DC.

DEAR SENATOR MURRAY: I want to express our thanks and appreciation for your vote for Senate Bill 240. It is very important for businesses and employees in the state of Washington.

Eagle Hardware & Garden, Inc. had a basically unfounded class action suit filed against the company by Steve Berman. It was a frivolous suit and the insurance company will settle the case, but we know these suits can damage a fledging company and affect the price of the stock for all shareholders.

Again, your vote for Senate Bill 240 is greatly appreciated.

Very truly yours,

DAVID J. HEERENSPERGER.

HI-REL LABORATORIES,
Spokane, WA, June 2, 1995.

To: Senator Slade Gorton, Senator Patty Murray.

DEAR SENATORS: I would like to take a moment and thank each of you for being cosponsors for S. 240.

As you know, we need strong laws to protect the rights of the people, However, business needs support on many laws which cause great harm.

We urge you to continue to support this bill and hope that you will work hard to convince others that this bill as written, needs to be passed and not a watered down version,

Hi-Rel Laboratories, Inc, and the American Electronics Association will always stand behind a person who in fact has a legitimate suit against a company, but to have the suits for no reason other than to be able to settle a suit on an un-earned basis just to make sure the defense lawyers have income, borders on fraud.

Thank you again for the support.

Respectfully,

JOHN LEVEL,
VP Gen. Manager.

Mrs. MURRAY. I want to read just a portion of another letter I received. It is from Michael Darling, who wrote:

> Digital Systems International settled two securities cases in 1993 for payments of cash and stock valued at $7.5 million, not including litigation expenses. The costs of the litigation forced the company to lay off 30 workers—and to ask those remaining to accept pay cuts.

Mr. President, I have also heard from the opponents of the legislation. I have listened carefully to every argument against the bill. I have worked to make this legislation good for all the parties involved.

In fact, I have studied this issue for more than 2 years with members of both sides of the aisle—in a strong bipartisan fashion—to make this bill work for the American people.

As we debate this bill, there are ads running in the papers and inflammatory attack ads being broadcast by both sides in this debate. Given the lengthy debate we have had on this bill, I find these campaigns very disturbing.

Let me say to these groups, Mr. President, they are not serving anyone's purpose but their own.

They are not helping craft legislation that works for America—they are slugging it out trying to seek advantage.

I stand here on the floor today and say clearly to both sides of this issue—

Keep things in perspective. Use some common sense. Stop attacking and start cooperating.

Mr. President, I have seen some unfortunate—and inaccurate—statements made about this bill. Many have referred to an editorial from a Seattle newspaper which overlooked some of the bill's most important provisions.

First, their editorial states that high-profile, meritorious cases of securities fraud could not be brought once S. 240 becomes law.

That is simply not true. The SEC can always fight fraud, and they do so with vigor and clear purpose.

This point is made quite clearly in the committee report:

> None of the provisions in S. 240 affects the SEC's ability to bring enforcement actions.

Second, the editorial stated the bill contains a loser-pays provision.

Again, this is untrue. S. 240 does not contain any fee-shifting provisions.

It merely modifies rule 11 of the Federal Rule of Civilian Procedure. And, rule 11 does not sanction anyone just for losing their case.

This provision actually favors the small investor. S. 240 states that the sanction does not apply if it will cause undue financial hardship on the sanctioned party.

Mr. President, this editorial has been challenged aggressively by public officials, business people, and many constituents in my State. I now ask unanimous consent to have printed in the RECORD a series of letters-to-the-editor to Washington newspapers on this issue.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From Seattle Post-Intelligencer, June 19, 1995]

EDITORIAL ON FRAUD LAW SHOWS HOMEWORK WASN'T DONE

(By John Level)

Your June 2 editorial regarding Sens. Patty Murray and Slade Gorton was certainly not good reporting. Both senators became co-sponsors of S. 240 because the bill is long overdue. If you had done your homework, you would have found the following information.

High-growth companies have become targets of abusive securities litigation. There are about 300 lawsuits filed in each of the past few years. Ninety-three percent are settled before they go to court with settlements that amount to $8.6 million or a $2.4 billion a year industry.

The only reason that these cases are settled out of court is that it is cheaper in the long run. The trail lawyers are the only big winners in these suits. In many cases, over 60 percent of the settlement goes to the legal system.

Nearly seven out of 10 investors surveyed by Public Opinion Strategies for the National Investor Relations Institute say they want the bill passed. The only people who do not want the bill passed are the lawyers, people who make a living from lawsuits and some people who have not read the bill or even seen it. I suspect that is the case with you.

Your editorial was written without a full understanding of the bill, and your remarks about Murray are fully uncalled for. A retraction should be made to her. While I don't agree with Murray all of the time, she certainly made a good decision in supporting this bill and it appears that she ''read'' it.

[From Seattle Times, June 7, 1995]

INVESTORS RETAIN RIGHT TO SUE

(By Scott G. Hallquist)

The misleading information printed by The Times concerning securities litigation reform has been a disservice to Times readers. In both an editorial published May 29 and a news article published May 31, Times writers incorrectly suggested that the proposed legislation will strip investors of their right to sue companies for fraud. This is simply not true.

The legislation to be considered by the Senate represents a negotiated compromise that preserves an investor's right to sue, while implementing reforms intended to curb lawsuits that are filed without reasonable basis.

By providing a safe harbor for forward-looking company forecasts made in good faith, the legislation is expected to improve the quality of information companies can make available to investors.

Most troubling to me was a personal attack upon the integrity of Sen. Patty Murray by a local attorney who specializes in securities litigation. Unlike her accuser, I do not believe that Sen. Murray can be ''bought off'' and applaud her courage for voting in favor of this legislation.

In our securities markets, the ability of individual investors to sue for damages for fraud by securities issuers does provide an important incentive for companies to provide accurate and timely information to investors. In approving the legislation now being considered by Congress, Sen. Murray and other members of Congress balanced the need to preserve redress for investors in fraud cases, against the need for public companies to be able to discuss future performance without the fear that unanticipated developments will invariably result in costly and protracted litigation.

Growing public companies are primary engines of job creation and economic growth in our state. Appropriately balanced legislation such as the securities litigation reform bill supported by Sen. Murray is a reasonable step that need not be feared by individual or public investors.

[From Seattle Times, June 19, 1995]

REFORM MEASURE DOESN'T LIMIT LIABILITY OF ACCOUNTING FIRMS

(By John A. Moga)

Your May 29 editorial and your May 31 news report on congressional efforts to repair a securities litigation system that is drowning investors and businesses in a sea of unmerited lawsuits included a number of disturbing factual errors.

Your report that legislation (S. 240) introduced in the Senate by Republican Sen. Pete Domenici would relieve accounting firms of liability is simply not true. Rather, the bill establishes a system of proportionate liability that would base liability on a defendant's degree of responsibility for any plaintiff damages. In cases of ''knowing fraud'' where the defendant was guilty of deliberate misconduct, the defendant would remain liable for the total amount of damages assessed by the court. By the way, this provision applies to all defendants—not just accounting firms as you suggest.

The report also erroneously says that the bill eliminates the ''fraud on the market'' provision of current law. This, too, is untrue. S. 240 retains fraud on the market—which enables shareholders to recover even when they are unaware of the erroneous statement—an important provision for investors.

Finally, I was distressed by the flat assertion in your editorial that the proposed reform measures strip investors and government of their right to sue. Neither the Senate bill nor a measure passed by the House earlier this year does any such thing. I believe you should re-visit this issue and make sure you have all the facts right. Your readers deserve it.

LAWYERS THE ONLY ONES TO REAP BENEFITS

(By Austin L. Wolff)

Your editorial in defense of the current class-action securities law is very wrong. You have not looked at the real issue. Stockholder class-action suits enrich the lawyers at the expense of the stockholders and the consumer.

Most suits against small public companies are never proved but instead settle out of court because, regardless of right or wrong, it is cheaper to pay than to defend. A word that would describe this type of settlement is ''blackmail.'' Carol Bartz, president of Autodesk, a CADD software company, explained it this way at President Clinton's business conference. A lawyer, using the name of a couple of shareholders, instigated a class-action suit. Autodesk's lawyers reviewed the claim and concluded that the company was not in the wrong but advised the company to pay $10 million because it would cost $100 million to defend. That is called a ''negotiated'' settlement.

In a recent stockholder case against Egghead, the Issaquah-based software retailer, I personally heard the judge approve a similarly arrived-at settlement that paid the suing lawyer about $700,000, which computes out at the rate of $700 per ''billable'' hour. That is almost 200 times minimum wage.

The two stockholders in whose name the suit was brought had lost a total of less than $1,200. The managers who were running the company at that time paid nothing because they were covered by a company guaranty. The total cost to the company, and thus to the rest of the stockholders, was in the order of $3 million, plus the loss of much management and employee time. Among those stockholders, and thus among those who in essence paid, was my nephew, a minor, whose savings account for college was invested in the company. . . .

The judge implied that settlements like this would encourage more such suits. Woe to small businesses, woe to the investing public.

There are adequate criminal laws regarding fraud that are handled by state and federal agencies; let those agencies prosecute. . . .

[From Seattle Post-Intelligencer, June 16, 1995]

EDITORIAL FAILS TO ACKNOWLEDGE THE NEED TO REFORM EXISTING LAW

(By Dan Grimm)

As state treasurer and a member of the State Investment Board, I read with interest your June 2 editorial on securities litigation reform. The SIB has been involved in costly and protracted litigation involving allegations of securities fraud. (Your editorial noted the SIB's recent recovery of $1 million in the settlement of a securities fraud case. And like some corporations, the SIB has had to deal with hastily drafted lawsuits filed by attorneys who were out to make a quick buck.

I was disappointed that you failed to acknowledge the need to reform the securities litigation law. The fact is, many organizations representing investors and government entities support legislation designed to deter costly and frivolous litigation while preserving vital investor rights and remedies.

Your editorial correctly pointed our that legislation under consideration by Congress could unduly burden investors and limit their access to the courts. That's why I sent a letter to our Senate delegation urging them to oppose legislation that does not strike an appropriate balance between the concerns of investors and corporations.

I have been in contact with Sen. Patty Murray to share those concerns, and contrary to the assertions of your editorial, she shares the view that securities-reform legislation must protect the rights of investors as well as address the problems of frivolous lawsuits. In fact, Murray was instrumental in making sure that legislation under consideration by Congress will reasonably protect the rights of small and large investors. With her assistance, the draconian ''loser pays'' provision was tempered in the Banking Committee. I am optimistic that Murray will be successful in her efforts to see that other anti-investor language is moderated or even removed from the bill as it moves through the Senate.

Mrs. MURRAY. Mr. President, this system needs reform. S. 240 will retain the rights of investors to bring suit if they have been the victims of securities fraud.

At the same time, it will clamp down on the abusive suits that prey on investors and small business owners.

It is an honest effort to reduce the excessive costs to investors and our economy. It enjoys bipartisan support.

It is a good compromise.

For those of us concerned about the rights of investors—let me be very clear.

It is absolutely critical to me that businesses and entrepreneurs remain bound to their obligations to maximize the return-on-investment—to seniors

and average American families who invest in stocks and bonds.

I will not support a bill which goes further than this in changing the current system.

I will not support a loser pays provision.

I will fight efforts to remove the protections for small investors in the bill.

I will reject any legislation that takes away the SEC's powers to fight fraud.

These are lines I will not cross, and in fact, no Senator should cross.

They set my standards publicly for Senators offering amendments today—and Senators who go into conference with the House.

As it stands now, S. 240 brings rationality and perspective and common sense to the system.

And, I urge its swift adoption.

Mr. LEAHY. Mr. President, I have many questions about S. 240, the so-called Private Securities Litigation Reform Act. This bill is intended to curb frivolous lawsuits by private investors claiming securities fraud. But I fear that this bill would also stifle honest lawsuits. I cannot support a bill that will infringe on the rights of innocent securities fraud victims.

Our Federal securities laws provide enforceable legal rights to the Securities and Exchange Commission (SEC) and private investors. The ability of private investors to enforce their rights is indispensable to enforcing our Federal securities laws. As one former Commissioner of the SEC said:

> Because the Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions preform a critical role in preserving the integrity of our securities market.

A perfect example of this critical role is the securities fraud case involving Charles Keating, known for his role in the largest savings and loan debacle in U.S. history. After Keating, as president of the Lincoln Savings & Loan of California, sold uninsured bonds in the lobbies of Lincoln branches by making misrepresentations, private investors sued under our Federal securities laws. A class of 23,000 investors recovered $240 million of their $288 million in losses through private securities fraud actions.

I am sure that the vast majority of professionals working in the securities industry strive to provide accurate information and there are some abuses of the private securities litigation system. This legislation would, undoubtedly, curb many of these abuses. For instance, I support the bill's provisions to prohibit lawyers from paying bounties to professional plaintiffs, those who buy a few shares of different stocks so they may bring shareholder suits for a living.

But this bill also overreaches beyond these abuses and penalizes innocent investors. Under S. 240, for example, aiders and abettors cannot be sued in private securities actions, even if they knowingly assist securities fraud. The defendants in the Charles Keating case whose liability depending on aiding and abetting, which included Keating's lawyers, accountants and consultants, paid over $100 million to fraud victims.

In addition, the nonpartisan Congressional Budget Office estimated that enactment of S. 240 would increase costs to the SEC for enforcement actions by $125 million to $250 million over the next 5 years. In these tight budget times, I am very doubtful that Congress will increase the SEC's budget by such a large amount. As a result, enforcement of our securities laws will suffer.

I have heard from many Vermonters, including the commissioner of the Vermont Department of Banking, Insurance and Securities—the State's chief securities regulator—who feel S. 240, as reported by the Senate Banking Committee, would severely limit private actions under securities laws. Vermont institutional investors, such as the Towns of Colchester, Brandon and Stowe, Teamster Union Local 597, the Vermont NEA, AFSCME Council 93, the Vermont State Labor Council and others have also alerted me to their opposition to this bill. Vermont consumer and senior groups including Vermont Public Interest Research Group, Council of Vermont Elders, Older Women's League, Southwestern Vermont Council on Aging and the Central Vermont Council on Aging opposed S. 240. Moreover, the Commissioner of the SEC—the national's chief securities regulator—also has significant concerns about S. 240 as reported.

I believe we are moving too fast on this bill, ignoring the SEC and others concerns. That is why I supported a motion on the Senate floor to refer this bill to the Senate Judiciary Committee, of which I am a member. This legislation would make significant changes to Federal litigation rules and should be carefully reviewed by the Senate Judiciary Committee before the full Senate votes on it. Unfortunately, that motion was defeated.

Thousands of Vermonters and millions of Americans depend on our Federal securities laws to protect their investments, savings and retirements. These laws are just too important to add questionable curbs that may protect companies and individuals who commit fraud at the expense of innocent investors. Unless this bill is significantly amended, I will vote against it.

UNANIMOUS-CONSENT AGREEMENTS

Mr. D'AMATO. Mr. President, I would like to propound a number of unanimous consent agreements which we have worked out in order to accommodate Members and in order to move the legislative flow.

I ask unanimous consent that Senator Bryan be recognized to offer an amendment relative to aiding and abetting on which there will be 1 hour for debate to be equally divided in the usual form, and any second-degree amendments may be limited to half that debate time, and must be relevant in the first degree they propose to amend.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I further ask that following the debate on the Bryan amendment, the amendment be laid aside, and Senator Boxer be recognized to offer an amendment relative to lead plaintiffs, on which there will be 90 minutes for debate equally divided in the usual form, and any second-degree amendment be limited to half the debate time and must be relevant to the first-degree amendment they propose to amend.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I further ask that at 9:15 on Tuesday, the Senate resume consideration of S. 240, and that there be time for 30 minutes of debate on the Bryan amendment to be equally divided in the usual form, and following that debate there will be 30 minutes for debate on the Boxer amendment, to be equally divided in the usual form.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I ask unanimous consent that at the hour of 10:15 on Tuesday, the Senate proceed to vote on or in relation to the Bryan amendment, to be followed immediately by a vote on or in relation to the Boxer amendment, with 2 minutes prior to the second vote for Senator BOXER in the usual form, to set forth an explanation, 1 minute on each side.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I further ask, following the two stacked votes at 10:15, Senator SARBANES be recognized to offer an amendment relative to safe harbor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I ask unanimous consent that Senator ABRAHAM be recognized, and that the time he utilizes be charged against the time that we would be allocated in considering the Bryan amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ABRAHAM. Mr. President, I rise today to express my support for S. 240. This legislation makes a number of important reforms that are designed to prevent abuse in litigation connected with the issuance of securities.

This in turn will improve the investment climate in this country, which will make it easier to start businesses and create jobs.

These changes will be made without, in my judgment, in any way undermining protection for investors against genuine fraud or other misconduct by issuers.

There is one particular set of reforms the bill would make on which I would like to focus. The bill will require courts to sanction attorneys who file

frivolous pleadings. This reform will apply when the lawyers file frivolous proceedings on behalf of plaintiffs and on lawyers filing on behalf of defendants. I think it is an extremely sound proposal which should command strong support from Members on both sides of the aisle.

Indeed, as the Presiding Officer will recall, he himself offered a similar provision with regard to the product liability issue some weeks ago, a provision which I supported and which a majority of Senators supported at that time.

Mr. President, under present law, Federal Rules of Civil Procedure No. 11 requires all attorneys to have some factual and legal basis for filing any claim or defense. If attorneys violate this requirement, courts may award sanctions against the violator. Right now, however, the courts are not required to take any action against the violator.

The changes proposed by S. 240 would do three things. First, they would require courts to find, at the end of all securities cases, whether any attorney violated rule 11. Second, the court would then have to impose a sanction if they found a violation. Third, that sanction would presumptively require the attorney in violation to pay the other side's attorney fees, although the court could select another sanction if the attorney shows that the presumptive sanction would impose an undue burden on the sanctioned party.

Two important features of this reform should particularly be known. First, the court would only be obligated to impose a sanction on an attorney who filed a frivolous pleading; that is, a pleading wholly lacking in a legal or factual basis. This reform will in no way kill legitimate litigation.

Second, the sanction is paid by the person signing the frivolous pleading; that is to say the attorney responsible, not by the party the attorney is representing.

The Supreme Court itself has noted the securities litigation has been especially prone to be misused as a tool to extort settlements. It is Congress' responsibility to do something to put an end to this abuse. The rule 11 provisions are one mechanism this legislation puts in place to do just that.

This leaves me, however, with one problem about what we are doing here this week. It is certainly good we are taking serious steps to enact litigation reforms that will address abusive practices in the securities area. Similarly, it was good we took similar steps to enact reforms that address abusive practices in the field of product liability, which we did just a few weeks ago.

I ask, Mr. President, why are we stopping here? Brokerage firms, accountants, and manufacturers, and the people who buy their products or use their services, are far from the only victims of our out-of-control civil justice system.

Our homeowners, farmers, volunteer groups, charitable organizations, small businesses, State and local governments, architects, engineers, doctors and patients, employers and employees, are likewise injured by our civil justice system on a daily basis.

Every day, lawsuits suffering from the same defects as those the sponsors of this litigation have brought up are filed against all of these people.

Indeed, when their plight was brought to the attention of the Senate during the product liability debate, along with several other colleagues, I led an effort to broaden the reforms that bill would have made.

We wanted reforms that would benefit all Americans. A majority of Senators supported many of our broadening proposals, yet the will of that majority was frustrated by opponents of broader reform, who made clear they would filibuster a bill that made civil justice reforms that would benefit all Americans. I considered mounting a similar effort in conjunction with this bill, but sponsors of this legislation were assured that it would suffer a similar fate. Therefore, and with some regret, I yielded to their request not to offer broadening amendments at this time. However, I do not believe the Senate can forever avoid confronting the fact that, while it is making important reforms in specific areas of civil justice, it is refusing to make broad-based reforms that will help small businesses, charities, and other institutions that form the backbone of this country. I, for one, will continue to bring these reforms up, again and again. I will not rest until broad-based reforms to our civil justice system are adopted.

Mr. President, I think it is important that we take the actions we take today to protect the people in the securities industry and people who are shareholders in corporations that are affected by these frivolous lawsuits, just as I think it was appropriate that we take those actions in conjunction with product liability actions. But across America, every day the small business people, the farmers, and the charitable organizations in our communities suffer from frivolous lawsuits brought against them. They suffer when the joint and several liability provisions cause deep pockets to end up paying for damages they had virtually no connection with creating. I think it is time for across-the-board reforms that protect, not just certain areas of civil justice, but all areas.

For those reasons, I intend to come back to this Chamber at a future time to offer some of those types of reforms, and I look forward to working with other Members of the Senate who agree we need them and we need them soon.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. D'AMATO. Mr. President, I commend my colleague from Michigan because he does have, and has had, a number of proposals that I believe would have strengthened the bill. He has agreed, in order to get legislation that would pass and begin to address some of the shortcomings in the present system, to withhold them—I deeply appreciate that—so we can make some progress. I fully anticipate in the future he will go forward with those legislative initiatives.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

AMENDMENT NO. 1474

(Purpose: To amend provisions relating to liability for aiding or abetting violations)

Mr. BRYAN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Nevada [Mr. BRYAN], proposes an amendment numbered 1474.

Mr. BRYAN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 127, strike line 20 and all that follows through page 128, line 15, and insert the following:

SEC. 108. AUTHORITY OF COMMISSION TO PROSECUTE AIDING AND ABETTING.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

''(n) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (b) and (d), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule or regulation promulgated under this title, shall be deemed to violate such provision to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of a duty owed by such person.''.

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 20 of the Securities Exchange Act of 1934 (15 U.S.C. 78t) is amended—

(1) by adding at the end the following new subsection:

''(e) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of paragraphs (1) and (3) of section 21(d), or an action by a self-regulatory organization, or an express or implied private right of action arising under this title, any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule or regulation promulgated under this title, shall be deemed to violate such provision and shall be liable to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of a duty owed by such person.''; and

(2) by striking the section heading and inserting the following:

''SEC. 20. LIABILITY OF CONTROLLING PERSONS AND PERSONS WHO AID OR ABET VIOLATIONS.''.

(c) INVESTMENT COMPANY ACT OF 1940.—Section 42 of the Investment Company Act of 1940 (15 U.S.C. 80a–41) is amended by adding at the end the following new subsection:

''(f) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (d) and (e), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule, regulation, or order promulgated under this title, shall be deemed to violate such provision to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of a duty owed by such person.''.

(d) INVESTMENT ADVISERS ACT OF 1940.—Section 209(d) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9) is amended—

(1) in subsection (d)—

(A) by striking ''or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation,''; and

(B) by striking ''or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice''; and

(2) by adding at the end the following new subsection:

''(f) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (d) and (e), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule, regulation, or order promulgated under this title, shall be deemed to violate such provision to the same extent as the pension to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of duty owed by such person.''.

Mr. BRYAN. Mr. President, I yield myself such time as I may require.

Mr. President, our colleagues will recall, under the unanimous consent agreement propounded by our distinguished chairman, that this is an amendment that deals with restoring aiding and abetting liability. The amendment which I offer is to restore the state of the law as everyone in America believed it to be prior to last year's Supreme Court decision in a case involving Central Bank of Denver versus First Interstate Bank of Denver.

With one stroke of the judicial pen, so to speak, this 5-to-4 decision wiped out private liability for crooked professionals who aid and abet, but who are not defined as primary participants in securities fraud under the provision of the law. What we are talking about are those people who counsel and assist in furtherance of the perpetration of fraud. Some of them are disreputable lawyers—who ought to be disbarred. Others are accountants. Others are professionals who, by virtue of their own affirmative action, have aided and contributed to the securities fraud involved.

Aiding and abetting liability was the primary method through which professional assistors of fraud—these lawyers, accountants and investment banks—have historically been held liable to defrauded investors. In my view, if this decision is allowed to stand without action having been taken by the Congress, it will seriously weaken and erode the effectiveness of our Federal securities laws because it overturns three decades of established precedent in which Federal courts have permitted private investors to sue aiders and abettors of securities fraud.

Every circuit court of appeals to address the issue—11 circuits—has upheld aiding and abetting liability. Investors have long had the right to sue accountants, brokers, bankers and lawyers who, by their actions, have assisted the primary perpetrators of such securities schemes. This right of action has played a critical role in compensating those investors who have been swindled in major financial frauds of recent times. I will comment a bit more on that in just a moment.

The damage caused by the Central Bank decision is immeasurable. Dozens, if not hundreds, of participants in securities frauds have had cases against them dismissed on the basis of the Central Bank decision. An unknown number of other cases against clear wrongdoers have been precluded, based on the Central Bank decision. And the deterrence of securities fraud, which ought to be one of the prime reasons for the law in the first place, has suffered a major blow. The problem is that in immunizing wrongdoers who substantially assist fraud, we clearly give fraudulent behavior a green light.

I cannot think of any argument that could be advanced, as a matter of social or economic justice, in which we ought to reward fraudulent behavior on the part of those who aid and abet a primary perpetrator in a securities fraud to the detriment and loss of literally tens of thousands of innocent investors. Under the Central Bank case, it is simply OK to help others commit securities fraud so long as you are careful not to make any direct statements or direct the wrongdoing.

I know a good bit of animosity is directed to America's lawyers, and I must say that I am not happier than anybody else who has seen in America, speaking generically, a proliferation of a lot of litigation that ought not to be filed. If I might cite an outrageous case in my own State that has nothing to do with the issue currently, but it is the kind of case that just engenders real hostility on the part of the public—and count me on the part of those being hostile. It is a person who, under the workers compensation law in our State, had been denied recovery. Subsequent to that, he drove his automobile into the worker compensation office in the Las Vegas area, nearly killed several people who were working, and then a year or two later had the temerity to file a lawsuit against the SIS, which is the worker compensation system in Nevada, blaming the system for causing his action in doing extensive damage to the building and literally terrifying those employees.

So I am not unmindful of the hostility that has been generated. But this is a case that rewards lawyers. If you are clever enough not to make a direct statement or participate directly in the wrongdoing, then you are home free. You do not go to jail, you go home free. I cannot imagine that is the sort of thing that we want to encourage.

To put this into some historical context, if this decision had been on the books earlier, the substantial recoveries by the victims in the Keating case—which is the Lincoln Savings and Loan case—would have been impossible. As you will recall, in the Lincoln Savings and Loan case, the primary wrongdoer was the nefarious Charles Keating. By the time the class action is filed, Mr. Keating is bankrupt.

There was a judgment entered of about $240 to $262 million in the class action. But about half, a little more than $100 million of recovery for the 23,000 bondholders, would have been denied to these 23,000 bondholders. These are people who are totally innocent, have no culpability at all other than the fact that they relied upon some representations made at the savings and loan which they kind of thought was a local, home-based outfit. Everybody knew each other. Mr. and Mrs. Smith would be greeted every morning. ''Have you walked your dog? Your cat?'' ''How are the grandkids doing?'' That sort of thing. But the aiders and abettors responded with more than $100 million of recovery that otherwise would have been denied to these 23,000 bondholders. Had this case, Central Bank, been the law, that $100 million recovery would not have been possible.

These are aiders and abettors, people who have assisted in the fraud. Again, if the scales of justice mean anything, should those who have aided and abetted, in terms of their own conduct, not be held responsible, to respond to damages incurred by their conduct to those who are totally innocent?

That is what this whole issue is all about. Federal District Judge Stanley Sporkin, a former SEC enforcement chief, in his opinion in the Keating case asked critical questions that sum up the theory behind aiding and abetting:

> Where were the professionals when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated?

In a subsequent speech, Judge Sporkin elaborated,

> For this kind of massive, very sophisticated fraud to have occurred, it required the complicity of certain professionals that we all know of—CPAs, lawyers and appraisers. I am suggesting that perhaps these professionals did not discharge their responsibilities to the broader public interest.

The responsibility of corrupt accountants and lawyers for the savings and loan debacle of the 1980's can hardly be overstated. On August 12, 1992, then SEC Chairman Richard Breeden wrote Senator DOMENICI:

> Securities fraud actions against accounting firms that participate in or assist in fraudulent activity by not properly

preforming their auditing functions are important to the maintenance of high standards of quality and integrity among public accounting firms.

Parenthetically, I should say I think the public has a right to expect that level of integrity.

Then Chairman Breeden went on to say:

Investors rely heavily on the accuracy of all of audited financial statements of public companies as do creditors, investment analysts and others. When others fail to adhere to generally accepted accounting principles or generally accepted auditing standards, many innocent parties may suffer. Indeed, inaccuracies in audited financial statements of banks and savings and loans have contributed billions of dollars in investor losses during the past 10 years. Public policy should seek to maintain high expectations of integrity and accuracy in the performance by others and accountants of their tasks.

Mr. President, that is what the Republican Chairman of the SEC had to say about the importance of holding aiders and abettors responsible for their actions.

A number of notable statistics from cases brought by the Federal Government highlight the importance of holding professional assistors liable: In 1990, the RTC banned six of the largest accounting firms—Ernst & Young, Deloitte & Touche, Coopers & Lybrand, Peat Marwick, Arthur Andersen, and Grant Thornton—from receiving thrift reorganization work because they were being sued by the Government for failure to perform their audits of S&L's in a professional manner.

According to the General Accounting Office, when all categories of professionals are considered, Resolution Trust Corp. attorneys suspected wrongdoing on the part of one or more professionals affiliated with over 80 percent of failed thrift institutions. More than 80 percent. There is some indication that professionals were responsible, and attorneys in particular were suspected of wrongdoing.

In one astounding example of the pervasive role of accountants in S&L wrongdoing, a Federal judge stated in 1992 that:

[The Office of Thrift Supervision] advised the court that approximately one-third of the 690 financial institutions that have failed were audited by Ernst & Young or its predecessor.—*Director of the Office of Thrift Supervision* v. *Ernst & Young*, 786 F. Supp. 46, 52 (D.D.C. 1992).

In a speech before the American Bar Association, Timothy Ryan, former Director of the Office Thrift Supervision, stated:

The federal agencies have uncovered actionable abuse in a third of the failed thrifts investigated to date. It is clear that many of the unlawful scheme hatched at those failed institutions could not have proceeded without the active assistance of professional service providers, especially lawyers. They have abandoned their ethics for expediency, and sold their good name to satisfy their greed.

Mr. President, the point I seek to make is that unless the law is changed, that kind of conduct, so articulately denounced, will remain unpunished and innocent investors will be unable to recover from lawyers, accountants, and other professionals.

So, Mr. President, the loss of aiding and abetting liability undermines fundamental protections for investors and the securities markets. Many defrauded investors will not recover their losses because, typically, the perpetrator of the fraud is insolvent, in jail, or has fled by the time the case is completed. In addition to wiping out private actions against aiders and abettors, the Central Bank case calls into question the SEC's own enforcement actions against aiders and abettors.

S. 240 fails to restore aiding and abetting liability for private actions. Although it authorizes the SEC to take action against aiders and abettors who knowingly violate the securities laws, it effectively eliminates the ability of the Commission to proceed against reckless professional assistors, which is now permitted by most courts.

This amendment, which was drafted with the technical assistance of the SEC, reverses the Central Bank decision, and restores the status quo ante. It restores the law to the way it was prior to the Central Bank case last year by restoring aiding and abetting authority in individual securities fraud actions and clarifying the SEC's authority to pursue aiders and abettors for reckless and knowing fraud.

The original sponsor of securities litigation reform, Senator DODD, has recognized the importance of aiding and abetting liability and has urged a response to Central Bank. At a May 12, 1994, hearing before this committee, he said:

In my view, aiding and abetting liability has been critically important in deterring individuals from assisting possible fraudulent acts by others. Until the Supreme Court changed the landscape a few weeks ago, aiding and abetting liability was an important tool in ensuring honesty and high professional standards by individual professionals who facilitate access to the securities markets. In my view, we need to respond to the Supreme Court's decision promptly and I emphasize promptly.

In a February 27, 1995, ''Dear Colleague,'' Senator DODD and Senator DOMENICI reiterated that a reversal of Central Bank should occur ''as a part of a comprehensive package to fix our broken securities class action system.'' In his additional views to the committee report on S. 240, Senator DODD again expressed his concern about the restoration of aiding and abetting liability for private actions.

Even the Supreme Court majority opinion in Central Bank which was based solely on the lack of the actual words ''aiding and abetting'' in the statute, recognized the need for restoring aiding and abetting liability. In the words of Justice Kennedy:

To be sure, aiding and abetting a wrongdoer ought to be actionable in certain instances. The issue, however, is not whether imposing private liability on aiders and abettors is good policy, but whether aiding and abetting liability is covered by the statute.

The SEC argued strongly in the Supreme Court that ''aiding and abetting'' liability was critical to enforcement of the Federal securities laws. Since the Court decision, the SEC has repeatedly urged Congress to restore aiding and abetting liability. Most recently, on April 6, 1995, SEC Chairman Arthur Levitt testified before the Subcommittee on Securities that:

Unless another theory of liability can be applied in a particular case, persons who knowingly or recklessly assist the perpetration of a fraud may be insulated from liability to private parties if they act behind the scenes and do not themselves make statements, directly or indirectly, that are relied upon by investors. Because this is conduct that should be deterred, Congress should enact legislation to restore aiding and abetting liability in private actions. Such legislation should also clarify the Commission's ability to use the aiding and abetting theory of liability where it is not expressly provided by statute.

Levitt previously testified that, of 400 pending SEC cases, 80 to 85 rely on aiding and abetting theories of liability.

I must say, Mr. President, as I read the current version of S. 240, even the ability of the SEC to recover for aiding-and-abetting liability seems to be more narrowly confined than those circumstances where there is knowledge or scienter involved.

On May 25, 1995, the day S. 240 was voted out of the Banking Committee, Chairman Levitt again raised the aiding-and-abetting issue, noting that, while some of the SEC's authority had been restored, ''a more complete solution is preferable.''

The bar association of the city of New York—undoubtedly the leading organization of plaintiff and defense attorney's in the securities field—has taken an extremely strong position on this issue. As Mr. Sheldon Elsen testified in the House,

Let me turn, finally, to lawsuits against lawyers, accountants, underwriters and other professionals. Experience in these cases has shown that securities frauds do not succeed very often without the aid of such professionals, but that it is almost impossible to prove the professionals' involvement . . . The Association feels particularly strongly about this matter, which involves lawyer misconduct. In our view, the primary problem of abuse by lawyers lies in the conduct of securities lawyers involved in fraudulent transactions.

That is a scorching indictment by the most distinguished and knowledgeable and the most sophisticated bar in America dealing with this subject. And it deals with lawyer misconduct. Thus our purpose here simply is to deter lawyer misconduct on the part of the plaintiffs bar, and that we certainly ought to do. If the changes which our able chairman has crafted to rule 11 do, indeed, deal with misconduct in the form of frivolous actions by the plaintiffs bar, why would we not also want to impose liability on lawyers, accountants and others who are helping

to assist in the perpetration of this fraud? The policy disconnect, Mr. President, I find difficult to comprehend.

Mr. President, as I have indicated previously, the securities regulators in their respective States also support this proposition. And it seems to me that in light of the indications that we have seen that the amount of securities fraud is estimated to be about $40 billion annually—the SEC has commented recently in an article which I shared with our colleagues on Friday that securities fraud is not something out of the 19th century; it is very much alive, very sophisticated—the sophisticated aiders and abettors, the clever lawyers, the smooth accountants who assist in this fraud behind the scenes, they ought to be brought to the bar of justice, and economic recovery for innocent victims is the way of achieving that economic justice.

I yield the floor and reserve the remainder of my time.

The PRESIDING OFFICER. Who seeks recognition? The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, I thank the Chair. I will try not to take a great deal of time on this. I have said privately, Mr. President, I am going to hire the Senator from Nevada as my lawyer if I am ever in need of a lawyer, after the Senator from New York apparently.

I have known the Senator from Nevada for a long time. No one is better in crystallizing an argument and making a thoughtful presentation on a point. Certainly we have seen his incredible ability here over the last several days on a number of amendments that he has offered to this bill.

On this particular issue of aiding and abetting, he has once again displayed those skills which should probably earn him a distinguished reputation as great debater of causes. But we disagree on this amendment. I say that because we agree on aspects of this. The tendency of these debates on amendments is to lose sight of where you agree.

One of the things this bill does do is, of course, extend to the SEC the authority to bring aiding and abetting cases, which was not the case prior to this legislation as a result of Supreme Court decisions so we have strengthened it.

Second, when it comes to the issue of fraud, knowing intentional fraud, we do not change anything in effect. The joint and several provisions apply. People who are knowingly involved in those activities, all can be subject to the maximum financial penalties.

What we are talking about here is a much lower standard and one that would apply, as the amendment indicates, to knowing or reckless behavior. It is a result of that standard and the amendment of the Senator from Nevada that I would take exception, particularly the recklessness standard. The knowing standard, if you could really tighten that up to some degree and actual knowledge, and so forth, I think you might have something that we would like to talk about. But the recklessness standard here is a standard that is so difficult to apply that it in effect would destroy the attempts of this legislation to mitigate against this explosion of unwarranted litigation in the area of securities.

Let me just, if I can, Mr. President, as a matter of background point out that until the Central Bank of Denver case was decided last year, many circuit courts recognized aiding-and-abetting liability.

I want to come back to that point in a minute because one of the points I wish to make here is that it is being implied or suggested if we adopt this amendment, all we are doing is going back and just applying the law as it was prior to the Central Bank of Denver case. I would argue very strenuously here in a moment that, in fact, we are going by and applying a different standard than existed prior to the decision on Central Bank of Denver and, in fact, going further back than I think the courts at least in many cases would like to see us go.

At any rate, that was the situation. Prior to Central Bank of Denver there was a controversy about aiding-and-abetting. In that case, the Supreme Court decided that there was no aiding and abetting liability for private lawsuits involving fraud and that in fact that idea evolved as a result of section 10(b), rule 10b-5. And many can argue, in fact, that probably was the case; that we had not legislatively determined that, this has been more of an evolution of an idea over the years, and so the issue comes back to us if we want to expand it.

The Supreme Court did not believe that section 10(b) intended to cover aiding-and-abetting liability. You can argue about that, but that is how the Court ruled. Providing for aiding and abetting liability under section 10(b) would be contrary to the goal of this legislation.

I remind my colleagues to come back to the central goal of this legislation, and that is to reduce the number of frivolous lawsuits that are being brought under 10(b) and to try and avoid what my colleague from New York, I think, has appropriately described as sort of a hijacking scheme that goes on where you end up with these settlements because if you do not settle, the small percentage of risk that you may end being held accountable causes people to settle for amounts vastly in excess of their involvement.

The case we talked about earlier today where Peat Marwick in a $15,000 contract to go in and do an audit of some banks books were brought to trial, and it went on for some time. The courts ultimately decided that in that case Peat Marwick was not responsible, did not meet the aiding-and-abetting standard, but the legal fees for Peat Marwick for a $15,000 contract, which is a nothing contract, were in excess of $7 million. That is what it cost that company over a $15,000 contract.

We want to stop that kind of stuff. That should not have to go on, frankly. And that is where the crux of this whole legislation is designed to try and minimize those sorts of problems.

At any rate, the Supreme Court said in the Central Bank of Denver case—and it is highly appropriate that we have as the Presiding Officer this evening the distinguished Senator from Denver—from Colorado. I apologize—in that case litigation under rule 10b-5 presents a danger of vexatiousness—it is a mouthful, that word, ''vexatiousness''—different in degree and kind and would require secondary actors to expend large sums even for pretrial defense and the negotiation of settlement.

That is exactly what happened to Peat Marwick—a $15,000 contract, a $7 million legal fee. Peat Marwick, it was painful to them. They probably passed that cost on to a lot of other clients out there, so it is not as if somehow the company just absorbed it, as bad it was for them, but there is where you get the economic ripple effect as a result of a lawsuit where again the allegation is that they were marginally involved, aiding and abetting on a $15,000 contract. The Court said no, they were not ultimately but not before that company spent $7 million to defend against a $15,000 contract.

The Supreme Court did not consider whether the SEC was able to bring cases for aiding and abetting, and the committee print, as I mentioned a moment ago, restores aiding and abetting liability for the Securities and Exchange Commission. Allowing the SEC to bring cases against aiders and abetters strikes, we think, a balance. It allows the SEC to punish bad actors without opening the door to a flood of unnecessary litigation.

So, Mr. President, that is the reason that we reluctantly oppose the amendment of our colleague, because it does change the standard.

Now, let me come back to the point I made earlier, because the suggestion that all we are doing is making whole the situation prior to the Supreme Court's decision on the Central Bank of Denver case is just not borne out.

Let me point out that prior to the Central Bank of Denver the courts across the country adopted different types of scienter, standards, for the aiding-and-abetting context. Some courts concluded that, as with the primary violators, recklessness was sufficient.

I would say to my colleague from Nevada he is correct in that. There were courts that did hold the recklessness standard adds enough to net someone under the aiding-and-abetting provisions. Other courts, I would point out just as quickly, Mr. President, held that where the alleged primary violators did not have an independent duty

to disclose information to the plaintiff, proof of actual knowledge of the fraud was required. Still other courts adopted what the SEC described to the Supreme Court as the sliding scale approach to aiding and abetting under which the degree of scienter required for aiding-and-abetting liability varied depending upon the nature of the defendant's conduct and the presence or absence of a duty to disclose.

So here we had a lot of different standards being used. Recklessness was one, in some courts. But in many others, it was actual knowledge or sliding scales.

The Seventh Circuit had essentially eliminated aiding-and-abetting claims by requiring proof of all elements of a primary violation of 10b–5 in order to impose liability.

Accordingly, expanding to private suits the provision included in the committee print would not provide any real protection against abusive claims. And that approach, if we adopted this amendment, would actually represent, as I said a moment ago, an expansion of liability, not a return to pre-Central Bank of Denver status quo, because it would overrule those decisions that had set the higher standard. That is, actual knowledge before you can get a minor player in terms of the aiding-and-abetting clause.

Again, my point is—and again I say this with all due respect to the author of the amendment—throughout the amendment it is knowing or reckless, and on the reckless standard, let me, just for the purpose of my colleagues, point out how difficult that standard is to apply. Again, this is citing some work that has been done on the issue. I will footnote them accordingly.

Let me begin with this. The prevailing reckless standard does not limit, as I am sure the case can be made, liability to highly culpable wrongdoers, and that is the suggestion here. Again, the highly culpable wrongdoers are not covered. We get them under this bill, in fact. And this is where the problem comes with recklessness. The vagueness of the recklessness standard is one of the principal reasons that joint and several liability should be modified, and that is what we do in this bill.

In practice, the legal standard does not provide protection against unjustified or abusive claims because juries can and do misapply the standard. Juries today have considerable difficulty in distinguishing innocent mistakes, negligence, and even gross negligence—none of which, by the way, Mr. President, is actionable under rule 10b–5—from recklessness.

So, while to the layman recklessness sounds like something else, recklessness can actually be a minor mistake, a mathematical mistake. In effect, you could get netted under the recklessness standard.

One commentator observed:

> The courts have been less than precise in defining what exactly constitutes a reckless misrepresentation. This imprecision has resulted in ad hoc, if not arbitrary, recklessness, if I may use the word, determinations. The result is that the actual and potential parties to section 10(b) and rule 10b-5 actions cannot predict with any degree of certainty how a trier of fact will characterize alleged conduct and, thus, whether it may serve as the basis of liability.

I am quoting from Johnson, ''Liability for Recklessness Representations and Omissions'' under section 10(b) of the Securities and Exchange Act of 1934 in the Cincinnati Law Review, 1991.

Let me quote further from Commissioners of the SEC. Commissioner Beese argues:

> Because the standard of recklessness is a vague one and its interpretation by both the court and the jury is difficult to predict accurately, defendants that may not have acted in a reckless fashion cannot be assured of being vindicated at trial.

Former SEC Chairman Breeden observed:

> The problem is that almost anything can be said to be reckless.

He goes on to say:

> It is all too easy to apply 20/20 hindsight to a complex problem and conclude that someone behaved less than perfectly.

The standard of reckless behavior has tended to expand in recent years as courts and even at times the SEC tried to reach out to compensate investor losses. Even the SEC, with all its expertise, has misjudged the standard. In a case arising out of a 1982 bankruptcy of one of an accounting firm's clients, the SEC alleged a violation of rule 10b–5 asserting that the firm had acted recklessly in failing to comply with the professional standards in an audit. A Federal court rejected every claim, including the claim that the firm had acted recklessly. The court found that the SEC's claim ''involved complex issues of accounting as to which reasonable accountants could reach different conclusions. It follows that no finding of fraud or recklessness can rationally be made in that case.''

That was SEC versus Price Waterhouse, decided in 1992.

Mr. SARBANES. Will the Senator yield for a question?

Mr. DODD. I will be glad to yield.

Mr. SARBANES. Does your bill allow for any private right of action against an aider and abettor?

Mr. DODD. No, it does not.

Mr. SARBANES. Not even knowingly. I have been listening to the Senator very carefully, and he is talking about recklessness.

Mr. DODD. Right.

Mr. SARBANES. My own view is, if you are reckless, you ought to be able to be reached as an aider or abettor. I understand the Senator is opposed to that. The Senator's bill, as I understand it, would not allow a knowing aider and abettor to be reached by a private securities suit; is that correct?

Mr. DODD. Let me say to my colleague, the problem with just the word ''knowing'' is that it is far too vague a word. I said at the outset of my remarks that if you could apply where you had actual knowing, knowledge of the fraud itself, then you might raise a different standard. I said that at the outset of my remarks.

My problem is your amendment says ''knowing or recklessness.'' I focused my remarks on the recklessness side of this because under the amendment, you could be nabbed under the recklessness standard. Again, as I pointed out, with a series of court decisions——

Mr. SARBANES. The bill does not have a knowing standard in it; is that correct? The bill leaves out aider and abettor altogether in a private action.

Mr. DODD. No. What we have said here is where you have the knowledge, knowing fraud involved here, then obviously the whole question of joint-and-several liability applies. In almost every case an aider and abettor, where you have that kind of knowledge situation, would be snagged. Yes, we do cover that in that situation.

What they are attempting to do with this amendment is to reach a different level. So when you have that fact situation, clearly as we made that case all the way through this debate dealing with proportionate liability, we do not allow proportionate liability to apply. Where you meet that standard of the actual knowledge and intent to defraud, then you get everybody involved.

Mr. SARBANES. The aiding-and-abetting issue is separate from the joint-and-several issue, is it not?

Mr. DODD. De facto they end up not being separate. If this amendment were adopted, that is not the case, because you have a reckless standard here which is a much, much lower threshold than the other ones we require you to meet.

Mr. D'AMATO. Will the Senator yield for a question?

Mr. DODD. I will be glad to yield.

Mr. D'AMATO. If one is tangentially involved, let us say an accountant, and knowingly and intentionally participates in a fraud, is that person, regardless of their portion of liability, held jointly-and-severally liable?

Mr. DODD. Absolutely. Absolutely.

Mr. D'AMATO. So that a person, would be considered as a minor participant, an aider and abettor, as a result of this amendment. We have made very clear, that if they knowingly and intentionally participate in fraud, that defendant can really be held as a primary culprit, so to speak; he or she would be libel for all the damages under the present situation; is that not true?

Mr. DODD. My understanding is that is correct.

Mr. D'AMATO. Of course, as it is clearly stated in the S. 240 the Securities and Exchange Commission, still has the ability to go after those for their intentional wrongdoing.

Mr. DODD. That is there, also. We include that in the bill specifically. As I pointed out a minute ago, everybody said let us go back to Central Bank of Denver. Prior to that case, different standards were being used on the aiding and abetting provisions. Some

courts did recklessness. Obviously, if you are an attorney for the plaintiff in that case, of course you are going to allege that. In effect, you have wiped out our efforts in the bill to try and minimize that. So you are back in the negotiation phase again. But up to the 93 or 98 percent of these cases people are settling out of court. That is what every good attorney would advise his clients. They would say, ''You are exposed to the whole cost on this. With the reckless standards being so low, my advice is you better settle, because if do you not, that is a pretty low standard.'' In a sense, you get snagged for the whole amount. We are trying to avoid that.

Mr. SARBANES. You let the knowing aider and abettor go free. How can you justify that? I will argue the recklessness with you, and I understand that is a more complicated issue. But how can you let the knowing aider and abettor go free?

Mr. DODD. It is not a question of letting him go free. I think in the most recent colloquy the Senator from New York and I had, we made it clear that where you have that standard, I think we establish very clearly what the intent of the legislation is.

I say to my colleague, having to face the law firm of Sarbanes and Bryan or Bryan and Sarbanes is difficult under any set of circumstances. But the word ''knowing'' alone is a rather loose term in terms of what constitutes knowledge. So I say to my colleague from Maryland that if, in fact, it is the desire of the Senator from Nevada and the Senator from Maryland to offer an amendment that truly raises the level of knowledge to a point where legal definitions would apply, I, for one—not speaking for my colleague from New York or others—would entertain such an amendment. That is what you have done. The word ''knowing''—you have to be much more definitive.

Mr. SARBANES. If the Senator will yield further, I am trying to point out what you have done with the bill. In other words, what you have done with the bill is let a knowing aider and abettor go free. Now, I cannot, for the life of me, understand how you can possibly justify that. A knowing aider and abettor cannot be reached and held liable when a securities fraud is perpetrated. How can you justify that?

Mr. DODD. That is not what the case is here. You are applying two different standards here. When you have actual knowledge and intent to defraud, again, we do not allow an aider and abettor, in that case, to get off the hook at all. It is a different standard you are applying here.

Mr. SARBANES. I would refer the Senator to pages 131 and 132 of his bill, where they define a knowing securities fraud. ''Defendant engages in knowing securities fraud if that defendant, (1), makes a material misrepresentation with actual knowledge that the representation is false * * *. And it also requires other things.

The central—

Mr. DODD. To reclaim my time, that is under the section dealing with proportionate liability. Again, my colleague is fully aware that, obviously, it would only apply it to proportionate liability. When you have the knowledge and intent to defraud, then the joint and several applies.

Mr. SARBANES. Will the Senator repeat that again?

Mr. DODD. We do not apply proportionate liability when you have the knowledge and intent to defraud. You cannot escape and get proportionate liability. Joint and several applies.

Mr. SARBANES. By your own admission, under this bill, an aider and abettor cannot be reached in a private action suit, is that correct?

Mr. DODD. An aider and abettor can be reached through Government action, but not private action, correct. Under the standards you have set here—

Mr. SARBANES. How can you justify that?

Mr. DODD. To go back to the point I am trying to make to my colleague over and over again, under the proportionate liability standard—which is the section we are talking about here—recklessness is such a low standard.

Mr. SARBANES. You are not even reaching the aider and abettor; you only go to recklessness.

Mr. DODD. My colleague from Maryland has a fundamental and inherent objection to proportionate liability.

Mr. SARBANES. I am trying to get over that. I am trying to point out that there are a lot of other problems with this bill.

The PRESIDING OFFICER. The time the Senator has been allocated has expired.

Mr. BRYAN. Mr. President, I would be happy to yield more time. How much time remains?

The PRESIDING OFFICER. There are 11 minutes 27 seconds remaining.

Mr. BRYAN. I yield five more minutes to the Senator.

Mr. SARBANES. What I am trying to point out to my colleague is that there is a joint and several liability problem in this bill. We have tried to deal with that—unsuccessfully. There was a statute of limitations problem in this bill. I think these are large problems. These are what the independent objective groups have been writing to us about.

Now we are addressing the aider and abettor problem. The way you have written the bill, aiders and abettors in a private action go scot-free—whatever the test is. They go scot-free on recklessness and on knowingly. The way you have written the bill —

Mr. DODD. I say to my colleague, if he will yield, the way you have written your amendment, what you are asking us to support is that you would apply that standard of reckless behavior, which is an unfair standard to apply.

Mr. SARBANES. I do not think it is unfair. But I do want to make this point. The question is, who is going to go scot-free? For years, we caught aiders and abettors on recklessness and knowingly, on both of those standards. That was the law.

Mr. DODD. Not in every court, no, no. There were courts that set a much higher standard in this country than that. Actual knowledge was required by many courts in the country prior to the decision by Central Bank of Denver. You are going back and weakening a standard applied in many courts.

Mr. SARBANES. If the Senator will yield, the general prevailing standard on reaching aiders and abettors was, in effect, thrown out in the Denver case.

Mr. DODD. I point out to my colleague—and you may not have been here when I pointed out the cases where the SEC used sliding scales in cases. Other courts used actual damages.

Mr. SARBANES. Fine. I am prepared to concede to the Senator that, in certain jurisdictions, there were sliding scales and all the rest. But you have eliminated all of that.

Mr. DODD. I did not, the Supreme Court eliminated that.

Mr. SARBANES. You do not have a sliding scale encompassing knowing standard. You have knocked it out, and all the aiders and abettors are dancing their way down the street.

Mr. DODD. I did not do it, the Supreme Court did it.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BRYAN. I am enjoying this colloquy. If the Senator requires more time, I yield three more minutes.

Mr. SARBANES. The final point is that, obviously, tomorrow we are going to do the so-called safe harbor. I call it pirate's cove because it is being carved out here for all the sharks and barracudas to find sort of a comfort and solace——

Mr. DODD. Including the buccaneer barristers.

Mr. SARBANES. The Senator from Nevada and I have conceded that we want to do some things about frivolous suits. We are trying to get at the extraordinary lengths to which you have gone to immunize from liability and, therefore, throw the burden upon innocent investors. I think the Senator from Nevada put it very well the other day. He said this is a ''Trojan horse.'' It is waving the pennant of frivolous suits, but hidden within the Trojan horse are lots of other things as well. That is exactly the case. That is what we have been trying to, in effect, lay out in the course of this debate.

Mr. DODD. If my colleague will yield on that point, would you not admit that the present situation, in the absence of passing this legislation, is certainly as big a Trojan horse as anything he might describe with this legislation being adopted?

Mr. SARBANES. What I want to do is pass a good piece of legislation. I want to avoid the comment that was at the end of the article that I put in the RECORD the other day about the pendulum swing. And that in the course of

swinging the pendulum too far, what you are going to require are some investors to actually be defrauded and not gain any recovery before you will straighten out the law. We ought to straighten it out now and not allow that situation to happen. We tried to address the issue of joint and several liability versus proportionate liability. We had this extension of the statute of limitations, and we are doing aiders an abettors today, and tomorrow we are going to do the ''pirate's cove.''

The Senator from California has, I think, some very worthwhile amendments to offer as well. This is not a balanced bill. That point needs to be made and needs to be made very clear. This is not a balanced bill. There are certain problems we want to get at, and we ought to do that. This bill overreaches. It is unbalanced. I think we will pay a high price for it.

The PRESIDING OFFICER. The Senator from New York has used all of his time.

Mr. BRYAN. Mr. President, I will yield back the remainder of my time. I want to thank my colleague, Senator SARBANES, for making the point that I think needs to be made here, that if the recovery is premised and predicated upon aider and abettor recovery; whether the conduct is intentional, whether it is knowing, or reckless, no recovery. The only way in which you can attach liability is under an aiding and abetting theory. That is the point he has made.

The Senator from Connecticut quite correctly points out that with respect to others that are primary, then the level of misconduct, whether intentional or knowing, creates the joint and several liability situation, and the reckless conduct which the Senator from Maryland and I agree ought to be included as well.

That is when you get the proportionate liability. There is no question about proportion or joint and several. There is no recovery if the cause of action is based upon aiding and abetting. That is the point he has made so clear.

Mr. SARBANES. The Senator put it very clearly. The point we were trying to make, the aiders and abettors walk scot-free as far as private lawsuits are concerned under this legislation.

Mr. BRYAN. This is my understanding.

Mr. SARBANES. We try to attach liability that way.

Under the different theories of liability, there is an argument over recklessness and knowingly and so forth.

The bill never attaches liability to the aider and abettor; is that correct?

Mr. BRYAN. That is my understanding.

Mr. SARBANES. I understand in many suits that an important part of the recovery, on the part of the innocent investor, is from the aiders and the abettors.

Mr. BRYAN. That is my understanding.

Tomorrow, as we complete the debate, I will have additional data to share with my colleagues. I have never been involved in this area as an attorney representing a class action or defending this, but the issue is quite substantial, and the impact, I think, will astonish some of our colleagues. It is not just an academic discussion among Senators in good faith trying to craft a piece of legislation.

The impact is profound. There must be reasons, when these actions are brought, they are brought under a theory of aiding and abetting. It must be the only way to get into court against some of this misconduct with lawyers, accountants, bankers, and others. We simply wipe them out. ''You folks can do whatever you want. You are home free.'' That is a public policy that, in my view, is indefensible.

Mr. SARBANES. If the Senator will yield for a second, I would like to bring this discussion towards close by saying there is a point where I agree very strongly with the Senator from Connecticut.

At the outset of his statement he gave praise to the very strong statement which the Senator from Nevada had made on this issue. I want to fully associate myself with that judgment. I think he is absolutely right. I urge all my colleagues, and their staffs that are following this issue, to go very carefully through the opening statement which the Senator from Nevada made when he presented his amendment. It was a very powerful statement as to why aiders and abettors ought not to be completely free from liability.

Mr. BRYAN. I notice a number of colleagues are about ready to join the floor with other amendments.

I will simply share one additional statistic in closing and yielding the remainder of my time. Chairman Levitt has stated, of 400 pending SEC cases, 80 to 85 rely on aiding and abetting theories of liability. We are talking about a substantial number.

I yield the floor and yield back the remainder of my time.

Mr. ROCKEFELLER. I ask unanimous consent that the Senator from West Virginia be allowed to speak for 5 minutes as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

MEDICARE SELECT

Mr. ROCKEFELLER. Mr. President, because I know a lost cause when I see one, I concede that the majority leader is succeeding in passing what is known as the Medicare select legislation tonight. The conference report will pass tonight. Nobody else will comment on it, but I will. I just hope I will not be tempted into saying, ''I told you so'' a year from now if some troubling signs turn out to be an omen of serious problems.

For some reason, many of my colleagues on the other side of the aisle are adamant about rushing to expand a pilot project limited to 15 states into one for all 50 States. The conference report is an agreement to make this extension, but only for 3 years instead of the 5 years that had been passed by the House. I still think 3 years is too long, but I have assurances from the chairman of the Finance Committee that we will have a hearing or hearings, and a good faith process, to consider whether any changes are warranted.

What is Medicare select? Medicare select is a managed care insurance policy that is sold to senior citizens to fill in the gaps of Medicare coverage, of which there are many. It differs from other MediGap policies because it only pays Medicare's cost sharing amounts if the senior citizen receives his or her medical care from an insurer's selected network of health care providers.

What bothers me is the rush to expand this limited program before an evaluation of this demonstration project, done at the direction of Congress is completed and reviewed in oversight hearings. As the proponents of this push to expand the program know, the independent researchers evaluating the pilots will have their analyses completed by mid-August and a draft final report submitted by October.

Leapfrogging over a careful effort to review a demonstration project, in order to decide if and how to expand the approach, is not the way to do business with Medicare and its beneficiaries. I think it is a mistake. I think it is bad precedent. I have to wonder whether it has to do with special interests eager to see this program quickly expanded. I think it is a mistake to ignore emerging signs that this approach to the marketing of medigap policies may be costing Medicare rather than achieving savings. When the majority of this body has just told senior citizens of America they want to cut Medicare by $270 billion, where is the sense in also extending a program for 3 years that might drain Medicare even more.

Just in recent days, another yellow line started flashing. Based on reports routinely submitted to the Government from the top notch research firms conducting the Medicare select study for HCFA, some startling findings have been reported on how the Medicare select program is operating. They are finding that Medicare select enrollees had significantly higher Medicare costs in comparison to seniors with regular medigap insurance. The Congressional Budget Office agrees that the new study raises serious questions about the operation of the Medicare select program.

On average, Medicare's costs have increased 17½ percent—higher—under Medicare select, which we are expanding to all 50 States. Only one State, Missouri, experienced lower Medicare costs for its Medicare select enrollees. Mr. President, 8 States had higher Medicare costs for its Medicare select. Alabama, 12 percent higher; Arizona, 23 percent; Florida, 8 percent; Indiana, 57 percent higher; almost 6 percent in